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A CLIENT ALERT FROM PAUL HASTINGS

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New Consumer Product Safety Legislation a Roadmap for Plaintiffs' Bar

FROM THE PRODUCTS LIABILITY GROUP

The Consumer Product Safety Improvement Act of 2008 ("the Act"), intended to "modernize" the Consumer Products Safety Commission ("CPSC" or "the Commission"), was signed into law by President Bush on August 14, 2008.¹ Touted as "the most significant overhaul of U.S. consumer product safety law since the creation of the Consumer Product Safety Commission"² and "the first step toward revitalizing an important safety agency and restoring confidence in the safety of consumer products for years to come,"³ the Act maintains the basic structure of federal consumer product safety efforts, reauthorizing the CPSC through fiscal year 2014. Yet, this new legislation also expands the CPSC's mandate and provides the commission with powerful new tools to aid in its enforcement duties.

Reacting to product recalls that topped headlines in 2007,⁴ Congress formally took up consumer product safety issues late last Fall when Rep. Bobby Rush of Illinois introduced H.R. 4040⁵ on November 1, 2007. After five versions, two name changes,⁶ and compromises between the Senate and House versions of the bill, Congress passed the Act by overwhelming majorities - 89 in favor in the Senate⁷ and 424 in favor in the House.⁸

The Act has both great breadth, tackling a wide range of topics from children's products to all

terrain vehicles, and great depth, drilling down to very specific standards for lead and certain phthalates (plastic softeners). As to its scope, President Bush noted that the Act enlarges the CPSC's role especially as it pertains to products designed for children.⁹ In fact, Congress specifically devoted eight sections of the Act to children's product safety.¹⁰ In addition to these provisions, among other things, the Act provides for: the study of risks to consumers from formaldehyde in textiles,¹¹ expedited judicial review of CPSC enforcement actions¹² and increased civil penalties.¹³ Addressing perennial preemption concerns head-on, the Act reiterates that CPSC regulations preempt contrary state laws, but that the Act does not preempt state regulation in areas where the CPSC has failed to act.¹⁴ State warning laws are also left intact, and the Act is not intended to preempt state common law tort claims.¹⁵

Phthalates Singled Out

Congress has elevated the importance of regulating certain phthalates (plastic softeners) by prominently including new standards for these substances in the Act itself. Circumventing the normal administrative rule-making process, 180 days after enactment, the Act bans the manufacture, sale, distribution, and importation of "any children's toy or child care article" that contains more than .1% di-(2-ethylhexyl) phthalate (DEHP), dibutyl

phthalate (DBP), or benzyl butyl phthalate (BBP).¹⁶ While the Act places an outright ban on the phthalates listed above, until a final rule is adopted by the CPSC, it places an interim ban on "any children's toy that can be placed in a child's mouth or child care article" that contains more than .1% diisobutyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).¹⁷

It is unclear why Congress provided direct legislation regarding certain phthalates while allowing most standards to be developed and evaluated at the Commission level. Regardless of the reason, it is clear that phthalates have now been called to the attention of plaintiffs' lawyers, and lawsuits centered on the six phthalates regulated by the Act are likely to ensue.

New Third-Party Testing Requirements

The Act also provides increased rigor for children's product safety by, among other ways, requiring that manufacturers and labelers of imported children's products submit their products to accredited third-party testers for certification of compliance with all CPSC standards.¹⁸ The CPSC is charged with accrediting such "third-party conformity assessment bodies."¹⁹ This new provision is sure to spur the creation of new business entities devoted to conformity assessment and undoubtedly will increase costs for manufacturers and labelers that import children's products.

Increased Litigation Likely

The Act likely will lead to increased litigation on two fronts: (1) prosecution by state attorneys general and (2) product liability litigation.

The Act expands the ability of state attorneys general to enforce federal law by, among other things, permitting them to initiate a suit based on an allegation of "substantial product hazard."²⁰ The expanded enforcement power granted to state attorneys general, coupled with current public opinion regarding the lax enforcement of safety regulations, and may prompt officials to look into product safety issues with a revitalized fervor.

Similarly, on the civil litigation front, synergies amongst several provisions of the Act likely will spell an increase in product liability litigation. Innocuous when viewed separately, when used collectively, several provisions of the Act yield a powerful new tool for plaintiffs' lawyers. For example, the Act's ban of certain phthalates highlights a new category of products that the plaintiffs' bar can target. The Act's new product labeling requirements will permit easier product identification. Finally, the call for the creation of a new publicly-accessible database for tracking "harm relating to the use of consumer products..." is sure to create a profitable trolling ground for attorneys. These three provisions in tandem create a perfect storm for increased product liability claims. Thus, regardless of intention, the Act creates a roadmap for plaintiffs' lawyers.



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¹ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 100-314, pmb., 122 Stat. 3016 (2008).

² Press Release, U.S. House of Representatives Committee on Energy and Commerce, House Approves Consumer Product Safety Legislation (July 30, 2008) (available at http://energycommerce.house.gov/Press_110/110nr335.shtml).

³ Press Release from, U.S. Senate Committee on Commerce, Science, and Transportation, President Signs The Consumer Product Safety Improvement Act of 2008 Into Law (Aug. 14, 2008) (available at <http://commerce.senate.gov/public/index.cfm?FuseAction=PressReleases.List&Month=8&Year=2008>).

⁴ See, e.g., Speech of Hon. Charles B. Rangel, Conference Report on H.R. 4040 p. E1688 (July 30, 2008) (available at www.thomas.gov).

⁵ H.R. 4040, 110th Cong. (2d Sess. 2008).

⁶ Initially called the Consumer Product Safety Modernization Act and then the Consumer Product Safety Reform Act.

⁷ U.S. Senate Roll Call Vote No. 193, 110th Cong., 2d Session (available at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00193).

⁸ 154 Cong. Rec. H7587 (July 30, 2008) (congressional vote).

⁹ Press Release, Office of the Press Secretary, President Bush Signs H.R. 4040, H.R. 4137, and H.R. 6432 Into Law (Aug. 14, 2008) (available at <http://www.whitehouse.gov/news/releases/2008/08/print/20080814.html>).

¹⁰ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 100-314, §§ 101-08, 122 Stat. 3017-38 (2008).

¹¹ *Id.* § 234, 122 Stat. 3073.

¹² *Id.* § 211, 122 Stat. 3047-48.

¹³ *Id.* § 217, 122 Stat. 3058-60.

¹⁴ *Id.* § 231, 122 Stat. 3070.

¹⁵ *Id.*

¹⁶ *Id.* § 108(a), 122 Stat. 3036.

¹⁷ *Id.* § 108 (b), 122 Stat. 3036-37.

¹⁸ *Id.* § 102 (a)(2), 122 Stat. 3022.

¹⁹ *Id.* § 102 (a)(3)(c), 122 Stat. 3023-24.

²⁰ *Id.* § 218, 122 Stat. 3060-62.

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