

BLOG POST

Post-Election Update: Consumer Product Safety

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With the re-election of President Obama, the Consumer Product Safety Commission (CPSC) will continue to have a majority of Commissioners from the President's party. The continuation of the status quo may result in a more activist CPSC, including attempts to pass more mandatory consumer product regulations. In addition, the election results also resulted in some changes to the committees in Congress with jurisdiction over consumer product safety issues.

The Consumer Product Safety Improvement Act (CPSIA), signed into law in 2008, reaffirmed the number of CPSC Commissioners from three to five. CPSIA supporters hoped that adding two more Commissioners would add a variety of expertise to the Commission. However, the addition of two more Commissioners also contributed to the CPSC's bureaucracy, inhibiting the Commission from moving quickly.

The Commission is currently down to three members (two Democrats and 1 Republican) because two Commissioners' terms expired. President Obama nominated Marietta Robinson to be a CPSC Commissioner earlier this year. The Senate did not act on her nomination. The President would need to re-nominate her and also nominate a Republican to fill the vacancies. No action is expected in the immediate future and the CPSC will continue to function with three Commissioners.

Consumer Product Safety Commission

The Consumer Product Safety Act, the law that created the CPSC, is based on encouraging cooperation between the private sector and the CPSC to ensure and strengthen product safety. A vast majority of the product safety standards for products are voluntary, meaning that the industry works with all stakeholders, including the CPSC and standards-making bodies such as the American National Standards Institute, to create appropriate safety standards. In fact, only nine mandatory standards have been promulgated by the CPSC in 35 years, and these standards are traditionally meant for bad actors or industries that do not work cooperatively with the CPSC.

As the National Association of Manufacturers wrote to Congress earlier this year, in order to issue a mandatory rule, the law requires the Commission to "find that an existing or voluntary standard would not be adequate, the benefits of the rule bear a reasonable relationship to its costs and the rule is the least burdensome requirement that prevents or adequately reduces the risk of injury. To issue a mandatory standard, the Commission also must make a finding that an existing voluntary standard would not prevent or adequately reduce the risk of injury in a

manner less burdensome than the proposed CPSC mandatory standard.”

Despite the law, the CPSC has begun rulemaking proceedings on a variety of consumer products, including table saws and Recreational Off-Highway Vehicles. These industries, as well as some Members of Congress, are urging the Commission to return to the well-established and effective voluntary standards-setting process.

In the past year, the CPSC also filed an administrative complaint against Maxfield & Oberton, the company that produces the popular high-powered magnet “Buckyballs” to force it to stop selling their products because the agency claims the products are dangerous to children. This was the first time in 11 years that the CPSC filed an administrative complaint against a company. The CPSC also obtained agreement from 11 other magnet manufacturers from producing these products and successfully urged retailers to stop selling the product. While the case now goes to court, other industries are concerned that the CPSC’s position in the case, that “warning labels don’t work,” sets a bad precedent given that warning labels are one of the tenets of long-established product safety practices in the U.S. and around the world.

The CPSC’s Consumer Database, mandated by the CPSIA, went online in March 2011. This searchable Internet database contains reports of product defects and harm caused by consumer products. Manufacturers continue to be concerned that the database contains unsubstantiated accusations that damage the reputations of companies and their safe products. Recently a federal court ruled against the CPSC and in favor of a company that filed a suit to stop the agency from publishing a report about its product on the safetproducts.gov database. The company, which filed the suit under seal because it did not want to be identified with the report, claimed that the report wrongly connected the company’s product to a consumer’s injury. The court agreed that the complaint was materially inaccurate and granted summary judgment to the company, preventing CPSC from including the complaint in the database. Observers are closely watching to see if the court’s decision will spur other companies to file suit against CPSC.

CPSC recently announced an impending change in the agency’s interpretation of its authority that could result in the disclosure of preliminary confidential information identifying the manufacturer of consumer products “under investigation” by the Commission. The issue involves companies that self-initiate reports to the CPSC or in response to a filing under section 15(b) of the CPSA. The change would allow CPSC to inform the media and other third parties that a product is “under investigation.” The business community fears that this will have a negative impact on the reputation of manufacturer and the product that could depress or even halt sales.

113th Congressional Outlook

Congress maintains the status quo with the House retaining a Republican majority and the Senate still under control of the Democrats. Consumer product safety issues fall under the jurisdiction of the House Energy and Commerce Committee and the Senate Commerce Committee, with the day-to-day oversight falling to each Committees’ respective Subcommittee.

The Committee leadership positions will largely remain unchanged with one exception: the Ranking Republican on the Senate Commerce Committee. With the retirement of Senator Kay

Bailey Hutchison from the Senate, the top Republican slot will go to Senator Jim DeMint of South Carolina. In addition there could be one major leadership change at the House Subcommittee level. Currently the House Subcommittee is chaired by Rep. Mary Bono Mack. Her reelection contest remains unresolved with the Chair currently trailing her Democratic opponent by some 5,000 votes. Should she be defeated there will be a new Chairman of the House Subcommittee with direct oversight over the CPSC. Under this circumstance the leaders of the Committee may use seniority of the Energy and Commerce Committee to determine the next Subcommittee Chair. Those members who currently do not have an existing Subcommittee and are next in seniority are: Lee Terry of Nebraska, Mike Rogers of Michigan and Tim Murphy of Pennsylvania. If seniority is not used then the Chair could be given to any current member of the Energy and Commerce Committee.

Given that there will be some new leadership on these two Committees and the fact that the 112th Congress attempted to address many of the unintended consequences that resulted in the passage of the Consumer Product Safety Improvement Act in 2008, we believe that the Subcommittees will take some time through the use of oversight hearings to examine ways to provide additional relief. For example, the CPSC still has not implemented a crucial part of the reform package passed during the last Congress – namely, relief in testing protocols for small manufacturers and adoption of rules to reduce testing cost for all manufacturers.

Generally though, look for the new Congress to take some time to review recent CPSC actions and to hear from impacted manufacturers. Both Committees have an interest in increasing manufacturing jobs in the United States and there will be some emphasis placed on CPSC activities as the Congress looks to this priority. Efforts to legislate will begin slowly in the new Congress but could speed up should the issues we described above begin to impact manufacturers. It could be that the pending policies such as the recent announcement by CPSC to change Section 15 notifications and the recent court decision on the database will impact the activities of the oversight Committees. Finally, should the CPSC begin to promulgate a host of mandatory product safety standards without following the requirements of the Consumer Product Safety Act this too could force individual manufacturers to seek relief from the Congress.