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CPSIA

House Commerce Panel Eyes Draft Bill To Cut Regulatory Burden of Landmark Law

House lawmakers in an April 7 hearing examined discussion draft legislation that business interests say will address many of the unintended consequences of the Consumer Product Safety Improvement Act, and safety experts and the Consumer Product Safety Commission say will weaken an effective law and reverse its health and safety effects.

The Subcommittee on Commerce, Manufacturing, and Trade of the House Energy and Commerce Committee said the draft legislation aims to reduce the “regulatory burdens created by CPSIA” without harming consumers; enhance CPSC's ability to investigate complaints and prioritize on the basis of risk; and improve the usefulness and information provided in the new CPSC public database.

Republican subcommittee members said the hearing represents a “bipartisan effort” to address a number of concerns manufacturers and retailers of products intended for children 12 years old and under say were created by the CPSIA. But in actuality, the hearing brought forth evidence of the increasingly wider philosophical divide between safety advocates and businesses over implementation of CPSIA and its unintended consequences.

The draft bill responds to charges that the CPSIA has consumed inordinate amounts of time and resources as businesses struggle to stay afloat financially while balancing compliance with lead testing and certification.

The discussion draft addresses provisions of the law that House Republicans say intends to “strike an appropriate balance” by providing relief to business interests by reducing the regulatory burdens of the law without undercutting consumer protections, giving CPSC a level of flexibility to grant exclusions to lead limits for children's products, and addressing business concerns over utility and accuracy of information submitted to the agency's new public database, Chairman Mary Bono Mack (R-Calif.) said in an opening statement.

“A fundamental premise is that the Commission can actually protect consumers far better when it is allowed to set priorities and regulate based on risk,” Mack said. “Where possible, we should spare the Commission from having to make time-consuming, case-by-case determinations, and let it spend more time on bigger problems. This is especially true in our current budget climate, where we have to make the most of scarce agency resources.”

The draft legislation seeks to address these issues by

- amending the definition of children's product to a lower age, thereby reducing the scope of products regulated;
- postponing the deadline for the step down to the 100 ppm lead content limit, due to take effect in August; allowing CPSC to consider whether 100 ppm is technologically feasible before the deadline rather than after; allowing CPSC to apply the lead limits to products up to age 13 based on risk; making lead limits applicable only to products manufactured after they became effective; and setting new limits, at a level to be determined, for lead in parts of children's products that are made from metal alloys and cannot be swallowed;
- applying the third-party testing requirement for certain “priority” standards only (such as for paint, children's jewelry, cribs, pacifiers, and small parts); giving CPSC “flexibility to require third-party testing for other standards only if it establishes exemptions or alternative testing requirements for products made in small quantities, and if the agency determines that the benefits of third-party testing for other products justifies the additional costs;
- allowing CPSC to exempt products or classes of products and set alternative requirements from the labeling requirement if it is not economically feasible; and
- narrowing the pool of consumers who can submit reports of harm to the public database to only those who have experienced an actual injury or risk of injury plus family members and other authorized representatives, such as legal representatives; creating a process for strengthening product identification through better descriptions; limiting inaccurate information and expediting CPSC investigations; and amending a section that would make it a prohibited act to misrepresent a submission to the database.

CPSC At Odds With Provisions

The agency's commissioner majority is not buying the Republicans' reasoning. Although not testifying at the hearing, CPSC Chairman Inez Tenenbaum and two Democratic commissioners, Thomas Moore, and Robert Adler, said in an April 6 letter to the subcommittee they had “serious concerns with significant portions of the discussion draft.” The draft bill “seeks to reverse some of the significant steps made toward providing for a safer marketplace and would turn back the clock to the pre-CPSIA era when harmful products made their way into the stream of commerce and into the hands of innocent children, “the commissioners wrote.

The measures also would reverse manufacturers' efforts and penalize the responsible companies that already are acting to meet the law's requirements as they design safer products, the commissioners argued.

They also acknowledged that some CPSIA provisions could be improved—such as easing the administrative burdens the CPSIA has placed on manufacturers, particularly smaller businesses. They noted the subcommittee's draft bill is not consistent with this

approach. The letter goes further to explain (with arguments from testimony in support of the CPSC position):

- Protecting children 12 years old and under from unsafe products should continue as is in accordance with Congress's policy judgment.
- There is no known safe level of lead, so CPSC opposes any change to the law that would lead to an increase in the doses to which children are exposed. (Given the extreme toxicity of lead, the concept of setting different lead levels for children is “troubling,” Dana Best, a physician representing the American Academy of Pediatrics, said.)
- There is a need for “some targeted relief for small crafters and similar small businesses from some testing requirements, and where product safety would not be compromised, [providing] relief where we have been able to do so.” (Even so, third-party testing is necessary to ensure the safety of children's products. There has been a dramatic change in children's products in the marketplace since CPSIA. More than 96 percent of products tested by certified third-party testing laboratories have been in compliance with the lead requirements, said Caroline Cox, a research director for the Center for Environmental Health.)
- Commissioners oppose any proposal that would restrict the open and transparent approach to safer products by hiding consumer product safety information from the public as it did in the past. (The database is an important tool because it brings information into the open that used to be completely hidden from consumers, even as they continued to use products that had safety-related problems, said Rachel Weintraub, director of product safety and senior counsel, Consumer Federation of America.)

‘One-Sided Proposal.’

Statements and questioning by leading subcommittee Democrats and testimony from consumer advocates underscored the frustrations with the Republican proposal. Even so, many continue to call for a “consensus product with bipartisan support.”

As it stands now, the draft is a “one-sided proposal that provides relief to industry,” said Rep. Henry Waxman (D-Calif.). There's no chance a bill this extreme could become law, he said, because it would not pass the Senate, and it would be vetoed by the President.

Rep. Bobby Rush L. Rush (D-Ill.) told the committee, “We're focusing on undoing one of the legislative achievements of this subcommittee. I'm still waiting to see where we talk about real policy solutions. We need to agree once and for all, and we need regulatory predictability.”

Rep. Joe Barton (R-Texas), chairman emeritus of the full Commerce committee countered by noting the bill “is not a wrecking ball, but is a good-faith attempt to reconcile some of the problems. It gives the agency flexibility; it modifies some of the

principles, but keeps the core of the principles, and allows for common sense in implementation. There can be bipartisan compromise. The discussion draft is a good starting point but it is not an endpoint.”

“Our only goal is to correct the problems that we know in CPSIA,” said Bono Mack in concluding remarks. “We’re simply working to make the law better. I hope we can put these political differences aside and pass a bill that we can be proud of.”

Bipartisan Support Erodes

In a January 2010 report to Congress, agency commissioners recommended several measures they said would address problems with the law: making the 100 ppm lead limit prospective; providing CPSC more flexibility to grant exclusions to the lead limits; providing an exclusion for printed materials; and providing CPSC greater flexibility to address small manufacturers' and crafters' concerns related to third-party testing.

The report to Congress followed a September 2009 House Commerce hearing in which CPSC Chairman Inez Tenenbaum opened the door to the notion that the CPSIA might need to be amended (37 PSLR 987, 9/14/09). The discussion demonstrated the erosion over time of some of the original bipartisan support for the law. While Democratic committee members and consumer groups have continued to praise the agency's implementation of the law, Republican leaders have increasingly sided with industry and small businesses in wanting to amend aspects of the law they say are too stringent and do not provide relief to stakeholders in difficult financial times.

In a Feb. 17 hearing, both Tenenbaum and CPSC Commissioner Anne Northup told lawmakers that the CPSIA does not grant the agency the flexibility to address problems related to lead content limits and testing requirements(39 PSLR 224, 2/28/11).

But efforts to amend the law have faltered, according to House lawmakers: No fewer than 12 bills were introduced in the 111th Congress by members of both parties to address particular issues.

Senate ATV Amendment

The hearing comes a week after Senate lawmakers introduced an amendment to a small-business program reauthorization bill that would exempt youth-sized all-terrain vehicles and off-highway vehicles from the lead-content limits of the CPSIA (39 PSLR 363, 4/4/11). The amendment seeks to stop the ban on youth-sized ATVs, according to Paul Vitrano, general counsel for the Motorcycle Industry Council, who testified in the hearing in support of ending the ban on these products.

“The real risk to children comes from banning youth models, not from the lead in certain components,” Vitrano said. He added, “even CPSC scientists acknowledge the presence of lead in metal alloys in these youth models does not present a health hazard to children.”

Three panels of witnesses testified before the House Commerce subcommittee, including Robert J. Howell, CPSC assistant executive director of hazard identification and reduction, Rachel Weintraub, Dan Marshall, vice president of the Handmade Toy Alliance, and representatives from various law firms.

By Lorraine Gilbert

The discussion draft legislation is available at
<http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8422>.