

CONGRESS VOTES TO STRENGTHEN THE CONSUMER PRODUCT SAFETY COMMISSION

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We need to continually improve our import safeguards to meet the changing demands of a global economy. We must ensure that our food supply and imported products remain among the safest in the world. Our purpose is not just to look at today, but to anticipate tomorrow.

-- Secretary Michael O. Leavitt
Chair, Interagency Working Group on Import Safety
August 6, 2007

Although the Consumer Product Safety Commission has not officially christened 2007 as the “Year of the Recalls”, it has been publically acknowledged by the Commission’s Acting Chairman Nancy Nord, the media, and a variety of consumer protection groups and safety advocates. The integrity and safety of products, especially imports, is being questioned and has shaken the long standing confidence regarding items which consumers have long taken for granted. In 2007, tires, dog food and toothpaste from China have all been recalled. Most troubling were toy recalls, including one that involved millions of dangerous toys distributed by Mattel. Many of the toys contained dangerous amounts of lead, while others were made with hazardous magnets that could seriously injure children if they were swallowed. Approximately \$2 trillion of imported products entered the United States in 2006. Experts expect that number to triple in the next seven years. Compounding this situation is the threat of a wrong, or insufficient, reaction by government and business leaders to undersatnding the issues and implications of the potential solutions. The challanges of ensuring the safety of consumer products, regardless of whether they are produced domestically or abroad, include the ever present demand for new products, faster inventory turnover and greater consumer spending. In anticipation, U.S. importers, distributors and retailers should be looking to adopt proactive and pre-emptive approaches to influence and manage the impact of these legislative and regulatory changes, and to ensure compliance with stepped up standards and expectations while not compromising the risks inherent to their business and commerce.

The current Congress will almost certainly approve product safety legislation that will significantly impact the recall process and the process for ensuring product safety. In an effort to demonstrate their willingness to act, President Bush established the Interagency Working Group on Import Safety by Executive Order on July 18, 2007. The group is chaired by Health and Human Services Secretary Michael Leavitt, and includes officials from many other agencies such as the Department of Agriculture and the Consumer Product Safety Commission (CPSC). The IWGIS is commissioned to review and assess current procedures directed at ensuring the safety of products exported to the U.S.; identify the methods by which U.S. importers may enhance the safety of imported products; and, survey practices of federal, state and local governmental agencies concerning import safety to highlight best practices and improve coordination among agencies.

In September 2007, the IWGIS submitted its initial report to President Bush, *Protecting American Consumers Every Step of the Way: A strategic framework for continual improvement in import safety*. The report outlines an approach that can build upon existing efforts to improve the safety of imported products, while facilitating trade.

On November 6, 2007 the Working Group released an *Action Plan for Import Safety* that provides specific short- and long-term recommendations to better protect consumers and enhance the safety of the increasing volume of imports entering the United States. The *Action Plan* promotes a program of improvements in product safety that is largely government “hands off” and business driven. For example, to encourage good importer practices, the IWGIS proposes creating a public list of certified foreign firms and businesses and giving products made by those firms expedited processing at US ports of entry. The IWGIS also suggests increasing civil penalties for non-compliance up to \$10 million.

The Administrative initiative contemplates some legislative changes, but the Congress is working to create a product safety bill to send to the President by the end of the year that is likely to be far more expansive, with more mandatory testing standards, particularly for products intended for children. Among the import safety-related measures moving through the Congress are bills that would create a single agency to oversee food safety; increase the number of inspections and create a fee to defray food inspection costs; name an import “czar” to coordinate and oversee import safety; and to simplify the Food and Drug Administration’s and Consumer Product Safety Commission’s recall process.

Pending Bills in Congress

The two primary CPSC-related bills under consideration are S. 2045 (“The CPSC Reform Act”) in the Senate and H.R. 4040 (“Consumer Product Safety Modernization Act”) which has already passed both chambers of Congress.

The committee-passed bill, known as S. 2045 “the CPSC Reform Act”, is designed to reform the CPSC to provide greater protection for children's products, to improve the screening of noncompliant consumer products, to improve the effectiveness of consumer product recall programs, and for other purposes. Under the bill, the CPSC would increase civil penalties for violations of the laws administered by the CPSC to a maximum of \$250,000 per incident, with a \$100 million cap (in place of its current \$1.8 million cap). The Senate bill would also permit state attorney generals to pursue civil penalties for violations of the federal acts and provide for whistleblower protection for employees of manufacturers, private labelers, distributors, and retailers. Finally, the bill would require manufacturers or distributors to post a bond to cover recall costs or, for imported products or substances, holding costs. Furthermore, and with respect to children’s products, S. 2045 would require independent third party safety certifications for products designed for children, require the manufacturers to label their products with tracking information to facilitate recalls, and would completely ban the use of lead.

This bill is in the first stage of the legislative process where the bill is considered in committee and may undergo significant changes in markup sessions. The bill has been referred to the Senate Commerce, Science, and Transportation, Subcommittee on Consumer Affairs, Insurance, and Automotive Safety. This bill was considered in

committee which has recommended it be considered by the Senate as a whole. Although it has been placed on a calendar of business, the order in which bills are considered and voted on is determined by the majority party leadership. Sometimes the text of one bill is incorporated into another bill, and in those cases the original bill, as it would appear here, would seem to be abandoned. It is likely that the bill will come to a vote at the end of the year.

The advancing H.R. 4040, the Consumer Product Safety Modernization Act, which has already passed both chambers of Congress, would make any children's consumer product containing more than specified amounts of lead a banned hazardous substance under the Federal Hazardous Substances Act. Moreover, the Act would modify requirements regarding action plans of manufacturers, distributors, or retailers to deal with products that present a substantial hazard. It would also require manufacturers, distributors, or retailers to give public notice of a substantial product hazard on their Internet website and to third party Internet websites on which the product was for sale. The Act would authorize increases the maximum civil penalties under the Consumer Product Safety Act, the Federal Hazardous Substances Act, and the Flammable Fabrics Act, including forfeiture of assets associated with the violation of any Act enforced by the CPSC.

In December 2007 the House of Representatives voted 407-0 in favor of the bill with 25 not voting. In March 2008, the Senate voted 79-13 in favor of the bill with 8 not voting. The bill may now proceed to a conference committee of senators and representatives to work out differences in the versions of the bill each chamber approved. The bill then goes to the President before becoming law.

At the heart of any debate over the strict measures being authorized in these bills is public concern about the importation of unsafe products from abroad; namely China. In response to this concern, as these bills indicate, the Senate Commerce Committee has drafted legislation (the forthcoming substitute for the CPSC Reform Act, S. 2045) that boost criminal penalties for distributing products in violation of consumer-products laws and regulations, dramatically raise fines for such violations, and give state attorneys general the power to sue firms on behalf of their citizens. Some may say this is a "gift" for trial lawyers. What remains to be seen is the effect, and even unintended consequences, these bills will have on commerce and the business sectors. At a time when economic growth is slowing, a balanced approach is vital. Congress should take care to avoid policies such as these that raise the cost of doing business, increase legal uncertainty and risk, and threaten jobs, while also managing to uphold its duty to care for the general welfare.