



Products Liability

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Expert Analysis

The Consumer Product Safety Improvement Act: Not Just for Kids

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If you think you do not need to worry about the Consumer Product Safety Improvement Act of 2008¹ because you do not sell children's products, think again. The CPSIA has been touted by Congress as a swift response to the lead-paint-toy crisis, but the act is actually much more than a lead ban.

While the press, politicians and consumer organizations have focused almost *all* their attention on certain key provisions of the act that address children's products, it also contains a host of new provisions that apply to nearly all products within the jurisdiction of the Consumer Product Safety Commission.

Understanding how the new law applies to sellers of all types of consumer products is essential to reducing the risks of uninformed noncompliance. In addition, companies can consider a variety of measures to better position themselves to comply with the law and respond quickly to minimize legal risks if consumer product safety issues do arise.

A Bigger, Stronger Agency

As an initial matter it is important to know that the CPSIA strengthens, modernizes and reauthorizes the CPSC and its primary umbrella statute, the Consumer Product Safety Act,² by allocating more money and resources to the busy, active agency. The CPSC's budget for fiscal year 2009 is \$80 million.³ By fiscal year 2014 that budget will increase to more than \$136 million.⁴ The new budget is intended to fund the vastly expanded operations commissioned by the new act.

Staffing also will increase. In 2008 the CPSC employed fewer than 400 full-time equivalent employees.⁵ By 2013 more than 500 full-time employees will work for the commission.⁶ In addition the act permits two commissioners (from different political parties) to form a quorum for one year, so the current two-commissioner CPSC can move forward on issues, such as mandatory recalls, that generally require the staffing of at least three commissioners.⁷

Thus, the additional personnel and temporary quorum modification will enhance the commission's enforcement efforts and its ability to investigate and detect violations of both new and existing product safety requirements.

Stiffer Penalties

The stakes for noncompliance with the new law are higher now, too. In addition to personnel and money, the act gives the agency more teeth to effectively enforce the laws and regulations it administers. The CPSC increases the maximum civil penalties from \$8,000 to \$100,000 for each violation, and from \$1.8 million to \$15 million for a series of related violations.⁸

The new law also drastically increases criminal penalties for knowing and willful violations. Violators now face up to five years in prison,⁹ and the CPSC can require forfeiture of assets.¹⁰

Directors and officers face stiff punishment for violations, and can be subject to criminal liability even if they do not have knowledge that their corporation received a notice of non-compliance from the CPSC.¹¹ Companies simply cannot afford to ignore the CPSIA and other applicable statutes enforced by the commission and they should consider even simple steps such as:

Product Line Review. Performing a review of your product line to identify all applicable consumer product safety rules.

Regulatory Expert. If your company does not already have one, designate an employee to become the expert on the CPSC's laws and regulations, including all consumer product safety rules applicable to your company's products.

Review/Revise Purchase Orders. Review purchase contracts with foreign manufacturers and, if needed, strengthen with protective provisions to reduce costs and liability should problems arise in the field. For example:

- Add or update representations and warranties of compliance with all applicable product safety laws and regulations, as well as an arbitration clause subjecting the foreign manufacturer to U.S. jurisdiction.
- Provide foreign manufacturers with the relevant consumer product safety standards and test samples of the product *throughout* the

manufacturing process to ensure continued conformity with applicable standards.

These modest investments upfront have the potential to reap great savings in the future by reducing compliance problems and shifting risk when compliance problems are unavoidable.

Information Disclosure to the Public

In the CPSIA, Congress gave the CPSC additional tools to monitor consumer product safety. While increased penalties on the back end and increased scope of coverage on the front end help to achieve this aim, Congress recognized the power of information disclosure to inform the public of potentially unsafe products and to incentivize companies to be more proactive in investigating issues with their products.

The CPSIA mandates a system in which more information will be available to the public faster than ever before.

Publicly Available Online Database

The act requires the commission to create an online, publicly available, searchable database that tracks reports of safety-related issues for consumer products.¹² This database will cover all consumer products under the agency's jurisdiction; it is in no way limited to children's products. The database will be designed to give consumers more information regarding consumer complaints and other reports of harm involving consumer products.

When the database is established in February 2010, the public will be able to search it by date, product name, model, and manufacturer or private labeler to find any incident reports or complaints.¹³

Anyone, from consumers to government agencies to public safety groups, will be able to report incidents of harm involving any product regulated by the CPSC, without having to disclose his or her contact information to the manufacturer or private labeler of the product at issue.¹⁴

While the database is a major step in making more information available to the public, it also poses the potential for false or misleading reporting. The commission must afford any manufacturer or private labeler named in a report five business days to comment on the report or claim confidential treatment of trade secrets in the report.¹⁵

If the CPSC determines an incident report is inaccurate, it may decline to post the report on the database.¹⁶ Thus, it is important for manufacturers and private labelers of any type of consumer product to be ready to review and respond in a timely manner to any notifications from the commission of reports for the database to ensure their accuracy. Possible steps include:

- **CPSC Disclosure Expert.** Designate an internal “expert” who understands the CPSC disclosure rules to reduce the risk that confidential, inaccurate or misleading information is posted on the CPSC’s public database or disclosed in response to a Freedom of Information Act response. The expert would review disclosure notices from the commission and regularly monitor the CPSC database for reports on the company’s products.
- **Communication System.** Establish an effective communication system to quickly evaluate CPSC disclosure notices so appropriate decisions can be made about whether and how to submit responsive comments to the CPSC or object to disclosure.

In addition, manufacturers will be on notice of information posted on the public database for purposes of their reporting obligations under Section 15(b) of the CPSA. Manufacturers must report to the commission if they obtain information that reasonably supports the conclusion that a product does not comply with a consumer product safety standard, may contain a defect that creates a substantial risk of injury or it creates an unreasonable risk of injury or death.¹⁷

Therefore, consider steps to ensure awareness of the information in the public database as it is posted and to implement potential reporting obligations such as:

- **Internal Communications.** Create an internal communication system to ensure the commission’s incident reports immediately reach those responsible for maintaining internal customer service and liability databases.
- **Customer Service Databases.** Review and upgrade as necessary customer service and liability databases so they operate efficiently and effectively to further reduce the risks of Section 15(b) reporting violations.

Responding to FOIA Disclosure Notices

The CPSIA shortens the time that manufacturers and private labelers have to respond to FOIA notices and to designate documents as “confidential” to prevent their public disclosure (to 15 days, formerly 30).¹⁸ Manufacturers should be prepared to respond to FOIA letters to the commission in this much shorter timeframe.

The new public disclosure rules will require even more acute awareness of CPSC notices of imminent information disclosure because of the very short response periods afforded manufacturers. The steps suggested above are equally applicable to ensuring an appropriate response to and consideration of a FOIA notice.

Additional New Provisions

Record-keeping

The CPSIA includes additional provisions applicable to manufacturers of all consumer products, not just children’s products. For example, the act imposes new record-keeping requirements on manufacturers, importers, retailers and distributors of any type of consumer product.¹⁹

Manufacturers must provide identifying information about retailers, distributors and subcontractors in the supply chain for all consumer products. In light of these new requirements, the following measures relating to record-keeping may be useful to consider:

- **Recordkeeping Process.** Evaluate and upgrade, as necessary, record-keeping processes and databases, and consider maintaining electronic and/or paper records on each product component, among other items, so long as the product is manufactured, imported, sold or distributed in the United States.
- **Record-keeping Policy.** Companies should consider consulting counsel about establishing an appropriate record-keeping policy if one is not already in place. Although the commission has not yet established a time period for retention of these records, the act mandates that consumer registration cards be retained for at least six years after the date of manufacture.²⁰

General Conformity Certification

In addition to record-keeping, the CPSIA requires importers and domestic manufacturers of products

subject to any consumer product safety standard under the CPSA or any similar ban, standard, rule or regulation under any law administered by the CPSC,²¹ to provide general conformity certificates of compliance with applicable rules.²²

These rules and regulations extend far beyond children's products and cover products from mattress pads, to garage door openers, to mirrors and other products. Refrigerators, for example, must be certified to the Refrigerator Safety Act standard that requires a mechanism to allow for opening the door from the inside in case a child is trapped inside.²³

Importantly, the commission has stayed the requirement for general conformity certification until Feb. 10, 2010, for most products,²⁴ so certification is not required until that date.²⁵ However, all products subject to consumer product safety standards, bans, rules or regulations still must comply with applicable rules.

Where certification is required, the certificate must accompany each shipment and be furnished to authorities upon request. It also must be furnished to distributors and retailers.²⁶ According to the CPSC's final rule regarding general conformity certification issued Nov. 10, 2008, certificates may be furnished electronically by providing a unique URL or Web address.²⁷ In addition, the commission's final rule streamlines who must certify.

For products manufactured domestically, only the domestic manufacturer must certify. For products manufactured abroad, only the domestic importer must certify.

The certificates must state that the product conforms to all applicable consumer product safety standards and must specify which standards are applicable.²⁸ The certificate also must include the identity of the party issuing the certificate and any third-party assessment body that provided the testing.²⁹

It is illegal to issue a false certificate or fail to furnish a truthful certificate.³⁰ Thus, certification is an important new requirement, and failure to comply can result in serious sanctions. Given the expansion of the certification rules to importers and the disproportionate number of recalls of imported products, one can expect even more scrutiny of imports and certificates at the borders.

In addition to the suggestion to conduct a product-line review to identify all applicable consumer product safety rules, manufacturers can consider other steps to

minimize noncompliance with the certification rules, including:

- *Testing Protocols.* If another entity is commissioning any testing on which the certificates are based, review the protocols and results of the testing before certifying compliance.
- *Periodic Certificate Reviews.* Review certificates regularly to ensure they are up to date. Design, manufacturing and other changes to products can require new testing and thus new certificates.

Advertising

Manufacturers of consumer products also must comply with the CPSIA's new advertising requirements.³¹ No product advertisements may contain a reference to a consumer product safety rule or voluntary standard unless the product does in fact conform to that standard.

Also, product advertising and labeling is a factor in the commission's determination of whether to deem a product a children's product, toy or child care article and thus potentially subject to a panoply of additional requirements.³² Thus, to further reduce compliance risks, suggested steps to manage advertising include:

- *Regulatory Reviews of Marketing Materials.* Marketing departments should work closely with product regulatory experts to ensure that all advertising and marketing accurately reflect a product's conformity to applicable safety standards.
- *Children's Product Marketing.* Identify for marketing departments products that should not include marketing descriptions suggesting the products are intended for children, play or sleep/soothing, to avoid classification as a children's product, toy or childcare article, as necessary.

Enhanced Recall Authority and Reporting Triggers

While the CPSA has long provided a definition for "substantial product hazards" (either a failure to comply with applicable CPSA rules or a product defect that creates a substantial risk of injury) and required the immediate reporting of any such hazards, the CPSIA now gives the commission new enforcement powers.

The commission can create rules designating certain characteristics of consumer products as "substantial product hazards," so long as voluntary standards aimed

at those characteristics have effectively prevented the risk of injuries.³³

The CPSIA also expands and adds teeth to the reporting requirement for substantial product hazards by adding more reporting triggers. For example, previously, manufacturers, distributors, and retailers were required to report when a consumer product failed to comply with a consumer product safety standard under the CPSA.

The new law expands the reporting requirement for failure to comply with any consumer product safety standard, rule, regulation or ban under any act enforced by the commission.³⁴

The act also gives the CPSC more authority over the substance of voluntary corrective action plans. While the commission still must obtain a court order to compel corrective action, the commission may well exercise more muscle in negotiating voluntary corrective action plans by virtue of the stronger language in the act.

To reduce the risk of reporting violations, consider ways to effectively monitor product issues and consumer incident reports, such as:

- *Notifications.* Designate a person or team to regularly review trend and incident data from the customer service database or to implement automatic “red flag” notifications in customer service databases for reports of serious injury, death or repeated incidents.
- *Internal Reporting Criteria.* Develop internal Section 15(b) reporting criteria so decisions on whether to file a Section 15(b) report are made quickly and consistently.

Newly Prohibited Acts

Prohibited Sales

The CPSIA prohibits the import, sale, distribution or manufacture for sale of any product that is subject to a voluntary corrective action or CPSA Section 12 order or is considered to be a banned, hazardous substance. The act also prohibits the import, sale or distribution or manufacture for sale of any product that fails to comply with any applicable consumer product safety standard, rule, regulation or ban under any act enforced by the commission.

Thus, to ensure internal procedures are in place to immediately stop the manufacture, distribution or sale of products that become the subject of a voluntary recall or a CPSC order, consider the following:

- *Stop-Sale Orders.* The most efficient method is implementation of a company-wide “stop sale” order of a specific stock-keeping unit through computerized notification and transaction prevention.
- *Contact Strategy.* Establish a contact strategy such as an e-mail notification with confirmation to immediately alert all distributors and retailers, so a stop-sale and inventory pull can be implemented down the distribution chain.

Prohibited Exports

Moreover, the CPSC now can forbid the export of any consumer product that is subject to a Section 12 or Section 15 order or a voluntary corrective action, or is a banned hazardous substance.³⁵ Previously, the commission had no control over exports. This is a significant change in the law. Companies can use procedures similar to those suggested to immediately stop the export of products that become the subject of a CPSC recall or order.

What Can You Do?

As mentioned, there are many tools companies can employ to reduce the risks of noncompliance with new and existing consumer product safety requirements and to thrive in this new regulatory environment.

First, conduct a methodical review of your product portfolio. It is essential to determine what consumer product safety standards potentially apply, what products require certification, what products require testing and what records must be kept.

Second, review your inventory, sales, marketing, product development and laboratory testing processes for potential compliance issues. The act requires manufacturers to be proactive, and this review is an essential step.

Third, examine the supply chain and determine whether suppliers are aware of the new law and existing regulatory requirements, and whether they are endeavoring to comply with the relevant provisions. Consider requiring representations and warranties of compliance with consumer product regulatory requirements in all

purchase contracts with suppliers and/or requesting indemnifications for failures to comply.

Finally, consider discussing more detailed or complex questions with counsel or a regulatory specialist and carefully monitor new developments coming from the CPSC. New regulations and guidance documents are posted on the commission's Web site regularly.

This regulatory regime is developing rapidly, and many manufacturing and consumer groups are playing an active role in the development of the regulations and interpretations of the law. Understanding the full breadth and scope of the CPSIA and how it applies to your specific products will substantially reduce your regulatory risks.

Notes

- ¹ Consumer Product Safety Improvement Act, Pub. L. No. 110-314 (2008).
- ² 15 U.S.C. §§ 2051-2089.
- ³ See 2009 Performance Budget, U.S. Consumer Product Safety Commission, February 2008, available at <http://www.cpsc.gov/cpscpub/pubs/reports/2009plan.pdf>.
- ⁴ Pub. L. No. 110-314, § 201(a).
- ⁵ See 2008 Performance and Accountability Report, U.S. Consumer Product Safety Commission, November 2008, at 12, available at <http://www.cpsc.gov/cpscpub/pubs/reports/2008par.pdf>.
- ⁶ Pub. L. No. 110-413, § 202(c).
- ⁷ See *id.* Section 202(a).
- ⁸ See *id.* Section 217(a).
- ⁹ See *id.* Section 217(c).
- ¹⁰ See *id.* Section 217(d).
- ¹¹ See *id.* Section 217(c).
- ¹² *Id.* Section 212(a).
- ¹³ Pub. L. No. 110-413, § 212(b).
- ¹⁴ See *id.*
- ¹⁵ See *id.* Section 212(c)(2).
- ¹⁶ See *id.* Section 212(c)(4)(A).
- ¹⁷ 15 U.S.C. § 2064(b) (2004).
- ¹⁸ Pub. L. No. 110-314, § 211(1)-(2).
- ¹⁹ See *id.* Section 215(b).
- ²⁰ *Id.* at Section 104(d)(3).
- ²¹ The CPSC also administers the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, the Children's Gasoline Burn Prevention Act, the Refrigerator Safety Act, and the Virginia Graeme Baker Pool and Spa Safety Act.
- ²² See Pub. L. No. 110-314, § 102(a).
- ²³ Refrigerator Safety Act Regulations, 16 C.F.R. § 1750.4 (2009).
- ²⁴ The stay does not apply to products subject to: (1) the ban on lead in paint and other surface coatings effective for products made after Dec. 21, 2008; (2) the standards for full-size and non-full-size cribs and pacifiers effective for products made after Jan. 20, 2009; (3) the ban on small parts effective for products made after Feb. 15, 2009; (4) the ban on small parts effective for products made after Feb. 15, 2009; ATV's manufactured after April 13, 2009; and (5) pre-CPSIA

testing and certification requirements, including for: automatic residential garage door openers, bike helmets, candles with metal core wicks, lawnmowers, lighters, mattresses and swimming pool slides; and (6) pool-drain-cover requirements of the Virginia Graeme Baker Pool & Spa Safety Act. See Notice of Stay of Enforcement of CPSIA Testing & Certification Requirements, 74 Fed. Reg. 25,6369, 25,6397-6399 (Feb. 9, 2009).

- ²⁵ *Id.*
- ²⁶ 16 C.F.R. § 1110.13 (2009).
- ²⁷ *Id.* See also Sample General Certificate of Compliance & Frequently Asked Questions, available at <http://www.cpsc.gov/ABOUT/cpsia/faq/elecfaq.pdf>.
- ²⁸ See Pub. L. No. 110-314, § 102(a)(1).
- ²⁹ See *id.* Section 102(g)(1).
- ³⁰ See *id.* Section 216(a).
- ³¹ *Id.* Section 103(c).
- ³² For example, a manufacturer of an adult-sized inflatable pool might not necessarily intend the product for use by children, but if the advertisements or labels imply that it is an item for children, it could be considered a children's product and consequently be subject to additional requirements such as the phthalate and lead limits.
- ³³ Pub. L. No. 110-314, § 223(a).
- ³⁴ *Id.* Section 214(a).
- ³⁵ *Id.* Section 216(a)(7).

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