

THARPE & HOWELL

BUSINESS LAW UPDATE

FEBRUARY, 2009

IMPORTANT UPDATE TO THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

The Consumer Product Safety Improvement Act of 2008 has set new, higher standards for the production and/or distribution of products intended for children. These standards are far reaching and will now be used as the standard of care in **product liability** and **related suits**. The failure of a manufacturer to perform reasonable due-diligence to determine the applicability of this Act in relation to the products it manufactures, imports, sells, and/or distributes, and to insure conformance to the provisions of the Act, can result in adverse consequences for the business and its insurance policy issuers. This Business Law Update is intended to make our business clients and colleagues and insurance carriers aware of the important changes to this law, and the various steps which may be taken to mitigate risk.

BACKGROUND ON THE CONSUMER PRODUCTS SAFETY ACT

About The Consumer Products Safety Act:

In 1972 the United States Consumer Products Safety Commission (“CPSC”) created the Consumer Products Safety Act (“CPSA”) to address all types of defective products. Recently, there have been a number of well publicized recalls of defective and adulterated products, particularly children’s products, that led to the passing of the Consumer Products Safety Improvement Act of 2008. (“CPSIA” or the “Act”). This Business Law Update covers the updates, clarifications, and changes to the Act which are occurring daily.

About The Consumer Products Safety Commission:

The CPSC was established to protect the public “against unreasonable risks of injuries associated with consumer products.” It has jurisdiction over more than 15,000 types of products that involve risks related to fire, electrical, chemical, mechanical, or that can otherwise cause injuries. In 2007, there were a total of 448 product recalls involving the CPSC, with 52% of them relating to children’s products (totaling 46,562,901 units). The recalls stemmed from 657 reported deaths or injuries, an increase of over 374% from 2006. 17% of the recalls took place **after** a child was injured or killed. Lead hazards involved 49% of the recalled products, followed by choking, strangulation, entrapment, aspiration, burns, lacerations, fractures, magnet ingestion, and other injuries.

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Of the 213 recalled children's products, only 35 were **not** manufactured in Mainland China. For example, almost all of the lead poisoning recalls involved Chinese products as lead paint is not available in the U.S. The balance of the Chinese recalls were primarily related to the product's design that did not comply with flammability or other design safety standards.

About The Improvement Act:

The new law is far reaching and affects manufacturers, importers, wholesalers, distributors, and retailers of consumer products. The Act is primarily focused on products intended for children, and significantly impacts the way products are designed and manufactured. Not only does it establish manufacturing standards, it establishes product testing protocols and an extensive consumer complaint database. The Act includes widespread bans on lead and phthalate, new safety standards and mandatory testing procedures, product certification and disclosures, tracking labels, product registration, and warnings.

The new law also increases potential civil penalties of up to \$15 million. It reduces the burdens of proof for criminal prosecution, and allows state attorneys general to enforce federal product safety laws. It gives the CPSC greater authority over product recalls and enforcement of product safety laws, whistle blower protection for employees who report safety violations or cooperate investigations, and stepped-up enforcement efforts involving other federal agencies, foreign product safety regulators, and state health agencies.

The statute is quite complex and far-reaching. Certain aspects of the law are subject to immediate implementation, while other aspects will be developed by the CPSC over time with phased-in implementation. The following is a summary of the key elements of the new law.

KEY ELEMENTS OF THE ACT

The Act defines children's products as a consumer product "designed or intended primarily for children 12 years of age or younger." It defines children's toys as products "designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays." Finally, it defines child care articles as a consumer product "designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething." Some important provisions of the Act for business owners and their insurance carriers to consider are:

Administrative And Procedural: The Act increases the budget of the CPSC to fund new activities and initiatives including restoring the Commission to five members. It requires the CPSC to develop a searchable database, accessible to the public through the internet, on the safety of consumer products. It will include reports of deaths and injuries allegedly caused by consumer products, including manufacturers' names and product names, and will require that the CPSC share information with state public health agencies.

Advertisement Size And Placement: Cautionary statements must be prominently displayed. Additional requirements for advertisements in printed materials and the internet are specified.

Certificates: The Commission clarified the requirements making clear that absent another product safety standard requiring something different, only importers or domestic product manufacturers are required to issue conformity certificates. The certificates must be passed along to distributors and retailers. Electronic issuance and distribution can be accomplished by posting the certificates on a website. They can also be transmitted electronically to Customs as long as the original can be immediately produced upon request.

Certification: The Act expands certification and testing requirements for all products that are subject to the jurisdiction of the CPSC. It requires third party testing and certification for compliance with safety standards. Third party test reports **are not** equivalent to certificates. The certificate must be issued by the first party (for example, the manufacturer). The product cannot be sold if no certificate accompanies the product.

Children's Products: The CPSC will consider the following factors in assessing whether the product is intended for children: intended use of the product; how the product is marketed; whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; Classification under Age Determination Guidelines (published September, 2002).

Component Parts: There is an exclusion for inaccessible component parts. So long as a child would not be able to access the component and the component does not become physically exposed it may be excluded.

Consumer Product Safety Database: The Act creates a consumer product safety database to which consumers, government agencies, health care professionals, child care providers and "public safety entities" may provide reports of "harm relating to the use of consumer products." The report must describe the "harm" or injury, the product, the manufacturer, causation, and contact information of the complaining party. However, the identity of the person reporting the harm is maintained as confidential.

Exceptions For Sale Of Used Products: According to a U.S. Consumer Product Safety Commission release "sellers of used children's products, such as **thrift stores and consignment stores**, are **not** required to certify that those products meet the new lead limits, phthalate standard or new toy standards." The release goes on to say that **resellers** are **not** required to test said products **already in inventory** prior to sale.

Exceptions To Lead Provisions: The lead content provision of the Act recognizes that some products and materials should be excluded if it is clear that the product or material will not result in any absorption of lead into the body or otherwise have an adverse impact on health or safety. The CPSC has recommended such applications be supported by reliable test results or other scientific evidence.

Expanded Enforcement Powers: The CPSC has been given increased authority for product recalls and notification of recall to consumers. The Act authorizes the Commission to order all those in the supply chain, including manufacturers, distributors and retailers, to cease distributing an allegedly defective product. It also requires the CPSC to develop "guidelines establishing a uniform class of information to be included in any [recall] notice," and specifies information that must be included.

Import-Export Issues: The Act establishes mandatory testing and certification for imported children's products and other regulated products by off-shore manufacturers. It prohibits exports of recalled, banned, hazardous or non-conforming products to other countries, and establishes policies for the cooperation of the International Trade Data System with the U.S. Customs and Border Protection to prevent non-compliant products from entering the United States. It also establishes procedures to destroy products that have been refused admission into the United States for failure to conform to safety regulations and provides for studies concerning the effectiveness of measures designed to prevent the importation of unsafe products into the United States.

Information Sharing: The Act now allows the Commission to make confidential information on products available to any Federal, State, local, or foreign government agency for law enforcement or consumer protection purposes. The Act prohibits the CPSC from disclosing to manufacturers or others product safety-related information received from a foreign source, while requiring the CPSC to disclose information pursuant to court orders and to share confidential product safety information with other countries.

Lead: The Act requires lead levels be reduced to 600 parts per million by **February 10, 2009**; 300 parts per million by **August 14, 2009**; and 100 parts per million by **August 14, 2011**. By **August 14, 2009**, the Act will provide for rules related to electronic devices and inaccessible component parts. It reduces lead paint content from 0.06 percent to 0.009 percent effective **August 14, 2009**. It also changes how lead content in paint is tested and calculated.

Other Products: It imposes a ban on three-wheeled all-terrain vehicles (ATVs), adopts American National Standard ANSI/SVIA-1-2007 as a safety standard for other ATV's, and mandates additional studies and standards focused on ATV's intended for use by youth. It also addresses the use of formaldehyde in textiles and apparel.

Natural Material: The CPSC recently addressed the issue of naturally occurring materials and certain metals and their alloys (which do not exceed the lead content) that was particularly important to the handicraft industry. It generally exempted materials that are "untreated and unadulterated by the addition of materials or chemicals including pigments, dyes, coatings, finishes or any other substance, and has not undergone any processing that could result in lead content that exceeds the CPSIA lead limits" It lists, among other things, gemstones, wood, natural fibers (e.g., cotton, silk, etc.), and other natural materials. It excludes materials such as solder or base metals in electroplate, clad or fill applications.

Penalties: The Act increases the existing civil penalties for violations of the CPSA, the Flammable Fabrics Act and the Federal Hazardous Substances Act, from the existing limits of \$8,000/\$1,825,000 for each violation, to \$100,000 for each violation with a cap of \$15 million. Criminal penalties include larger fines, up to five years' imprisonment, and forfeiture of assets associated with a violation. It also eliminates a previous requirement that directors, officers and agents had to actually know of violations before being criminally charged.

Phthalates: The Act prohibits the sale of children's toys and child care articles with concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP). (Effective **February 10, 2009**.) It further bans the sale of children's toys that can be placed in a child's mouth (smaller than five centimeters in dimension) and child care articles that contain more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP). It provides for further studies of phthalate and phthalate alternatives. (Effective **February 10, 2009**.) Lastly, it provides limited federal preemption of recently passed state laws regulating phthalate and phthalate alternatives.

Recalls: It eliminates the right of a party recalling a product to elect whether they will offer a refund, repair and/or replacement for recalled products and permits the CPSC to require a refund, repair and/or replacement as the CPSC determines to be in the public interest. It creates new requirements for recall notices in languages other than English and provides prohibitions against stockpiling and selling products that violate product safety regulations. (Products with more than 600 ppm of lead must come off the shelves no later than **February 10, 2009**.) It also provides for a feasibility study on requiring manufacturers, importers and retailers to establish escrow funds, **purchase insurance** or otherwise provide financial security to pay for recalls and/or destruction of recalled products.

Safety Rules Affecting Toys And Children's Products: The Act adopts ASTM F963-07 safety specification standards effective **February 10, 2009** and directs further studies. It establishes new standards for infant and toddler products and requires manufacturers to provide registration cards and a more effective distribution of recall and safety notices. New, permanent tracking labels required on children's products and their packaging that provide source, production date, and batch information. (Effective **August 14, 2009**.) The Act increases warning requirements and incorporates the Federal Hazardous Substances Act which requires warnings on packaging and accompanying descriptive materials. These warnings must be included in all internet advertisements by **December 12, 2008**, and in all catalogs and other printed materials by **February 10, 2009**.

State Attorneys General New Civil Right Of Action: With 30 days notice to the CPSC, Attorneys General may seek to enjoin the manufacture, distribution and/or sale of consumer products which do not conform to product safety standards enforced by the CPSC, if those violations affect the state or its residents. The Attorney General may also seek injunctive relief to prevent the sale of any product that is subject to corrective action, to correct a failure to comply with certain Commission orders and to prevent the sale of products bearing an unauthorized safety certification mark. Although the CPSC may intervene in suits brought by the Attorneys General it need not do so. This effectively allows each individual State Attorney General to enforce federal product safety rules.

State Enforcement: The Act allows the attorney general of each individual state to enforce the CPSA including seeking injunctive relief. It requires states to give the CPSC advance notice of any intent to initiate a state action, and prohibits the CPSC from preempting damage claims arising under common law and state statutes.

Testing: It establishes standards for laboratory accreditation and "firewalling" rules for labs owned or controlled by manufacturers. The Act requires compliance according to the following schedule: **September 13, 2008**, for lead paint; **October 13, 2008**, for cribs and pacifiers; **November 12, 2008**, for small parts; **December 12, 2008**, for metal jewelry; **March 13, 2009**, for baby bouncers, walkers and jumpers; and **June 14, 2009**, for all other children's products. A "Reasonable Testing Program" specifying the number of samples required for testing and frequency of testing has not been defined. The CPSC has indicated that compositing of parts is not allowed for lead and phthalate testing. Lab accreditation will be required separately for each applicable section of the Act starting with lead in paints/surface coatings. Third party certification requirement shall apply to any children's product manufactured more than 90 days after CPSC has established and published rules for accrediting third party labs.

Tracking Labels: Tracking labels are required on product and packaging of children's products including children's apparel products.

Whistle Blower Protection: The Act establishes whistle blower protection for employees who report or provide assistance in consumer product safety enforcement proceedings or who refuse to participate in an employer's illegal conduct. Statutory damages include injunctive relief, reinstatement, back pay, interest, general damages, and attorney fees and costs.

RISK MANAGEMENT

Violations can result in government and private citizen actions that can interfere with or even shut down a business. Those companies that face exposure under the Act should consider developing a due-diligence protocol for risk management. Following are certain techniques that can be taken to reduce the potential risks associated with violating the Act.

Analysis Of Information: Analysis and interpretation of complaints and investigation of accuracy of such complaints; and analysis as evidence to determine if it rises to the level of a substantial product hazard.

Customer Complaint Response: Carefully track and meaningfully respond to consumer concerns and complaints before they are reported to the CPSC and put into the data base, or ripen into litigation.

Design Education: Educating product development teams, such as mechanical and industrial designers, brand managers, engineers, chemists, etc. on the requirements of the Act; and managing the chemical introduction/inclusion in new products.

Document Management: Establish document management systems and document retention policies to demonstrate compliance with Act. Verify documentation of all lab testing and verify reports are properly written in compliance with the Act.

Human Factors: Evaluation of difficulty of child access to product components; design, administration, and analysis of consumer-product interaction studies; and assessment of developmental and age appropriateness of products or activities.

Indemnity And Insurance: A party in the stream of commerce can transfer much of the risks that arise under the CPSIA to others, via contractual risk transfer and insurance. Contractual risk transfer requires the use of specific contract language resulting in one party expressly indemnifying the other for the loss. There are typically two separate obligations involved, an obligation to defend a party against suits and claims, and an obligation to pay for any resulting loss or damage. This is commonly known as express indemnity and, typically, the party who controls the manufacturing of the product indemnifies distributors and retailers.

In addition to a business having its own liability insurance it can be named as an additional insured under the liability policy of the other. It is important that the insurance has coverage for completed products and is maintained. If a party is an additional insured under the policy of another, then it is important that the additional insured obtain an endorsement from the subcontractor's insurer to confirm coverage.

Modifications: Monitor supply chains to ensure that suppliers do not introduce non-compliant parts, subassemblies, chemicals, paints, glues, etc., into otherwise conforming products.

Qualify Testing Labs: Engage certified laboratories and contractually mandate them to keep their certifications current. Ensure certified lab use and advise the company on proper application of appropriate testing protocols and product standards.

Scientific Research: Understand the research required in relation to the abilities of children and their use of products, the use and effectiveness of warnings; standards for testing, corrective action plans for products, and the tracking and analysis of consumer complaint data.

Warnings: Design warnings for use in product advertisements shown on internet sites, catalogs, and other locations; the effect of product warnings at points of sale on purchasing decisions; and testing and safety information. Development of Corrective Plans; development of internal standards, testing, and tracking procedures; and assessment of impact of public safety campaigns.

UP TO THE MINUTE CHANGES

[AS OF FEBRUARY 10, 2009]

The provisions of the Act are subject to constant change. The following are some recent items of importance:

- * A ban on phthalates and lead in products intended for children 12 and under went into effect on **February 10, 2009**, and applies to existing inventory.
- * New legislation affecting the Act has been proposed.
- * CPSC granted a one year stay on testing for lead and phthalates except on certain new products.
- * CPSC issued a comprehensive guide to the CPSA on February 10, 2009.
- * CPSC issued a guide to help Small Business owners understand the new rules. The guide can be downloaded at: www.cpsc.gov/ABOUT/Cpsia/smbus/cpsiasbguide.pdf

COMMENTS

The failure of a manufacturer, importer, seller, and/or distributor of products to understand and insure conformance of the Consumer Product Safety Improvement Act can have adverse consequences for both the business and its business policy insurance carrier. The Act is somewhat complicated and contains steep civil and criminal penalties for non-compliance. This makes it extremely important for those in the stream of commerce to consistently keep up-to-date on the specifics of the Act - as there have been many additions, changes, and clarifications to it already. It is anticipated that new legislation will also expand the Act and the power of the Consumer Product Safety Commission.

Please note that updated information and notices are available on the Government's official website located at www.cpsc.gov/ABOUT/Cpsia/cpsia. Should you have any questions or comments about the Act, please feel free to contact me.

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