

The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 17, No. 3

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March 2009

Law And Practice: The Consumer Products Safety Improvement Act Of 2008

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No legislation in recent memory has engendered more confusion and consternation than the Consumer Product Safety Improvement Act of 2008 (*Pub. L. No. 110-314* (HR 4040)) (the "CPSIA"). The complexity and difficulty of fully complying with the CPSIA's regulatory framework, coupled with the consequences of non-compliance, have created substantial risks to all parties in the consumer products supply chain, as well as to asset-based lenders. The Consumer Product Safety Commission ("CPSC") has acknowledged that the law as adopted, and the expense of full compliance, may in fact be too burdensome for many businesses, and recently issued a one-year stay of its enforcement of certain important provisions of the law. Despite the stay, businesses and lenders that deal in consumer products will have to contend with a highly technical legal framework and will undoubtedly incur substantial compliance costs. Attorneys should be prepared to deal with the legal issues that will surely arise.

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Testing And Certification Requirements Of The CPSIA

The CPSIA is intended to both significantly enhance compliance with existing consumer safety laws, which were not uniformly or effectively enforced in the past, and adopt new substantive standards and limitations on certain harmful substances, such as lead and phthalates.

A widely discussed compliance measure of the CPSIA is the new testing and certification requirements for specified regulated consumer products (which are listed on the CPSC website). All parties in the consumer products supply chain, including, without limitation, manufacturers, importers and retailers of regulated consumer products, are required by the CPSIA to issue or make available compliance certifications indicating that their products meet the requirements of the CPSIA. The certification must be based on a test of each product or upon a reasonable testing program and must specify each such rule, ban, standard, or regulation with which the product must comply. Failure to comply can result in seizure and/or destruction of goods, recall of goods already sold, civil penalties and potential liability to customers.

The certification and testing requirements in the CPSIA have, in the words of the CPSC, caused "substantial confusion" and resulted in "thousands of email, tele-

phone and written inquiries as to how to comply, when to comply, what is required in support of the various certifications, what form the required certificates must take and who must issue them . . ." as well as "innumerable inquiries seeking relief from the expense of testing." *Notice of Stay of Enforcement of Testing and Certification Requirement*, 74 Fed. Reg. 25 (Feb. 9, 2009) at 6396. The CPSC acknowledged that the new act "cut a broad swath through the business community from books to children's apparel to toys and sporting goods to children's electronic products" . . . and that "many of the firms making consumer products . . . are small businesses" who "do not have laboratory test facilities and must turn to outside labs" for a wide array of complex and expensive tests. *Id.* at 6398.

In response, on January 30, 2009, the CPSC issued a one-year stay of enforcement for "certain testing and certification requirements" for manufacturers and importers of specified regulated products, including products intended for children twelve years old and younger (with certain listed exceptions as set forth on its website). *Press Release, Office of Information and Public Affairs, CPSC Grants One Year Stay of Testing and Certification Requirements for Certain Products* (Jan. 30, 2009), at <http://www.cpsc.gov>. Most importantly, the stay is only a stay of enforcement of the testing and certification provisions, not of the substantive provisions of the law. Accordingly, unless stayed or reversed on appeal, manufacturers and importers will need to meet the new lead and phthalates limits, as well as mandatory toy standards and other requirements, but are not required to meet the third-party testing or certification requirements during the pendency of the stay.

The stay, however, is not a panacea. For example, the CPSIA empowers state attor-

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neys general to bring civil actions to enforce the CPSIA, and they are not bound by the stay, even though the CPSC urges otherwise. The CPSC press release states that “the Commission trusts that state attorneys general will respect the Commission’s judgment that it is necessary to stay certain testing and certification requirements and will focus their own enforcement efforts and other provisions of the law, e.g. the sale of recalled products.” *Press Release, supra*. Moreover, many consumer product businesses that sell its products to major retailers will find that their customers require evidence of compliance in the form of certificates, undertakings or other documentation, despite the stay.

Additionally, the recently imposed stay does not mention U.S. Customs, even though the certification requirements of the CPSIA apply to both imported and domestically produced goods. Importers may find the CPSIA particularly challenging since there is a specific provision providing for the non-compliant goods to be refused admission at customs (or sent back to the importer). The non-conforming products may not be exported out of the country and “shall be destroyed . . . unless the Secretary of the Treasury permits the export in lieu of destruction.” In addition, “all expenses . . . in connection with the destruction . . . shall be paid by the owner or consignee.” *15 U.S.C. §§ 2066(e), (f)*. Based on a literal reading of the statute, an importer who receives non-compliant goods cannot legally export them to return them to the party who provided them and may be liable for destruction expenses.

Retroactive Applicability Of Certain Provisions Of The CPSIA

Since the stay does not affect the substantive provisions of the CPSIA, the standards and limitations on certain harmful substances is effective February 10, 2009. One of the most controversial aspects of the CPSIA is its applicability to goods already in the stream of commerce on its effective dates, regardless of when such goods were manufactured. Section 108 of the CPSIA provides for new limits on phthalates, beginning on February 10, 2009. The CPSC’s General Counsel issued an advisory opinion on September 18, 2008, and declined reconsideration on November 17, 2008, that such limits do not apply to “existing inventory” manufactured before February 10, 2009 (the General Counsel Advisory Opinion can be found at www.cpsc.gov). The CPSC’s General Counsel stated that, as long as goods were manufactured in accordance with the applicable law prior to February 10, 2009,

they could continue to be sold and distributed in commerce after February 10, 2009. The opinion of the CPSC had several bases: (i) that the relevant provision of the act was not intended to apply to goods manufactured before its effective date, (ii) that phthalates were distinguishable from lead in that Congress did not make a specific declaration that phthalates are “a banned hazardous substance,” and (iii) in the absence of a specific unambiguous statement that the prohibitions were to be applied retroactively, it was inappropriate to do so. *Id.*

Two consumer organizations, the National Resources Defense Council, Inc and Public Citizen, Inc., brought suit against the CPSC under the Administrative Procedure Act, 5 USC §§703, *et seq.*, and filed a motion for summary judgment. In a lengthy memorandum opinion and order issued on February 5, 2009, just five days before the effective date of the new phthalate provisions, the United States District Court for the Southern District of New York held that the November 17, 2008 letter regarding the phthalate provisions of Section 108 would be set aside, and the new phthalate provisions would apply to inventory existing on February 10, 2009, regardless of the date of manufacture. *National Resources Defense Council, Inc. and Public Citizen, Inc. v. U.S. Consumer Product Safety Commission*, 08-10507 (PGG) (S.D.N.Y., filed Feb. 5, 2009). Accordingly, all non-compliant inventory still on store shelves, in transit or in warehouses on February 10, 2009 must be destroyed, even if such inventory complied with all applicable laws on the date of manufacture.

The new limitations on lead, by their terms, apply to existing inventory on their effective date, and as of February 10, 2009, children’s products with more than 600 ppm total lead cannot lawfully be sold in the United States, regardless of when they were manufactured.

The Way Forward

There continues to be tremendous disruption, confusion and concern in a variety of industries affected by the CPSIA. Stores are destroying non-compliant goods, and suppliers are scrambling to understand a law so complex that the agency charged with enforcing it has begged for mercy and stayed its enforcement. Large retailers already are policing their suppliers to protect themselves from liability, and a compliance industry, particularly among testing laboratories, is already developing.

While certain enforcement, certification and testing requirements are not fully

implemented, or are stayed, many aspects of the law are already effective, and the CPSIA remains a formidable law, with far-reaching consequences. Most significantly, the CPSIA imposes severe fines and penalties for violations of the law, and allows the imposition of fines and penalties of up to one hundred thousand dollars (\$100,000) per violation and fifteen million dollars (\$15,000,000) in the aggregate.

Moreover, the CPSIA provides for a considerable increase in funding for the CPSC’s enforcement of consumer laws, which will create a powerful and effective regulatory organization to enforce consumer products safety. In the words of Thomas H. Moore, Commissioner of the CPSC, the CPSC “had been underfunded almost to the point of extinction.” *Letter from Thomas H. Moore, Commissioner of the CPSC to Members of Congress* (Feb. 3, 2009) (available at www.cpsc.gov/pr/statements.html). With this increased funding, the CPSC is going to be an important regulatory body, with significant powers and rights, and the muscle to enforce them. Thus, all businesses potentially affected by the law should move as quickly as they can toward full compliance, regardless of the stay.

Asset-based lenders whose collateral is consumer products should also take note of the CPSIA and its consequences. The CPSIA applies not only to goods in the borrower’s possession but also extends to goods that have been sold to stores or stored in warehouses. Unwary lenders to businesses that violate the CPSIA may wake up to find that accounts receivable or inventory that it relied upon to secure a loan are worthless. This possibility requires that these lenders adopt due diligence procedures heretofore not practiced.

Due to the potentially devastating consequences the CPSIA could have on non-compliant consumer product businesses, in-house attorneys and outside general counsel would serve their clients well by becoming familiar with applicable provisions of law, subscribing to periodic updates on the CPSC website, and keeping abreast of new developments. Asset-based lenders should review their loan portfolios to identify existing borrowers that are subject to the CPSIA, and all such borrowers should be carefully monitored to ensure CPSIA compliance. Businesses large and small that deal in consumer products must prepare for a new world in which product testing is the rule, rather than the exception, and in which trading partners in the stream of commerce enforce a complex regulatory scheme to protect themselves.