

**The Consumer Product Safety Improvement Act of 2008 and
its Effect on Product Liability Litigation
By Kenneth Ross***

On August 14, 2008, the President of the United States signed legislation that reformed the laws and regulations of the U.S. Consumer Product Safety Commission (“CPSC”) governing all consumer products sold in the U.S. This legislation, called the U.S. Consumer Product Safety Improvement Act of 2008 (“CPSIA”), is the most important revision to the Consumer Product Safety Act (“CPSA”) since the CPSC’s formation in 1972.

This reform legislation is primarily the Congressional response to the significant number of consumer product recalls that have occurred in the last few years, many concerning products manufactured in China. These recalls exposed deficiencies in the safety requirements for toys and other children’s products sold in the U.S. and inadequacies in the budget and staffing required by the CPSC to satisfy its legislative charge.

The changes will result in more recalls, more likelihood of non-compliance with legal requirements, greater fines and penalties, and increased product liability litigation resulting from product recalls and regulatory violations.

Reporting Requirements

First, I should mention what the CPSIA did not change. It did not alter the general reporting requirements which require a manufacturer to report to the CPSC any defect that could cause a substantial product hazard and any product that violates a consumer product safety standard. What did change is that the manufacturer’s need to report will grow because of the increased number of standards and regulations promulgated under the CPSA.

Section 15(b) of the CPSA requires manufacturers, importers, distributors and retailers to notify the Commission immediately if it obtains information that reasonably supports the conclusion that a product distributed in commerce (1) fails to meet a consumer product safety standard or banning regulation, (2) contains a defect which could create a substantial product hazard to consumers, (3) creates an unreasonable risk of serious injury or death, or (4) fails to comply with a voluntary standard upon which the Commission has relied under the CPSA.

The most important basis for reporting to the Commission is Section 15(b)(2) which requires both a defect and the possibility of a substantial product hazard. The regulations to the CPSA provide some guidance on how to analyze the need to report. The first question is whether there is a defect. Under this section, a product without a defect is not subject to the reporting

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requirements even if injuries occur. Many products are reasonably safe and not defective and people still get hurt.

However, given the significant increase in the number of regulated products and safety standards, the portion of the reporting law dealing with a failure to comply with such a standard becomes even more important. This failure to comply does not have to result in a defect or substantial product hazard. The mere failure to comply violates the CPSA and requires a report to the CPSC.

CPSIA

As of early January 2009, the implementation of the CPSIA is frankly a huge mess. Congress inserted such aggressive implementation dates and wrote the law in a way that so adversely affected many U.S. manufacturers that the CPSC staff has had to, through interpretations and rules, try to clarify the law so it could be understood and try to soften some of the unintended consequences.

Many questions about the CPSIA's requirements and effects will remain unanswered until the CPSC develops and issues regulations, rules and advisory opinions based on the legislation. The CPSC has set up a website that provides up-to-date information on CPSIA developments, including proposed regulations, advisory opinions, proposed notices of rulemaking, and CPSC seminars on the implementation process. See <http://cpsc.gov/about/cpsia/cpsia.html>.

Below is a summary of the most important provisions of this law and a discussion of their current status as of early January:

Administrative, Procedural, and Enforcement Changes

- **Searchable database (Section 212)** – The CPSIA requires the CPSC to establish a consumer accessible and searchable database on the Internet. The database must include reports on deaths and injuries caused by consumer products, the name of the product, and the manufacturer's name. Manufacturers will be allowed to ask the CPSC to correct materially incorrect information and protect against disclosure of trade secrets before information is posted on the database. The CPSC must submit to Congress a plan for developing this database by February 2009, and the database must be established by October 2010. This database is one of the most significant changes that could adversely affect a company's reputation and product liability litigation.
- **Budget and employees (Sections 201 and 202)** – Congress significantly increased the CPSC's budget and mandated a substantial staff increase. Part of the increased staff must be assigned to inspect ports and overseas factories. However, the increased budget is not yet funded and, with the economic crisis still unresolved, it is unclear whether or when the CPSC will receive a significant enough budget increase to hire more people, improve facilities, and implement new regulations and rules.
- **Civil and criminal penalties (Section 217)** – Civil penalties will increase to \$100,000 per violation with a cap of \$15 million. Congress prescribed a list of factors that the

CPSC must consider in deciding whether and how much to fine a company and required the CPSC to develop a regulation interpreting these factors. Criminal penalties also increased, permitting imprisonment and forfeiture of assets. In addition, a corporation can be held criminally liable even if its directors, officers and agents were not first informed of the corporation's violation of the law by the CPSC.

- **Enforcement by State Attorneys General (Section 218)** – State attorneys general can now sue companies for violation of CPSC statutes, provided that the CPSC receives advance notice of any such suit. The CPSC, the White House, and manufacturers all objected to this provision, but Congress kept it in the CPSIA. This provision is significant because some state Attorneys General, for political as well as safety reasons, have been historically more aggressive than the CPSC in trying to enforce existing and new safety standards.
- **Whistleblower protection (Section 219)** – A manufacturer cannot terminate or discriminate against an employee who provides information on a product safety matter to the CPSC, a state Attorney General, or a court of law.
- **Preemption (Section 231)** – Some states have enacted product safety legislation imposing stricter safety standards on children's products than the CPSC. The CPSC can preempt more stringent rules if they unduly burden the sale of products throughout the U.S. However, the CPSC cannot preempt claims by consumers under common law and state statutes. Of course, this provision will have an effect on future product liability litigation.
- **Public release of information (Section 211)** – The Freedom of Information Act and the current Consumer Product Safety Act contain protections against the release of certain information which the public requests on products and product safety issues. This section streamlines the process for the release of public information and allows for an expedited release of information deemed important for public health and safety.

Enhanced Recall Effectiveness

- **Enhanced recall authority and corrective action plans (Section 214)** – Congress adopted a number of provisions increasing the CPSC's authority (1) to order manufacturers to include Spanish on recall notices; (2) to revoke acceptance of a corrective action preventing the manufacturer from selling its products or require the manufacturer to amend its remedial plan; (3) to require recall notices to include certain additional information; and (4) to require manufacturers to offer a replacement, refund or repair of recalled products.
- **Tracking for children's products (Section 103)** – The CPSIA requires manufacturers of children's products to add permanent markings to help identify recalled products. The markings must include the product's source, production date, and batch. Markings must be in place by August of 2009.

- **Prohibited sale, manufacture, or import of recalled products (Section 216)** – The CPSIA prohibits everyone in the chain of distribution from selling, manufacturing or importing products that have been recalled. This section also prohibits the sale of a product without required certificates (see toy and children’s product certification requirements) or with false certifications.
- **Increased use of registration cards for durable infant and toddler products (Section 104)** – To increase recall response rates, the law requires that manufacturers provide registration forms to consumers and better track registered consumers.

New Requirements for Children’s Products and All Consumer Products

- **Third party testing and certification (Section 102)** – The law requires that all children’s products subject to CPSC standards, regulations, rules, or bans be tested by an independent testing company before the product can be imported or distributed. It also requires that all consumer products subject to similar CPSC provisions be tested for compliance and certified that they comply. The CPSC must develop an accreditation procedure for testing entities by July of 2009, except the testing procedure for the lead standard must be developed by November 2008.

There have been a number of staff memos and notices of requirements for accreditation requirements for testing companies. Despite that, it is clear that there are insufficient testing labs that have been accredited, that manufacturers are having a hard time finding a lab to do testing in time for the implementation dates, and that testing labs are increasing their fees to accommodate high demand.

The CPSC has issued a request for comments on Section 102’s testing requirements for component parts. Comments are due on January 30, 2009. After that, the CPSC will clarify the requirements for testing components.

And lastly, there have been a flurry of opinions, rules and FAQ’s clarifying the requirements for general conformity certificates that must accompany products subject to CPSC standards, regulations, rules or bans. The certification requirement became effective for products manufactured after November 12, 2008. The CPSC issued an “immediate final rule” on these requirements on November 18, 2008.

Foreign manufacturers, importers, U.S. manufacturers and retailers are still trying to determine who will create the certificates and what will they say. Since the certificates need to certify that the product was tested to and complies with certain standards, it is necessary for the responsible party to understand the standards. Since not all of the standards are clear as of this writing, certificates that comply with these requirements are not being prepared.

The Acting Chair of the CPSC said at a conference last year that the CPSC will not be rigorously enforcing the certification requirements. Hopefully, the Customs and Border

Protection agency does not stop foreign shipments from entering the U.S. without the appropriate certifications and that retailers understand the difficulties in meeting this requirement before the testing requirements are clear and testing labs can be found to do the appropriate testing.

- **Lead (Section 101)** – The law decreases acceptable lead levels in all children’s products, except for inaccessible component parts. This law preempts any current state law on lead in toys and children’s products. The CPSC received comments from the public on the changes in these requirements by October 31, 2008. Since then, they have issued a variety of documents trying to clarify the law and establish test procedures.

The biggest fight at the moment is over the effective date of the ban on lead in children’s products. The CPSIA stated and CPSC confirmed that it is illegal to sell, offer for sale, manufacture, import, or distribute children’s products that exceed acceptable lead levels after February 10, 2009. This will result in many products having to be pulled off of retailer’s shelves and destroyed if they have not been sold by that date.

On December 23, 2009 the CPSC issued various documents concerning lead in children’s products. All of these documents are trying to address industry concerns about the need to test materials that do not have lead or are inaccessible and either have the commission rule now that testing is not required or setting up a procedure for requesting an exclusion from testing. They are as follows:

- A proposed determination and notice of proposed rulemaking by the CPSC concerning certain materials and products that do not presumptively contain lead and do not need to be tested.
- A proposed procedure so the Commission can evaluate submissions and rule on additional materials and products that are excluded from the testing requirements.
- A proposed interpretative rule on inaccessible parts which do not need to be tested.
- An exemption for certain electronic devices that do not need to be tested.

On January 6, 2009, the Commission provisionally approved all four proposals. They voted to exempt electronic goods and inaccessible parts that contain lead from the new rules banning lead in children’s products. In addition, the Commission agreed to exempt some natural products from mandatory testing for lead. These proposals did not include all of the natural materials requested by industry.

These proposals reportedly will be open for public comment for a month and may be changed after the comments are received. In the meantime, manufacturers and retailers are perplexed about what they are required to do.

- **Phthalates (Section 108)** – The law regulates phthalates and bans specific phthalates in certain concentrations. The CPSC intends to further study the potential harmful effects of some types of phthalates. This section is the other hotly contested matter with lots of inconsistent activities.

There is a fascinating legal fight going on over the effective date of the phthalate ban. The Act says that certain products with phthalates are banned starting February 10, 2009. A normal reading of that act is that it is against the law to sell products with banned phthalates starting on February 10, 2009. The CPSC has taken the position in a letter from the CPSC General Counsel dated November 17, 2009 that this ban does not apply to products manufactured prior to February 10, 2009. Therefore such products with banned phthalates can still be sold after February 10. This letter was sent in response to industry requests for more time to comply.

Senator Barbara Boxer of California, who wrote this provision, said that this was not her intent and the CPSC's interpretation was blatantly incorrect. On December 4, 2008, the Natural Resources Defense Council and Public Citizen filed a complaint against the CPSC for declaratory and injunctive relief confirming that such products cannot be sold after February 10.

To add to the confusion, the California State Attorney General issued a letter dated December 3, 2008, referencing California's ban on certain phthalates that was passed October 2007 and is effective January 1, 2009, and saying that California's law is not preempted by the CPSIA ban or the CPSC's interpretation of its effective date. Therefore, it is against California law to manufacture, sell, or distribute products with banned phthalates starting January 1.

In addition, there are many unanswered questions concerning what products are subject to this ban. The CPSC requested comments on this section and the comments are due on January 12, 2009. The CPSC was going to have a conference in early December on this section and cancelled it presumably because there were so many questions they couldn't answer on the products subject to this ban.

In the interim, the CPSC's General Counsel has issued advisory opinions on application of this section to shoes and wearing apparel.

- **Durable nursery products (Section 104)** – Durable infant and toddler products, especially cribs, are subject to new safety standards. The CPSC has issued an advanced notice of proposed rulemaking and a request for comments that are due by January 26, 2009.
- **Advertising rules (Section 105)** – New rules will govern manufacturers and retailers in the advertising of toys and games. Mainly, the advertising will need to include warnings. The CPSC issued an advanced notice of proposed rulemaking on advertising on September 23, 2008 and then a final rule for labeling requirements dated November 17, 2008.

The above summary does not cover all of the CPSIA's new provisions. Manufacturers selling consumer products into the United States should consult the CPSC website for up to date interpretations of the new law. Manufacturers should also consult with a lawyer who is familiar with the specific requirements of the legislation and current activities to help identify how and when all of the legislation's provisions will affect the company and its products and how to comply.

Effect on Product Liability Litigation

Even though the CPSC has not yet implemented all its provisions, the effect of the CPSIA on the common law is already clear. Non-compliance with the statute or its implementing regulations will result in huge product liability problems if the non-compliance causes personal injury or property damage.

Moreover, given the inherent uncertainty in any new law or regulation until it is interpreted by the relevant agency and ultimately by the courts, manufacturers will likely be more at risk for non-compliance for some period of time. The potential for non-compliance and consequently such a claim in a product liability lawsuit could occur even if the CPSC does not claim that the manufacturer failed to comply.

Finally, the increase in recalls that will result from these additional safety standards will certainly prompt plaintiff's lawyers to pursue more claims of post-sale negligence. Completion of a CPSC-approved recall will not necessarily protect a manufacturer from a claim that it negligently carried out the recall. And, even if the manufacturer reported the matter to the CPSC and the CPSC did not require a recall, plaintiff's lawyers will undoubtedly claim that the manufacturer negligently failed to recall the product.

Conclusion

Manufacturers must understand how the new laws, rules and regulations apply to their products, how the CPSC will interpret and enforce them, how their competitors intend to comply, how their customers will require them to comply, and how to document their compliance. In addition, with the increased limits on fines, it is even more important for manufacturers to implement and maintain an effective post-sale monitoring program that captures all relevant post-sale information and funnels it to capable personnel for continual analysis and timely decisions on reporting and remedying potential defects and safety hazards.