I'm From the Government and I'm Here to Help – CPSC Gets "Helpful"

By Kenneth Ross[1]

The U.S. Consumer Product Safety Commission ("CPSC") has always encouraged companies to implement active product safety management programs. For example, it first published the *Handbook for Manufacturing Safer Consumer Products* in the 1970s, shortly after it was created.

Since 2010, however, the CPSC has made this a bit more official. Their thoughts on the adequacy of safety programs has appeared in a final rule of factors to be considered for civil penalties, in a 2010 consent decree for civil penalties, and now in two 2013 settlement agreements on civil penalties. It is time to reexamine the earlier activities and see what they are now saying in 2013.

The last edition of the CPSC's *Handbook for Manufacturing Safer Consumer Products* came out in 2006. It is 49 pages long and it deals with product safety policies, organization, and training as well as all aspects of design, manufacturing, quality, corrective actions, etc. In other words, safety procedures that they believe are appropriate for any company making consumer products in all aspects of the design, production, sales, and post-sales process. At the beginning of the handbook, it says:

> Manufacturers must assure the safety of consumer products. This is achieved through the design, production and distribution of the products they manufacture. It is best accomplished by a comprehensive systems approach to product safety, which includes every step from the creation of a product design to the ultimate use of the product by the consumer. The basic concepts for a comprehensive systems approach for the design, production and distribution of consumer products are discussed in this Handbook.

The safety processes advocated in this handbook are similar to those procedures employed by companies who have a functioning safety effort. So, there is nothing particularly onerous in this handbook that a company shouldn't already be doing. For the current edition of this handbook, see http://www.cpsc.gov/businfo/intl/handbookenglishaug05.pdf.

In addition, the CPSC's Recall Handbook, in existence for many years but updated in March 2012, has sections on the appointment of a Recall Coordinator, development of a company recall policy and plan, and extensive suggestions for the creation and retention of records to support a recall.

Recently, however, safety requirements encouraged by the CPSC have become a bit more onerous. On March 31, 2010, the CPSC Commissioners published in the Federal Register a final rule of factors that their staff will consider in connection with potential civil penalties. The rule

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clearly states that product safety programs will be considered by the staff in assessing civil penalties as follows:

> The Commission may consider, when a safety/compliance program and/or system as established is relevant to a violation, whether a person had at the time of the violation a reasonable and effective program or system for collecting and analyzing information related to safety issues. Examples of such information would include incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns. The Commission may also consider whether a person conducted adequate and relevant premarket and production testing of the product at issue; had a program in place for continued compliance with all relevant mandatory and voluntary safety standards; and other factors as the Commission deems appropriate. The burden to present clear, reliable, relevant, and sufficient evidence of such program, system, or testing rests on the person seeking consideration of this factor.

16 CFR §1119.4(b)(1).

In addition, the Commissioners released a statement dated March 10, 2010 concerning these new factors which said in part:

> The safety/compliance program factor takes into account the extent to which a person (including an importer of goods) has sound, effective programs/systems in place to ensure that the products he makes, sells or distributes are safe. Having effective safety programs dramatically lessens the likelihood that a person will have to worry about the application of this civil penalty rule. Any good program will make sure that there is continuing compliance with all relevant mandatory and voluntary safety standards. This is not the same as saying if one's product meets all mandatory and voluntary standards that the Commission will not seek a civil penalty in appropriate cases. The Commission expects companies to follow all mandatory and voluntary safety standards as a matter of course.

At the same time as the new civil penalty factors were being finalized, the establishment of a product safety management program was included in a consent decree for civil penalties. In a March 2, 2010 agreement, Daiso Holding, a U.S. subsidiary of a Japanese company, agreed to pay a little more than $2 million in fines for violating various laws and regulations concerning the sale of toys and children's products.

The consent decree requires Daiso to hire a product safety coordinator that is approved by the CPSC to do, in part, the following:

- create a comprehensive product safety program;
- conduct a product audit to determine which of Defendants' merchandise requires testing and certification of compliance with the FHSA, the CPSA, and any other Act enforced by the CPSC; and

- establish and implement an effective and reasonable product safety testing program in compliance with the FHSA, the CPSA, and any other Act enforced by the CPSC
- create guidance manuals for managers and employees on how to comply with product safety requirements
- establish procedures to conduct product recalls
- establish systems to investigate all reports of consumer incidents, property damage, injuries, warranty claims, insurance claims and court complaints regarding products under the jurisdiction of the CPSC that Defendants imported into the United States

The consent decree contains many more specific requirements and includes the following monitoring requirements:

> At the end of the first year of the monitoring period and at the end of any 180-day extension of the monitoring period under this paragraph, the Coordinator shall provide a written report to the Office of Compliance. If the Coordinator certifies Defendants are in compliance as described in this paragraph, the monitoring period will end. If the Coordinator cannot certify that Defendants meet each of the compliance requirements listed below, the monitoring period shall continue for an additional 180 days, at the end of which the Coordinator shall provide an updated written report to the Office of Compliance.

Paul Rosenlund, counsel for Daiso, reports that the CPSC did send staff to Daiso facilities to audit compliance, that Daiso passed, and that the monitoring was ultimately discontinued.

The CPSC did nothing further on imposing safety requirements until this year when safety/compliance requirements were inserted into two civil penalty settlement agreements and orders. In February, Kolcraft agreed to pay a $400,000 civil penalty. In addition, they agreed to the following language:

> 21. Kolcraft shall maintain and enforce a system of internal controls and procedures designed to ensure that: (i) information required to be disclosed by Kolcraft to the Commission is recorded, processed and reported in accordance with applicable law; (ii) all reporting made to the Commission is timely, truthful, complete and accurate; and (iii) prompt disclosure is made to Kolcraft's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to adversely affect in any material respect Kolcraft's ability to record, process and report to the Commission in accordance with applicable law.
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> 22. Upon request of Staff, Kolcraft shall provide written documentation of such improvements, processes, and controls, including, but not limited to, the effective dates of such improvements, processes, and controls. Kolcraft shall cooperate fully and truthfully with Staff and shall make available all information, materials, and personnel deemed necessary by Staff to evaluate Kolcraft's compliance with the terms of the Agreement.

> 23. Kolcraft shall implement and maintain a compliance program designed to ensure compliance with the safety statutes and regulations enforced by the CPSC that, at a minimum, contains the following elements (i) written standards and policies; (ii) a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary; (iii) effective communication of company compliance-related policies and procedures to all employees through training programs or otherwise; (iv) senior manager responsibility for compliance; (v) board oversight of compliance (if applicable); and (vi) retention of all compliance-related records for at least five (5) years and availability of such records to CPSC upon request.

Chairman Tenenbaum and Commissioner Adler issued a joint statement in connection with this agreement saying that they were concerned that Kolcraft had had a dozen recalls since 1989 and that some further action was required. They said:

> The failure of a company to have an effective means of detecting and addressing serious or continuous safety issues with its products is contrary to the expectations of consumers and is unacceptable to this Commission. While we certainly understand that even the most responsible companies can make mistakes, the failure of a company to have in place an effective compliance program and internal controls is irresponsible. Thus, going forward, we expect those companies that lack an effective compliance program and internal controls to voluntarily adopt them. If not, we will insist that they do so.

The commissioners also made it clear in their statement that having an adequate safety program does not get a company off the hook for failing to timely report a safety problem.

Finally, in May 2013, Williams-Sonoma agreed to pay $987,500 in civil penalties for failing to report timely to the CPSC. The three paragraphs from the Kolcraft opinion quoted above were also inserted in the Williams-Sonoma agreement.

Commissioner Nord submitted a statement on the Williams-Sonoma agreement that confirmed that while she is a strong advocate for corporate compliance programs, she questions the piecemeal creation of a mandate for such programs through enforcement. Commissioner Adler responded to Commissioner Nord's concern and signaled how he views the future use of such safety requirements. He said, in part:

> Far from viewing this settlement as punishment, I view it as the Commission and the company mutually agreeing to a set of reasonable measures designed to lead to safer products and fewer recalls in the future. Indeed, I suspect that the reason that companies agree to such language is their sense that any conscientious, responsible firm should follow such procedures in their approach to compliance. And to the extent that their past practices might have fallen short of these goals, they are eager to demonstrate that their future approach will be one of strict adherence to such provisions.

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> The fact that the Commission has sought similar language in the two settlements says little at this point about whether there has been a shift in agency policy in the future. Even if it did, there is nothing improper about implementing the policy in individual case settlements. That said, I do not rule out asking for such clauses in future non-civil penalty settlement agreements nor do I rule out future expansions of the Commission's voluntary recall policies.

It is too early to tell whether the CPSC will actually request compliance records and evaluate the sufficiency of either of these programs or whether these three paragraphs will be inserted into all future settlement agreements. However, it should be noted that Commissioner Nord will be leaving the Commission this fall and Commissioner Adler will continue. He could even become Chairman after the current Chairman leaves this year or next.

It is certainly possible for a company to have a robust safety program, to have information that the CPSC believes should be reported, and it just doesn't report because it does not believe that there is a defect or substantial product hazard. So, reasonable minds may differ. That doesn't justify imposing new procedures on a manufacturer who may already have sufficient programs in place. It will be interesting to see in the future whether companies that have good safety programs are able to keep the above three paragraphs out of their agreements and whether these programs will enable them to negotiate lower civil penalties.

Manufacturers should consider these requirements and evaluate their own programs. They should also consider the new ISO standard which sets forth some "best practices" in safety management as well as other studies and reports on what is an effective product safety management program. See Ross, "New International Standard on Consumer Product Safety," in *Strictly Speaking*, August 2011and Ross, "Establishing an Effective Product Safety Management Program," in *For the Defense*, Defense Research Institute, Inc., January 2003.

Most, if not all, of these practices and requirements have been utilized for decades by many companies. None of this is really new. However, most companies don't do a good enough job, especially as they begin to sell globally and have to monitor safety issues and incidents around the world. Also, the reporting requirements in other countries make it more difficult to coordinate this monitoring and decide how to respond to incidents and comply with everyone's different reporting requirements.

Therefore, it would be prudent for any company to pull their safety program out of the file cabinet and take a look at it with a fresh eye. Does it meet the standards established by ISO? Does it substantially comply with the CPSC's requirements? Does it comply with any requirements by the EU, Canada or Australia, all of whom have passed or updated their safety reporting requirements?

Hopefully, by doing this, a company can minimize the risk of safety problems in the field and minimize the necessity to do a recall.