

Client Alert

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CPSC Imposes Comprehensive Compliance Programs in Two Settlements, Warns this is the Wave of the Consumer Products Future

By Ellen N. Adler and Linda L. Lane

It is no news that Section 15(b) of the Consumer Product Safety Act (the Act) requires *immediate* reporting to the Consumer Product Safety Commission (CPSC) of any information which could support the conclusion that a product contains a defect which could create a substantial product hazard, creates an unreasonable risk of serious injury or death, or fails to comply with any other consumer product safety rule. It is also no news that failure to timely report is a violation of Section 19 of the Act, and subjects a company to civil penalties under Section 20 of the Act. What is news is that in the last two months, the CPSC has begun to impose comprehensive compliance systems on companies accused of untimely reporting potential product defects. The first such instance occurred in March, and the second occurred this week, imposing virtually identical internal and external compliance requirements in addition to the more standard monetary penalties.

On March 11, 2013, the CPSC announced that Kolcraft Enterprises, Inc. agreed to pay a civil penalty of \$400,000 for failing to report a defect in its play yards (the side rail of the play yards can fail to latch properly and can unlatch, posing a fall hazard). Although between January 2000 and July 2009 Kolcraft received about 350 reports of the play yard collapsing, resulting in 21 injuries to young children, Kolcraft did not report to the CPSC until January 2009. The \$400,000 penalty in and of itself was significant, as Kolcraft is a small business and the only allegation was untimely reporting, not a violation of any specific safety standard. But the most striking provision was not the monetary penalty—it was the agreement to the following intrusive and expansive internal and external compliance system obligations:

(1) 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.

(2) 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,

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and personnel deemed necessary by Staff to evaluate Kolcraft's compliance with the terms of the Agreement.

(3) 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.

The Republican Minority of the CPSC, Commissioner Nancy Nord, issued a statement expressing concern over the many compliance obligations dealing with conformance to general safety standards (particularly the "extensive record-retention requirement and the on-demand reporting of compliance data"), even though Kolcraft's past recalls had not reflected legal violations and the CPSC had not accused the company of violating safety standards.

The Democratic Majority of the CPSC, Chairman Inez Tenenbaum and Commission Robert Adler, also issued a joint statement, which was not shy in stating their view that the broad compliance obligations imposed on Kolcraft should be the wave of the future for all consumer product companies, voluntarily or otherwise: "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."

Adding more teeth to this warning, on May 6, 2013, the CPSC announced that Williams-Sonoma entered into a settlement agreement that imposed a three-part compliance program virtually identical to the one in the Kolcraft agreement. The CPSC also imposed a hefty fine of \$987,500. The CPSC found that the company's wooden hammock stands were defective because they posed fall and laceration hazards. Williams-Sonoma received notice of a product failure as early as November 2004. The CPSC found that by October 2006, when the company received its eighth incident report, it had sufficient information to trigger its reporting obligations to the CPSC. However, Williams-Sonoma did not file its Full Section 15 report until September 2008 (the product was recalled in October 2008, by which point there were 45 incident reports).

Commission Nord issued a statement on the Williams-Sonoma settlement, criticizing the "broad compliance program" as "inappropriate" and "smell[ing] of regulatory opportunism disguised as enforcement." Commission Nord pointed out that this was "the second recent instance in which the agency has insisted on a comprehensive compliance program even absent[t] any evidence of wide-spread noncompliance." In Nord's opinion, the Williams-Sonoma settlement "represents a shift in agency policy that will stretch across all of our enforcement activity."

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In light of the CPSC's open shift in position on penalties for reporting failures, all companies in the consumer products business would do well to examine and fortify their compliance programs to prevent such failures—and perhaps buy a little leniency in the event that one day, they will need to make a Section 15(b) report to the CPSC.

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