

Ringling In 2010: The CPSIA Past, Present And Future

Law360, New York (January 19, 2010) -- The Consumer Product Safety Improvement Act became law on Aug. 14, 2008. Since that time, the U.S. Consumer Product Safety Commission's implementation of the CPSIA has been a series of zig-zagging steps forward and backward, leaving many businesses scrambling to keep up with the changes and comply with the law.

The CPSIA has imposed new burdens on all businesses involved in the distribution of consumer products, not just those who manufacture, distribute or sell "children's products."

The CPSIA's requirements, coupled with the increased budget for the CPSC and changes to its leadership under the Obama administration, have resulted in increasing risks of businesses encountering enforcement of consumer product safety requirements, either directly by government prosecutors or indirectly through tort and other state law-based claims.

This article will review the not-so-linear progression of the CPSIA to this point in time, as well as preview things to come with a look at the CPSIA — past, present and future.

CPSIA Past

Since its adoption by Congress in the summer of 2008, the CPSIA has had a major effect in the regulation of "children's products" (broadly defined as consumer products designed or intended primarily for children 12 years of age or younger). These include the following:

- The lead content limits for children's products were lowered to 600 parts per million (ppm) in February 2009 and then to 300 ppm in August 2009.
- The legal limit for lead in paints and surface coatings was lowered to 90 ppm in August 2009.
- As of August 2009, all children's products must have tracking labels to assist in the identification and potential recall of products posing risks of substantial health hazards or injuries.
- Enhanced requirements governing the publicizing and implementation of recalls have gone into effect.
- The small parts ban for children's products under ASTM F963-07, previously a voluntary standard, has now been given the effect of law and is being regulated by the CPSC.
- Levels of certain phthalates in toys and childcare articles are now being stringently limited.

- The sale and resale of recalled items, even at thrift stores or yard sales, is prohibited.
- Third-party testing and certification of certain children's products by identified, accredited testing facilities is being phased in.
- Maximum civil penalties for violations have increased from \$8,000 to \$100,000 for a single violation and from \$1.8 million to \$15 million for a related series of violations.
- Criminal penalties can now include up to 5 years in prison for knowing and willful violations.
- Federal requirements are now subject to enforcement by state attorneys general.

As announced by CPSC Chairman Inez Tenenbaum, the result of these more stringent regulations being implemented over the past year plus is that "recalls are being reduced and toys are safer than ever."

As proof, Chairman Tenenbaum points to the fact that, as of Nov. 22, 2009, there were 38 toy recalls, down from 162 in 2008 and 148 in 2007. Moreover, she reported that there were only 15 recalls involving lead, down from 63 in 2007 and 85 in 2008.

CPSC Present

In what can be counted by some as a step back, the CPSC announced on Dec. 17, 2009, that they will be extending for an additional year (i.e., until February 2011) a previously announced stay on enforcement of the CPSIA's third party testing and certification requirements concerning the lead content of children's products.

Also announced in December was the CPSC's vote to institute a rolling approach to enforcement of general conformity certification ("GCC") and related "reasonable" testing requirements mandated by the CPSIA for consumer products beyond children's products.

Reasons given by members of the CPSC for these recent announcements include the following revealing sentiments:

- The stay was needed to give the agency more time to promulgate rules important to the continued implementation of the CPSIA and to educate the public on the requirements of the new rules. (Chairman Tenenbaum)
- The stay is the first step in preventing "the insidious encroachment of regulations that would impose enormous costs for negligible improvements in children's product safety." (Commissioner Northup)
- "The stay was needed because the deadlines set out in the CPSIA were wildly unrealistic and their enforcement would have resulted in even more chaos in the marketplace than we have already seen over the past year without increasing safety." (Commissioner Nord)

In another late December 2009 vote, the CPSC adopted an interim enforcement policy allowing component part testing to demonstrate compliance with the current lead in paint and lead in children's product

content limits.

The interim rule will give manufacturers and importers the choice of continuing to send samples of an assembled children's product out for testing or, alternatively, allow them to demonstrate compliance with the requirements through assembling test reports concerning each accessible component comprising a finished children's product, thereby potentially lessening costs.

Despite trying to effectuate these recent changes to help deal with reasonable business concerns, the CPSC has taken pains to underscore that all children's products currently being sold must still meet the CPSIA's substantive lead limits, that toys and childcare articles must meet its phthalate limits, and that all consumer products that are subject to specific substantive product safety standards (whether or not "children's products") must continue to address those requirements.

The CPSC also has expressly reserved all of its rights to enforce the law to its fullest extent in the event of receipt of a report triggering a recall.

This may leave retailers in the precarious position of violating the law if they sell products that do not meet the CPSIA's requirements but at the same time not being able to completely rely on manufacturers or importers to provide certification that the products are in fact in compliance.

This, combined with the continuing phase-in of third-party testing and certification requirements, has the potential to insert further uncertainty and confusion into an already complex system.

CPSIA Future

In addition to the periodic lifting of various testing and certification stays that will remain in effect in the near term, another major development yet to come under the CPSIA is the much anticipated public database for consumer products, tentatively titled "SaferProducts.gov."

The database is scheduled to be released by March 2011 and is intended to provide a publically accessible online tool where consumers can go to report product safety incidents and to search for prior incidents and recalls on products. The CPSC held a three-hour public meeting regarding the implementation of the database on Nov. 10, 2009.

Manufacturers are understandably concerned about establishing sufficient safeguards to filter out false and inaccurate reports on the database. Consumers, on the other hand, want to be given an unfiltered, honest assessment of the reported products. The CPSC again will be forced to walk a tightrope in striking an appropriate balance of interests.

The anticipated introduction of the online database will be in addition to other social media efforts already undertaken by the CPSC including free e-mail alerts, the ability to follow the CPSC on Twitter, YouTube, Facebook and Flickr, and the CPSC's new OnSafety blog.

The CPSC's December 2009 announcements also leave watchers wondering whether some of the CPSIA's requirements will be the subject of further modifications in the near future.

In its FY 2010 Financial Services Appropriation bill, Congress asked the CPSC to report on its assessment of the CPSIA, including enforcement efforts, difficulties encountered, and recommendations for improvement by Jan. 15, 2010.

In her statement released on Dec. 17, 2009, Commissioner Northup stated that her hope and expectation is that the CPSC will propose “a wide-ranging set of CPSIA amendments to Congress when we submit our report next month.”

A review of the CPSIA past, present and future may leave those in the children’s and consumer products industries wondering what to anticipate next as the CPSIA continues to morph and develop in a less than straight line fashion under the guidance of the CPSC and, ultimately, the Congress.

The stutter-step approach to enforcement of the CPSIA is due in large part to the tension between commercial realities on the one hand and the highly ambitious regulatory changes incorporated by Congress into the CPSIA in the wake of heightened publicity about tainted products sourced primarily in Asia on the other.

Industry members are perhaps best advised to remain attentive and keep a close eye on the CPSC’s announcements in order to remain on the right side of the law.

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