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## **A Change In The Product Safety Landscape**

Law360, New York (November 03, 2008) -- On Aug. 14, 2008, President Bush signed into law the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). Enactment of the CPSIA was the result of an intense legislative and media focus on U.S. product safety regulations that lasted for over a year.

Although much of scrutiny was directed towards toys and children's products, in fact the CPSIA dramatically changes the regulatory landscape for all consumer products, not just those used by children.

The CPSIA is complex legislation, amending the Consumer Product Safety Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act and the Poison Prevention Packaging Act. This article will summarize some of the major changes brought about by the CPSIA.

### *General Changes*

One of the changes with the broadest impact is a significant increase in civil penalty amounts available to the U.S. Consumer Product Safety Commission ("Commission") for violations of its statutory and regulatory mandates.

Prior to enactment of the CPSIA, civil penalties for violations were set at \$5,000 per violation, with a cap on penalties for related violations of approximately \$1.8 million.

Under the CPSIA, however, potential penalties increase to \$100,000 per violation, and the penalty cap increases to \$15 million. These increases require companies producing consumer products to pay even more careful attention to their obligations under the Consumer Product Safety Act.

In a victory for regulated companies, the CPSIA adds some new factors to be considered in assessing a penalty. Most significantly, when assessing a penalty, the Commission is now required to consider the egregiousness of the offense.

Moreover, the Commission is required to adopt a penalty policy within one year, something it has proposed, but not finalized, for some time.

Criminal penalties also were enhanced, with potential prison sentences increasing from one year to five years. Increasing the risk of criminal penalties, the CPSIA removes the prior requirement that notice of a violation be provided before criminal penalties could be sought; now, no notice is required before a criminal penalty can be imposed.

The CPSIA adds an enforcement role for state attorneys general, clarifying which violations can be enforced at the state level, and setting forth a procedure for a state attorney general to notify the Commission and giving it an opportunity to intervene in the action.

Establishing this role sets up the possibility of inconsistencies between Commission action and actions in various states, and companies will have to wary of this possibility.

The CPSIA also establishes protections for whistleblowers. It prohibits adverse personnel actions for employees seeking to notify the Commission of violations, or refusing to undertake actions that violate federal product safety regulations.

The act sets up a procedure for litigating whistleblower allegations through the Department of Labor, and United States District Court, if necessary.

The act requires the Commission to implement an Internet database of consumer product safety complaints. The Commission is to study the database for six months and establish it within two years, provided it has the funding.

One new certification provision has wide ranging implications. Manufacturers, importers and private labelers whose products are already subject to a variety of consumer product safety rules are now required to certify compliance with those regulations, and the certificate must accompany the product through the distribution stream. This provision takes effect soon, and the CPSC is providing guidance on how to comply.

At the request of the Commission, the CPSIA gives it enhanced recall authority. For the first time, it is a violation of federal law for a retailer to sell a recalled product.

Under changes brought by the CPSIA, in a mandatory recall, the Commission, rather than the manufacturer, can choose the recall remedy. And the statute now sets forth required elements of recall announcements.

Finally, although it does not appropriate any additional funding, the CPSIA authorizes significant additional funding and personnel for the Commission. This should permit the Commission to increase enforcement activities along with its new responsibilities. Unless Congress authorizes these funds, however, the Commission will have a difficult time undertaking the new requirements imposed by the act.

### *Children's Products*

In keeping with the focus on children's products, the CPSIA sets up a comprehensive scheme that substantially changes regulation of children's products (products primarily intended for children age 12 and under) and toys.

Addressing an issue that caused much recent publicity, the CPSIA reduces permissible amounts of lead in children's products from a permissible level of 600 parts per million to 100 parts per million within 3 years. Lead in paint used on children's products and furnishings is reduced from 600 parts per million to 90 parts per million.

Beginning in six months, the act adopts the ASTM toy standard as a mandatory standard for toys. The Commission is also required to review the ASTM standard, and strengthen it as necessary.

The CPSIA also requires independent, third-party testing and certification for children's products subject to product safety rules, including lead. The act requires the testing to be

conducted at CPSC accredited laboratories, and the CPSC has already begun the process of accrediting laboratories.

In order to permit consumers to determine if children's products are subject to recalls, the CPSIA adopts a requirement that children's products have tracking labels. In addition, manufacturers must provide certain durable nursery products with product registration cards and maintain a database of consumer contact information.

Further assisting consumers, the CPSIA requires advertisements with a direct means of purchase, including Internet advertising, to include small parts warnings for products whose packages also require those warnings.

Finally, the CPSIA imposes a temporary and permanent ban on phthalates on certain children's products, while requiring the Commission to establish a Chronic Hazard Advisory Panel to assess continuation of the temporary ban.

#### *Effective Dates*

The changes introduced by the CPSIA take effect over a wide range of dates. Frequently, the exact effective date of a provision depends upon action taken by the Commission. Companies and their counsel must carefully evaluate which new provisions apply, and closely monitor the regulatory activity of the Commission to determine the effective date of those provisions.

#### *Conclusion*

Despite the changes summarized here, this article does not address all of the changes brought about through enactment of the Consumer Product Safety Improvement Act. Companies making, distributing or selling consumer products should confer with counsel familiar with the CPSIA to see how it will affect them.

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