

Fixing The CPSIA: What's Next?

Law360, New York (April 07, 2009) — The Consumer Product Safety Improvement Act of 2008 affects virtually every level of the consumer product commerce stream — including manufacturers, importers, distributors, private labelers and retailers — and imposes stringent testing standards and certification requirements.

This sweeping legislation created mass confusion in the products world regarding who must certify, what products are covered, how the testing is to be done and how certifications are to be made available.

CPSIA testing standards regarding lead and phthalate content were to go into effect Feb. 10, 2009. As this deadline approached, however, panic set in — particularly among small business, artisans and resellers concerned that the expense of compliance would drive them out of business.

This confusion and resulting industry outcry placed tremendous demands on the Consumer Product Safety Commission staff. The commission was inundated with requests for clarification and guidance, and it received thousands of product-specific inquiries and requests for exemptions.

These demands were in addition to the CPSIA mandate that the commission establish detailed rules for the act's implementation and testing standards. And, it still had to deal with all other products within its jurisdiction.

In response, the commission called a timeout, announcing a one-year stay of some of the testing and certification requirements. In addition, it is working on new guidelines that may help alleviate some of the confusion surrounding the CPSIA.

The commission's actions, combined with the consumer products industry's response, have caused Congress to look at not just the CPSIA's intent but its actual effect.

Congressman John Dingell, D-Mich., sent a March 2, 2009, letter to the commission posing specific questions focused on identifying what is wrong with the CPSIA and how to fix it. The commission responded on March 20. The commission's responses may provide a number of clues about where the CPSIA is going — if Congress listens.

The Provisions at the Center of the CPSIA Debate

The CPSIA imposes strict demands on a tight timetable. The requirements sparking the most debate and confusion include:

Certification and Testing

Product manufacturers and importers subject to a consumer product safety standard or rule must certify in writing that the product conforms to all applicable standards or rules children's products must be tested by a third-party, accredited testing laboratory.

For products not intended for children, and until the commission publishes its mandatory third-party testing requirements in the case of children's products, the certification may be based on a reasonable testing program.

The CPSIA is backlogged with laboratories' requests for accreditation. And artisans and small businesses say the expense of third-party testing, particularly in respect to component parts, will put them out of business.

Children's Products

The CPSIA defines "children's products" as those designed or intended primarily for children 12 years of age or younger. Among other things, the CPSIA:

- creates new standards for phthalates (e.g., chemicals used in plastics) in children's toys and childcare products;
- declares all children's products, even those manufactured before the CPSIA became law, containing a certain percentage of lead to be "banned hazardous substances"; and
- converts the ASTM F963 voluntary toy standards (i.e., standards relating to safety requirements, labeling and testing for magnets and toxic substances, battery-operated toys, toys with cords, straps and elastics) to mandatory consumer product safety standards.

Lead Paint

The CPSIA lowers the acceptable lead limit for paint and other surface-coating materials on all products, not just children's products. Any consumer product that may contain lead paint must be tested.

Product Resale

Sellers of used children's products are not required to test or certify those products' compliance; but resellers are not allowed to sell children's products that exceed applicable lead and phthalate limits.

In response, many resellers unable to determine whether the used products in their inventory meet the limits have simply stopped selling.

Enforcement

The CPSIA increased the penalties that the commission may impose for product safety violations, and it allows state attorneys general to enforce many of its provisions. The stay does not prohibit these state attorneys general from undertaking their own enforcement actions.

Implementing the Stay

The stay essentially postponed the certification requirement and delayed the implementation of mandatory third-party testing. The stay will remain in effect until Feb. 10, 2010; at that time, the commission will vote whether to end or extend the stay.

The stay does not apply to all products. Manufacturers and importers still must certify compliance with lead levels in painted products, crib and pacifier standards, small parts standards, lead content levels in children's metal jewelry, ATV standards and pool drain cover standards.

Also, the stay does not apply to any products for which testing and certification was required before the CPSIA's enactment.

Importantly, the stay of testing and certification requirements does not change the fact that all products must meet the underlying safety standard. This means that products that do not comply with the new safety standards cannot be sold.

The commission justified the stay by stating that it needed time to follow through on four proposed rulemakings, which were pending as of Jan. 15, 2009, that will address the following:

- determinations of materials that inherently will not exceed the CPSIA lead content limits;
- exemption of certain electronic devices;
- guidance on the inaccessibility of lead-containing component parts of children's products; and
- procedures for excluding products from lead content requirements.

Guidance on Enforcement

Since the stay, the commission has published an Enforcement Policy for lead limits in children's products. The policy, which went into effect on Feb. 10, 2009, permits the industry to rely on proposed rulemakings for guidance until the rules become final.

More importantly, for certain products the commission will not prosecute a person for manufacturing, importing, distributing or selling a product unless it makes a determination that the person had actual knowledge the product did not comply or was put on notice of that possibility by the commission.

This limitation on prosecution only applies to products for which the commission has already made a preliminary determination regarding lead content, including:

- products made of natural materials, such as wood, cotton, wool and certain metals and alloys that the commission has recognized rarely, if ever, contain lead;
- ordinary children's books printed after 1985; and
- dyed or undyed textiles, unless a textile undergoes additional treatment, has ornamentation, or has fasteners that could increase lead content.

Additional Rulemaking

The commission has been hard at work drafting rules clarifying the CPSIA. In addition to the four proposed rulemakings that formed the basis for the stay, the commission has taken the following action:

- Solicited comments (through March 25) for its proposed rule on the products for which the phthalates limit will apply;
- Issued a final rule on March 11 on the procedures and requirements for obtaining a commission exclusion from the lead content requirement;
- Published the testing methods that the commission will use to determine phthalate and lead content;
- Solicited comments (through April 27) for its proposed rule regarding the CPSIA's tracking label requirement; and
- Issued an interim final rule regarding exemptions from the lead content requirements for certain electronic children's products.

Increased Dialogue

The stay of enforcement has also increased the dialogue within Congress and between Congress and the commission. On March 4, Congressman Dingell wrote to the commission asking detailed questions about its difficulties in implementing the CPSIA.

Chairman Nancy Nord responded on March 20, enclosing comprehensive responses from the commission's career staff imploring Congress to amend the CPSIA.

The theme running through all 21 pages of the response is clear: the commission needs more discretion to effectively implement the CPSIA and uphold its general purpose.

The logic behind this request is that the CPSIA's rigid requirements, deadlines and standards deprive the commission of using risk analysis in establishing priorities and resource allocation.

The commission concludes that this rigidity, combined with the limited resources and budget of a small agency, has prevented it from taking important measures with respect to other product safety rules.

More flexibility and discretion, the commission suggests, would allow it to maximize its effectiveness in improving children's health and safety.

In general, the commission discussed three areas where Congress could improve the CPSIA:

Retroactivity

The commission explored multiple problems with the retroactive effect of the law, especially the effect on libraries and resellers.

The commission proposes changing the CPSIA to apply only prospectively unless the commission makes a determination that exposure to a particular product class presents a health and safety risk. Alternatively, the commission recommends an exemption for resellers and libraries and the implementation of an "as is" rule.

"Children's Product"

The commission views the definition of "children's product" as over-inclusive for the CPSIA's goals, considering that the risk of mouthing and ingestion decreases with age.

The commission suggests lowering the age limit and giving the commission the discretion to set higher age limits for products that pose a greater risk to older children.

Certification and Testing Requirements

The commission's response acknowledges that the confusion caused by the testing and certification schedule is a serious problem.

The commission asks Congress to eliminate the rigid time-table, to give the commission the discretion to address certification and testing on a product-class basis, and to allow the commission the flexibility to amend implementation as needed and based on proper risk assessment.

Though the commission is now adding its voice to the chorus of cries for help in the wake of the passage of the CPSIA, Congress is not showing signs of movement.

On March 6, Congressmen Joe Barton, R-Texas, and George Radanovich, R-Calif., wrote to Congressman Henry Waxman, D-Calif., Chairman of the House Committee on Energy and Commerce, reopening their request for a hearing on the CPSIA. They urged that this was necessary to prevent the stay from merely putting off the inevitable downfall of many businesses.

On March 11, Chairman Waxman responded that the stay would allow the Commission to resolve questions of implementation, and a hearing would be better timed to occur after President Obama selects a new

agency head.

Chairman Waxman's response does little or nothing to allay the concerns of small businesses who have seen Chairman Nord as friendlier to industry than Commissioner Moore.

In fact, Commissioner Moore responded separately to Congressman Dingell's letter on March 20, calling the CPSIA "a huge vote of confidence for the agency" and dismissing the protests from small business as a "hue and cry of some in the business community who will never be happy with the closer scrutiny and accountability required by the act."

Commissioner Moore asked Congress to appoint a third commissioner to lead the agency, which, he concluded, would end the stalemate and allow the commission to present a unified position to the staff. He implies — and most businesses assume — that this unified position will be in favor of preserving the strict nature and industry-altering effects of the CPSIA.

What Happens Next?

The stay of portions of the CPSIA has given industry the breathing room it needed to come to terms with the broad provisions of the CPSIA, allowing it to regroup, develop strategies for implementing the testing and certification requirements, and pursue exclusions and other remedies from the new requirements.

As affected manufacturers and retailers lobby for exemptions and stays, consumer groups continue to press for additional limitations and active enforcement.

Observers also will be watching to see if the commission's March 20 message to Congress leads to a legislative re-examination of the CPSIA.

The commission's message is clear: without some restructuring of the CPSIA, there are major hurdles — perhaps insurmountable — to achieving the act's safety objectives that all agree are worthwhile.

— By W. Jeffery Edwards, Ashley Cummings and Meghann C. Thomas, Hunton & Williams LLP

W. Jeffery Edwards is a partner with Hunton & Williams in the firm's Richmond, Va., office. Ashley Cummings is a partner with the firm in the Atlanta office. Meghann Thomas is an associate with the firm in the Richmond office.

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