THE U.S. CONSUMER PRODUCT SAFETY COMMISSION:

WHAT YOU NEED TO KNOW TODAY–AND TOMORROW

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At least weekly, it seems yet another company is facing the daunting task of implementing a large-scale recall of one or more of its products. Nancy Nord, acting chairman of the Consumer Product Safety Commission ("CPSC"), aptly termed the summer of 2007 the "summer of recalls." Nord's agency has overseen recalls of laptop batteries, cribs, millions of toys, baby seats, and a great many other products. There have been many other recent high-profile recalls—of peanut butter, pet food, frozen hamburgers, and, most recently, pot pies—under the jurisdiction of the Food and Drug Administration and the Department of Agriculture as well.

The financial ramifications of such recalls can be extraordinary, and any misstep in the process can put a company's assets, goodwill, and brand equity at risk. For example, shortly after the Topps Meat Company—the largest U.S. manufacturer of frozen hamburgers—recalled more than 21 million pounds of meat, it announced that it was going out of business as a result. As the chief operating officer, Anthony D'Urso, noted, "In one week we have gone from the largest U.S. manufacturer of frozen hamburgers to a company that cannot overcome the economic reality of a recall this large." Topps Meat Company, press release: "Topps Meat Company Ends Operations After 67 Years" (Oct. 5, 2007). Besides the complex issues and practical burdens of conducting a recall while rehabilitating their brand names and corporate reputations, companies are faced with a plaintiffs' bar ready to initiate litigation over every such recall and in the process disparage (or worse) everything companies facing large-scale recalls must try to accomplish.

The purpose of this article is twofold: to arm the reader with a basic understanding of the CPSC's jurisdiction and standards and to describe key features of currently pending legislative proposals to amend the Consumer Product Safety Act in the wake of recent criticisms of the existing regulatory structure. *See, e.g.,* E. Lipton, "Safety Agency Faces Scrutiny Amid Changes," *The New York Times* (Sept. 2, 2007). Indeed, an editorial in *The New York Times* on October 10, 2007, went so far as to dub the CPSC the "Caveat Emptor Commission." In all, given the significant risks and long-term ramifications of such recalls, it is prudent to evaluate these issues carefully in an effort to minimize the risk that a recall will occur in the first place and, if it does, to maximize the likelihood that your company is prepared for it.

OVERVIEW OF THE CPSC–WHAT YOU NEED TO KNOW TODAY

The CPSC is the lead U.S. agency charged with oversight of consumer safety relating to most consumer products—approximately 15,000—used in and around the home, in schools, and in recreation. A list of products over which the CPSC asserts jurisdiction may be accessed at http://www.cpsc.gov/businfo/reg1.html (last visited February 25, 2008). The CPSC does not have jurisdiction over many other products, including foods, drugs, cosmetics, medical devices, firearms and ammunition, boats, motor vehicles, aircraft, and tobacco. A list of products over which the CPSC does not have jurisdiction may be accessed at http://www.cpsc.gov/businfo/notcpsc.html (last visited February 25, 2008).

The CPSC is fundamentally charged with protecting the public from "unreasonable risks of injury and death" associated with the consumer products within its jurisdiction. Companies involved in the manufacture, importation, distribution, or retail sale of these products are subject to CPSC jurisdiction and oversight. CPSC duties extend beyond the oversight of consumer product recalls to maintaining an injury information clearinghouse and establishing safety standards for certain products or helping outside organizations to do so.

Firms subject to the CPSC's jurisdiction must notify the agency when they obtain information "which reasonably supports the conclusion" that a consumer product (1) fails to meet a consumer product safety standard or regulation; (2) contains a defect that could create a substantial product hazard to consumers; (3) creates an unreasonable risk of serious injury or death; or (4) fails to comply with a voluntary standard upon which the CPSC has relied under the Consumer Product Safety Act (*e.g.*, voluntary standards applicable to chain saws or unvented gas space heaters). That's the big picture, but the devil is in the proverbial details.

First, it is important to realize that a company is obligated to contact the CPSC "immediately" upon obtaining reportable information, which means within 24 hours. *See* 15 U.S.C. § 2064(b)(3); 16 C.F.R. Part 1115 ("Substantial Product Hazard Reports"). When the CPSC evaluates whether timely notification was made, it considers not only the actual knowledge of the company, but also what a reasonable person, acting under the circumstances, should have known about the hazard while exercising due care. Accordingly, the clock for disclosure starts running when the information is received by an employee or official who may reasonably be expected to be capable of appreciating its significance. *See* CPSC, *Recall Handbook* § I(A)(2) (May 1999). If a company is uncertain about whether information is reportable, it is permitted to investigate the matter for a "reasonable" amount of time (up to 10 days is deemed "reasonable"; longer periods of time will need to be justified to the CPSC). This rapid-disclosure requirement is likely to mean that a company is reporting information while its own investigation is ongoing. The CPSC encourages firms to report if in doubt as to whether a defect could present a substantial product hazard, particularly where the extent of public exposure and/or the likelihood or seriousness of injury are not well known. (It is noteworthy that shareholder litigation filed against Mattel pertaining to its recent recalls involving 21 million toys alleges, among other things, that the company breached its duty to shareholders by delaying reporting beyond this required time period. *See* L. Story, "Mattel Faces Shareholder Suit Over Toy Recalls,"

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The New York Times (Oct. 10, 2007).) The only express exemption from this disclosure requirement applies when the company otherwise obligated to report has "actual knowledge" that the CPSC has already been adequately notified of the failure to comply or of the defect or risk.

This discussion raises the important question of what constitutes "reportable information." Of course, the most direct answer is no doubt information that assists the CPSC in evaluating whether some form of remedial action is appropriate, and the CPSC relies on the concept of product "defect" to inform that judgment. A "defect," in the simple sense of the term, is a fault, flaw, or irregularity that causes weaknesses, failure, or inadequacy in form or function. A defect can be the result of a manufacturing error or can stem from the design of the product or the materials used in its manufacture, including the product's contents, construction, finish, packaging, warnings, or instructions. *See* 16 C.F.R. § 1115.4 (2007). The mere fact that a product presents a risk of injury does not render it defective (*e.g.*, a kitchen knife). When evaluating whether a product's risk of injury could make the product defective, the CPSC considers the following factors: the utility of the product, the nature of injury that the product may cause, the need for the product, the population exposed to the risk of injury, its experience with the product, and other information that sheds light on the product and patterns of consumer use. CPSC, *Recall Handbook* § II. These criteria roughly parallel those applied under the law of many states to evaluate legal claims of product defect, commonly referred to as the "risk utility test."

If the information indicates that a product has a defect, the company and the CPSC must consider whether the defect creates a substantial product hazard. The CPSC looks to four factors to evaluate this second inquiry: (1) pattern of defect (*i.e.*, cause of defect and how it manifests itself); (2) number of defective products distributed; (3) severity of risk (*i.e.*, whether the injury that might occur is serious and/or whether the injury is likely to occur); and (4) likelihood of injury (*i.e.*, number of injuries that have occurred or could occur; intended use/foreseeable misuse of product; and group at risk, such as children or the elderly). According to the CPSC's regulations, most defects "could present a substantial product hazard if the public is exposed to significant numbers of defective products or if the possible injury is serious or is likely to occur." *See* 16 C.F.R. § 1115.4.

OVERVIEW OF PROPOSALS TO CHANGE THE CPSC–WHAT YOU NEED TO KNOW TOMORROW

The recent spate of recalls has spurred action in both houses of Congress, with competing bills in the House and Senate looking to alter the landscape of regulation under the CPSC. These proposals, if enacted, would have a wide range of effects. From the seemingly mundane measure of increasing the CPSC's funding to the requirement for independent third-party certification of compliance with applicable safety standards for children's products, the proposals could significantly alter the framework within which companies subject to the CPSC must operate. S. 1847, 110th Cong. § 2(a) (2007); S. 2045, 110th Cong. § 3 (2007); and S. 1833, 110th Cong. § 3 (2007). A summary of some of the proposed changes is set forth below.

One proposal expands the list of prohibited acts to make it unlawful to "sell a product" in three circumstances: The product (1) fails to conform to an applicable consumer product safety standard; (2) is the subject of a voluntary recall or other corrective action by a manufacturer and is determined by the CPSC to be unsafe; or (3) is declared imminently hazardous, is deemed to pose a substantial hazard necessitating a recall, or is designated a hazardous substance under the Federal Hazardous Substances Act. S. 2037, 110th Cong. § 1 (2007). This amendment would close the exception for sellers that rely in good faith on the representation by the manufacturer or distributor that the product either is not subject to a safety standard or complies with any applicable standard. Accordingly, this proposal could require retailers to create infrastructure and bureaucracy to oversee the compliance of the products they sell.

Another proposal would require the inclusion of tracking information on consumer products or packaging to enable consumers to determine whether their products are among those recalled. S. 2037, 110th Cong. § 2 (2007); S. 2045, 110th Cong. § 11 (2007). The proposal would require the "source, date, and cohort (including the batch, run number, or other identifying characteristic)" to be on each consumer product or its packaging, with an expressed preference for the information being on the product itself "to the greatest extent feasible." While the CPSC already has the authority to require inclusion of this information in packaging or on products, it has not chosen to do so in many circumstances. Accordingly,

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making this provision mandatory could cause increases in manufacturing costs. Moreover, ambiguously requiring the information to be on the product itself "to the greatest extent feasible" raises the specter of having to alter the product design to satisfy the requirement.

For manufacturers of children's products (defined variously as products for those under age seven or under age five), a proposal would require independent third-party certification of the product's compliance with applicable safety standards. S. 1833, 110th Cong. § 3 (2007); H.R. 3903, 110th Cong. § 2 (2007). Depending on the yet-to-be-determined standards and protocols for these certifications (S. 2045, 110th Cong. § 10 (2007)), this requirement may complicate the manufacturing and shipping processes necessary to accommodate certification and necessitate expanded management of the third-party-certification process. This requirement could have the effect of reducing investment in in-house testing facilities. Since appropriate product stewardship includes product testing as an integral component of product design and manufacturing, the requirement could ultimately lead to products that are, contrary to the stated purpose, less safe.

On a perhaps more practical level, other proposed changes may affect manufacturers' interactions with the CPSC, with some commentators fearing that the proposed changes may shift the CPSC's focus from cooperating with manufacturers to positioning itself for litigation against them. Erin Marie Daly, "Retailers Target Flaws in CPSC Reform Bill," *Product Liability Law 360*, Oct. 19, 2007, at 2.

For example, the pending proposals would increase funding levels for the CPSC, increase the number of its full-time employees, and minimize the impact of political appointees on the CPSC's work. S. 2045, 110th Cong. §§ 3(a), 4(a), and 4(d) (2007). This may portend a CPSC that is more proactive in working with manufacturers.

Moreover, one proposal would give the CPSC, not the business entity, the power to determine whether the recall remedy will be to repair the product, replace it, or provide a refund, based on what the CPSC "determines to be in the public interest." S. 2045, 110th Cong. § 13(5). This shift in control could alter the initial negotiation positions of the CPSC, resulting in a more complex, costly, and lengthy process.

A number of proposals create or increase the punishments that could be imposed on a manufacturer that fails to furnish the required compliance certificate, presents a false certificate, or misrepresents information in an investigation. S. 2045, 110th Cong. §§ 16(c) and (d) (2007). Existing penalties would be increased, with civil fines for knowingly committing prohibited acts increased to $250,000, with a limit of $100 million, and criminal penalties of up to one year in prison for the knowing commission of prohibited acts and up to five years for the knowing and willful commission of prohibited acts. S. 2045, 110th Cong. §§ 17(a) and (b) (2007).

One particularly troubling proposal is the ill-defined measure that would allow as a criminal penalty the forfeiture of assets associated with a violation. S. 2045, 110th Cong. § 17(d) (2007). For example, this could conceivably include forfeiture of the plant where the products were made, as well as any revenues from the sale of the product. Another proposal would permit enforcement by a state attorney general on behalf of the state's citizens, with a provision to allow the recovery of fees and costs. S. 2045, 110th Cong. § 21 (2007). Such a provision is likely to provide an incentive for litigation. Finally, a proposal would provide for whistleblower protection and incentives, ensuring protection against discrimination for reporting violations and providing a monetary reward of up to 1 percent of any civil penalty collected for the reported violation. S. 2045, 110th Cong. § 22 (2007). ■

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