



COMPANIES BEWARE

ARMED WITH STRICTER SAFETY STANDARDS AND NEW ENFORCEMENT ARTILLERY, THE CPSC TAKES AIM AT UNSAFE PRODUCTS

The Consumer Product Safety Commission (“CPSC”) was recently overhauled to bolster oversight of consumer products, especially imports, with the passage of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”). Armed with new, significantly beefed-up enforcement powers, the CPSC is poised to take aim at companies whose products are not in compliance with all applicable safety standards under the law. U.S. companies must be prepared for these changes or risk facing fines of up to \$15 million and/or prison time of up to five years.

BACKGROUND ON THE CPSC

The CPSC was established in 1972 as an independent federal regulatory agency to protect the public from unreasonable risks of injury and death associated with consumer products used in or around the household. Not only does it oversee domestic products, but the CPSC is one of only two government agencies with

primary responsibility for overseeing the safety of imported consumer products. (The other is the Food and Drug Administration.)

For many years, the CPSC was underfunded and understaffed, yet American consumers still enjoyed the safest consumer products in the world. Historically, the CPSC relied chiefly on voluntary compliance with all legally required safety standards as well as voluntary reporting by U.S. companies of any product safety issues. When a manufacturer became aware of a “substantial product hazard,” it was required to voluntarily report this information to the CPSC.¹ The CPSC would then work with the manufacturer to remedy the “substantial product hazard,” occasionally through product recalls. This system of voluntary compliance and reporting was mostly successful for many years. However, the changing landscape of consumer products, both in their complexity and in their countries of origin, recently led to some very

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big, high-profile recalls. These recalls called into question the CPSC's ability to police the safety of U.S. consumer products and prompted Congress to pass the CPSIA.

IMPORTED CONSUMER PRODUCTS SKYROCKET

Every business, from *Fortune* 500 companies to small and mid-sized businesses, has come to depend more and more upon imported products in order to reduce costs and remain competitive. There has been a 101 percent increase in imports over the last decade.² According to the Department of Homeland Security, there are 327 official ports of entry in the United States.³ In 2006, the CPSC valued consumer imports (through an estimated 800,000 separate importers) at \$2 trillion.⁴ This value is expected to triple to \$6 trillion by 2015, according to some figures. For 2007, the CPSC has estimated the value of imports under its jurisdiction alone at \$639 billion.⁵ The CPSC further estimates that Chinese products comprised approximately 42 percent of that \$639 billion.⁶ Indeed, the value of Chinese imports nearly *quadrupled* in the 10-year span from 1998 to 2007.⁷

In a draft report issued in July 2008, the CPSC acknowledged not only a vast increase in the number of imports and their manufacturing standards, but also greater product variety, technical complexity, and sophistication.⁸ Adding to the CPSC's oversight woes is the fact that imported products are frequently not from one place but contain components from many different countries. These consumer-product realities made the CPSC's ability to police the safety of consumer products a much more challenging task—one that an underfunded and understaffed agency was not equipped to handle.

NEW CONSUMER PRODUCT LEGISLATION PASSED

During the CPSC's fiscal year 2007, it announced 473 recalls.⁹ Of those, 82.4 percent were imported products, and of those, 74 percent were from China.¹⁰ The safety of consumer products, primarily imports, and the ability of the CPSC to police them were called into question after what CPSC acting chairman Nancy Nord termed the "summer of recalls" in 2007.

Since then, the public outcry for more oversight has been loud, clear, and consistent. The answer to this cry has come in the form of sweeping legislation, now known as the CPSIA, which was signed into law by President Bush on August 14, 2008.¹¹ The CPSIA passed the House of Representatives by a sweeping margin of 424 to 1 and the Senate by 89 to 3.

Briefly, the CPSIA:

- Increases the maximum penalty for *each* violation of a safety standard from \$8,000 to \$100,000.¹²
- Increases the maximum penalty for each series of violations from \$1.825 million to \$15 million.¹³
- Provides for prison terms of up to five years for individuals who knowingly and willingly manufacture, offer, distribute for sale, or import a noncomplying product.¹⁴
- Doubles the CPSC's budget to \$136 million by 2014.¹⁵
- Defines "children's products" as those products intended for use by children aged 12 or under.¹⁶
- Bans all but minute levels of lead in children's products.¹⁷
- Bans, either permanently or pending further study, six types of phthalates in all children's products.¹⁸
- Requires children's products to be certified by an independent laboratory for compliance with safety standards.¹⁹
- Requires tracking labels to be placed on all products.²⁰
- Substantially enhances recall authority.²¹
- Allows states to bring enforcement actions on behalf of the CPSC for alleged violations of safety standards. If the state is successful, reasonable costs and attorneys' fees may be recovered from a product manufacturer, distributor, or retailer.²²
- Issues new safety standards for "durable infant or toddler" products.²³
- Adopts ASTM International Standard F963-07 as the mandatory consumer product safety standard for children's products and gives the CPSC authority to decide within one year whether stricter standards are warranted for certain toys.²⁴
- Provides "whistleblower" protections to employees who report consumer product hazards.²⁵
- Requires the CPSC to set up a user-friendly database where consumers, government agencies, child-care providers, and doctors can report incidents of injury, illness, death, or risk related to products.²⁶

These sweeping changes, along with the increased power the CPSC now has to enforce its safety standards, make it imperative that U.S. companies know what is coming in the future and how to be ready for it.

The major components of the CPSIA addressed in this article are (1) the general overhaul of the CPSC (its personnel, laboratories, and port presence); (2) the new maximum penalties for violation of safety standards; (3) the CPSC's enhanced recall authority; (4) independent testing and certification

requirements; (5) the ability of states to bring injunctive relief against violators; and (6) the whistleblower protection afforded employees. The article does not summarize each individual section of the 163-page CPSIA, and readers interested in specific details of the new safety standards on lead and phthalates, for example, should consult the CPSIA itself.

OVERHAUL OF THE CPSC—MORE FUNDING AND MORE PERSONNEL

Even before passage of the CPSIA, the CPSC took big steps to bolster its oversight of import safety and make its safety standards more widely understood internationally. One such crucial step by the CPSC was to create a Chinese-language page on the CPSC web site—a necessary tool for assisting Chinese companies that desire more information regarding compliance. In the future, the CPSC web site also will provide links to foreign-language materials for significant supplier nations, such as Vietnam and various Spanish-speaking countries. Furthermore, the CPSC staff has worked with the National Institute of Standards and Technology and the American National Standards Institute to translate U.S. product safety standards into Chinese.²⁷

Also in early 2008, the CPSC established an Import Surveillance Division within the Office of Compliance and Field Operations. In the past, the CPSC rarely conducted point-of-entry inspections. The personnel in the new Import Surveillance Division, which works with the Customs and Border Protection (“CBP”), represent the first permanent, full-time presence of CPSC personnel at key ports of entry. These personnel are specifically trained in import surveillance procedures and the rapid identification of defective and noncomplying consumer products.²⁸ They are charged with identifying possible problem shipments through the use of the CBP’s import-tracking system. Products that are identified as suspicious are sampled and then sent to the CPSC’s lab in Maryland for testing. In the last year, this laboratory has tested at least three times the number of products it tested in prior years. Those shipments not in compliance are held up at the port of entry.

With the increased funding provided by the CPSIA, port-of-entry activities will be increased. For instance, CPSC personnel have already started using X-ray fluorescence technology to screen for lead and other heavy metals in consumer products, testing more samples of products, and conducting more port-of-entry “blitzes” (periodic large-scale inspections

at ports) where appropriate.²⁹ A permanent inspection office has been set up in Long Beach, California, the nation’s second-busiest port, and the CPSC plans to set up permanent inspection offices at other U.S. ports.

Furthermore, the CPSIA requires the CPSC, subject to the availability of appropriations, to increase the number of its full-time employees, currently 420, to at least 500 by 2013, including more port-of-entry facility agents.³⁰


Aiding in enforcement, the CPSIA authorizes increased funding levels for the CPSC for six consecutive years, starting at \$88.5 million in 2009 and ultimately increasing by approximately 55 percent to \$136 million by 2014.³¹ What is more, for 2009 and 2010, an additional \$40 million is expected to be authorized to upgrade the CPSC’s laboratories, and \$1 million is authorized to research the safety of nanotechnology in products.

MAXIMUM PENALTIES INCREASED TO \$15 MILLION

The net effect of this bolstered enforcement capability is that more fines will be assessed against and collected from companies violating the law. The CPSIA increases civil fines from \$8,000 to \$100,000 per individual violation and raises the maximum penalty from \$1.825 million to \$15 million for aggregate violations. It also assesses criminal penalties of up to five years in prison for those who knowingly and willingly violate product safety laws.³²

According to a recent Congressional Budget Office (“CBO”) Budget Report, since 2001, civil penalties assessed by the CPSC have averaged \$4.9 million annually, while the average penalty actually collected during that same time was \$470,000, or about 25 percent of the maximum penalties of \$1.825 million. Only 20 percent of the historic penalties exceeded \$1 million. The CBO estimates that enactment of the CPSIA will increase federal revenues by \$43 million over the 2009–2018 period—nearly doubling the average penalties now collected by the CPSC.³³

The CBO Report states that increasing the cap on penalties would change the dynamics of litigating and settling large cases and that the average penalty would eventually double for larger cases and increase by about 20 percent for smaller ones. The CBO therefore concludes that the CPSIA will not affect direct spending. In other words, any increased funding will be paid for by higher and more frequent fines.

A person wearing a black jacket is shown from the chest down, holding a bow and arrow. The arrow has a yellow tip and white fletching. A quiver with several more arrows is visible on their back. The background is a plain, light-colored wall.

**ONE CAN ASSUME THAT
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VERY AGGRESSIVE ACTION
TAKEN BY THE CPSC
TO SEND THE MESSAGE
TO THE OUTSIDE WORLD
THAT IT IS NOW VIGILANTLY
POLICING THE SAFETY
OF CONSUMER PRODUCTS**

ENHANCED RECALL POWER

As many product manufacturers know, product recalls are costly and a major business disruption. Now, it will be faster and easier for the CPSC to issue mandatory recalls.

In the past, the CPSC had the power to require a company to recall a product that presented a “substantial product hazard,” a term notoriously vague and ill-defined by the CPSC. Historically, the CPSC received direct consumer, governmental, or emergency-room report complaints and then evaluated whether there was a pattern of injury before deciding to investigate further with the manufacturer. Whether a recall, or some action short of a recall, was required was usually a decision made jointly by the manufacturer and the CPSC in a cooperative fashion.

The CPSIA has made material changes to the definition of “hazardous product” and the way that recalls will be handled in the future. First, under the old regime, the CPSC defined “substantial product hazard” as the “failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public.”³⁴ The CPSIA has amended this provision to read that a “substantial product hazard” is the “failure to comply with an applicable safety rule under this Act or a similar rule, regulation, standard or ban under any other Act enforced by the Commission.”³⁵ Thus, the CPSIA broadens the circumstances under which a product may be deemed to be a “substantial product hazard.”

Also new under the CPSIA is that the CPSC may recall a consumer product if it determines the product to be “imminently hazardous,” not just containing a “substantial product hazard.” An “imminently hazardous” consumer product is one that “presents imminent and unreasonable risk of death, serious illness, or severe personal injury.”³⁶

Next, under the old system, if the CPSC determined, after notice and a hearing, that a product contained a “substantial product hazard,” it would send notification of such finding to the public as well as to the manufacturer, distributor, and retailers of the product, and some sort of resolution would be worked out whereby the product would be either repaired, replaced, or refunded. Under the newly revamped CPSIA, the CPSC may order the distribution of the product to cease in its entirety. This power to order a company to cease distribution of a product extends to any product determined by

the CPSC to contain an imminent hazard. Perhaps of greatest concern, the CPSIA does not require a hearing to be held prior to the CPSC’s ceasing the distribution of a product it has determined may present an imminent hazard.

Finally, under the old law, the manufacturer had the option of offering to refund the purchase price, repair a recalled product, or replace it. The CPSIA now empowers the CPSC to make that election for the manufacturer based on the “public interest.”³⁷

Many open questions remain about how this new recall authority will play out and how swiftly the CPSC will act in exercising it. Historically, most complaints directed to the CPSC were hearsay and, in many instances, originated from consumers themselves, police departments, or hospital personnel. Due to the anecdotal nature of complaints the CPSC receives, many of which can be unreliable or include misleading or false information, it is unknown whether these complaints will comprise the basis for a swift decision by the newly armed CPSC to recall an “imminent product hazard.” It is also unclear how aggressive the CPSC will be in unilaterally instituting orders to cease the distribution of imminently hazardous products or to unilaterally mandate the recall of an imminently hazardous product it determines creates substantial safety hazards. However, in light of the avalanche of negative publicity recently heaped upon the CPSC, one can assume that, at least in the short term, there will be some very aggressive action taken by the CPSC in order to send the message to the outside world that it is now vigilantly policing the safety of consumer products, particularly those for children.

INDEPENDENT TESTING AND CERTIFICATION REQUIRED

The CPSIA now requires all children’s products to be submitted to independent third-party testing. Specifically, the CPSIA requires all children’s products to be tested by a “third-party conformity assessment body” for compliance with any safety rule applicable to that particular product. The question of who or what is an acceptable “third-party conformity assessment body” is also answered by the CPSIA. In order to meet that definition, the testing facility must be accredited by the CPSC pursuant to requirements established on a statutory timetable that will vary according to the specific safety standard at issue. Under the CPSIA, the CPSC has up to 10 months after enactment to establish requirements for accrediting

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third-party conformity assessment bodies for all safety standards applicable to children's products.

The CPSIA also addresses proprietary or "firewalled" conformity assessment bodies, which would be those testing bodies affiliated or associated with a manufacturer due to the need to protect proprietary and confidential information relating to the product. The CPSIA continues to allow these proprietary or firewalled testing facilities to qualify as conformity assessment bodies. However, to be accredited by the CPSC, a proprietary conformity assessment body must meet additional criteria, showing that it provides equal or greater consumer safety protection than an independent third-party conformity assessment body and has a variety of procedures to protect against "undue influence" by interested parties.³⁸

STATES PERMITTED TO ENFORCE CPSC SAFETY STANDARDS

The CPSIA provides for an additional assault on unsafe products by permitting state attorneys general to take steps to obtain injunctive relief when they believe that a company is violating any consumer product safety rule, standard, regulation, certification, or labeling requirement. The only impediment that the states apparently have prior to instituting such injunctive relief is to provide 30 days' notice to the CPSC and allow the CPSC to intervene. If the injunctive relief involves a "substantial product hazard," the state may file a civil action immediately after notifying the CPSC of its intent to do so.

PROTECTION FOR WHISTLEBLOWERS

The CPSIA prohibits manufacturers and others in the chain of distribution from taking any discriminatory or adverse personnel action against (1) any employee because the employee or person acting pursuant to the employee's request provides information about the employer to a federal or state agency "about any act or omission that the employee 'reasonably believe[d]' was a violation of an order, rule, regulation, or other provision" under any Act enforced by the CPSC; or (2) any employee who testifies about such a violation, or who planned, assisted with, or participated in any proceeding involving such a violation, or who objected to or refused to participate in any action that he or she reasonably believed was such a violation.³⁹ After an investigation by the Secretary of Labor, if the employee's claim is found to be meritorious,

the relief available includes (1) affirmative action to abate the violation; (2) reinstatement with back pay and restoration of seniority and other terms and conditions of employment; and (3) compensatory damages. What's more, should the employee prevail, the CPSIA makes it mandatory that the employee be reimbursed for all costs and expenses, including reasonable attorneys' fees and expert fees.⁴⁰

CONCLUSION

It is critical that all U.S. companies that sell or distribute any consumer products that fall under the CPSC's jurisdiction immediately get a handle on the details of the CPSIA. Equally important is a clear appreciation for the real weapons now available to the CPSC to recall unsafe products, to step up enforcement, and to assess and collect big-ticket penalties from companies that violate any safety standards applicable to their products. ■

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¹ The term "substantial product hazard" is defined by statute to mean "(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of the defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." 15 U.S.C. § 2064 (a).

² See U.S. Consumer Product Safety Comm'n draft report, *Import Safety Strategy* (July 2008), at 2.

³ See Customs & Border Protection web site: <http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/> (last visited Feb. 6, 2009).

⁴ See U.S. Consumer Product Safety Comm'n draft report, *Import Safety Strategy* (July 2008), at 5.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ Enacted as Public Law 110-314, commonly known as (and cited herein as) “H.R. 4040.”

¹² H.R. 4040, Sec. 217 (a)(1)(A).

¹³ H.R. 4040, Sec. 217 (a)(1)(B).

¹⁴ H.R. 4040, Sec. 217 (c)(1).

¹⁵ H.R. 4040, Sec. 201 (a).

¹⁶ H.R. 4040, Sec. 235 (a).

¹⁷ H.R. 4040, Sec. 101.

¹⁸ H.R. 4040, Sec. 108.

¹⁹ H.R. 4040, Sec. 102 (a)(1)(A).

²⁰ H.R. 4040, Sec. 103 (a).

²¹ H.R. 4040, Sec. 214.

²² H.R. 4040, Sec. 218.

²³ “Durable infant or toddler product” is defined as “durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years.” (See H.R. 4040, Sec. 104.)

²⁴ H.R. 4040, Sec. 106.

²⁵ H.R. 4040, Sec. 219.

²⁶ H.R. 4040, Sec. 212.

²⁷ See U.S. Consumer Product Safety Comm’n draft report, *Import Safety Strategy* (July 2008), at 7.

²⁸ *Id.* at 9.

²⁹ *Id.*

³⁰ H.R. 4040, Sec. 202 (c)(1).

³¹ The funding authorized is approximately \$118 M for FY 2010, \$115.6 M for FY 2011, \$124 M for FY 2012, \$132 M for FY 2013, and \$136 M for FY 2014. (See H.R. 4040, Sec. 201 (a).)

³² H.R. 4040, Sec. 217 (a)(1)(A)–(B) & (c)(1).

³³ See Congressional Budget Office Cost Estimate, H.R. 4040 (Aug. 8, 2008).

³⁴ See 15 U.S.C. § 2064 (a)(1).

³⁵ H.R. 4040, Sec. 214 (a)(1).

³⁶ H.R. 4040, Sec. 214 (a)(3)(B).

³⁷ H.R. 4040, Sec. 214 (b)(3).

³⁸ H.R. 4040, Sec. 102 (b).

³⁹ H.R. 4040, Sec. 219 (a).

⁴⁰ H.R. 4040, Sec. 219 (a).