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Consumer Product Safety Commission Update

Consumer Product Safety Commission Legislative Update

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CPSC ESTABLISHES STANDARDS FOR THIRD-PARTY TESTING ACCREDITATION

Section 102 of the 2008 CPSIA requires that the general conformity certificates issued in connection with children's products subject to the CPSC small parts regulations must be based on testing by a third party laboratory that has been specifically accredited to perform the particular children's product test applicable to the product. On November 17, 2008, the CPSC established the standards and procedures for accreditation.

The third-party testing laboratory must be accredited by a signatory accrediting body of the International Laboratory Accreditation Cooperation- Mutual Recognition Arrangement (ILAC-MRA). The accreditation must be to ISO Standard ISO/ESI 17025:2005- General Requirements for the Competence of Testing and Calibration Laboratories and include testing for compliance with the small part regulations of 16 CFR part 1501. The laboratory's accreditation and compliance documents must be electronically filed with the CPSC. The CPSC will maintain on its website a current list of accredited laboratories that are qualified to perform the third party testing required under the 2008 CPSIA.

A testing laboratory in which the manufacturer or private labeler owns more than a 10 percent interest must meet additional requirements. This firewalled laboratory must submit to the CPSC its "training documents showing how employees are trained to notify the CPSC immediately and confidentially of any attempt by the manufacturer, private labeler or other interested party to hide or exert undue influence over the laboratory's test results. The CPSC must formally accept by order this accreditation before any firewalled laboratory may perform third-party testing.

The CPSC also permits government owned or controlled laboratories to attain accreditation where: (1) the manufacturers or private labelers, where practicable, are permitted to choose laboratories not owned or controlled by the government in that country; (2) the laboratory's results are not subject to undue influence; (3) the laboratory is not given favorable treatment or the results given more weight over non-government laboratories; and (4) the laboratory does not exercise undue influence over other governmental authorities on matters related to the distribution of products. The CPSC will engage the government laboratory to ensure compliance with these additional requirements.

FINAL RULE ON LABELING REQUIREMENTS FOR TOY AND GAME ADVERTISEMENTS

Prior to the enactment of the 2008 CPSIA, 15 U.S.C. §1278 contained warning requirements on toy and games that posed a choking hazard to children three years and under. Any toy or game intended for use by a child between 3 and 6 years old is required to contain prescribed cautionary labels on the packaging, descriptive materials that accompanied the product, and on retail bins or vending machines when the product was sold in bulk. Similar requirements were in place for toys or games involving latex balloons, small balls and marbles.

The 2008 CPSIA expanded these requirements to advertisements on the internet (effective December 12, 2008), as well as catalogues and on other printed materials (published and distributed after February 10, 2009). In connection with catalogues and printed material, the CPSC was charged with: (1) the option to promulgate regulations regarding the size and placement of the cautionary statements, (2) the task of clarifying the applicability of these requirements to catalogues and other printed material distributed solely between businesses and not to individual consumers, and (3) the option to establish a grace period of no more than 180 days for distribution of catalogues and other printed material. On November 17, 2008, the CPSC issued a final rule addressing all three issues.

The CPSC promulgated six full cautionary statements to be included in catalogues and other printed materials. The full cautionary statements generally contain a safety alert symbol (! inside a triangle) with language such as “WARNING: CHOKING HAZARD—small parts Not for children under 3 yrs.” or similar language related to the particular item (i.e. ball, balloon, marble, etc.). The seller may include this full precautionary statement in the advertisement.

Alternatively, the CPSC will permit an abbreviated cautionary statement to accompany each individual product advertisement as long as the full cautionary statement applicable to that product appears near the beginning of the catalogue before any catalogue pages that contain advertisements or adjacent to the ordering information of form. The CPSC designated the six full cautionary statements by number (1-6), which can be referenced in the abbreviated cautionary statement. For example, the abbreviated statement may contain a safety alert symbol with language “CHOKING HAZARD (1,2). Not for under 8 yrs.” Each page on which the abbreviated cautionary statement appears must also contain a statement on the bottom of the page referring to the precise location of the full cautionary statement.

The CPSC has permitted multiple full or abbreviated cautionary statements to be replaced by one statement. Where all products in a catalogue require the same cautionary statement, it may appear on the front cover or equally conspicuous location, as long as it advises the consumer that the warning applies to all products. Where all products on one page or two facing pages of a catalogue require the same warning, one warning may be placed at the top of the page as long as it so advises the consumer that it applies to all products on the page or facing pages.

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Under all scenarios, the CPSC requires that it be “reasonably related to the type-size of any other printed matter in the product advertisement, and must be in conspicuous and legible type by typography, layout or color with other printed matter in the advertisement and separated from other graphic matter.”

With respect to business to business materials, the CPSC created an exception only where the catalogue or other printed material is distributed solely between businesses unless the recipient business is expected to be purchasing the product for use by children. The CPSC identified day care centers, school and churches as examples of businesses that would not fall within this exception.

Finally, the CPSC established a 180-day grace period, meaning that sellers have until August 9, 2009 to come into compliance with this new standard. The CPSC balanced the significant costs to sellers without a grace period against the relatively small likelihood of harm to consumers who would not have purchased the product had the cautionary statement appeared during the grace period.

FINAL RULE ON MANDATORY ATV STANDARDS

For years, the CPSC and major ATV distributors in the United States have abided by a voluntary standard for ATVs known as ANSI/SVIA, *The American National Standard for Four Wheel All-Terrain Vehicles Equipment Configuration, and Performance Requirements*. On April 19, 2009, this standard will become mandatory.

Historically, ATV distributors developed actions plans pursuant to which they agreed to abide by many of the ANSI/AVIA voluntary standards and agreed to monitor their dealerships. The newly-mandated standard requires ATV manufacturers and distributors to file with the CPSC action plans substantially similar to prior action plans. These action plans address the standards as they relate to the ATV's equipment and configuration, maximum speed capability, speed capabilities of youth ATVs, service and parking brakes, pitch stability, electromagnetic compatibility, sound level limits and certification labels. The plans must be approved by and filed with the CPSC, unless the action plan was filed with the CPSC before August 14, 2008.

While the 2008 CPSIA permits the CPSC to promulgate standards for three-wheel ATVs, it continues to ban three-wheel ATVs for importation and sale in the United States in absence of such standards. The CPSC affirmatively reaffirmed the current ban and did not indicate that any standards were contemplated.

NEW CIVIL PENALTIES: CEILING RAISED TO \$15 MILLION

The Consumer Product Safety Improvement Act of 2008 (CPSIA) increased the CPSC's ability to seek increased civil penalties for violations of product standards, record keeping, safety reporting and other requirements from its current \$1.825 million level to a staggering \$15 million for any related set of violations. Trepidation surrounding these enormous potential penalties is fueling the scramble to ensure compliance with the recent and imminent changes in substantive consumer product standards as well as compliance with long standing safety reporting requirements.

The CPSC's authority to seek civil penalties for violation of the Consumer Product Safety Act (CPSA) is found at 15 USCA §2069. Under this section, "[a]ny person who knowingly violates §2068 of this title shall be subject to a civil penalty not to exceed \$5,000 for each such violation."

Likewise, the CPSC's authority to seek civil penalties for a violation of the Federal Hazardous Substances Act (FHSA) is found at 15 USCA §1264 and has a nearly identical provision wherein, "[a]ny person who knowingly violates §1263 of this title shall be subject to a civil penalty not to exceed \$5,000 for each such violation."

The statutes, as originally enacted, provided for the maximum civil penalties to be adjusted upward every 5 years based on increases in the Consumer Price Index. As of August 14, 2008, the date of enactment of the CPSIA, the highest civil penalty that could be sought by the CPSC was in the amount of \$8,000 per violation, with a maximum of \$1,825,000 for any "related set of violations". Under the newly enacted CPSIA, Section 217, this amount will be raised more than 16-fold to \$100,000 per violation, with a maximum of \$15,000,000 for any related set of violations. This new maximum penalty amount will take effect no later than August 14, 2009.

The CPSC can seek civil penalties for various "prohibited acts" listed in Section 19 of the CPSA (15 USCA §2068) or Section 4 of the FHSA (15 USCA §1263). The CPSA and the FHSA have a similar statutory scheme and have generally the same criteria for imposing civil fines. The CPSC also has authority to seek civil penalties under the FFA, for knowing violations of a specific flammability regulations or standards promulgated under the act.

Prohibited Acts under the Consumer Product Safety Act

Under 15 USCA §2068 of the CPSA, the following acts are unlawful, and considered "prohibited acts" which may subject a firm to civil penalties: (1) manufacturing, selling or importing any consumer product which is not in conformity with an applicable consumer product safety standard or which has been declared a banned hazardous product; (2) failing or refusing to permit access to or copying of records, to establish or maintain records, to make reports or provide information, to permit entry or inspection, as required under the CPSA; (3) failing to timely furnish information required by section 2064(b), relating to providing notification to the CPSC of substantial product hazards; (4) failing to comply with CPSC orders issued under

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section 2064(c) or (d) relating to product recalls; (5) failing to furnish Conformity Certificates required by section 2063 or issuing a false certificate or to failing to comply rules under Section 2063(c) relating to product certification and labeling; (6) failing to comply with any rule under Section 2058(g) (2) relating to stockpiling; under Section 2076(e) relating to provision of performance and technical data, under Section 2082 relating to labeling and testing of cellulose insulation or under Section 2067(b) relating to exportation of non-conforming products; and (7) Failing to furnish information required by Section 2084 relating to lawsuit settlements or judgments.

Prohibited Acts under the Federal Hazardous Substances Act

Under 15 USCA §1263 of the FHSA, the following acts are prohibited, and may form the basis for the CPSC to seek civil penalties: (1) introducing and receiving misbranded hazardous substances or banned hazardous substance into interstate commerce; (2) altering labels of hazardous substances in interstate commerce; (3) giving a false guarantee or undertaking referred to in Section 1264(b)(2); (4) failing to permit entry or inspection by authorized CPSC personnel; (5) introducing into interstate commerce any hazardous substance in a food, drug, or cosmetic container; (6) failing to notify the Commission with respect to certain exports, pursuant to Section 1273(d); (7) failing to comply with an order issued under section 1274; (8) introducing solder with lead content in excess of 0.2 percent into interstate commerce without proper warnings.

Consequently a firm may be subject to civil penalties, which are currently substantial, and which will soon be even more significant, for engaging in variety of “prohibited acts” such as selling a product that does not comply with CPSA standards, including the new lead and phthalate bans for certain children’s products, failing to promptly file reports under Section 15(b) to notify the CPSC of products that may present a substantial product hazard, and failing to supply appropriate conformity certificates, including those mandated by section 102 of the Consumer Product Safety Improvement Act of 2008, just to name a few.

What Constitutes “Knowing” Violation of the Acts?

The relevant statutes provide that a person who “knowingly” violates Section 1263 or Section 2068 shall be subject to a civil penalty. The statutes, however, appear to permit civil penalties to be sought where a firm’s actions, rise to the level of negligence, only, without any actual knowledge or intentional conduct.

For the purpose of the CPSA and FHSA civil penalty statutes, the term “knowingly” means: (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations. 15 U.S.C. §1264(c)(5); 15 U.S.C. § 2069(d). Several other statutes that permit regulatory agencies to seek civil penalties for violations contain almost identical definitions of the term “knowingly,” 42 U.S.C.A §6303(b); 15 U.S.C.A. §3414(b)(6)(B); 15 U.S.C.A. §1194(e)(4).

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In *U.S. v. Shelton Wholesale, Inc.*, 34 F.Supp.2d 1147 (W.D. Mo. 1999), the court discussed and applied this definition as imputing knowledge when a person fails to act reasonably in the circumstances, such as when they do not exercise due care. See generally *Aimone by Aimone v. Walgreen's Co.* 601 F.Supp. 507 (D.C.Ill. 1985)(interpreting language found in 15 U.S.C. § 2069.

The term “distribution in commerce” is defined by 15 USC 2052 (a)(6) as “to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.” Interstate shipment of hazardous product is proven within meaning of this section if evidence shows that product is found within the state and the product was either not manufactured there or was manufactured in another state. *U.S. v. Chalaire*, 316 F. Supp. 543 (E.D.La. 1970).

CPSC Can Settle Penalty Claims but Cannot Directly Impose Penalties

Although it is a common misconception, the CPSC cannot “levy” penalties in an administrative forum, but must instead commence a civil action, through the United States Department of Justice in order to assess any civil penalties. “[T]he Commission must determine the amount of the penalty it wishes to seek and it is authorized to compromise that amount, but it is the court that decides whether, and in what amount, a penalty will be assessed. *Athlone Indus. v. Consumer Product Safety Commission*, 707 F.2d 1485 (D.C. Ct. App. 1983).

In most instances, civil penalty claims made by the CPSC are resolved through settlement rather than by litigation. Settlement Agreements must be provisionally approved by the Commissioners, then published in the Federal Register for a 15 day comment period. In the absence of any comments, the settlement agreement is considered final and binding.

Penalty Amounts

The Consumer Product Safety Improvement Act of 2008 revised the factors that the CPSC must consider in determining the amount of penalty it will seek in commencing an action for a civil penalty. The revised language of 15 USCA 2069(b) identifies relevant factors in determining the amount of the penalty:

In determining the amount of any penalty to be sought upon commencing an action seeking to assess a penalty for a violation of section 2068(a) of this title, the Commission shall consider the nature, circumstances, extent, and gravity of the violation, including the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed, the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses, and such other factors as appropriate.

15 USC 2069(b).

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The CPSIA requires the Consumer Product Safety Commission to issue final regulations providing its interpretation of the penalty factors described above no later than August 14, 2009. At the time this article was submitted for publication, the CPSC staff was in the process of soliciting stakeholder comments and input related to this issue, in particular, whether it was appropriate for the CPSC to develop a formula or matrix to weigh any or all of the various factors, in determining the amount of any penalties it will pursue.

The CPSC is also required under 15 USCA 2069(c) to consider the following factors in determining the amount for which it will settle a civil penalty matter, and the amount by which any penalty assessed by a court may be mitigated:

Any civil penalty under this subsection may be compromised by the Commission. In determining the amount of such penalty or whether it should be remitted or mitigated, and in what amount, the Commission shall consider the appropriateness of such penalty to the size of the business of the persons charged, including how to mitigate undue adverse economic impacts on small businesses, the nature, circumstances, extent, and gravity of the violation, including, the nature of the substance involved, the severity of the risk of injury, the occurrence or absence of injury, and the amount of the substance distributed, and such other factors as appropriate. The amount of such penalty when finally determined, or the amount agreed on compromise, may be deducted from any sums owing by the United States to the person charged.

15 USCA 2069(c).

Previous efforts by the CPSC to issue rules to clarify factors used to determine the amount of civil penalties to pursue were commenced, but did not result in any final regulations. On July 12, 2006, the CPSC published at 71 FR 39248 for comment proposed new regulations to be added as 16 CFR 1119 describing factors considered in determining the amount of civil penalties to be pursued. These proposed factors included: (1) previous record of compliance; (2) timeliness of response; (3) safety and compliance monitoring; (4) cooperation and good faith; (5) economic gain from non-compliance; (6) product failure rate; and (7) any other pertinent factors.

Comments on these factors were solicited and received, however, no final regulations were. Under the CPSIA, it is incumbent upon the CPSC to issue a final regulation providing its interpretation of the penalty factors. It is unknown whether the CPSC will resurrect a version of its previously published proposed rule or some variation of that rule, however, the CPSC's published request for comments and information on this subject suggests that the above factors again are being considered as components of any regulation that will be issued.

Recommendations

The risk of penalties based on non-compliance with existing CPSC statutes and regulations, and based on on-compliance with the myriad new requirements imposed by the Consumer Product Safety Improvement Act of 2008 has been raised by an order of magnitude. The CPSC has

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telegraphed its intentions to more aggressively pursue civil penalties for substantive violations of Consumer Product Safety Commission standards during the first quarter of 2009. The language of the statute permits even an unintentional violation to result in substantial civil penalties.

To reduce the risk of unintentional violations, leading to potentially severe penalties, companies should have in place procedures and safeguards to ensure that products undergo systematic, reasonable testing, by third party laboratories where required, to ensure compliance with applicable standards, and maintain scrupulous records to support mandatory compliance certifications. The implementation of programs and procedures to identify safety issues reportable to the CPSC under Section 15(b), which provides for mandatory reporting of substantial product hazards, will also reduce the likelihood of penalties for failure to timely report.

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