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GOVERNMENT IN TOYLAND: REGULATING CHILDREN'S PRODUCTS UNDER THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT

On August 14, 2008, the Consumer Product Safety Improvement Act of 2008 (the "Act") was signed into law, amending the Consumer Product Safety Act and substantially increasing the power of the Consumer Product Safety Commission (the "Commission") to regulate the sale of children's products. Since then, the Commission has vigorously enforced many of the Act's provisions and is preparing final regulations for full implementation.

The Act was urgently enacted by Congress after the death of a four-year-old boy in Minneapolis from lead poisoning after swallowing a charm that was attached to a pair of Reebok tennis shoes. The charm was later found to be composed of 99% lead. Reebok was subsequently fined \$1 million – the largest fine in the Commission's history at the time.

Following this tragic death, there were a number of well-publicized recalls of children's products containing lead. The public outrage over the death and the recalls prompted Congress to act to ensure that children are not exposed to the dangers of hazardous substances, including lead and phthalates (a family of chemical compounds used in toys and many other products to soften plastics). Only after the Act became law did many realize the direct and indirect costs imposed upon retailers, manufacturers, and even consumers, as well as the uncertainty of how the Act was to be enforced.

The Commission's Increased Enforcement Authority

Believing that the Minneapolis boy's death and the subsequent lead-related recalls were the result of lax enforcement, Congress greatly increased the authority of the Commission to enforce consumer protection laws. It substantially increased the Commission's annual budget and staff so it could more aggressively regulate the production, sale, and resale of not only children's products, but also any Commission-regulated products. As the new Commission Chairman observed, "We are a new commission that has new powers – and we are not afraid to use them."

Congress also substantially increased the civil and criminal penalties under the Act, including authorizing criminal penalties for selling recalled products. Civil fines were increased from \$8,000 to \$100,000 per violation, and the maximum penalty for a related series of violations was increased from \$1.8 million to \$15 million. The Commission's aggressive enforcement under this Act is already apparent. So far this fiscal year, the Commission has assessed civil penalties of almost \$4 million for lead-related violations involving children's products, including a record \$2,050,000 fine.

The Commission also has increased its scrutiny of online auction sites. According to one report, the Commission maintains an Internet surveillance team that monitors online auctions and sales sites such as eBay and Craigslist for recalled products. Earlier this year, an enforcement proceeding based on an Internet sale of a non-compliant product resulted in a stipulated settlement of \$200,000. This online monitoring may well expand to include children's products subject to the lead and phthalates regulations and other Commission-regulated products.

Another new feature designed to aid enforcement is a publicly accessible database scheduled to be operational by March 11, 2011. Anonymous complaints will be accepted, and there are no mechanisms to verify the accuracy of the reported information, causing concern among manufacturers and retailers. Another concern is that the information may be used to encourage or facilitate product liability litigation.

Finally, the Act provides another layer of enforcement by authorizing the attorneys general of each state to enforce federal consumer product safety statutes. Therefore, even if the Commission decides not to pursue an enforcement action against a seller, an individual state attorney general could pursue the claim.

The Expanding Scope of the Commission's Regulatory Power

The extremely broad regulatory scope of the Act has sparked much confusion and concern among small business owners, resellers, and even individuals who make crafts part time. The Act imposes third-party testing and certification requirements upon "manufacturers" and importers. Although one would assume "manufacturer" means businesses engaged in manufacturing toys or children's products, the Act extends its regulatory control to part-time "crafters" and "small-batch manufacturers." For instance, a guide published by the Commission states that something as simple as adding ribbons to hair clips, knitting hats, or stringing beads into necklaces for sale or donation makes one a "manufacturer." Many hobbyists and crafters are likely unaware of their testing and certification obligations under the Act.

The term "children's products" is defined as "a consumer product designed or intended primarily for children 12 years of age or younger." If circumstances suggest, however, that a product originally intended primarily for use by a child is being sold or marketed as a collectible for adults, such as an antique, it is not subject to the Act. Conversely, even if the essential nature of a product suggests that it is not primarily intended for use by a child, it may nevertheless be considered a children's product because of its decorative features. For example, a ballpoint pen would not typically be considered primarily intended for a child, but if the same pen is adorned with cartoon figures or other decoration appealing to a child, it will likely be deemed a children's product.

Manufacturer statements as to the intended age of the product's users, including age recommendations displayed on product packaging, are considered in determining whether a product is primarily intended for use by a child 12 years old or younger. Even so, if the "product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger," it may still be considered a children's product notwithstanding any product labeling or manufacturer statements to the contrary.

Regulations Relating to Phthalates and Lead in Children's Products

While the focus of Congress was to regulate lead and phthalates in children's products, the Commission is granted authority to regulate other substances deemed to be hazardous, such as cadmium. The Act reduced the acceptable level of phthalates to 0.1% and established a schedule for lowering the acceptable levels of lead in surface coating (lead in paint) and component parts (lead content) over the coming years. The Act lowered the acceptable level of lead in paint from 600 ppm to 90 ppm, effective August 14, 2009. The most contentious issue regarding the lead limits relates to the gradual lowering of the acceptable lead content level from 600 ppm to 300 ppm, effective August 14, 2009, with further reduction to 100 ppm, if technologically feasible, effective August 14, 2011. These new levels are to be applied retroactively, resulting in potential liability based on a sale of a product manufactured prior to the effective date. This has caused significant concern as it relates to the 100 ppm standard scheduled to go into effect in August 2011, since many current products would not comply with this strict standard.

Although many issues have been raised regarding the Act's application, two specific types of products merit mentioning. The first involves youth all-terrain vehicles. The lead content portion of the Act has resulted in substantial uncertainty for the youth ATV industry. In fact, no sooner was the law passed than the Commission established special rules allowing certain manufacturers to continue selling these products, despite their non-compliance, for a limited period that expires May 1, 2011. Whether the issues involving these products will be resolved by then is uncertain.

The second type of product that has caused concern is children's books. The Act's lead content testing and certification requirements apply to children's books published after August 14, 2009, even though modern printing methods and materials do not generally involve lead use. Testing and certification requirements do not apply to older books, but resellers, schools, and libraries can be held liable under certain circumstances for selling a book with a non-compliant lead content. The Commission has taken the position, at least in the interim, that resellers, schools, and libraries can assume, absent information to the contrary, that books printed *after* 1985 are compliant and, conversely, that older books are non-compliant.





Third-Party Testing and Certification Requirements

One of the most contentious provisions in the Act for small businesses is the third-party testing and certification requirements. Children's products must be tested by a third-party testing facility that has been specifically authorized by the Commission to perform such testing. If the children's product is compliant with the lead and phthalates regulations, a compliance certificate will be issued. This certificate must "accompany" the product in the distribution chain so that anybody can confirm that the product has been tested and is compliant. The Act requires that each product be retested if there is any manufacturing process or material change. Furthermore, each product must be retested periodically to ensure that it remains compliant. These testing and certification requirements apply to all children's products, except those where "all accessible parts" are made of "natural materials," such as gemstones, wood, cotton, and wool, known not to contain unacceptable levels of lead or phthalates. However, if such product has any surface coating or incorporates nonexempt and accessible component parts such as buttons, hinges, or fasteners, it must comply with the third-party testing requirements.

Enforcement of the testing and certification provisions has been stayed until February 10, 2011. One concern leading to the stay is the cost for third-party testing in the United States, which can range from \$500 to \$2,000 per product, substantially more than the cost for such testing in China or other foreign countries. The net effect is that the third-party testing requirements impose substantially higher costs on domestic "small-batch manufacturers" as compared to large manufacturers who can take advantage of lower costs overseas and spread the testing and certification costs out over a larger volume of products. Due to these burdens, many small retailers and manufacturers have closed their businesses, and some foreign manufacturers of small-batch toys, specifically in Germany and other European Union countries, have refused to export to the United States.

Trying to Add Certainty to An Uncertain Statute

The Commission recently published a number of final and proposed rules implementing various sections of the Act. These regulations have tried to add certainty to many of the issues now facing manufacturers, retailers, and resellers. Even the Commission recognizes that certainty is difficult, if not impossible, to accomplish. Consequently, the Congressional Energy and Commerce Committee is currently in the process of drafting a new bill, referred to as the Consumer Product Safety Enhancement Act ("CPSEA"), designed to ameliorate some of the burdens and uncertainty of the Act. Although the draft CPSEA attempts to deal with small-batch manufacturers' concerns, it may not go far enough. The final chapter has yet to be written regarding the Act and its regulations.

Conclusion

Manufacturers, retailers, and resellers should be aware of their obligations if they sell children's products. They should prepare for the full enforcement of the testing and certification requirements currently scheduled to begin on February 10, 2011, and assess their regulatory exposure by inventorying what, if any, children's products they sell. If a business sells any children's products, it should establish clear compliance procedures, including, at a minimum, a thorough review of its purchasing procedures. This includes (1) confirming that its manufacturers and/or importers comply with the third-party testing and certification requirements; (2) a review of any distributor, importer, or manufacturer agreements to provide appropriate assurances in the event of noncompliance; and (3) a review of any insurance coverage for liability relating to non-compliance with consumer protection statutes. Resellers should establish clear procedures for evaluating products accepted for resale to ensure compliance with the Act and identifying and rejecting products that have been recalled.

Hopefully, the uncertainties inherent in the Act will be resolved by the CPSEA and the final regulations. In the meantime, businesses should take steps to ensure compliance.

