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In this Analysis & Perspective, attorneys Jan E. Simonsen, Ali A. Beydoun, and Kelly M. Lippincott survey changes in federal recall requirements and provide companies with practical guidance for avoiding a recall's attendant risks. They note important business considerations, and advise companies to take care in responding to reports of harm related to their products once the Consumer Product Safety Commission begins posting the complaints and responses in its forthcoming publicly available database.

## **The Consumer Product Safety Improvement Act of 2008—How Companies Can Plan Ahead to Avoid Risk**

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**O**n Feb. 10, 2009, important provisions of the Consumer Product Safety Improvement Act of 2008 (CPSIA) became effective. Reacting to the well-publicized 2007 and 2008 recalls of imported toys with lead paint and other hazards, the CPSIA improves upon and creates new safety standards and limits on products aimed at children. Now that this new legislation is active, it is imperative that manufacturers and retailers

educate themselves—and their staff—on how to be in compliance.

The CPSIA makes it clear that its intended federal regulatory minimums do not preempt existing or new state regulation of product safety. Therefore, even companies following the many detailed requirements of the CPSIA are still responsible for complying with more restrictive state requirements where they exist. With so many consumer products covered by the new provisions—from children's clothes to toys, and everything in between—the law's impact will be widely felt.

This article highlights changes in recall protocol, and serves as a basic roadmap for employers who are faced with a product recall scenario. Practical guidance is provided as to how companies can avoid related risks, with the intent that they can both protect their legal interests and remove dangerous products from public access, if necessary.

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## Changes in Recall Protocol With the 2008 CPSIA

The rules and provisions related to product recall are detailed under Section 15 of the 1972 Consumer Product Safety Act (CPSA), and have been recently revised by the CPSIA. Under the earlier 1972 CPSA, companies that manufacture, distribute, import or sell consumer products in the United States were required to notify the Consumer Product Safety Commission (CPSC) “immediately” (defined in the CPSC recall handbook as within 24 hours) if the company obtains information suggesting that its product fails to comply with any applicable consumer product safety rule or voluntary standard upon which the Commission has relied under the CPSA. A company faced with the possibility of needing to recall a product must alert the Commission if it finds that the product contains a defect that could create a substantial product hazard to consumers, or creates an unreasonable risk of serious injury or death. While the 2008 CPSIA does not fundamentally change these guidelines, it does expand them by stating a company must also comply with “any other rule, regulation, standard, or ban under this [2008] Act or any other Act enforced by the Commission.”

Following the filing of a report by the company, the CPSC goes through an evaluation process to make a determination on the product’s level of defect or risk. This evaluation process can take several weeks and the company may not agree with the final conclusion or the wording that is presented to the public. One way a company can avoid a potentially adverse CPSC final determination is by implementing a “voluntary” recall within 20 days of its initial notification to the CPSC. This process, referred to as “Fast Track,” speeds implementation of the recall, and gives the company more control over what information is presented to consumers and how it is presented.

Once a recall is in effect, the 1972 CPSA requires customer notification by mailing notices to known customers and distributors or retailers and issuing a joint press release with the CPSC. The CPSC reviews the recall plan proposed by the company, which often includes placing notices such as signs in retailer locations. Any additional efforts to reach customers is at the discretion of the company recalling the product.

One significant difference between the earlier 1972 CPSA and the 2008 CPSIA is that the latter revised Act increases notification requirements by now specifying that a company is:

To give public notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website, providing notice to any third party Internet website on which such manufacturer, retailer, distributor, or licensor has placed the product for sale, and announcements in languages other than English and on radio and television where the Commission determines that a substantial number of consumers to whom the recall is directed may not be reached by other notice.

In addition, the 2008 CPSIA gives the CPSC more authority over a company’s recall action plan. For example, the CPSC can now require that a company give a refund, replacement and/or repair rather than allowing companies to choose which remedy to offer consumers. Further, if the CPSC determines the action plan is not being followed or is ineffective, it can revoke its approval of the plan.

## Facing a Product Recall—What a Company Should Do

A company’s decision whether to initiate a product recall when one of its products has been the subject of a complaint submitted by the CPSC needs to be made swiftly, because under the new law a manufacturer has only 10 days to respond. The response must be carefully tailored as it will be posted on the CPSC searchable database, which can easily be viewed by customers, plaintiffs’ attorneys, and shareholders. The decision regarding how to respond depends on a number of factors, including whether the defect affects safety, the risk of physical harm to customers, and the cost of remedies. While a product recall can be a costly endeavor for a company—often, much higher than production costs—the cost of no action relating to a potential recall can be even greater.

Under the new law, a company opens itself up to significant fines and even criminal penalties for allowing a dangerous product to stay on the market. And with the reporting requirements on the CPSC searchable database, the manner in which a company responds to information about a defective product will be readily accessible to the public, not a favorable scenario for a company to face.

If a recall is determined to be the best response to a complaint from the CPSC, there are many costs that the recalling company will face. In addition to the first-party costs incurred by the company in performing a recall, which may be very high depending on the size of the company, the number of products affected, and the number of its consumers, there are the costs associated with third parties. A company must consider its liability to purchasers and users of its products, but it also must consider its potential liability to other third parties, such as other companies that incorporate the component or ingredient into their own products. A recall of that component or ingredient may cause the third-party manufacturer to suffer an interruption to its business, loss of profits, and damage to its reputation because of the recall of the product.

Third-party liability might not be a concern if the company only sells its products under its own label or sells its product directly to consumers. If the product is incorporated into other products, however, then the recall’s effect on other manufacturers will likely increase the associated expense.

To ensure the workability of the system, manufacturers will be required to label children’s products with tracking information, using their own product-appropriate systems that enable them to better identify recalled products. Obviously, it would be unlawful for retailers to sell a recalled product.

In fact, the biggest risk posed by the CPSIA to consumer product manufacturers is the requirement that, by no later than Aug. 14, 2011, the CPSC develop and implement the aforementioned publicly available database on which the agency must post all reports of harm alleged to have been caused by a consumer product received from consumers, local, state or federal government agencies, health care professionals, child service providers and public safety entities. The CPSC would have the authority to remove or correct a complaint if it is found to be inaccurate. Under the Act, the CPSC will provide manufacturers five business days to provide any comments on a report prior to posting it, which

comments will, if the manufacturer wishes, be added to the database. The CPSC must post the information within 10 business days of providing notice to the manufacturer. It is worth reiterating that the database will be available to and searchable by the public at large.

### Create a Planning Checklist

Planning for these new provisions is essential. These provisions further emphasize the need for every consumer product importer, manufacturer, distributor and retailer to have in place a strong risk-management program that includes:

- design and manufacturing controls to prevent potential defects,
- effective quality control monitoring to enable immediate identification, evaluation, and review of consumer complaints alleging injury, and response to them,
- regular review by upper management of reports of product damage, breakage or injury that may indicate an emerging problem,
- strong surveillance programs to ensure that complaints received by the company (such as those from retailers, retail website comments, media reports and other sources) are identified and addressed;
- and a designated person(s) trained in and charged with evaluating the company's compliance with reporting and other obligations to the CPSC.

### What a Company Can Do to Avoid Risk

To be prepared in the event a complaint is registered with the CPSC, a company should organize a corporate team that will be responsible for receiving CPSC complaints and analyzing the accuracy and validity of any such complaints. Again, advanced preparation is key so that you are not caught in reactive mode, but rather are ready to implement a plan that is already in place. The team also should be organized to respond to any complaints and to implement any remedies, including recalls, swiftly if necessary. Having a crisis management plan in place before a company is confronted with a CPSC complaint, or complaints from any other source, can minimize the costs of addressing the situation, reduce litigation, eliminate the risk of civil or criminal penalties, and prevent adverse publicity that can scar a brand name. In addition to satisfying the requirements of the CPSC, a company's quick response to a defective product is the key to reducing the risk of others being harmed by the product, thus reducing the company's exposure to liability.

To ensure the safety of imports, the Act requires the CPSC to develop a plan to identify shipments of consumer products intended for import into the United

States by improving information sharing among federal agencies, including U.S. Customs and Border Protection. Compliance with this provision requires companies to identify manufacturers and subcontractors in the supply chain to CPSC. Conversely, the CPSC would prohibit a U.S. entity from exporting a product that does not comply with consumer product safety rules unless the importing country has notified the Commission of its permission. This provision grants the CPSC greater oversight to prevent the entry of unsafe consumer products into the United States.

Lastly, the Act presents many practical commercial and business risk management considerations for the manufacturing industry to contemplate. Companies subject to these new requirements may wish to consider implementing compliance policies and procedures regarding product development, conceptualization, and design. Moreover, product manufacturing and testing measures should include the establishment of enhanced supply chain management mechanisms to ensure that suppliers do not introduce non-compliant parts, subassemblies, chemicals, paints, glues, etc., into products. There are proper ways to shift risk in these relationships through contractual mechanisms, including partnerships with certified laboratories where there are contractual requirements that they keep their certifications current. These labs can advise the company on proper application of appropriate testing protocols and product standards.

The CPSC has recently demonstrated its commitment to policing companies and enforcing the provisions of the CPSIA. In April 2009, the CPSC announced that 14 firms agreed to pay a total of \$1,055,000 in civil penalties. The penalties settle allegations that the firms knowingly failed to report to the CPSC immediately, as required by the CPSIA, that children's hooded sweat-shirts or jackets they sold had drawstrings at the hood and/or neck. Children's upper outerwear with drawstrings, including sweatshirts or jackets, pose a strangulation hazard that can cause death to children. Therefore, while the newness of the CPSIA deems that resulting litigation patterns and results are still to be determined, there is little doubt the legislation will have a significant impact.

A solid product risk management program must involve a commitment by a company—starting from the very top—for establishing and enhancing systems to carefully track and meaningfully respond to consumer concerns and complaints before they ripen into threatened or actual litigation. Companies must consider ways to establish or enhance document management systems to demonstrate compliance and ensure that proper pre-introduction product testing is undertaken and certified lab results are properly written, submitted, and retained.