

Product Safety Crackdown



Sweeping CPSA Changes Impact Marketing, Shipping, Quality

By Jill Robb Ackerman, Baird Holm LLP

Retailers, manufacturers, importers and distributors, beware. Sweeping changes to the Consumer Product Safety Act (CPSA) require that these types of commercial entities take significant steps now to comply with the new regulations. Some of the new rules are already in effect, and others will become law over the next several years, meaning retailers and product distributors must be well versed in the new regulations to conform now and remain in compliance in the future.

If your business imports and distributes one of the more than 15,000 consumer goods regulated by the Consumer Product Safety Commission, your company will very likely be affected. And while the impact of the Consumer Product Safety Improvement Act of 2008 (CPSIA) depends on the nature of your business, one thing is certain: Noncompliance is not an option.

Regulators can now mete out severe civil and criminal penalties to any business running afoul of new regulations.

Sellers and importers of children's products must be particularly vigilant. Coming on the heels of numerous product safety recalls and a wave of negative publicity, new third-party testing requirements, advertising restrictions, bans on certain chemicals, and rules regarding product certification impose numerous additional restrictions applicable exclusively to sellers and importers of children's products, toys, and all-terrain vehicles.

When considering how to ensure CPSIA compliance, companies importing and distributing any type of product — and particularly those in the business of children's products — should review three primary areas of their business, including:

- Product safety policies and procedures;

- Personnel policies governing employee interaction and response to compliance issues; and
- Contracts with business partners to mitigate risk under CPSIA rule changes.

CREATING SYSTEMS THAT PROTECT AND PREPARE

As a starting point, retailers, manufacturers, importers and distributors should begin with a thorough review of the systems currently in place for detecting, reporting and responding to product safety issues. We've outlined recommended steps to address corporate policy weaknesses and update them in light of new regulations.

1. Review Systems for Detecting Safety Concerns: As a starting point, companies should audit their current product safety

policies to ensure all procedures reflect with current (and phased-in) regulatory and recall requirements. To mitigate your company's risk, this policy must be internally and externally facing and extend to your company's domestic and international business partners.

Extensive information concerning the current regulatory framework is available at the Consumer Product Safety Commission's web site (www.cpsc.gov), including timelines summarizing scheduled rulemaking and upcoming compliance deadlines. If your company does not already have a product safety policy in place, one should be developed and implemented immediately.

2. Establish Procedures for Responding to Red Flags:

A company's product safety policy must also govern and delineate how the company will respond to red flags indicative of potential violations under the CPSA. Consumer complaints, customer warranty returns, consumer watchdog alerts, and notices published by the Consumer Product Safety Commission can signal potential product safety issues — and companies must have safeguards in place to react and respond.

To avoid running afoul of the CPSA changes, companies should modify product safety policies to help detect, analyze, and respond to red flags expeditiously:

- a. **Collecting Information:** All policy handbooks should outline how and which sources a company will use to monitor and identify potential hazards in its product mix. Depending on the volume and nature of the products sold, distributed, or manufactured, a variety of information sources exist for identifying potential red flags. These can include input from stores, customer correspondence, reports via customer hotlines, product claims, public lawsuit information, or National Injury Information Clearinghouse letters published by the Commission.
- b. **Compiling Information:** Once information sources have been defined, policies must include how companies will collect and compile the safety data gathered. Information must also categorize data by the type of hazards and harms identified.

Data collection systems should also assess whether additional action is necessary, such as reporting a hazard to the Commission or implementing a recall.

To assist in the monitoring process, a weekly report identifying the following information may be useful and include: Date Incident Reported to Company; Transaction Information; Customer/Client Information; Store Where Sold; Incident Date; Supplier/Source Information; Product Information; Product Defect; Injury or Damages; Source of the Information; Claim Number.



Sellers and importers
of children's
products must be
particularly vigilant.
Coming on the
heels of numerous
product safety
recalls and a
wave of negative
publicity...

- c. **Identifying "Triggers" that Require Company Action:** Before a potential issue arises, companies should identify "triggers" that may require filing a report with the Commission, implementing a recall, or other appropriate responses. Safety policies may identify "automatic" responses triggered either by the severity of an injury (e.g., death or an injury requiring medical attention) or the nature of the hazard (e.g., electrocution or choking by a child). Other responses may be triggered by an accumulation of significant events, such as if three or more injuries or hazards relating to the same product result within a specified period of time.

3. Regularly Review Your Policy For Compliance: To ensure continuous compliance and a policy that reflects changing regulations or rules, companies should consider a periodic review process. The Commission has established an aggressive schedule for formal rulemaking on more than 40 issues over the next several years. In the last two months alone, the Commission has issued formal regulations that establish rules for advertising of children's products and standards for third-party testing of cribs and pacifiers. For purposes of conducting the periodic review process, it is recommended that companies designate a Product Safety Coordinator tasked with leading a team who determines the most cost-effective means of compliance.

ESTABLISHING A LINE OF DEFENSE

Company employees charged with implementing product safety policies are the most critical line of defense against a violation. There are several steps employers should take to ensure corporate employees are well prepared to identify, address and respond to any product safety issue early on.

1. Designate a Product Safety Coordinator:

A high-level manager or executive should be designated as a company's internal Product Safety Coordinator. The Product Safety Coordinator serves as point person for all product safety issues, with the attendant responsibilities of ensuring employee compliance and implementing the company's recall plan whenever necessary. The Product Safety Coordinator should have the authority to implement interim changes to product safety policies whenever new regulations go into effect.

2. Establish Training Programs for Key Personnel:

To ensure continuous compliance, companies can establish ongoing training programs for key personnel in areas such as supply-chain management, quality control, and marketing, among others. New regulations affect supply chain, quality control and marketing departments and many companies will need to upgrade their training programs and safety procedures to reflect this change.

a. Supply-Chain Management:

Beginning Nov. 12, 2008, all containers bound for U.S. ports were required to be accompanied by a certificate of conformity declaring that all products being imported for warehousing or consumption comply with all applicable regulations. This

requirement applies to all categories of consumer goods, and failure to comply can result in destruction of the shipment contents. Supply chain and shipping personnel should be briefed on the new regulations and policies implemented to ensure adherence to new procedures.

b. Quality Control Personnel: Under forthcoming regulations, the Commission will establish third-party testing standards for children's products ranging from baby bouncers to metal jewelry. New rules relating to uniform information to be contained in recall notices, testing of random samples, and certain banned chemicals are expected as well. Certain lead restrictions will apply retroactively to current inventory taking effect in February 2009. Implementing standard quality control procedures now, both in-house and among supply chain partners, is essential to ensure product quality conforms to new requirements.

c. Marketing Personnel: New regulations applicable to certain toys restrict advertising that provides consumers with a direct means for purchase or order, such as catalogs, other printed materials, and Internet web sites. Toys or games for use by children ages 3 to 6 that include small parts, or any toy for use by children age 3 years or older that contains a balloon, small ball, or marble, must prominently display a warning label required by regulation. The requirements for Internet advertising take effect Dec. 12, 2008; the requirements for catalogues and other printed materials take effect in February 2009.

3. Whistleblower Protection: One of the biggest potential landmines of the new legislation includes some of the most expansive whistleblower-retaliation protections under any federal statute. As such, employment policy manuals must be amended to reflect the changes and human resource managers and hiring managers should be educated on anti-retaliation rules.

EXECUTING CONTRACTUAL REQUIREMENTS AND PARTNER AGREEMENTS

Under the new regulations, controls for third-party testing have been stepped up, and companies can be held liable for the ac-

tions of suppliers and manufacturers. All new contracts should reflect the new reality under the CPSIA to include provisions that help shift and share the burden associated with them.



Some experts also recommend companies look to product safety experts to help them craft compliance policies and protocols...

1. Third-Party Testing: Under the new law, every manufacturer, importer, or private labeler of children's products must have the product tested and certified by an accredited independent lab. Manufacturers, importers, and private labelers of such goods must enter into new contracts for testing with third-party laboratories as the new testing standards are phased in. Seek advice on drafting these contracts at the outset to ensure that the proper and necessary protections are in place.

2. Other Contracts: Standard purchase agreements with manufacturers and suppliers will need to be reviewed and, in some cases, renegotiated to ensure compliance with the new standards. Issues that may need to be addressed include inspection and oversight responsibilities of certain importers, requirements for regular testing of product batches, and clear delineation of all reporting and recall responsibilities, in-

cluding allocations of costs and expenses associated with any recall.

3. Outsourcing Certain Responsibilities: Depending on the scope and nature of a business, it may be possible to outsource certain responsibilities or shift certain burdens to other parties in the supply chain. Numerous import/export service providers and sourcing companies are available by contract to handle new issues related to certification of shipments and testing of goods. Such an arrangement may be especially well-suited for small- to mid-size retailers sourcing directly from overseas.

Changes related to the Consumer Product Safety Improvement Act of 2008 are extensive, and the Commission has been granted wide authority and resources to enforce its new rules. In combination with heightened consumer sensitivity to product safety issues and active and engaged watchdog groups, compliance with all consumer product safety rules is more important than ever. Failure to do so can lead to not only hefty civil or criminal penalties, but also substantial public relations damages.

The new rules are intricate, sweeping and impact everything from manufacturing contracts and import procedures to corporate data collection policies. To protect the viability of your business, manufacturers, importers, distributors and retailers are wise to establish now a comprehensive product safety policy. Some experts also recommend companies look to product safety experts to help them craft compliance policies and protocols, given the complexity of the new regulations — and the risks associated with non-compliance.

As we enter a new era of product safety regulations, protecting your customers is the best way to protect your business, your goodwill, and your investment.



Jill Robb Ackerman is the chairperson of Baird Holm's Litigation section. Her practice includes complex business litigation in federal and state courts and arbitration proceedings concerning corporate disputes, copyright, trademark and unfair competition, trade regulation, computers and technology. Ms. Ackerman received a #1 ranking for Intellectual Property Litigation in Nebraska through Chambers USA. Jill may be contacted at jrackerman@bairdholm.com or (402) 636-8263.