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## **CPSIA — The Challenge For Smaller Businesses**

Law360, New York (March 15, 2010) -- The Consumer Product Safety Improvement Act of 2008 is landmark legislation that addresses many aspects of product safety. As the CPSIA continues to be phased in, businesses involved in the manufacture or import of consumer products are working to ensure that they are, and will remain, in compliance with its provisions.

Smaller businesses and businesses that manufacture or import relatively low volumes of consumer goods often face particular challenges making sure that they are in compliance with the CPSIA.

Because they often do not have the same personnel or other resources of larger companies, many of these smaller businesses may find it more difficult to (1) determine what the CPSIA requires of them and (2) bring themselves into compliance with the CPSIA in a cost-effective manner.

This article touches on some examples of areas where small businesses might be especially challenged and suggests how they should plan to efficiently ensure compliance.

### **Third-Party Testing**

For example, small businesses may find it difficult to ensure they are in compliance with CPSIA's third-party testing requirements for children's products.

Certification of compliance for the CPSIA's children's products requirements, including, among others, lead content, phthalates and lead paint limits, must be based upon testing conducted by a third-party laboratory that the Consumer Product Safety Commission has approved. Manufacturers of children's products can no longer rely on internal testing procedures.

Third-party testing may increase related expenses. The fees may range from several hundred dollars to several thousand dollars per product,[1] and these charges do not vary by size of manufacturer. While large-volume manufacturers may be better able to absorb these third-party testing costs, these increased expenses may have a more pronounced effect on smaller businesses when their lower production volume creates less room to absorb additional expenses.

Further, the third-party testing requirements are not merely a one-time commitment. Section 102 of the CPSIA requires a manufacturer to have its children's products tested any time there is a material change in the product — a change that could affect a product's ability to conform to a product safety rule, including a product design change, a change in the manufacturing process, or a change in the component part supplier.[2] Thus, the cost of third-party testing can quickly add up.

Additionally, section 102 of the CPSIA requires manufacturers to periodically test their children's products. The CPSC has not yet promulgated a regulation explaining the requirements of periodic testing, also known as "continued compliance testing," but encourages testing at least once a year.[3]

However, the CPSC, recognizing the burden this could place on some businesses, determined that low-volume manufacturers do not have to retest until at least 10,000 units of the product have been produced since the last third-party testing of the product, unless the product has been materially changed.[4]

## **Tracking Labels**

The CPSIA's tracking label requirement also presents challenges to small businesses. Manufacturers must put permanent distinguishing marks on children's products and their packaging, to the extent practicable, if the product was made on or after Aug. 14, 2009.[5]

The labeling must contain the product location, production date, name of manufacturer or private labeler, and cohort information such as lot, batch and run numbers.[6]

While small businesses are not required to institute a lot, batch, run number system if they do not already use one, the CPSC has instructed manufacturers to find a way to ascertain detailed production information and to distinguish between products made at different locations, with different component parts, at different times, and any other material differences.[7] Small manufacturers without such an existing tracking system may incur

added costs revising their tracking and production processes.

While the CPSC has stayed enforcement of certain testing and certification requirements, no such stay of enforcement applies to tracking labels. Small businesses must take steps to ensure that they understand the CPSIA's tracking label requirement and to implement any changes necessary to keep their businesses in compliance with same. If not, they should anticipate hearing from their retailers and distributors, and perhaps the CPSC, on the issue.

## **In-House v. Third-Party Resources**

The CPSC has issued a great deal of guidance and regulations regarding the CPSIA since its enactment, and we expect the CPSC to promulgate much more rulemaking in the future. Smaller companies may often lack the internal resources needed to get a handle on the nuances of the CPSIA, monitor CPSC rulemaking, and advise how the CPSIA applies to the company's products.

Accordingly, without assistance these entities may struggle to keep track of the influx of new requirements, and they may not readily identify the most efficient manner in which to ensure compliance with them. In these situations, an affected small business would be wise to consider proactively seeking advice from a third-party such as outside counsel regarding its compliance with CPSIA requirements.

Otherwise, such companies may not even be aware that these requirements could apply to their products until they receive a letter from their retailers or distributors advising that their products will not be sold until the retailer receives certification of compliance for CPSIA requirements.

In fact, some retailers are demanding certification before it is actually required, ignoring the stay of enforcement that was extended for certain testing and certification requirements. This pressures manufacturers into early compliance and accelerates the need for small businesses to make sure they understand what exactly is required of them.

Manufacturers want to be compliant and want to give their retailers what is necessary to sell their products. However, manufacturers need guidance specific to their products as to what the CPSIA requires and how to accomplish compliance in the most cost-effective manner to keep the cost of compliance from reaching far enough into profits to result in closing down the business.

The need for further guidance and clarification from the CPSC adds to the difficulty in understanding what steps are required for compliance. However, the CPSC chair has indicated that confusion or ignorance of the law, even by small businesses, does not excuse companies from complying:

"CPSC's new authority to seek higher civil penalties does not mean we will ignore serious violations by small businesses. We will continue to take enforcement action against any business, large or small, that violates the Commission's product safety laws and regulations." [8]

## **Conclusion**

Understanding and applying the CPSIA's requirements may present significant burdens for small businesses in the form of both logistical and financial challenges.

Small businesses would be prudent to take a proactive approach to addressing CPSIA compliance, whether by devoting an in-house team to understanding CPSIA compliance or by hiring an outside resource to evaluate their product line and advise what the company should do to achieve the most cost-effective CPSIA compliance possible.

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*The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*

[1] Karen Shichman Crawford and Heather Guerena, "Not-So-Smooth Sailing Under CPSIA" Law360, March 27, 2009.

[2] CPSC Guidance Document: Testing and Certification Requirements under the Consumer Product Safety Improvement Act of 2008. [www.cpsc.gov/library/foia/foia10/brief/102testing.pdf](http://www.cpsc.gov/library/foia/foia10/brief/102testing.pdf).

[3] Id.

[4] Id.

[5] 15 U.S.C. § 2063(a)(5); CPSC Statement of Policy: Interpretation and Enforcement of

Section 103(a) of the Consumer Product Safety Improvement Act.  
[www.cpsc.gov/about/cpsia/sect103policy.pdf](http://www.cpsc.gov/about/cpsia/sect103policy.pdf).

[6] 15 U.S.C. § 2063(a)(5).

[7] Id.

[8] CPSC Chairman Inez Tenenbaum, News Release, U.S. Consumer Product Safety Commission, TGH International Trading to Pay \$31,500 for Violating Federal Safety Law (Aug. 17, 2009), [www.cpsc.gov/cpsc/pub/prerel/prhtml09/09307.html](http://www.cpsc.gov/cpsc/pub/prerel/prhtml09/09307.html).