

Legal Updates & News

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Enhanced Recall Regulations Proposed Under the Consumer Product Safety Improvement Act of 2008

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Introduction

The Consumer Product Safety Improvement Act of 2008 (the “Act”), which became law on August 14, 2008, imposes a number of new requirements on product manufacturers, distributors, and retailers. The focus of this client alert is the draft regulations proposed by the Consumer Product Safety Commission (“CPSC”) on March 20, 2009 that include guidelines and requirements for product recall notices. (For additional general information on the Act, please see earlier [Product Liability updates](#).)

The proposed regulations would apply to manufacturers (including importers), retailers, and distributors of all consumer products and not just “children’s products” otherwise regulated under the Act. They represent a substantial enhancement of past recall-related procedures and likely will impose significantly greater burdens on those who are required to carry out mandatory consumer product recalls in the future. The new requirements will also serve as guidelines the CPSC will use for negotiating the terms of future voluntary product recalls.

The CPSC will be accepting public comments on these regulations until April 20, 2009, after which they are likely to be quickly finalized, published in the Federal Register, and put into effect.

Proposed Content of Recall Notices

Pursuant to the new draft regulations, the following would be required to be included in a recall notice:

- a description of the product, including model number or stock keeping unit (“SKU”); names by which the product is commonly known; a photograph of the product; and any other identifying information, such as color, identifying tags, or labels;

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- a clear and concise statement of the action being taken with respect to the product;
- the number of units of the product covered by the recall;
- a description of the substantial product hazard that clearly enables consumers to identify the risks of potential injury or death associated with the product, including the problem or hazard/risk that lead to the recall;
- identification of the manufacturers and significant retailers of the product;
- the approximate price of the product or a price range;
- the dates between which the product was manufactured and sold; and
- the number and description of any injuries or deaths associated with the product, including the ages of those killed or injured and the dates on which the Commission received such information.

In addition to the above, under the proposed regulations the word “recall” would also need to be included in the recall notice to help draw consumer and media attention to the action being taken.

Proposed Distribution of Future Recall Notices

The proposed regulations also suggest that direct-recall notices will need to be issued to identified consumers “where possible.” In addition to the provision to consumers of the more robust information delineated above, this would represent a fairly significant departure from the past where broad, general distributions of recall notices to consumers at large through press releases and website postings have been the predominant practice absent class action settlements requiring enhanced distribution of notices.

Conclusion

Some of the changes being made to the Consumer Product Safety Act will affect all businesses involved in the distribution of consumer products, not just those who manufacture, distribute, or sell so-called “children’s products.” The Act’s expanded recall notice and dissemination requirements fall into this category, and the CPSC’s proposal implementing these requirements portends some substantial and potentially burdensome changes in both the content and distribution of recall notices in the future.

Coupled with its implementation of the more stringent requirements contained in the Act, the increased budget for the CPSC and changes to its leadership under the Obama Administration will likely result in increased enforcement of consumer product safety requirements, including recalls. Companies also face significantly higher penalties (up to \$100,000 for an individual violation, and \$15 million aggregate) for failure to comply.

Morrison & Foerster LLP has closely followed the Consumer Product Safety Improvement Act as it evolved in the Congress and ultimately was signed into law in 2008. We represent a variety of companies and trade associations with interests in this area and assist them with legislative, regulatory, and litigation matters.

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