

[Alerts and Updates]

Split Vote by CPSC Signals That Tracking Labels Must Be Placed on Children's Products by August 14, 2009

May 27, 2009

A split vote by the U.S. Consumer Product Safety Commission ("CPSC") regarding new product labeling requirements is likely to offer little relief to a consumer product industry trying to comply with new safety standards, and signals that permanent tracking labels must be placed on children's products as of August 14, 2009.

In August 2008, Congress enacted the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), which sets forth numerous new product safety requirements, including a tracking label requirement for children's products (*i.e.*, consumer products that are intended primarily for children 12 years of age and under). Under Section 103 of the CPSIA, "to the extent practicable," children's products must have "permanent" labels on such products and their packaging as of August 14, 2009. The label must include certain information that would make it easy to identify the product in a safety recall. The label must enable a manufacturer to "ascertain the location and date of production of the product, cohort information (including the batch, run number, or other identifying characteristic)" and other identifying information deemed pertinent by the manufacturer. The label must also enable the ultimate purchaser to "ascertain the manufacturer or private label, location and date of production of the product, and cohort information (including the batch, run number, or other identifying characteristic)."

The CPSC has requested public comments regarding the new labeling requirements but has not issued any regulations or comprehensive guidance. The CPSC has, however, clarified that tracking labels are required only on products manufactured on or after August 14, 2009, and also that hangtags and adhesive labels are not acceptable. The CPSC has also indicated that these labels are required for children's products manufactured both domestically and abroad. Many questions remain unanswered, including what items may not be practicably labeled because of their size or other characteristics (which would exempt such items from this requirement) and guidance on the term "permanent" label, as some labels may fade or degrade over time, and some products have relatively short useful lives. The CPSC also has not responded to inquiries as to whether certain of the more-lengthy required information could be set forth on a website (as opposed to on the label) that would be accessible via a web address placed on a label.

Due to the limited guidance from the CPSC, and the shortage of lead time to bring products into compliance by August 14, 2009, the National Association of Manufacturers petitioned the CPSC for a one-year stay of enforcement of the tracking label requirement. Earlier this year, the CPSC issued a similar enforcement stay as to testing and certification for the new lead content and phthalate requirements of the CPSIA.

On May 13, 2009, the two acting CPSC commissioners, Nancy Nord (Republican appointee) and Thomas Moore (Democratic appointee) issued split votes on this stay request, with Commissioner Nord voting in favor of the stay request and Commissioner Moore voting against the stay request. Because of the split vote, the stay request has essentially been denied. Thus, anyone involved with the sale, importation or manufacture of children's products should ensure that their products come into compliance by August 14, 2009.

The split vote also illustrates a problem that has existed at the CPSC for the last several years. With only two out of an authorized five commissioners sitting, the CPSC has, at times, been unable to take certain actions. President Obama, who has pledged to be a

strong advocate for consumer safety, nominated two Democrats as additional commissioners in early May 2009. It is anticipated that President Obama will nominate a fifth Republican commissioner later this summer. Once the confirmation process is complete, the CPSC should return to a full complement of five commissioners focused on consumer safety.

About Duane Morris

The Duane Morris Product Safety, Compliance, and Recalls Group is actively advising clients regarding the Consumer Product Safety Improvement Act of 2008 and its impact upon their operations, and is working with them to develop compliance tools and programs. The firm's compliance advice is unique to each client's circumstances and products, and has covered a wide range of topics, including:

- Identifying CPSC regulations that apply to the company's products, and determining when and how each regulation must be implemented;
- Developing systems of documenting compliance with CPSC regulations, including testing and inspections (internal and third party) and conformity certificates;
- Import, export and customs issues;
- Communicating with customers, as well as with subcontractors and suppliers, regarding the parties' expectations on product safety and CPSC compliance issues, and negotiating terms for warranties, indemnities, insurance and other compliance matters;
- Training employees and industry groups regarding product safety and risk management issues;
- Communicating with CPSC management and compliance staff regarding proposed regulations and to obtain rulings and interpretations on a variety of compliance issues;
- Advising companies regarding possible reporting obligations to the CPSC under Sections 15 and 37 of the Consumer Product Safety Act and preparing and presenting product hazard reports as appropriate; and
- Advising companies regarding possible obligations to recall products, negotiating the terms of recalls with CPSC compliance staff, advising clients regarding logistics, public relations and other issues that arise in product recalls, and assisting clients with international compliance issues when their products are distributed in multiple countries.

For Further Information

If you have questions about this Alert or would like more information, please contact [Robert B. Hopkins](#), [Paul S. Rosenlund](#), [Andrew E. Mishkin](#), [Sharon L. Caffrey](#), [Karen Shichman Crawford](#), any other [member](#) of the [Products Liability and Toxic Torts Practice Group](#) or the attorney in the firm with whom you are regularly in contact.