

Legal Updates & News

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CPSC Declines to Stay Tracking Label Requirements

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by [Linda L. Lane](#), [Robert L. Falk](#)

Introduction

The federal Consumer Product Safety Improvement Act (“CPSIA”), which became law last year, imposes a number of new requirements on consumer product manufacturers, distributors, and retailers. The focus of this client alert is on the CPSIA’s provisions regarding required tracking labels for all children’s products, effective August 14, 2009, and the Consumer Product Safety Commission’s (“CPSC”) recent consideration, and at least temporary rejection, of a request for emergency one-year stay of enforcement of those requirements. (For additional general information on the CPSIA, please see earlier [Product Liability updates](#).)

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Section 103 of the CPSIA

Section 103 of the CPSIA, entitled “Tracking Labels for Children’s Products,” goes into effect on August 14, 2009, and would apply to all “Children’s Products” manufactured after that date. Under the CPSIA, a “Children’s Product” is a consumer product primarily designed or intended for use by children ages 12 and under. Section 103 requires, “to the extent practicable,” the placement of permanent, distinguishing marks on Children’s Products and packaging to enable manufacturers and consumers to ascertain the location, date of production, and other identifying information regarding the source of the product in the event of a recall.

Request for Comments

In January 2009, CPSC staff was directed to develop tracking label guidance for the CPSC’s consideration by June 2009. In this regard, on February 26, 2009, the CPSC requested public comment regarding implementation of the CPSIA’s tracking label program. The comment period ended April 27, 2009. The CPSC specifically requested comments as to the following:

- The conditions and circumstances that should be considered in determining whether it is

- “practicable” to have tracking labels on Children’s Products.
- Whether labeling requirements should be standardized as to nomenclature, appearance and arrangement of information, and what effect standardization would have.
 - Whether tracking labels should be in English, in other languages, or by alpha numeric code.
 - How privately labeled products should communicate information regarding the manufacturer.

Over 130 comments were received and are now being analyzed by the CPSC. Moreover, a public forum was held on May 12, 2009, to gain additional information.

Request for Emergency Stay of Section 103

On May 13, 2009, the CPSC issued its response to the National Association of Manufacturers’ request for emergency stay of the Section 103 labeling requirements. Acting Chair Nancy Nord voted to grant the request for a stay, while Commissioner Thomas Moore voted to deny the request. Because a unanimous decision was required to grant the stay, it was effectively denied.

In her statement in favor of a one-year stay of enforcement, Chairman Nord noted that one of the most important responsibilities of the CPSC is its ability to recall products found to be harmful to consumers and that tracking labels could facilitate these efforts. She recognized, however, that compliance with the provisions would cause significant disruptions and adverse impacts on manufacturers, especially small companies. She suggested that high-value, long-lasting products with a history of recall issues should be targeted first and that the CPSC could then determine how tracking labels should apply to additional products.

In his statement against the stay, Commissioner Moore stated that he expects the tracking label provisions to evolve over time as the CPSC learns more about manufacturers’ attempts to comply with these provisions of the statute. He suggested that as long as manufacturers label their products with the information required by the statute and do not take a “cavalier” approach to the “to the extent practicable” language, they will not be found to violate the law. Perhaps significantly, he stated that he could not presently vote to grant the request for a stay of enforcement of the *entire* Section 103. He recognized that in the past [the CPSC had stayed enforcement of the CPSIA for certain products](#), but that it has not granted such a blanket stay of enforcement for every affected product.

Conclusion

The vague requirements of Section 103 of the CPSIA have left a wide wake of confusion for manufacturers of Children’s Products, leading such manufacturers to seek guidance on, and ultimately a stay of, the enforcement of the tracking label provisions. The CPSC is expected to offer guidance to the public as to compliance with the tracking labeling requirements in June 2009, but this is merely two months before the requirements go into effect, leaving some to wonder whether there will be enough time for manufacturers to act in advance of the August 14, 2009 statutory deadline for the required tracking labels.

On May 5, 2009, President Obama named a new Chair of the CPSC (Inez Moore Tenenbaum), added a fourth Commissioner (Robert Adler), and promised a fifth Commissioner. From their backgrounds, it seems unlikely that these appointees would be willing to vote in favor of the requested stay. Moreover, the President requested \$107 million for the CPSC’s budget, a figure that is a 71% increase over 2007 funding. Many feel that these changes will likely result in increased enforcement of these and other safety requirements set forth in the CPSIA.

Morrison & Foerster LLP has closely followed the Consumer Product Safety Improvement Act as it evolved in Congress and ultimately was signed into law in 2008. We have since advised a variety of clients on its implementation and helped them keep abreast of developments emanating from the CPSC. In addition, we regularly represent children’s and consumer product companies and trade associations and assist them with a variety of legislative, regulatory, administrative enforcement, and litigation matters. For further information or assistance, please contact [Robert Falk](#) or [Linda Lane](#).

