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CPSC Proposes Revisions To Reporting Regulation

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On May 26, 2006, the U.S. Consumer Product Safety Commission (CPSC) published for comment in the Federal Register proposed revisions to CPSC's interpretive rules to attempt to clarify when companies must notify the agency of a potential safety hazard or conduct a recall.

Section 15(b) of the Consumer Product Safety Act (CPSA) requires manufacturers, importers, distributors and retailers to notify CPSC immediately upon receiving information that "reasonably supports the conclusion" that a product (a) fails to comply with an applicable consumer product rule or with a voluntary safety standard upon which the CPSC has relied, (b) "contains a defect which could create a substantial product hazard," or (c) "creates an unreasonable risk of serious injury or death." Further, CPSC may seek to require a company to recall products deemed to present a "substantial product hazard." The statutory standard is highly subjective, and the CPSC staff has been increasingly aggressive in second-guessing companies' reporting decisions and in pursuing stiff civil penalties for alleged late reporting.

The maximum civil penalty for a related series of violations is currently $1.825 million, and CPSC has had at least 16 civil penalty settlements of $500,000 or more in the past five years to resolve late reporting allegations.

The proposal would make the following three changes:

First, the proposed rule would add four factors to the current non-exhaustive list of criteria CPSC considers in deciding whether a product "defect" exists.[1] The additional factors are:

- "the obviousness of such risk";
- "the adequacy of warnings and instructions to mitigate such risk";

[1] The current regulation provides a non-exhaustive list of factors used to determine whether a "defect" exists, including the utility of the product involved; the nature of the risk and injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the Commission's own experience and expertise; the case law interpreting federal and state public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination. 16 C.F.R. § 1115.4.

- "the role of consumer misuse of the product"; and
- "the foreseeability of such misuse."

Second, the proposed rule provides that, in making a "substantial product hazard" assessment, CPSC "recognizes that the risk of injury from a product may decline over time as the number of products being used by consumers decreases." This reduced risk could, in turn, weigh against the need for a recall.

Third, the proposed rule makes explicit that CPSC considers compliance or non-compliance with mandatory or voluntary standards in determining the need for a recall. However, the proposed rule also states that even compliance with a mandatory standard "may not, of itself, relieve a firm from the need to report to the Commission."

Despite the intent of the proposed rule to further advise industry on "how to comply with the requirements of section 15(b)," CPSC's proposal seems to provide little relief from the subjectivity inherent in the reporting requirements. Companies already argue the "new" factors to the CPSC staff, and the staff already considers these factors when the staff deems it appropriate to do so. Thus, the issue is not which factors *may* be considered, but rather *when* particular factors are relevant and how much weight they should be given. Yet, these decisions typically require the exercise of judgment and are not readily susceptible to being resolved through a regulation. Thus, it is unlikely that the proposed amendments would result in any significant change in the staff's approach to section 15(b) reporting or recall issues, as the additions do not limit CPSC's enforcement discretion in any way.

The proposal also could cause confusion. For instance, the rule states that CPSC would consider "the adequacy of warnings and instructions to mitigate such risk" as a factor in determining whether a product defect exists. Although product liability law varies from state to state, a product warning may not protect a company against a claim that a product contains a design defect.[2] Similarly, the CPSC staff may deem warnings inadequate to cure a design defect. Yet, based on the proposed rule, companies might mistakenly conclude that the staff will deem reporting unnecessary simply because product literature warns of a potential hazard.

In addition, although the draft Federal Register notice states that the CPSC's rule "is not intended to reduce the volume of reporting to the Office of Compliance," the amendments could have exactly that effect. In assessing whether a reportable defect exists, for example, a firm might rely too heavily on the existence of a product warning, potential consumer misuse or compliance with a voluntary safety standard. As noted, however, the addition of these factors likely will not limit the CPSC staff's ability to claim that a company violated the reporting requirements.

Although the proposed regulation will not resolve ambiguities in the statutory language of section 15(b), CPSC's attempt to provide industry with additional guidance in this area is commendable. In addition, CPSC's statement that it may adopt a new interpretive regulation on civil penalties is a promising development. Currently, there is little guidance on how the staff decides when to seek civil penalties or the amount of such penalties. The statutory criteria on civil penalty amounts direct CPSC to consider the nature of the defect, the severity of the risk, the presence or absence of injuries, the size of the company and the number of products. But these factors are vague, and additional guidance is needed.

Comments to CPSC's proposed revisions to its interpretative rules are due by June 26, 2006.

For further information about this proposed regulation, or to discuss its implications, please contact:

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[2] *See, e.g.*, Restatement (Third) of Torts § 2, comment and Reporter's Note l.