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THE "LONG ARM" OF TSCA SECTION 8

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Throughout 2006 and 2007, numerous retailers, in cooperation with the Consumer Product Safety Commission (CPSC), have announced voluntary recalls of children's toys containing lead paint. In April 2006, the Sierra Club petitioned the U.S. Environmental Protection Agency (EPA) and CPSC to take certain actions regarding lead in children's products. Upon EPA's denial of the Sierra Club's petition under Section 21 of the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, (TSCA), the Sierra Club brought a lawsuit challenging EPA's determination and seeking to compel EPA, among other things, to require the submission under Section 8(d) of TSCA of health and safety data for lead and lead salts and to issue TSCA § 6(b) quality control orders regarding the production of toy jewelry and the need to minimize the lead content. In April 2007, EPA and the Sierra Club reached a settlement of that lawsuit. *See* U.S. EPA, "Lead in Toy Jewelry," at: http://www.epa.gov/oppt/lead pubs/ toyjewelry.htm. In contrast to EPA's denial of the petition, CPSC commenced rulemaking and issued an Advance Notice of Proposed Rulemaking to ban children's jewelry containing more than 0.06 percent lead. 72 Fed. Reg. 920 (Jan. 9, 2007).

Although lead paint in consumer products has received intense scrutiny of late, companies participating in voluntary recalls have focused understandably on compliance with the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, (CPSA) and the CPSC's "lead standard." In an unusual development, the Sierra Club, however, now seeks to commence litigation against those companies on the basis of their alleged failure to comply not with the CPSA, but with TSCA § 8(e). The Sierra Club's actions highlight a new area of potential jeopardy and litigation for such companies.

TSCA Section 8(e). Section 8(e) of TSCA requires

> [a]ny person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of such information unless such person has actual knowledge that *the Administrator has been adequately informed of such information*.

(emphasis added). It is merely arguable, at best, whether TSCA § 8(e) even applies to "articles" such as toys. (The authors of this article are unaware of any EPA enforcement action against the makers of retail products for their alleged failure to meet the requirements of TSCA § 8(e).) EPA issued its first TSCA § 8(e) policy statement or guidance document in 1978. *See* 43 Fed. Reg. 11,110 (Mar.16, 1978). In 2003, EPA revised its TSCA § 8(e) guidance. *See* 68 Fed. Reg. 33,129 (June 3, 2003). The guidance makes clear that information which already is known to EPA need not be reported to the agency. However, in its 2003 Comment and Response Document for EPA's Revised Policy Statement for Section 8(e) of TSCA, the agency disagreed that "it should consider itself 'adequately informed' of all information in possession of Federal agencies." The final guidance stated specifically that "product contamination information that could be required to be submitted to [CPSC] under their regulations" is not exempt from reporting under TSCA § 8(e) because "CPSC has a more narrow purview (i.e., consumer product safety) and could not adequately assess or address chemical contamination from a product that may also have industrial/commercial applications or may present potential environmental risks during its manufacture and processing." 68 Fed. Reg. 33129, 33134. Accordingly, "reporting to EPA, as well as CPSC would allow EPA, consistent with the intent of TSCA, to address all the potential risks presented, where appropriate." *Id.* "Consequently, EPA [] concluded, that section 8(e) reporting will continue to be required

for chemical product contamination, because EPA, uniquely among Federal agencies, has the authority to address all potential health and environmental risk aspects of a chemical's life cycle." *Id.* at 33134-45.

EPA Notifications to Companies. As part of its settlement of the Sierra Club litigation, on April 30, 2007, EPA sent letters to 120 companies that "EPA ha[d] identified as having participated in a recall related to lead in a consumer product or [the] settlement" with Sierra Club to "ensure that [the company was] aware of the reporting requirements under [TSCA] section 8(e) …." *See* U.S. EPA, "Lead in Toy Jewelry," at: http://www.epa.gov/oppt/lead/pubs/toyjewelry.htm and EPA's sample letter available at http://www.epa.gov/oppt/lead/pubs/jewelryletter.pdf. EPA's letter included the following guidance from its recently edited and updated September 2006 TSCA § 8(e) "Question and Answer" guidance document:

> **Q.25.** Are studies or reports showing absorption from manufactured products or articles of a chemical known to be capable of causing serious health effects potentially reportable under TSCA section 8(e)? For example, are studies or reports showing absorption of lead following oral or dermal exposure to a particular type of article for which it was not previously known that such absorption could occur potentially reportable under TSCA 8(e)?
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> **A.25.** Yes—The discovery of previously unknown and significant human exposure to a chemical, when combined with knowledge that the subject chemical is recognized or suspected as being capable of causing serious adverse health effects (e.g., cancer, birth defects, neurotoxicity), provides a sufficient basis to require the reporting of the new-found exposure data to EPA under section 8(e).
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> **Q.26.** Is the discovery of a hazardous or toxic constituent in a product reportable under TSCA section 8(e)?
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> **A.26.** Reporting of the presence of a hazardous or toxic constituent that was previously unknown to be contained in a product, including manufactured articles, should occur under TSCA section 8(e) where data shows that widespread or significant exposure to the toxic component has occurred or is substantially likely to occur, and such exposure presents a substantial risk of injury to health or the environment. Persons subject to TSCA 8(e) reporting should consider the toxicity of the constituent, the constituent's concentration in the product, and whether significant exposure to the toxic component has occurred or is likely to occur at any stage in the product's lifecycle from production through disposal. In cases of extremely toxic chemical substances in products in commerce, exposure may generally be presumed.

Id. The agency's letter then closed by indicating that it hoped the "letter will assist you in assessing your company's potential obligations under TSCA." *Id.*

Sierra Club's Notice of Intent to Sue. On the heels of EPA's notification, Sierra Club recently sent Notices of Intent to Sue to ten of the 120 companies that received EPA's letter for their alleged failure to comply with TSCA § 8(e) indicating that it is "prepared to file the lawsuit after 60 days if [the company] does not document that it has fully complied with its responsibilities under TSCA." *See* Sierra Club's July 25, 2007 letters at http://www.sierraclub.org/environmentallaw/lawsuits/0322.asp. Citing the same Question & Answer document as EPA's earlier notification letters to the companies, the Sierra Club stated its belief that the companies' "product[s] present[] a substantial risk of injury to the health of children in light of the dangers that prompted CPSC to act and due to the widespread distribution in commerce." *Id.* According to the Sierra Club, "[b]ecause [the companies] requested the voluntary recall, [they] had knowledge of the danger posed by the product to children. And since [the companies] manufactured, imported, processed, or distributed this product in commerce, [the companies were] required to immediately inform the Administrator of the U.S. EPA as soon as [they] obtained information reasonably showing that the products presented a substantial risk of injury to health or the environment." *Id.* Sierra Club went on to assert that "[n]otifying

CPSC does not relieve your company of its responsibilities to notify EPA. CPSC's press release is not sufficient to notify EPA." *Id.*

The letters from EPA and the Sierra Club represent a novel situation and the first instance in which EPA and a non-governmental organization (NGO) have rresponded with retailers concerning the potential obligations of retailers pursuant to TSCA. Moreover, the letters put retailers in a uniquely awkward position with respect to not only their regulatory compliance with TSCA (no doubt a statute about which most retailers have not previously had a second thought) but also in their relationships with suppliers and downstream customers and product users. This is complicated by concerns that must be addressed by any recipient of such a letter: specifically, how do I defend against a threatened TSCA § 20 law suit? As of this writing, the Sierra Club has not yet filed suit against companies for their alleged failure to comply with TSCA § 8(e).

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