

Indiana Manufacturers Association's

Executive Memo



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The Consumer Product Safety Improvement Act of 2008 - Reaction or Overreaction?

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"To every action, there is an equal and opposite reaction." Sir Isaac Newton uttered this famous axiom over three centuries ago, articulating his Third Law of Motion. And, yet, Congress at times proves Newton's

theory untrue, as the recent implementation of the Consumer Product Safety Improvement Act of 2008 (the act) reveals. Only this time, the reaction (i.e., the act) comes at the expense of U.S. manufacturers and importers and their retailing and distributing partners, and Congress has done so at one of the most challenging economic times in recent history.

Congress reacted to news reports on the importation of lead-containing children's toys by passing the act. In short order, the act implements sweeping changes for U.S. manufacturers and importers of consumer goods and children's products, many of which have corresponding implications for retailers and distributors. In its zest to find a solution to the primary problem -- the importation and sale of goods failing to meet existing U.S. consumer products laws -- the act creates a bureaucratic web of regulation that the Consumer Product Safety Commission (the commission) has neither the resources nor manpower to administer. In the interim, the requirements for U.S. manufacturers and importers (not to mention their retailing and distributing partners) are costly and contain numerous

potential pitfalls, including those potentially resulting in the delay or destruction of shipments, among other penalties.

Here are some of the requirements immediately relevant to Indiana manufacturers and importers of consumer goods and children's products:

Certification Requirements

The act requires manufacturers and importers (including distributors and retailers who import) to provide a certificate of compliance for each consumer product manufactured after November 12, 2008, that is subject to a product safety regulation. Certificates must verify that each product is in compliance with all applicable safety standards and must do so based upon a "reasonable testing program." This includes compliance with the Consumer Products Safety Act, Federal Hazardous Substances Act, Flammable Fabrics Act, Poison Prevention Packaging Act, Refrigerator Safety Act, and other regulations enforced by the CPSC. So long as companies follow the specifications of the CPSC, they can provide electronic certificates as an alternative to paper certificates.

While the CPSC "expects every company to make best efforts to comply promptly with the new general certificate requirements," the CPSC recently indicated that there would be a "period of adjustment" during which it would "concentrate initially more on the substantive requirements underlying the certificate than on the certificate or the form of the certificate itself." The CPSC has not yet defined the length of this period of adjustment. 16 C.F.R. §1110.

Children's Products

Children's products (loosely defined as products intended for use "primarily" by children under age 12) receive heightened scrutiny under the act. One of the act's most significant changes is the requirement that all children's products and components be tested by accredited third-party laboratories to confirm compliance with safety standards. The first requirement is aimed at lead paint testing and impacts all children's products manufactured after December 22, 2008. The CPSC also has issued or will soon issue accreditation requirements for testing full size cribs, non-full size cribs, pacifiers, children's jewelry, walkers and other products subject to children's safety rules.

Though an important change, third-party testing and certification requirements are not the only developments in children's product safety in 2008. The act also includes new limits on lead and phthalates, as well as advertising and product tracking requirements that will be phased in during 2009.

Other Notable Provisions

- The act expressly impacts a variety of specific products, such as certain chemicals, ATVs, pool drains,

and portable gas canisters.

- The act provides whistleblower protections for any employee who provides information regarding product safety violations to an employer or the government, or refuses to participate in activities that the employee reasonably believes violates the law or poses a "substantial and specific danger to the public health and safety."
- Penalties for violating safety requirements have significantly increased under the act. The cap on civil penalties increased from \$5,000 to \$100,000 per individual violation, and from \$1.8 million to \$15 million for a series of related violations. Criminal penalties also were increased.

However, perhaps the most significant change of all is yet to come. The act requires the commission to create a national database of consumer product complaints to be made available via the Internet, while simultaneously decreasing the notice period that companies have to object to the release of information by the commission. As a practical matter, manufacturers and importers will likely need to monitor the database, investigate complaints (even those not reported directly to the company), respond via the database to false or misleading complaints, and comply with legal consumer reporting requirements triggered when a complaint is added to the database. For many Indiana manufacturers and importers, monitoring the database alone will stress resources. And, while the commission lacks the necessary resources to make the database a reality in 2008, the next Congressional session could bring sufficient allocations to change that fact.

The act's short-term mandates are difficult and costly for many Indiana manufacturers and importers. Moreover, the act's long-term mandates may fundamentally change the way Indiana manufacturers and importers do business. Indiana manufacturers, importers, retailers and distributors should seek careful counsel on whether the act applies to them and the specific requirements binding on their businesses. What's more, the effect of the act is ever-evolving, as each week the commission issues new rules and guidance, and communication with legal professionals carefully monitoring the developments is critical.

Undoubtedly, the requirements of the act will tax the resources of Indiana businesses in 2009 and beyond, at a time when we can least afford it. While no one (including Indiana's manufacturers and importers) questions the value of preserving the safety of children from harmful contaminants like lead, it's hard to believe that the general conformity certification and other general consumer product requirements effectively achieve that goal. Sometimes, a reaction creates more problems than it solves.
