The Consumer Product Safety Improvement Act of 2008 is a major overhaul of consumer product regulation and enforcement. This Analysis and Perspective article by attorney Kerrie L. Campbell provides an overview of this complex law and the “new” Consumer Product Safety Commission, including practical suggestions to companies and an examination of agency activity expected in the near future. The article also reviews significant new regulatory requirements, and highlights expanded reporting requirements and enforcement tools.

A series of Analysis and Perspective articles to be published in forthcoming issues of Product Safety & Liability Reporter will examine the new law from different perspectives, and will analyze specific provisions that are particularly important to the product safety and liability community.

How Companies Can Navigate the Sweeping New Compliance and Enforcement Rules in the Consumer Product Safety Improvement Act of 2008
BY KERRIE L. CAMPBELL

Passed by an overwhelming majority in the House and Senate and signed into law by President George W. Bush, the Consumer Product Safety Improvement Act of 2008 (H.R. 4040) (Improvement Act) is the most comprehensive reform of product safety regulations in CPSC history. Much more than a law banning lead in toys—a predominant news headline—the Improvement Act creates many new regulatory challenges for companies subject to CPSC’s jurisdiction, significantly strengthens the commission’s resources and structure (almost doubling the agency’s budget over time), substantially increases civil penalties from the current maximum of $1.85 million to $15 million, and creates powerful new enforcement tools and protections for consumers.

Not so well-known is that the Improvement Act directs the commission to complete a lengthy list of unfunded and complex safety mandates (including about 40 new rulemakings) on an ambitious schedule that would give any adequately staffed and funded government agency pause. One voice in a loud chorus of praise for the historic legislation, Acting CPSC Chairman Nancy Nord, has noted that the law “contains many new missions and mandates for the agency—responsibilities that are not funded by the bill. . . . [T]he next step for Congress will be to pass an appropriations bill that will fund these new requirements.”将会 the agency be able to complete its formidable “to do” list within the rigorous time limits set by Congress? Undaunted, Nord insists, “We are going to meet the deadlines.”

The new law was passed, in part, in response to public alarm over the recent spate of toy recalls involving millions of products and to criticism that the CPSC was not adequately equipped to carry out its mission of ensuring product safety. Much will be said and written about the new law. Many major changes to the regulatory landscape will be immediate, while others will evolve over time, as complex issues of funding, logistics, and implementation are worked through by the agency and Congress. Companies should plan for approaching effective dates, evaluate overall compliance programs, and closely monitor publications and requests for comments posted on CPSC’s Web site (www.cpsc.gov). Stakeholders are encouraged to ask questions and submit comments to the CPSC on practical issues of concern as the agency proceeds to accomplish the tasks mandated by the new law.

I. Companies Should Plan for Key Effective Dates for New Regulatory Requirements

Peppered with more deadlines and effective dates than you can keep track of without a painstakingly developed chart, the Improvement Act is a complicated and difficult read. The most important date to know to plan for new rules and requirements is August 14, 2008, “the date of enactment,” from which all of the effective dates and deadlines in the Improvement Act are calculated.

In circumstances where a notice of a new rule, rulemaking or standard will be published in the Federal Register, the CPSC staff has noted that “effective” dates will be calculated based on the date of the relevant Federal Register notice.

A. Significant New Rules and Requirements During the First 180 Days From Enactment

Major regulatory changes and requirements go into effect at various times over the first six months from the August 14, 2008, enactment date.

Stricter Mandatory Standards to Enhance the Safety of Children’s Products

In response to public alarm about the recent spate of toy product recalls, largely related to lead paint content, the Improvement Act contains a number of provisions limiting and banning lead content over time, banning phthalates and requiring their evaluation over time, and requiring certification, third-party testing, labeling, and product registration, all to ensure the safety of children’s products.

1. New Definitions

Companies need to understand the new definitions for children’s products and toys. The term “children’s

1 The House adopted the conference report on the bill (H.R. 4040) by a vote of 424–1 July 30; the Senate cleared the measure by a vote of 89–3 the next day. (House vote 543, p. 2148; Senate vote 193, p. 2145).


3 Industry, government and consumer groups have generally publicly praised the legislation. For example, Toy Industry Association President Carter Keithley described the new law as “a historic change for the industry . . . [that] adds a remarkable level of additional toy safety assurance.” Annys Shin, “Senate Sends Sweeping Product-Safety Bill On to Bush”, Wash. Post, Aug. 1, 2008, at A14. Rachel Weintraub, director of product safety and senior counsel with Consumer Federation of America, called the reform law “much needed, long overdue and necessary to ensure that CPSC can successfully ensure the safety of consumer products.” Press Release, Consumer Federation of America, “Consumer Groups Applaud Senate Passage of Strong Product Safety Bill” (July 31, 2008). Acting CPSC Chairman Nancy Nord “applaud[s] the fact that Congress has given the Consumer Product Safety Commission many of the additional authorities and enforcement tools [she] requested last year.” CPSC Press Release #08-349 (July 31, 2008) and; Commissioner Thomas Moore is “deeply gratified” and thankful that the law will “make [a] new beginning possible for our agency.” The Honorable Thomas Hill Moore, Statement on the Historic Passage of the Consumer Product Safety Improvement Act of 2008 (July 31, 2008).

Kerrie L. Campbell is on the Advisory Board of Product Safety & Liability Reporter. She is a partner in the law firm of Manatt, Phelps & Phillips LLC and chair of the Consumer Product Safety Practice Group. Ms. Campbell has represented companies on all aspects of CPSC compliance and enforcement for two decades. Based in Washington, D.C., she can be reached at 202-585-6526 or kcampbell@manatt.com.

4 See, CPSC Press Release #08-349, supra note 3.


6 In her comments at the September 4, 2008, CPSC Public Meeting in Washington, D.C., CPSC General Counsel Cheryl Falvey noted that effective dates, which depend on the CPSC’s issuance of a rulemaking or other requirements, will be calculated from the date of such notice in the Federal Register.
product” applies to a number of toy safety provisions, while the term “children’s toys” and “child-care article” appear to be specific to phthalate provisions in the Improvement Act.

- **A “children’s product” (Section 235)** is defined as “a consumer product designed or intended primarily for children 12 years or younger.” To determine whether a product fits the definition, several factors are considered, including:
  - age labeling on the product, if reasonable,
  - packaging and advertising (could undercut age labeling),
  - whether consumers commonly recognize the product as being intended for a child 12 years or younger, and
  - CPSC’s Age Determination Guidelines (September 2002) and any successor guidelines.
- **“Children’s toys” (Section 108)** are defined as products “designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.”
- **A “child care article” (Section 108)** is defined as “a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething.”

### 2. Ban on Lead in Children’s Products and Lower Lead Limit (Section 101)

By Feb. 10, 2009 (within 180 days of enactment of the legislation), a children’s product that contains lead exceeding the standard will be treated as a banned hazardous substance under the Federal Hazardous Substances Act (FHSA). All children’s products containing specified levels of total lead by weight in any component are banned under the new law. Permissible trace amounts of lead content will be decreased from the current level in three phases over four years:

- from 600 ppm by product part weight initially (Feb. 10, 2009),
- to 300 ppm by product part weight one year after enactment (Aug. 14, 2009), and
- to 100 ppm by product part weight three years after enactment (Aug. 14, 2011) or if found not feasible by the CPSC, the lowest feasible levels. Additionally, permissible lead levels in paint will be decreased from 600 ppm to 90 ppm within one year.

The law permits the CPSC to exempt products from the applicable lead limits if it determines, after notice and hearing, and based on the “best-available, objective, peer-reviewed, scientific evidence,” that the lead content will not result in lead absorption by humans or have an adverse effect on public health or safety. There is also a vague exception for component parts that are “inaccessible” through reasonable foreseeable use and abuse “as determined by CPSC.” There may be some concern (whether warranted or unwarranted) if it depends on the circumstances that the exception will undercut the rule. By August 2009, the CPSC is required to issue a rule on what product components, or classes of components, will be considered to be “inaccessible.” The CPSC staff has indicated that it may issue some guidance on this before the deadline for the rule.

There is also an exception of sorts for electronic devices. If the CPSC determines that it is not technologically feasible for certain electronic devices, including devices containing batteries, to comply with the mandated lead limits, it may require electronic devices to have a child-resistant cover or casing that prevents exposure to and accessibility of the parts of the product containing lead.

### 3. Ban on Phthalates in Toys and Child-Care Articles (Section 108)

Generally speaking, phthalates are chemicals used to soften plastics. Effective February 10, 2009 (180 days after enactment of the Improvement Act), the new law permanently bans the sale of children’s toys and child-care articles with concentrations of more than 0.1 percent of three phthalates:

- di-(2-ethylhexyl) phthalate (DEHP),
- dibutyl phthalate (DBP), and
- benzyl butyl phthalate (BBP).

The law also imposes an interim ban on the sale of children’s toys that can be placed in a child’s mouth and all child-care articles that contain more than 0.1 percent of three other phthalates:

- diisononyl phthalate (DINP),
- diisodecyl phthalate (DIDP), and
- di-n-octyl phthalate (DnOP).

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**BNA Conference on New Law Set for Oct. 30**

A BNA conference, “The New Consumer Product Safety Improvement Act of 2008: The New World of Regulation and Enforcement,” will be held Oct. 30 in Washington, D.C. The conference will highlight the law’s impact on manufacturers, importers, and retailers of consumer products. The faculty includes CPSC Acting Chair Nancy Nord and General Counsel Cheryl Falvey. Special discount for BNA subscribers. For more information and registration, visit legaldedge.bna.com, call (800) 952-2477, or e-mail scribari@bna.com.

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7 CPSIA § 235(e)(16).
8 CPSIA § 108(e).
9 CPSIA § 108(e).
10 Under Section 101, the CPSC is required to perform several tasks. First, it must conduct a periodic review—no less than every 5 years—to determine if it is technologically feasible to revise the downward limit established in the Improvement Act. Second, no less than one year after enactment of the Improvement Act, the agency is required to complete a study to evaluate the effectiveness, precision, and reliability of X-ray fluorescence technology and other alternative methods for measuring lead in paint or other surface coatings when used on children’s products or furniture.
11 CPSIA § 101(b)(1)–(2).
12 CPSIA § 101(b)(2)(B).
14 CPSIA § 101(b)(4).
15 CPSIA § 108(a).
16 CPSIA § 108(b)(1).
This ban is also effective February 10, 2009, and these phthalates will remain prohibited on an interim basis until a review by a Chronic Hazard Advisory Panel (CHAP). The CPSC must begin appointing the CHAP no sooner than February 2009 (180 days after enactment of the Improvement Act), after which time the CHAP will have 18 months to study the health effects of phthalates. After completion of its study, the CHAP will have another 180 days to report its findings to the CPSC. Within another 180 days after the CPSC receives the CHAP report, the CPSC, by rule, will determine whether to make the ban permanent. Thus, while the interim ban becomes effective within 180 days of enactment of the Improvement Act, the ultimate determination on whether the ban will stick or be lifted is a couple of years down the road.

4. Voluntary Toy Safety Standard Becomes Mandatory (Section 106)

Effective February 10, 2009 (180 days after enactment of the Improvement Act), ASTM F963-07 (comprehensive toy safety standard) becomes a mandatory consumer product safety standard under Section 9 of the Consumer Product Safety Act. The ASTM standard does not apply to sporting goods, camping gear, athletic equipment, musical instruments or furniture, but does apply to “toy counterparts” of such items. If ASTM F963-07 is revised, the revised standard will be considered a CPSC safety standard under Section 9 of the CPSA effective 180 days after the CPSC receives notice of the revision, unless the agency determines that the revision does not enhance product safety.

5. Mandatory Third-Party Certification for Children’s Products (Section 102)

Before getting to third-party certification, Section 102 of the Improvement Act expands the requirements for general self-certification (essentially a “supplier’s declaration of conformity”) for consumer products. Effective November 12, manufacturers, importers and private labelers (foreign and domestic) must certify that products comply with all standards, rules and bans across all Acts enforced by the CPSC. Certification must be based on reasonable testing. Companies should note that general conformity certification is not limited to children’s products. That requirement applies to all consumer products subject to a CPSC standard, rule or ban.

Additionally, Section 102 requires all manufacturers, importers and private labelers to conduct third-party testing to certify that children’s products comply with all standards, rules and bans across all Acts enforced by the CPSC. Testing must be done by an accredited independent conformity assessment body before importing the product for use or warehousing or distribution in commerce. Third-party testing and certification requirements will become effective 90 days after the CPSC has published its requirements for accreditation of product-specific conformity assessment bodies. The law also provides firewalls for labs owned or controlled by the manufacturer, as well as procedures for audit and decertification (based on a finding of undue influence).

The Improvement Act dictates a rolling timeline for the CPSC staff to publish certification requirements for particular product categories:

<table>
<thead>
<tr>
<th>Product</th>
<th>CPSC Notice Date</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lead Paint</td>
<td>September 2008</td>
<td>December 2008</td>
</tr>
<tr>
<td>Cribs &amp; Pacifiers</td>
<td>October 2008</td>
<td>January 2009</td>
</tr>
<tr>
<td>Small Parts</td>
<td>November 2008</td>
<td>February 2009</td>
</tr>
<tr>
<td>Children’s Metal Jewelry</td>
<td>December 2008</td>
<td>March 2009</td>
</tr>
<tr>
<td>Baby Bouncers, Walkers, &amp; Jumpers</td>
<td>March 2009</td>
<td>June 2009</td>
</tr>
<tr>
<td>Other Children’s Product Safety Rules</td>
<td>June 2009</td>
<td>September 2009</td>
</tr>
</tbody>
</table>

Before importing any children’s product (designed or intended for children 12 years or younger) that is subject to a children’s product safety rule, the manufacturer (or importer or private labeler if applicable) must (1) submit samples of that product to an accredited third party for compliance testing and (2) issue a certificate verifying compliance based on the test results.

These certificates are a condition of import. Section 17 of the CPSA states that a product offered for importation “shall be refused admission” if it is not accompanied by a certificate required by Section 14. Section 14 requirements for the filing of certificates apply to general testing and certification of products—not just children’s products. By law, the certificate must:
- identify the issuer and conformity assessment body,
- use the English language,
- identify the product for use or warehousing or distribution in commerce,
- identify the issuer and conformity assessment body before importing the product for use or warehousing or distribution in commerce.

Regulatory Timetable for Third-Party Testing of Children’s Products

17 CPSIA § 108(b)(2).
18 CPSIA § 108(b)(3).
20 ASTM Intl Standard F963-07 Consumer Safety Specifications for Toys Safety § 1.4
21 CPSIA § 106(g).
22 At the Second Biennial U.S.-Sino Safety Summit, CPSC staff noted that Section 14 of the CPSA uses a term, “certification,” that has a different meaning than it does in recent international usage. The staff observed that “certification” under Section 14 is more like a “supplier’s declaration of conformity.” Comments presented at the Safety Summit are available on the CPSC’s Web site, www.cpsc.org.
23 CPSIA § 102(a)(1)(A).
24 Standards and certification issues for children’s products are more fully addressed by the Toy Industry Association and in publications available on TIA’s Web site: www.toyassociation.org.
25 On September 2, 2008, CPSC staff submitted to the Commissioners recommendations for an approach to establishing accreditation requirements for third-party conformity assessment bodies to test the lead paint requirements of 16 C.F.R. 1303. The Commissioners’ ballot votes are due September 9, 2008. In the event the recommendations are approved as anticipated, a Federal Register notice will be published shortly thereafter.
26 CPSIA § 102(b).
include the date and place of manufacture,
include the date and place where the product was tested,
provide the name and phone number of the person responsible for maintaining records of test results,
accompany the product or shipment of products covered by the certificate,
be given (as a copy) to each distributor or retailer of the product, and
upon request, be given (as a copy) to the CPSC.
CPSA Section 19(a)(6) makes it unlawful to either fail to furnish a certificate or to issue a false certificate (if the issuer has reason to know it is false or misleading in any material respect). Knowing violations are subject to civil penalties. Knowing and willful violations are subject to criminal penalties. 27

Although the Improvement Act gives the CPSC discretion to permit, by rule, electronic filing of certificates for imported products, there is no such rule or electronic filing option at this time. In other words, imports must be accompanied by a paper certificate at time of entry and paper certificates must be provided to each distributor and retailer.

6. New Labeling Requirements in Direct Sales Advertisements for Toys and Games (Section 105)

Retailers and marketers are subject to new requirements for labeling in direct sales advertisements for children’s products. The FHSA requires warnings on packaging and accompanying descriptive materials for toys and games containing small balls, balloons, small parts and marbles that present choking hazards and are not intended for children under three years of age. 28 Under the new law, any direct sales advertisement for a toy or game for which a choking hazard or small parts label is required must include a similar cautionary statement on or immediately adjacent to the advertisement. 29

The labeling requirement becomes effective within 120 or 180 days of enactment, depending on whether the advertisement is on an Internet Web site or in a catalogue or other printed material. 30 Cautionary statements or warnings required by the CPSA must be prominently displayed in advertisements on Internet Web sites by December 12, 2008, and in catalogues or other printed materials by February 10, 2009. 31

The commission has discretion to issue a rulemaking by November 12, 2008, on the size and placement of such cautionary statements and whether the requirement should apply to materials distributed solely between businesses (and not to ultimate consumers). If the agency misses this deadline, it has the discretion to provide a grace period on the effective date for catalogues and print materials up to 180 days. Anticipating the required changes ahead, companies may want to consider reducing current production runs on catalogues and other printed materials to minimize the amount of material that may not comply with the labeling requirement.

Stakeholders should be aware that the CPSC has published on its Web site a Request for Comments and

Information about the labeling requirements. Before the commission issues a rule on the labeling requirements, all companies impacted by this requirement should submit comments on issues of concern, including size and placement of the labeling, impact of the requirements on the business and timing constraints to implement changes in printed materials. Comments are due no later than October 15, 2008.

In terms of enforcement, the labeling requirement will be treated as a consumer product safety standard under Section 9 of the CPSA 32 and the publication or distribution of unlawful advertising will be treated as a prohibited act under Section 19 of the CPSA. 33

Recognizing that retailers (direct marketers) may have little, if anything, to do with product and package labeling, the law has “do ask” and “do tell” provisions. A retailer (direct marketer) will not be in violation of the requirement if it asks the manufacturer, distributor, or private labeler whether a cautionary statement is required and the retailer (direct marketer) is given false information or no information at all. Similarly, a manufacturer, distributor, or private labeler that supplies such a product is required to tell the retailer (direct marketer) about any required cautionary statement.

7. New Mandatory Rules for All-Terrain Vehicles (Section 232)

The Specialty Vehicle Institute of America, a non-profit coalition including manufacturers and distributors of all-terrain vehicles (ATVs) established to promote the safe use of ATVs, has noted that in recent years, nontraditional overseas ATV companies have entered the market in “growing numbers,” selling inferior products, resulting in a number of ATV recalls. 34 In response to the problem, the Improvement Act imposes an immediate ban on the importation and distribution of three-wheeled ATVs. 35 Within 90 days from enactment of the Improvement Act, the CPSC must adopt the American National Standard ANSI/SVIA-1-2007 as a mandatory standard for all other ATVs. This will happen sometime in November 2008, with the precise effective date depending upon the date of the Federal Register notice.

The mandatory standard will take effect in April 2009 (150 days after publication in the Federal Register). All ATVs must comply with the new standard. This means that each ATV must have an “Action Plan” describing actions the manufacturer or distributor agrees to take to promote safety, including rider training, dissemination of safety information and age recommendations. 36 Additionally, each ATV offered for sale must have a label certifying compliance with the standard and identifying the manufacturer, importer or private labeler and the ATV action plan applicable to the product. 37

29 CPSIA § 105.
30 The statute is silent on television advertisements.
31 CPSIA § 105(2)(A) and (B).
34 According to Ed Krenik, ATV Coalition spokesman, “The poor quality of many of these ATV’s create a danger for all ATV riders, particularly young riders, who are being targeted by these companies.” “ATV Coalition Applauds CPSC Improvement Act” (Aug. 4, 2008) available at www.newsinfmto.com/archives/3569.
35 CPSIA § 232 (c).
36 CPSIA § 232 (e)(2).
37 CPSIA § 232(a)(2).
B. Additional Regulatory Rules and Requirements Will Be in Effect One Year From Enactment

1. More Stringent Rules on Lead Content and Lead in Paint (Section 101)

Effective August 14, 2009 (one year from the enactment date), lead levels in paint will be reduced to 90 ppm for children’s products and furniture and possibly lower based on further feasibility study.\(^{39}\) By this date, the CPSC is also required to complete a study to evaluate how lead content in paint is tested and calculated to see if alternative means are feasible and effective.\(^{38}\)

2. Tracking Labels Will Be Required on All Children’s Products (Section 103)

Effective August 14, 2009, manufacturers (and importers) of a children’s product must place permanent tracking labels on the product and its packaging to the extent feasible. This requirement applies to all children’s products, whether or not another standard may apply, and thus goes well beyond products containing lead or phthalates.

The admirable purpose of the label is to improve tracking of products by permitting the manufacturer (or importer) and customer (retailer or consumer) to determine the location and date of production and batch information in the event of a recall. A significant practical limitation, however, is the available real estate on the product and packaging on which to place such labels. While this requirement is self-executing one year after the enactment of the Improvement Act, the CPSC staff has signaled interest in exploring a numbering or coding system for products that would be consistent across agencies and could alleviate available space problems. In its discretion, the CPSC may conduct a rulemaking to address these issues and has signaled the inclination to do so to provide clarity in this otherwise murky area.\(^{40}\)

3. Mandatory Standards for Durable Nursery Products (Section 104)

No later than August 2009, the CPSC is required to begin making mandatory standards for durable infant or toddler products that are substantially the same as, or more stringent than, applicable voluntary standards (if the CPSC determines that a more stringent standard would reduce the risk of injury associated with the product).\(^{41}\) The rulemakings are required on a rolling basis, with at least two categories of durable infant or toddler products addressed every six months, in order of priority, as determined by the CPSC. Regulated products include:

- full-size cribs and non-full-size cribs,
- toddler beds,
- high chairs, booster chairs and hook-on chairs,
- bath seats,
- gates and other enclosures for confining a child,
- play yards,
- stationary activity centers,
- infant carriers,
- strollers,
- walkers,
- swings, and
- bassinets and cradles.

Section 104 gives special treatment to cribs in that the mandatory crib standard will apply retroactively to cribs that are already in the stream of commerce.\(^{42}\) Once the standard is issued, a crib in a hotel or day care center, for example, will have to comply with the standard. Any failure to comply will be deemed a prohibited act in violation of Section 19 of the CPSA.\(^{43}\)

4. CPSC Will Issue Final Rule on Registration Cards for Durable Nursery Products (Section 104)

To facilitate owner registration and recall effectiveness for these products, no later than August 2009 (within one year of enactment), the CPSC is required to issue a final rule on product registration, which will require each manufacturer of a durable infant or toddler product to: (a) provide a postage-prepaid registration form with each product, (b) maintain contact information of registrants, and (c) permanently place the manufacturer name and contact information, model name and number, and the date of manufacture on each product.\(^{44}\)

C. Impact of New Mandatory Rules on Products in Inventory and in Consumers’ Hands

What should companies plan for with respect to a product that is in inventory or already in consumers’ hands? Will new requirements or prohibitions be enforced prospectively or retroactively?

Historically, the commission has taken different approaches to this issue under the Acts it administers. In the past, new requirements for products under CPSA regulations generally appear to have been enforced prospectively, while banned hazardous substances under the FHSA appear to have been treated differently. For example, within a very short period of time, the sale of banned dive sticks and lead-containing candle wicks from inventory was prohibited.

Having studied the issue in anticipation of the practical application of new rules under the Improvement Act, CPSC’s General Counsel, Cheryl Falvey, said it will be “a different analysis depending on which of the new provisions or standards is considered.”\(^{45}\) After outlining the various ways Congress handled the effective dates of the new standards and bans, Falvey warned that “the safest course to follow is to get products with lead and phthalates off the shelves by February 10, 2009.”\(^{46}\)

Companies concerned about inventory should ask questions and register concerns with the CPSC staff and watch closely for guidance or an opinion expected to be posted on the CPSC’s Web site in the near future.

\(^{38}\) CPSIA § 101(f).
\(^{39}\) CPSIA § 101(f)(1).
\(^{40}\) John “Gib” Mullan, CPSC associate executive director of compliance, Comment at CPSC Public Meeting in Washington, D.C. (Sept. 4, 2008).
\(^{41}\) CPSIA § 104(b)(1) and (2).
\(^{42}\) CPSIA § 104(c).
\(^{43}\) CPSIA § 104(b).
\(^{44}\) CPSIA § 104(d).
\(^{45}\) CPSC General Counsel Cheryl Falvey, Comment at CPSC Public Meeting in Washington, D.C., supra note 13.
\(^{46}\) Id.
II. Expanded Reporting Requirements and Enforcement Tools Are in Effect Now

A. Significant Changes to Section 15 of the CPSA (Section 214)

The Improvement Act expands the reach of Section 15, including the scope of CPSC’s authority over recalls and corrective actions.

1. Broadened Section 15(b) Reporting Requirement

As of October 13, 2008, the term “substantial product hazard” will cover a failure to comply with a consumer product safety rule under the CPSA “or similar rule, regulation, standard, or ban under any other Act enforced by the Commission.” Manufacturers (including importers), distributors, and retailers will be required by Section 15(b) to inform the CPSC when they learn that a product fails to comply with any rule, standard or ban under any Act administered by the CPSC.

2. More Power for CPSC to Order Involuntary Recalls

The Compliance Office appears to have long held the view that a failure to comply with other Acts administered by the CPSC (including the Federal FHSA, Flammable Fabrics Act (FFA) and Poison Prevention Packaging Act (PPA)) could create a “product defect” under Section 15(a)(2) of the CPSA. But now that the “substantial product hazard” term includes a failure to comply with any rule, regulation, standard or ban, the CPSC can order an involuntary recall based on the noncompliance. The agency is no longer required to have a trial-type hearing to order a stop sale or recall. Instead, if after notifying the manufacturer, the agency determines that a product is “imminently hazardous” and has failed a district court action, it can take the following additional actions:

- stop distribution of the product,
- order all parties in the distribution chain to stop distribution and sale, and
- notify appropriate state and local public health officials.

3. More Power for CPSC to Determine Recall Remedies

The CPSC has also been given more authority over the remedy in a recall. The choice of whether to repair, refund or replace a recalled product is no longer in the hands of company. Under the new law, the CPSC may order the manufacturer, distributor or retailer of a product that presents a “substantial product hazard” to repair, replace or refund as the commission sees fit.

4. More Requirements for Content and Dissemination of Recall Notices

No later than February 2009, the CPSC is required to make a rule on the information required in a recall notice. Unless the CPSC determines with respect to a particular product that one or more of the following items is unnecessary or inappropriate under the circumstances, recall notices must include the following information routinely included in recall notices before the enactment of the Improvement Act:

- product description, including model number, names by which product is commonly known and a photograph,
- description of action being taken,
- number of units subject to action,
- identification of manufacturers and significant retailers,
- dates of sale and manufacture,
- number and description of any injuries or deaths associated with the product, ages of any persons injured or deceased, and
- description of remedy, including action the consumer must take to obtain remedy and any information the consumer needs to obtain information about the remedy, such as contact information.

Under the new law, the CPSC may require a manufacturer, importer, distributor or retailer of a product to post a clear and conspicuous recall notice on its Internet Web site. The CPSC may require that notice be provided in languages other than English and on radio and television if the commission determines that a substantial number of consumers may not be reached by other notice.

B. Rules Prohibit the Sale or Import of Recalled and Banned Products (Section 216)

Effective September 13, 2008, the “Prohibited Acts” portion of Section 19 of the CPSA is amended to make it unlawful to sell a recalled product. It has previously been illegal to sell banned products but the vast majority of recalls are based on a defect or substantial product hazard. The CPSC now has explicit authority that makes it illegal to sell, offer for sale, manufacture for sale, distribute in commerce or import:

1. any consumer product that is not in conformity with an applicable consumer product safety rule under any Act enforced by the CPSC,
2. any voluntarily or involuntarily recalled consumer product,
3. any product subject to voluntary corrective action
- taken by the manufacturer
- in consultation with the CPSC
- where the CPSC has notified the public, or
- where the firm knew or should have known of the corrective action (even if it was not publicly announced),
4. a banned hazardous substance, or
5. a product bearing an unauthorized registered safety certification mark owned by an accredited conformity assessment body.

Additionally, there are new provisions to enhance import safety and interagency cooperation. Specifically, no later than August 2010 (within two years after enactment), the CPSC must develop a risk assessment methodology for the identification of shipments of consumer

47 CPSIA § 239(a)(2).
48 CPSIA § 214(a).
49 CPSIA § 214(c); 15 U.S.C. § 2064(d).
50 CPSIA § 214(c); 15 U.S.C. § 2064.
51 CPSIA § 214(a).
52 CPSIA § 239(a)(2).
53 The CPSC staff has noted that even if there has not been a public recall notice, in many cases there has been some “stop sale” notice from the manufacturer to the retailer, which would satisfy the “knew or should have known” criteria.
products that are intended for import into the United States and likely to include noncompliant products. The CPSC is directed to use the International Trade Data System established under the Tariff Act of 1930 and to increase cooperation with U.S. Customs and Border Protection to prevent the importation of unsafe products into the United States.

There is also a procedure to destroy noncompliant products refused admission by customs.

C. Rules Prohibit Export of Recalled and Non-Conforming Products (Section 221)

The CPSC may prohibit the export from the United States for sale of any consumer product that is not in conformity with an applicable consumer product safety rule, unless the importing country has notified the commission that such country accepts the importation of such product.

D. Expanded Prohibition on Stockpiling (Section 213)

Section 9 of the CPSA authorizes the CPSC to prohibit manufacturers from stockpiling products prior to the effective date of a consumer product safety rule. In other words, a product may not be manufactured at a higher-than-normal-rate between the date that a rule is promulgated and the date it takes effect, in an attempt to circumvent the rule. Previously, this authority only applied to safety standards and rules under the CPSA and not to standards or rules under other statutes enforced by the CPSC such as the FHSA or FFA.

The Improvement Act amends this provision to authorize the prohibition of stockpiling products prior to the effective date of an applicable rule under any statute enforced by the CPSC. Companies will have to proceed cautiously with respect to inventory that will be impacted by a new rule, standard or ban.

III. Increased Civil and Criminal Penalties for Companies and Individuals (Section 217)

One of the least controversial aspects of the Improvement Act is that the CPSC’s interpretation of penalty factors or (2) August 14, 2009 (one year from enactment of the Improvement Act).

New provisions also increase criminal penalty exposure by permitting larger fines and imprisonment up to five years. Notably, the Improvement Act authorizes the forfeiture of assets associated with a violation and removes the requirement that directors, officers and agents be aware of violations before being criminally charged. It appears that criminal penalty provisions also will become effective on the earlier date of the two noted above, meaning no later than August 2009.

As for how the CPSC will handle its substantially increased penalty authority, time will tell. The commission’s chief enforcement officer, John “Gib” Mullan, said the agency’s approach will be “resolute but fair,” and new criminal penalties “will be reserved for the most heinous-type case.”

IV. Consumers Have Greater Access to Information and More Enforcement Protection

One of the most controversial aspects of the Improvement Act is the treatment of information on products that are identified as specific products of named manufacturers. Historically, Section 6 of the CPSA has provided certain safeguards for the public disclosure of information, including protection for proprietary and trade secret information, and a requirement that companies be notified and given the opportunity to review information to be disclosed with regard to confidentiality and accuracy within a minimum time period prior to disclosure. To the extent that the CPSC disagreed with the company’s objection and decided to disclose information, the company could sue in federal district court to enjoin disclosure (a historically rare occurrence).

Consumer advocates (including media and attorneys) have criticized these safeguards as unnecessarily hindering the disclosure of safety and recall information. Industry advocates, and in particular, companies that are the subject of information and reports, have argued that stronger protections with regard to confirmation of accuracy and disclosure of information are appropriate.

A. Section 6(b) Disclosure Safeguards Decreased

The Improvement Act reduces the safeguards afforded companies and provides for greater disclosure of information in several ways:

- **Reduced Notice Period Before Disclosure (Section 211)**

  Effective immediately, the time period within which the CPSC must notify a manufacturer or private labeler of an intended disclosure and provide an opportunity to object or comment is reduced from 30 to 15 days. The time period for the CPSC to notify the company that the agency intends to disclose information over the company’s objection (before the disclosure) is reduced from 10 to 5 days.

- **Federal Register Notice Not Required for Quicker Disclosure (Section 211)**

  See, Comments at Public CPSC Meeting in Washington, D.C., supra note 40.

The CPSC is no longer required to publish a finding in the Federal Register that public health and safety require a lesser period of notice to a manufacturer or private labeler. It can publish such notice in any manner.

- **More Information Exempted From Disclosure Protections (Section 211)**

Under the new law, exemption of certain information from the disclosure protections under Section 6(b) of the CPSA is expanded to include violations of any rule or provision of any law enforced by the CPSC (not just the CPSA) and information for which the CPSC publishes a finding that public health and safety requires disclosure with a lesser period of notice and comment on accuracy than would normally be required.

- **CPSC Authorized to Seek Expedited Consideration of Injunction Action (Section 211)**

The CPSC is authorized to file a request for expedited consideration in a civil action brought by a manufacturer or private labeler to enjoin the disclosure of information.

**B. CPSC Required to Establish Internet Searchable Complaint Database (Section 212)**

The Improvement Act directs the CPSC to establish and maintain on its Internet Web site a searchable database of products and substances regulated by the commission.\(^{68}\) By February 14, 2009 (180 days after enactment of the Improvement Act), the CPSC must submit to Congress a detailed plan on how it will create and implement the database. This report is required to include a detailed implementation schedule, recommendations for necessary legislation and plans for a public awareness campaign.

The database is to be up and running no later than August 2010, and is required to include the following information:

- incident reports concerning products or substances from consumers, government agencies, health-care professionals, child-care service providers, and public-safety entities,
- notices of recalls and voluntary corrective actions undertaken in cooperation with the CPSC, and
- comments received from a manufacturer or private labeler requested to be included in the database.

The CPSC is required to provide clear and conspicuous notice to users of the database that the commission “does not guarantee the accuracy, completeness, or adequacy of the contents of the database.”\(^{69}\) While this “no guarantee of accuracy” notice requirement pays lip service to industry (and perhaps agency) concerns that information in the database is unsubstantiated and may be inaccurate, as a practical matter, it will not prevent misinformation from being widely disseminated about products and companies.

The new database information processing procedures are extremely time-compressed. For example, within 5 days of receipt of each report, the CPSC is supposed to transmit each report it receives to a manufacturer or private labeler “to the extent practicable.” The report must be posted on the CPSC’s Web site within 10 days after that and the CPSC can include the company’s comment either at that time or “as soon as practicable thereafter.” The prescribed time frames appear to be impractical, given the time it takes to communicate information, run facts to ground, and prepare appropriate comments and objections, particularly if the volume of unsubstantiated reports increases with the advent of the database.

There will have to be substantial revisions to the CPSC’s information-handling procedures, the specifics of which remain to be seen. Companies will have to re-evaluate and revamp internal procedures to process materials on a highly expedited basis.

Those supporting inclusion of the mandated CPSC database in the Improvement Act urged that it could or should be modeled after the public database maintained by the National Highway Transportation Safety Administration (NHTSA). As the CPSC staff has pointed out, however, since the beginning of NHTSA to the present, there have been a total of about 200 makes of vehicles to deal with on the NHTSA database. In stark contrast, the CPSC has jurisdiction over approximately 100,000 manufacturers of consumer products. While the NHTSA database may serve as a model, it does not approach the complexities inherent in a CPSC database of consumer product incidents and reports.\(^{70}\)

As for the utility of such a database, those with experience analyzing consumer incident reports can attest to the fact that the reports can and do sometimes contain materially inaccurate information, including erroneous product identification and unsubstantiated (if not inaccurate) allegations of incidents and injuries. To the extent that reports maintained in the database are unsubstantiated and contain inaccurate information, consumer product safety is not enhanced by making more of them readily accessible for public consumption. Foreseeable mischief includes undue public alarm over unwarranted safety concerns and the dissemination of unfair and damaging misinformation about products and companies.

**C. State Attorneys General Have Increased Enforcement Powers (Section 218)**

The Improvement Act provides state attorneys general (AGs) with authority to seek injunctive relief to enforce certain provisions of the CPSA.\(^{71}\) AGs will be able to sue on behalf of the residents of their states to:

- stop the sale of products that violate CPSC-issued safety standards,
- stop the sale of certain recalled products as announced by the commission,
- stop the sale of banned hazardous substances,
- stop the sale of children’s products that have not been certified as tested by third-party laboratories once those certification requirements go into effect,
- stop the sale of children’s products that lack tracking labels once that requirement goes into effect,
- enforce the prohibitions against stockpiling products in advance of regulatory changes, and

\(^{68}\) CPSIA § 212(a) (italics supplied).

\(^{69}\) CPSIA § 212(b)(5).

\(^{70}\) Comments at Public CPSC Meeting in Washington, D.C., supra, note 13.

\(^{71}\) Regarding other Acts enforced by the CPSC, the FHSA and FFA were amended in 1990 to expressly authorize state attorneys general to enforce consumer safety rules under those statutes by obtaining injunctive relief. In addition to expressly authorizing such authority under the CPSA, Section 218 of the Improvement Act amends the PPA to include similar authority.
stop the sale of products with safety marks if the use of those marks is unauthorized.\textsuperscript{72}

No authority is given, however, to enforce CPSA reporting requirements. State AGs are required to give the CPSC 30 days’ advance notice of any intent to initiate a state action. If the CPSC files suit first, the AG would be precluded from filing a state suit. The CPSC also has the right to participate in an AG suit.

Concerns about expanded AG authority include inconsistent enforcement of federal law and politicization of enforcement. As a practical matter, this provision removes some measure of enforcement discretion from the commission.

D. New Whistleblower Protections (Section 219)

The Improvement Act provides a remedy for an employee of a manufacturer, private labeler, distributor, retailer, or government agency, who believes he or she has been subjected to adverse employment actions in retaliation for:

- providing information to the employer, the federal government, or a state attorney general relating to a violation of any laws, rules or orders enforced by the CPSC.
- cooperating with a proceeding (testifying) concerning such a violation, or
- objecting to or refusing to participate in any activity or policy that the employee reasonably believed would be a violation of law, rules or orders enforced by the CPSC.\textsuperscript{73}

The employee is required to file a complaint with the Secretary of Labor, and then must notify the person allegedly responsible for the retaliation and provide an opportunity for that person to respond to the allegations.\textsuperscript{74}

If the Secretary of Labor, based on an investigation and hearing at the request of the defendant, determines that retaliation has occurred, an order for relief may include:

- reinstatement of employment,
- back pay (with interest),
- compensatory damages,
- litigation costs,
- expert witness fees, and
- attorneys’ fees.\textsuperscript{75}

A defendant adversely affected by a final administrative order may file an appeal in the federal appellate court with jurisdiction in the area where the violation allegedly occurred or in which the complainant resided when the violation allegedly occurred.\textsuperscript{76}

V. Practical Suggestions for Companies Subject to the New Law

The most important first step to ensure readiness for compliance is to understand the new regulatory requirements imposed by the Improvement Act. Once key provisions impacting a business are identified, the company can begin planning for effective dates. In the short term, companies should identify possible issues with testing and certification, inventory, importation and direct marketing advertising, and consider whether adjustments in production should be made.

Given the magnitude of the changes ahead, companies should evaluate and, if necessary, reallocate appropriate resources to ensure overall compliance with regulatory obligations and to minimize exposure to substantially increased penalties.

Companies subject to new testing and certification requirements that are not already working closely with a qualified third-party laboratory or conformity assessment body should begin doing so.

Particularly at this early stage of the implementation of the law, it is important to closely monitor the CPSC’s Web site for any guidance, requests for comment and Frequently Asked Questions and Answers. The CPSC staff has made clear that it welcomes and wants companies subject to the law and CPSC jurisdiction to ask most important developments, it may also be helpful to:

- sign up for the CPSIA e-mail list (on www.cpsc.gov),
- timely respond to the CPSC’s requests to submit comments,
- stay in touch with your trade association about issues and developments,
- attend a conference on the new law, and
- consult with outside counsel about issues of concern.

VI. What Will We See from the New CPSC?

We can expect to see an immediate “real world” impact as a result of the CPSC’s increased authority and enforcement powers, which will continue to be seen in the near and distant future.

For example, within two weeks of acquiring new authority under the Improvement Act, the commission voted to unilaterally issue a warning (based on a finding that the health and safety of the public required immediate notice) for consumers to stop using baby basinet involved in an infant strangulation death. The commission took this extraordinary action when the company that purchased the crib manufacturer’s assets declined to recall the product.\textsuperscript{77}

Other activity we are likely to see includes:

- increased reporting under Section 15(b),
- more recalls due to increased voluntary reporting,
- continued downward trend in percentage of corrective actions compared to number of reports filed,
- more CPSC Notices based on commission finding of necessity based on public health and safety,
- increased enforcement at borders,
- destruction of noncompliant imports, and
- more (and more substantial) penalties for noncompliance.

Most will agree that the CPSC was long overdue for reauthorization, beefed-up safety requirements, and more powerful enforcement tools. Many of the new

\textsuperscript{72} www.cpsc.gov, CPSIA Information, Section 218. Enforcement by State Attorneys General, Basic Summary.

\textsuperscript{73} The remedy is not available to an employee who has voluntarily or intentionally caused a violation of any laws, rules, or orders enforced by the CPSC. CPSIA § 219(d).

\textsuperscript{74} CPSIA § 219(b).

\textsuperscript{75} CPSIA § 219(b)(4)(A) and (B).

\textsuperscript{76} CPSIA § 219(b)(5)(A).

\textsuperscript{77} CPSC Press Release #08-278 (Aug. 27, 2008).
regulatory requirements will enhance consumer product safety. Some may not. Without doubt, the passage of the Consumer Product Safety Improvement Act of 2008 will dramatically impact each participant in the

consumer product "safety triangle"—industry, government and consumers.\textsuperscript{78}

\textsuperscript{78} The "safety triangle" aptly refers to the cooperative roles of government, industry, and the consumer in promoting consumer health and safety. CPSC Press Release \# 93-037 (Jan. 12, 1993).