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Product Recall Requirements Under the New Consumer Product Safety Improvement Act of 2008

September 2008
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The new Consumer Product Safety Improvement Act of 2008 (the "Act"), which was signed into law by President Bush on August 14, 2008, imposes a number of new requirements on product manufacturers, distributors, and retailers. The focus of this client alert is Section 214 of the Act which significantly revises the Consumer Product Safety Act ("CPSA") to add new requirements relating to reporting under section 15(b) of the CPSA, the recall of consumer products and the preparation of action plans.

Reporting

Section 15(b) of the CPSA establishes certain reporting requirements for manufacturers, importers, distributors, and retailers of potentially defective or hazardous products. Until the changes mandated by the Act, reporting was required only upon receipt of information that would support the conclusion that a consumer product failed to meet a consumer product safety standard, contained a defect that could create a substantial hazard or created an unreasonable risk of serious injury or death.

The Act amends Section 15(b) of the CPSA to add a new paragraph (b)(2) that expands the reporting requirements to apply to consumer products that fail to comply with any rule, regulation, standard or ban under the CPSA, or any other act enforced by the Consumer Product Safety Commission (the "Commission"). The changes to this section of the CPSA also provide that a report provided pursuant to new section (b)(2) may not be used as the basis for criminal prosecution under Section 5 of the Federal Hazardous Substances Act unless there is a showing of intent to defraud or mislead.

Public Notice

The Act also strengthens the Commission's authority to order a manufacturer, distributor or retailer to take certain public actions upon a finding that a product distributed in commerce presents a substantial product hazard. The Act authorizes the Commission to order the following: (1) that distribution of the product cease; (2) notification of all persons that transport, distribute or otherwise handle the product (or to whom the product has been transported, sold, distributed or who have otherwise handled the product) to immediately cease distribution of the product; or (3) notification to appropriate state and local public health officials. In addition, a manufacturer, distributor or retailer may be required to post clear and conspicuous notices on its website, and websites on which the product has been offered for sale, and produce announcements in languages other than English on both radio and television, when the Commission determines that a substantial number of consumers might not be reached by other forms of notice.

Action Plans

When the Commission issues an order to comply, it also must require the submission of a plan to

effect the actions required to eliminate the substantial product hazard. Any Commission approval of such plan must be in writing. The Commission also may determine that an approved action plan is not effective or appropriate, or is not being effectively executed. In this case, the Commission may issue a further order requiring amendment of an action plan. If the Commission finds that the manufacturer, retailer or distributor has failed to substantially comply with the action plan, it may revoke approval of the action plan and prohibit distribution in commerce of the product after the company receives a notice of revocation.

Recall Notices

The Act also adds a new Section 2064(i) that specifies requirements for recall notices. The Commission is required to establish guidelines for recall notice requirements no later than 180 days after the Act becomes law. The guidelines must include information that would be helpful to consumers in identifying the specific product being recalled, understanding the hazard identified with such product, and what remedy is available to a consumer who has purchased the product. With respect to the content of any required recall notice, the Act provides that they include (1) a description of the product (including model number or stock keeping unit, names by which the product is commonly known, and a photograph of the product); (2) a description of the action being taken; (3) the number of units of the product for which action is being taken; (4) a description of the substantial product hazard and reason for the action; (5) identification of the manufacturers and significant retailers; (6) the dates between which the product was manufactured and sold; and (7) the number and description of any injuries or deaths associated with the product, including the ages of those killed or injured and the dates on which the Commission received such information.

Conclusion

The changes to the Consumer Product Safety Act will affect all businesses involved in the distribution of consumer products. The Act's expanded reporting obligations and recall notice requirements potentially impact all manufacturers, distributors, importers and retailers of consumer products sold in the United States. The increased budget for the Commission is likely to mean increased enforcement of the consumer product safety requirements, including the ability to demand that companies take corrective action on an expedited schedule. Companies also face significantly higher penalties (up to $100,000 for an individual violation, and $15 million aggregate) for failure to comply.

Morrison & Foerster LLP has closely followed the Consumer Product Safety Improvement Act of 2008 as it evolved in the Congress and ultimately was signed into law by President Bush in mid-August. We represent a variety of companies and trade associations with interests in this area and assist them with legislative, regulatory, and litigation matters.

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