

CPSC's Immediately Effective Final Rule

Law360, New York (November 17, 2008, 12:00 AM ET) -- In sudden fashion, on Nov. 10, 2008, the Consumer Product Safety Commission (CPSC) took the unusual step of issuing an Immediately Effective Final Rule (Final Rule).

The Final Rule provided guidance on a key section of the new Consumer Product Safety Improvement Act of 2008 (CPSIA) by addressing widespread concerns with the general conformity certification provision.

This provision requires manufacturers, importers, and private labelers to certify that their products conform with all applicable safety rules under CPSC jurisdiction. The certification requirement is effective for all consumer products manufactured on or after Nov. 12, 2008.

Businesses who must produce a certificate of general conformity have questioned how they can realistically comply with the certification provision. The Final Rule is the CPSC's attempt to resolve what it has described as "substantial confusion over what is required by way of certification." CPSC Final Rule p. 2 (issued November 10, 2008).

The Final Rule streamlines certification in two ways: (1) it specifically designates who must issue the certificate, and (2) it announces that electronic certificates are a valid method of certification. Significantly, the Final Rule also delineates the Commission's philosophy of enforcement.

In both the Final Rule and a Nov. 12, 2008 Press Release, the CPSC declared it will focus its enforcement efforts in the near term, on compliance with the actual safety rules rather than on the certificates of compliance.

In issuing the Final Rule, the Commission aimed its attention at an important provision of the CPSIA that affects nearly all businesses involved with either imported or domestically produced consumer products. Under the new act, any failure to comply with the certification requirements has significant negative consequences.

For example, the CPSIA requires the destruction of noncompliant imported products (absent specific permission from the Secretary of the Treasury to export the product). The Final Rule is important because it clearly reveals that during an "initial period of adjustment", the Commission will not strictly enforce the seizure and destruction provision for failure to meet certification requirements.

The Perfect Storm

This crisis arose out of the confluence of several disparate factors. First, – to use the words of the acting chairman of the CPSC – the new law is "incredibly complex." Second, under the CPSIA, the scope of regulations that manufacturers, importers and others must comply with, has been greatly expanded. Prior to the new act, only a discreet number of consumer product safety standards required certification.

The CPSIA, however, expanded that scope to include all similar standards, bans, rules and regulations under any other act administered by the Commission. (Among others, the Commission enforces the Federal Hazardous Substances Act, the Flammable Fabrics Act, and the Poison Prevention Packaging Act.)

The effect has been a dramatic expansion of the regulated universe to include entities, who previously had no certification obligations. For example, virtually all manufacturers and importers of clothing must now certify that their products comply with the standards of the Flammable Fabrics Act (FFA).

While clothing manufacturers previously had to comply with FFA standards, they had not been under an obligation to create a certificate to that effect.

The final element contributing to this "perfect storm" of regulatory anxiety is the overburdened CPSC itself. Since the CPSIA's enactment in August, the Commission has received thousands of inquiries on how to comply with the general conformity provision of the CPSIA. The CPSC staff has further received hundreds of individual requests for guidance on how standards, regulations, etc. apply to various individual products.

Additionally, the new act imposes on the CPSC, a number of rulemakings and other statutory requirements – all under a mandatory and aggressive schedule.

Yet the Commission is still funded for fiscal year 2009 by a continuing resolution at FY2008 levels that were established prior to the imposition of numerous new CPSIA responsibilities. The Commission is straining to adequately meet all of its responsibilities on a timely basis.

The end result is a regulated community of manufacturers, importers and other businesses that cannot determine how they should comply with a new complex law. The strict deadlines and harsh penalties combine to put all regulated businesses at a much greater risk of noncompliance.

Final Rule Provisions

With the Nov. 12, 2008 date for general conformity certification looming, the Commission recognized a growing dilemma. Because the general conformity certificate provision was self-effectuating, the Commission had to take quick action outside of the usual rulemaking process. As such, the Commission issued a Final Rule without notice or opportunity for comment under the authority of Section 553(b) of the Administrative Procedure Act, 5 U.S.C. 553.

The Final Rule amends Title 16 of the Code of Federal Regulations by adding a new Part 1110. It streamlines the certification process in two ways: First, Section 1110.7 clarifies that only the importer – and not the foreign manufacturer or private labeler must provide a certificate of compliance for imported products.

Foreign manufacturers and private labelers do not need to be listed on a certificate. In the case of a product manufactured in the United States, only the manufacturer, and not the private labeler must certify. Private labelers do not need to be listed on a certificate.

Second, Section 1110.13 confirms an electronic certificate may be used to satisfy the CPSIA requirements that (1) a certificate of general conformity "accompany" each product or product shipment and (2) a certificate be "furnished" to each distributor and retailer of the product.

The provision that a certificate "accompany" each shipment of a product and be "furnished" to all distributors and retailers of the product created enormous problems for manufacturers and importers. Importers were faced with the extremely difficult burden of insuring that paper certificates "accompanied" the relevant products.

In a world of shipping containers that include combinations of any number of various products, (with different certification requirements), the successful completion of such a task was hugely problematic. Importers also faced complications "furnishing" paper certificates to all distributors and retailers of a product. Creating and tying appropriate paper certificates to numerous individual and small independent retailers was a logistical nightmare.

The Final Rule addresses this situation by announcing that electronic certificates will satisfy the "furnish" and "accompany" requirements. In order for an electronic certificate to be valid however, the Final Rule mandates the following:

[The electronic certificate must be] identified by a unique identifier and [must be accessible] via a World Wide Web URL or other electronic means, provided the URL or other electronic means and the unique identifier are created in advance and are available, along with access to the electronic certificate itself, to the Commission or to the Customs authorities as soon as the product or shipment itself is available for inspection.

CPSC Final Rule p. 27 (issued Nov. 10, 2008). The use of electronic certificates will greatly simplify the compliance process.

CPSC Enforcement Priorities

As noted above, the Commission stated that, given the existing confusion among regulated companies and the Commission's own limited resources, there will be an "initial period of adjustment." During this time, CPSC enforcement will "concentrate initially more on the substantive requirements underlying the certificate than on the certificate or form of the certificate itself." CPSC Final Rule p. 11 (issued November 10, 2008).

The message to regulated businesses is clear – concentrate your efforts on making sure your product complies with all of the applicable safety rules. Compliance with the certification forms is a secondary concern.

The Commission warned however, that "Importers should be aware that after this initial period of adjustment, failure to abide by the general certificate requirement will subject shipments to refusal of admission into the country and potential destruction." CPSC Final Rule p. 12 (issued Nov. 10, 2008).

Conclusion

The abrupt issuance of an immediately effective Final Rule reflects the enormous difficulties faced by both the Commission in applying the CPSIA, and the regulated community in complying with the new Act. The CPSIA's deadlines give little time for businesses to sort out the numerous and confusing regulations contained in this complex law.

The Commission has numerous mandates, few resources and little time to comprehensively interpret and clarify the new act. Similarly, those manufacturers, importers and others regulated under the law are facing a continuing series of new and stringent deadlines. This convergence of conflicting forces will most likely continue during the coming year, if not longer.

Regulated entities can expect that the Commission will take rapid and decisive action over the next several months in order to meet the pressing deadlines imposed by the new act. In doing so, the Commission is likely to continue its previous approach to rulemaking.

The Commission has consistently solicited input from those in the regulated community through various channels including public meetings, written comments etc. In order for such input to be effective, it should be submitted well in advance of the deadlines for comment.

The Commission's action in issuing the Final Rule was, to a great extent, a function of comments submitted by manufacturers, importers and others in the regulated community concerning the real difficulties they experienced attempting to understand and comply with the provisions of the CPSIA.

The Commission apparently recognized that the situation was an enforcement nightmare for both the regulated and the regulators. The practical effect of "by the letter" enforcement would likely have caused chaos with the importation and distribution of consumer products. The CPSC took notice, considered the numerous comments submitted to the Commission, and responded by issuing the Final Rule.

Entities who are regulated by provisions of the Consumer Product Safety Improvement Act should take away a lesson from this rulemaking. During this coming year, the CPSC will issue new rulemakings and take many other actions that define the application of the new act. Businesses regulated under the CPSIA must pay extremely careful attention to the Commission's actions and requests.

If your business is affected by provisions of the CPSIA, you should communicate with the CPSC "early and often." It is in the regulated and regulator's best interests to do so.

Those companies regulated under the CPSIA should take note of the Commission's expedited rulemaking and expect much activity from the Commission in the near future. Regulated entities must pay careful and continuous attention to the Commission's activities, and where possible, these businesses should make use of any opportunity to shape the ongoing application of this complex and important law.

--By Charles E. Joern Jr., Holland & Knight LLP

Chuck Joern is a partner with Holland & Knight in the Chicago office.