



Williams Mullen White Paper:

NEW CONSUMER PRODUCT SAFETY REGULATIONS  
TEST IMPORTS—AND IMPORTERS

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Importers, beware. The Consumer Product Safety Improvement Act of 2008 (CPSIA)<sup>1</sup> has created a wide range of new safety, documentation and record-keeping requirements. The CPSIA has also provided the Consumer Product Safety Commission (CPSC) authority to impose more severe civil and criminal penalties for violations. The changes affect importers at least as much as manufacturers, because the CPSC already has authority, and has increasingly exercised it, over companies or persons that bring consumer goods into the U.S. This Williams Mullen White Paper describes the CPSIA's basic scope, requirements and enforcement provisions.

## Scope: The CPSIA Covers Importers and Imports

For which parts of CPSIA compliance are importers legally responsible? On what specific products does the new law focus? Does the federal statute preempt state laws? Although answers to these scope questions sometimes differ depending on the statutory section at issue, one conclusion is clear: The CPSIA covers more entities and products than appears at first glance.

**Responsible Parties.** The CPSIA unambiguously affects importers. Confusingly, though, different sections of the CPSIA use various expressions to identify them. Sometimes, the statute speaks to the “manufacturer”;<sup>2</sup> at other times, to such persons as the “retailer, manufacturer, importer, distributor, or private labeler.”<sup>3</sup> Despite these differences in language, importers are always responsible for consumer product safety obligations involving imported goods. Notably, the Consumer Product Safety Commission Act (CPSCA), which the CPSIA amends, expressly defines a “manufacturer” as “any person who manufactures or **imports** a consumer product”<sup>4</sup> and authorizes the CPSC to issue orders prohibiting a company “from manufacturing for sale, offering for sale, distributing in commerce, or **importing**” certain products.<sup>5</sup> The CPSIA incorporates this definition by reference.<sup>6</sup> Similarly, the Federal Hazardous Substances Act,<sup>7</sup> the Flammable Fabrics Act<sup>8</sup> and the Poison Prevention Packaging Act<sup>9</sup> “assign responsibilities to **importers** comparable to those of manufacturers and distributors.”<sup>10</sup> Regulations expressly recognize “the critical position of **importers** in protecting American consumers from unreasonably hazardous products made abroad” and therefore hold importers “subject to the

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<sup>1</sup> Pub. L. 110-314 (Aug. 14, 2008).

<sup>2</sup> General conformity certifications, third-party testing and certification, tracking labels, consumer registration/recordkeeping/notification—see CPSIA §§ 102(a)(1), 102(a)(2), 103(a), 104(d).

<sup>3</sup> Toys and games cautionary statements—see CPSIA § 105. Compare to CPSIA § 108 (Phthalates ban—“any person [who] manufacture[s] for sale, offer[s] for sale, distribute[s] in commerce, or import[s]”); and CPSIA § 104(c) (Durable nursery product standards and consumer registration—“any person that . . . manufactures, distributes in commerce, or contracts to sell. . .”).

<sup>4</sup> 15 U.S.C. § 2052(a)(4) (defining “manufacturer”) (emphasis added).

<sup>5</sup> 15 U.S.C. § 2064(d) (authorizing orders involving Substantial Product Hazards)(emphasis added).

<sup>6</sup> See, e.g., CPSIA § 105 (requiring cautionary statements in advertisements for toys and games).

<sup>7</sup> 15 U.S.C. §§ 1261 *et seq.*

<sup>8</sup> 15 U.S.C. §§ 1191 *et seq.*

<sup>9</sup> 15 U.S.C. §§ 1471 *et seq.*

<sup>10</sup> 16 C.F.R. § 1009.3(c) (stating a general policy on imported products, importers and foreign manufacturers) (emphasis added).



same responsibilities as domestic manufacturers.”<sup>11</sup> While acknowledging that “the importer may not be the only person to be held responsible for protecting American Consumers from unreasonably hazardous products made abroad,” regulations also state that “the **importer** is, at least, in a strategic position to guarantee the safety of imported products.”<sup>12</sup>

Therefore, the importer is on the hook even when a given CPSIA section expressly mentions only “the manufacturer.” For example, one CPSIA section that mandates issuance of a certificate of compliance with all applicable requirements administered by the CPSC refers only to “every manufacturer.”<sup>13</sup> An immediately effective final rule published on Nov. 18, 2008, however, designates “the **importer** as the **sole entity** that must issue [this certificate] in the case of an imported product.”<sup>14</sup>

**Affected Products.** Which imports does the CPSIA cover? Categories include:

- Any “product which is subject to a consumer product safety rule;”<sup>15</sup>
- Any “children’s product that is subject to a children’s product safety rule” (including, among others, cribs and pacifiers, toys and games containing small parts, children’s metal jewelry, baby bouncers, walkers and jumpers);<sup>16</sup>
- Any “children’s product,” whether subject to a children’s product safety rule or not;<sup>17</sup>
- “Paint,” by itself or on another product’s surface (notably, furniture);<sup>18</sup>
- Any “durable infant or toddler product” (including, among others, cribs, toddler beds, high chairs, bath seats, gates, play yards, stationary activity centers, infant carriers, strollers, walkers, swings, bassinets and cradles);<sup>19</sup>
- Any “children’s toy or child care article;”<sup>20</sup>
- Any “toy or game intended for use by children who are at least 3 years old but not older than 6 years,” and any “balloon,” small “ball” or “marble;”<sup>21</sup>
- Any other “toy;”<sup>22</sup> and
- Any “new assembled or unassembled all-terrain vehicle.”<sup>23</sup>

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<sup>11</sup> 16 C.F.R. § 1009.3(b) (stating a general policy on imported products, importers and foreign manufacturers) (emphasis added); *see also* 16 C.F.R. § 1009.3(f)(1) (stating that importers “have responsibilities and obligations comparable to those of domestic manufacturers”).

<sup>12</sup> 16 C.F.R. § 1009.3(g) (stating a general policy on imported products, importers and foreign manufacturers) (emphasis added).

<sup>13</sup> CPSIA § 102(a)(1) (requiring issuance general conformity certifications).

<sup>14</sup> Certificates of Compliance, 73 Fed. Reg. 68,328, 68,328 (Nov. 18, 2008) (emphases added).

<sup>15</sup> CPSIA § 102(a)(1) (general conformity certification).

<sup>16</sup> CPSIA § 102(a)(2) (third-party testing and certification).

<sup>17</sup> CPSIA §§ 101(a)(1) (limit on lead content) and 103(a) (tracking labels).

<sup>18</sup> CPSIA § 101(f) (more stringent lead paint ban).

<sup>19</sup> CPSIA §§ 104(b)(2) (new safety standard) and 104(d) (consumer registration/recordkeeping/notification).

<sup>20</sup> CPSIA § 108 (limit on certain phthalates).

<sup>21</sup> CPSIA § 105, referring to Federal Hazardous Substances Act § 24, 15 U.S.C. § 1278 (cautionary statements in certain advertising for toys and games).

<sup>22</sup> CPSIA § 106(a) (ASTM International Standard F963–07 Consumer Safety Specifications for Toy Safety).



Categories in the above list sometimes overlap, because certain CPSIA requirements affect more than one type of import and because the regulatory definition of some terms (like “toy”) is still evolving. Generally, however, different CPSIA provisions affect different imports, and different obligations go with each, as explained more fully below.

**Preemption.** A final scope question concerns whether the CPSIA “trumps” prior federal laws and any state laws. The answer is generally yes, with some exceptions. A state standard for toy safety, for example, still applies if it was in place on Aug. 13, 2008, is stricter than the federal standard, does not unduly burden interstate commerce and was filed by the state with the CPSC before Nov. 12, 2008.<sup>24</sup> The CPSC received such filings from Arizona, California, Illinois and New York.<sup>25</sup> In addition, state warning requirements in place on Aug. 13, 2008 continue to apply.<sup>26</sup> Also, federal standards for particular phthalates do not undo the effect of any state standard for phthalate alternatives.<sup>27</sup> And compliance with CPSC rules does not eliminate liability at common law or under state statutes to persons seeking private remedies.<sup>28</sup> Otherwise, federal standards generally preempt state standards.<sup>29</sup>

## Requirements: The CPSIA Demands More Than Safe Products

The CPSIA mandates compliance with new consumer product safety standards regarding lead paint, overall lead content, toys, phthalates, cribs and pacifiers, small parts and all-terrain vehicles (ATVs). Besides ensuring that imported goods comply with those new standards, however, importers must satisfy new requirements involving testing, certifications, tracking labels, consumer registration/recordkeeping/notification, cautionary statements and bonding.

**General-Conformity Testing and Certification.** The importer of any “product which is subject to a consumer product safety rule,” whether under the CPSIA or another CPSC statute, must now issue a certificate, “based on a test of each product or upon a reasonable testing program,” stating that the product complies with the rule.<sup>30</sup> Such a certificate must identify: the product covered, the safety rule being certified, the entity doing the certifying (name, full mailing address and telephone number), the individual maintaining records of test results (name, e-mail address, full mailing address and telephone number), the date of manufacture (month and year), the place of

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<sup>23</sup> CPSIA § 232 (4-wheel ATV safety standard ANSI/SVIA 09109-2007, certification/label regarding approved ATV Action Plan, and ban on 3-wheel ATV importations until promulgation of 3-wheel standard).

<sup>24</sup> CPSIA § 106(h)(2) (exempting state law from preemption only on application by the state).

<sup>25</sup> These filings are currently available on-line at <http://www.cpsc.gov/ABOUT/Cpsia/cpsia.HTML#exclusion>, under the heading “Federal Register Notices and Other Requests for Comments and Information,” subheading “Section 106(h)(2)—Applications for Existing State or Political Subdivisions of a State Toy and Children’s Product Safety Standards in Effect” (last visited Mar. 6, 2009).

<sup>26</sup> CPSIA § 231(b) (preserving certain state law).

<sup>27</sup> CPSIA § 108(d) (not preempting existing state laws regarding phthalates alternatives).

<sup>28</sup> CPSIA § 231(a) and 15 U.S.C. § 2074(a) (preserving private remedies).

<sup>29</sup> CPSIA § 231(a) and 15 U.S.C. §§ 1203, 1261 note, 1476(a), 2074 and 2075 (generally providing for federal preemption of state standards).

<sup>30</sup> CPSIA § 102(a)(1) (requiring general conformity certifications).



manufacture (city and state, country or administrative region), the date and place of testing (city and state, country or administrative region), and any third-party laboratory on whose testing the certificate depends (name, full mailing address and telephone number).<sup>31</sup> The certificate must “accompany” the product or shipment,<sup>32</sup> be “furnished to each distributor or retailer”<sup>33</sup> and become “available” to the CPSC “as soon as the product or shipment itself is available for inspection in the U.S.”<sup>34</sup> The certificate may, however, be in hard copy or electronic form.<sup>35</sup> An electronic certificate “accompanies” the product or shipment if the certificate is “identified by a unique identifier,” “can be accessed” by electronic means, and is “created in advance.”<sup>36</sup> For example, a notation on the commercial invoice accompanying the shipment could direct the CPSC to a website, where the CPSC would find and view the certificate by means of the commercial invoice number. The commercial invoice number would presumably satisfy the CPSIA requirement that the certificate “accompany” the shipment and be “identified by a unique identifier.”<sup>37</sup> Likewise, the importer has “furnished” a certificate to distributors and retailers if they have “a reasonable means to access” it.<sup>38</sup> In any case, the electronic certificate must “have a means to verify the date of its creation or last modification.”<sup>39</sup> Although a third party may “enter” and “maintain” the required data,<sup>40</sup> importers are legally responsible for issuing the certificate when the product originates outside the U.S. (domestic producers, when the product is of U.S. origin).<sup>41</sup> The importer should maintain records for three years.<sup>42</sup> The requirement to issue a general conformity certification applies to products manufactured after Nov. 12, 2008.<sup>43</sup> The CPSC’s recent stay on enforcement of certain CPSIA requirements until Feb. 10, 2010 probably does not stop the requirement to issue general conformity certifications, because they fell among the first CPSIA requirements implemented.<sup>44</sup>

***Third-Party Testing and Certification.*** The importer of any “**children’s** product that is subject to a **children’s** product safety rule” must go further—submitting samples to an accredited third-party conformity assessment body and issuing a certification, based on the third-party test, that the children’s product complies with the rule.<sup>45</sup> The CPSIA generally defines a “children’s” product as “a consumer product designed or intended primarily for children 12 years of age or

<sup>31</sup> 73 Fed. Reg. at 68,332 (presenting the text of amended 16 C.F.R. § 1110.11).

<sup>32</sup> CPSIA § 102(a)(1) (regarding availability of general conformity certifications).

<sup>33</sup> *Id.*

<sup>34</sup> 73 Fed. Reg. at 68,332 (presenting the text of amended 16 C.F.R. § 1110.7(c)).

<sup>35</sup> 73 Fed. Reg. at 68,331 (presenting the text of amended 16 C.F.R. § 1110.5).

<sup>36</sup> 73 Fed. Reg. at 68,332 (presenting the text of amended 16 C.F.R. § 1110.13(a)(1)).

<sup>37</sup> *Id.*

<sup>38</sup> 73 Fed. Reg. at 68,332 (presenting the text of amended 16 C.F.R. § 1110.13(a)(2)).

<sup>39</sup> 73 Fed. Reg. at 68,332 (presenting the text of amended 16 C.F.R. § 1110.13(b)).

<sup>40</sup> 73 Fed. Reg. at 68,332 (presenting the text of amended 16 C.F.R. § 1110.15).

<sup>41</sup> 73 Fed. Reg. at 68,331-32 (presenting the text of amended 16 C.F.R. § 1110.7(a) and (b)).

<sup>42</sup> See 73 Fed. Reg. at 68,332 (presenting the text of amended 16 C.F.R. § 1110.11(d)).

<sup>43</sup> 73 Fed. Reg. at 68,328.

<sup>44</sup> See Notice of Stay of Enforcement of Testing and Certification Requirements, 74 Fed. Reg. 6396, 6396 (Feb. 9, 2009) (staying enforcement of all except certain expressly listed certification requirements).

<sup>45</sup> CPSIA § 102(a)(2) (mandating third-party testing and certification in the case of certain children’s products) (emphases added).

younger.”<sup>46</sup> Four factors, applied case by case, determine whether a particular product is designed or intended primarily for children 12 years of age or younger:

- “A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.”
- “Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.”
- “Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger.”
- “The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.”<sup>47</sup>

A separate certificate may address each applicable rule, or a combined certificate may address all such rules, so long as it specifies them.<sup>48</sup> The CPSC also allows a manufacturer’s own “firewalled” lab or a foreign “governmental” lab to conduct the “third-party” test, so long as the lab meets additional accreditation requirements preventing “undue influence.”<sup>49</sup> The timing of third-party testing requirements has grown complicated, though. Under a staggered implementation schedule, the CPSC has thus far established accreditation procedures for third-party laboratories that test compliance with standards for: lead paint;<sup>50</sup> cribs and pacifiers;<sup>51</sup> small parts;<sup>52</sup> and metal components in children’s jewelry.<sup>53</sup> An electronically searchable list of

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<sup>46</sup> CPSIA § 235(a) (defining “children’s product”).

<sup>47</sup> *Id.*

<sup>48</sup> See *id.*

<sup>49</sup> See, e.g., Third Party Testing for Certain Children’s Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies To Assess Conformity With Part 1303 of Title 16, Code of Federal Regulations, 73 Fed. Reg. 54,564, 54,565 (Sept. 22, 2008) (implementing regulations to accredit third-party testers for lead paint).

<sup>50</sup> Applicable to products manufactured after Dec. 21, 2008. See *id.*, 73 Fed. Reg. at 54,564 (implementing regulations to accredit third-party testers for lead paint); see also Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 73 Fed. Reg. 77,492 (Dec. 19, 2008) (banning certain levels of lead in paint).

<sup>51</sup> Applicable to products manufactured after Jan. 20, 2009. See Third Party Testing for Certain Children’s Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies To Assess Conformity With Part 1508, Part 1509, and/or Part 1511 of Title 16, Code of Federal Regulations, 73 Fed. Reg. 62,965 (Oct. 22, 2008) (implementing regulations to accredit third-party testers for cribs and pacifiers); see also Options to Address Crib Safety Hazards; Advance Notice of Proposed Rulemaking; Request for Comments and Information, 73 Fed. Reg. 71,570 (Nov. 25, 2008) (request for comments on how best to improve crib safety).

<sup>52</sup> Applicable to products manufactured after Feb. 15, 2009. See Third Party Testing for Certain Children’s Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies to Assess Conformity With Part 1501 of Title 16, Code of Federal Regulations, 73 Fed. Reg. 67,838 (Nov. 17, 2008) (implementing regulations to accredit third-party testers for small parts); see also Labeling Requirement for Toy and Game Advertisements, 73 Fed. Reg. 58,063 (Oct. 6, 2008) and Labeling Requirement for Toy and Game Advertisements; Final Rule, 73 Fed. Reg. 67,730 (Nov. 17, 2008) (implementing regulations requiring cautionary statements in advertising).

<sup>53</sup> Applicable to products manufactured after Mar. 23, 2008 (children’s metal jewelry). See Accreditation Requirements for Third Party Conformity Assessment Bodies To Test To the Requirements for Lead Content in



accredited laboratories now appears on the CPSC website.<sup>54</sup> The CPSC has not yet, however, established accreditation procedures for laboratories that test compliance with standards for: lead content other than in children’s metal jewelry; toys; baby bouncers, walkers and jumpers; phthalates; and all other children’s products subject to safety rules, whether promulgated pursuant to the CPSIA or some other CPSC statute. Therefore, the CPSC’s recent stay will prevent enforcement of third-party testing requirements on the latter products until Feb. 10, 2010, while enforcement of third-party testing for lead paint, cribs and pacifiers, small parts and children’s metal jewelry is not waiting.<sup>55</sup> The stay has also not delayed enforcement of a requirement to certify compliance with new ATV standards and the applicable ATV action plan.<sup>56</sup> And regardless of whether third-party testing requirements yet apply, all goods must comply with underlying safety standards.<sup>57</sup>

**Tracking labels.** Effective Aug. 14, 2009, importers of any “**children’s product**” must also ensure that a “permanent, distinguishing” mark on the product and its packaging, “to the extent practicable,” provides identifying information.<sup>58</sup> Such information must enable:

- “the manufacturer to ascertain the location and date of production of the product, cohort information (including the batch, run number, or other identifying characteristic), and any other information determined by the manufacturer to facilitate ascertaining the specific source of the product by reference to those marks;” and
- “the ultimate purchaser to ascertain the manufacturer or private labeler, location and date of production of the product, and cohort information (including the batch, run number, or other identifying characteristic).”<sup>59</sup>

To require such a label, a consumer product must have been “designed or intended primarily for children 12 years of age or younger.”<sup>60</sup> The CPSC was accepting comments until April 27, 2009.<sup>61</sup>

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Children’s Metal Jewelry as Established by the Consumer Product Safety Improvement Act of 2008, 73 Fed. Reg. 78,331 (Dec. 22, 2008) (implementing regulations to accredit third-party testers for lead in children’s metal jewelry).

<sup>54</sup> See CPSC, List of Accredited Testing Laboratories at <http://www.cpsc.gov/cgi-bin/labapplist.aspx> (last visited Mar. 9, 2009).

<sup>55</sup> See Notice of Stay of Enforcement of Testing and Certification Requirements, 74 Fed. Reg. 6396 (Feb. 9, 2009) (staying enforcement of all except certain expressly listed certification requirements). The stay has also not delayed enforcement of a requirement to certify compliance with new ATV standards and the applicable ATV action plan. See Final Rule: Standard for All Terrain Vehicles, 73 Fed. Reg. 67,385 (Nov. 14, 2008).

<sup>56</sup> See Final Rule: Standard for All Terrain Vehicles, 73 Fed. Reg. 67,385 (Nov. 14, 2008).

<sup>57</sup> See, e.g., 74 Fed. Reg. at 6397.

<sup>58</sup> CPSIA § 103 (mandating tracking labels); compare to Tracking Labels for Children’s Products Under Section 103 of the Consumer Product Safety Improvement Act; Notice of Inquiry; Request for Comments and Information, 74 Fed. Reg. 8781 (Feb. 26, 2009) (inviting comments on tracking label requirement).

<sup>59</sup> *Id.*

<sup>60</sup> 74 Fed. Reg. at 8782 (explaining the scope of the cautionary statement requirement).

<sup>61</sup> 74 Fed. Reg. at 8781 (inviting comments).



**Consumer registration/recordkeeping/notification.** Before tracking label requirements become effective (Aug. 14, 2009), the CPSC must publish regulations requiring the “manufacturer” of any “ **durable** infant or toddler product” to:

- provide with each product “a postage-paid consumer registration form”;
- “maintain a record” of consumer registrants’ “names, addresses, email addresses, and other contact information”; and
- “permanently place” on each product “the manufacturer name and contact information, model name and number, and the date of manufacture.”<sup>62</sup>

Under the statute, a “durable infant or toddler product” is “a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years” (including such items as cribs, toddler beds, high chairs, bath seats, gates, play yards, stationary activity centers, infant carriers, strollers, walkers, swings, bassinets and cradles).<sup>63</sup> Numerous statutory requirements govern the registration form’s attributes, including content, size of print, attachment to the product and an option for consumers to register through the Internet.<sup>64</sup> Regulations will require maintenance of registration information for “not less than 6 years after the date of manufacture of the product” and use of that information only to notify consumers of voluntary recalls, involuntary recalls or safety alerts.<sup>65</sup>

**Cautionary statements.** Already effective, another CPSIA provision requires that any Internet or catalogue advertisement providing a “direct” means to order a “toy or game intended for use by children who are at least three years old but not older than six years,” as well as “balloons, small balls, and marbles,” include a “cautionary statement.”<sup>66</sup> If the importer provides the product to a retailer, the importer must also inform the retailer of any applicable cautionary statement requirement, so that the retailer too will more likely comply with it.<sup>67</sup> A Final Rule published in November details labeling requirements as regards permissible text, location, conspicuousness, etc.<sup>68</sup> Given “the significant lead time involved in printing catalogues,” however, the CPSC is providing a grace period for catalogues printed before Feb.10, 2009 and disseminated before Aug. 9, 2009.<sup>69</sup> In addition, catalogues between businesses need not comply, unless the recipient

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<sup>62</sup> CPSIA § 104(d)(1) (imposing consumer registration requirements).

<sup>63</sup> CPSIA § 104(f) (defining “durable infant or toddler product”).

<sup>64</sup> CPSIA § 104(d)(2) (describing requirements for consumer registration forms).

<sup>65</sup> CPSIA § 104(d)(3) (describing requirements for recordkeeping and notification).

<sup>66</sup> CPSIA § 105 and 15 U.S.C. § 1278 (describing cautionary statement requirements); Labeling Requirement for Toy and Game Advertisements, 73 Fed. Reg. 58,063 (Oct. 6, 2008) and Labeling Requirement for Toy and Game Advertisements; Final Rule, 73 Fed. Reg. 67,730 (Nov. 17, 2008) (implementing regulations requiring cautionary statements in advertising); see also Third Party Testing for Certain Children’s Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies to Assess Conformity With Part 1501 of Title 16, Code of Federal Regulations, 73 Fed. Reg. 67,838 (Nov. 17, 2008) (implementing regulations to accredit third-party testers for small parts).

<sup>67</sup> CPSIA § 105 (describing the importer’s duty to inform).

<sup>68</sup> 73 Fed. Reg. at 67,736-39 (providing detailed labeling requirements), adding new 16 C.F.R. § 1500.20.

<sup>69</sup> 73 Fed. Reg. at 67,735 (stating the effective date and grace period for compliance with “small parts” cautionary statement requirements).





business itself “could be expected to be purchasing the product for the use of children instead of for resale” (e.g., catalogues directed to schools or day care centers).<sup>70</sup>

**Bonding.** At an undetermined time, the CPSC must also identify consumer products or component substances the destruction of which would normally cost more than required bond amounts under current law.<sup>71</sup> CPSC must then “recommend to U.S. Customs and Border Protection a bond amount sufficient to cover the cost of destruction of such products or substances.”<sup>72</sup>

## Enforcement: The CPSIA Gives the CPSC More “Bite”

Importantly, the CPSIA increases the CPSC’s enforcement powers. Among other provisions, the new law raises the level of civil and criminal penalties for violations, authorizes the CPSC to block whole classes of imports by means of a “Substantial Product Hazard List,” and generally mandates the destruction rather than re-exportation of noncompliant imported products.

**More Severe Penalties.** The CPSIA raises the maximum civil penalty per violation from \$5,000 to \$100,000 and the maximum for a related series of violations from \$1.25 million to \$15 million.<sup>73</sup> For criminal violations, the maximum term of imprisonment will increase from one year to five years and the maximum fine from \$50,000 to various alternatives, including \$250,000 for individuals, \$500,000 for organizations and/or “twice the gross gain” if the offense gives rise to pecuniary gain.<sup>74</sup> In addition, the importer could forfeit “assets associated with the violation.”<sup>75</sup> As under previous law, criminal penalties may affect both organizations and individuals who act “knowingly and willfully,” but unlike the old statute, the new statute punishes directors, officers and agents even when they lack prior “knowledge of notice of noncompliance received by the corporation from the Commission.”<sup>76</sup> By Aug. 14, 2009, the CPSC must publish a regulation interpreting certain statutory factors to be considered when the CPSC assesses civil penalties.<sup>77</sup> The new penalties will take effect either on Aug. 14, 2009 or as soon as the regulations come out, whichever occurs earlier.<sup>78</sup>

**Substantial Product Hazard List.** The CPSIA authorizes the CPSC to establish a list blocking any “class” of imported products that exhibit “characteristics whose existence or absence” the

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<sup>70</sup> 73 Fed. Reg. at 67,739 (describing a business to business catalogue exemption), adding new 16 C.F.R. § 1500.20(h).

<sup>71</sup> See CPSIA § 224(a) (regarding financial responsibility for destroying inadmissible goods).

<sup>72</sup> Id.

<sup>73</sup> Contrast CPSIA § 217(a)(1) (specifying new amounts for civil penalties) and 15 U.S.C. § 2069(a)(1) (specifying old amounts for civil penalties).

<sup>74</sup> Contrast CPSIA § 217(c), (d) and 18 U.S.C. § 3571 (together specifying new criminal penalties) with 15 U.S.C. § 2070(a)(1) (specifying old criminal penalties).

<sup>75</sup> CPSIA § 217(d) (making potential civil penalties include forfeiture of assets).

<sup>76</sup> Compare CPSIA § 217(c) (specifying new criminal penalties) and 15 U.S.C. § 2070(b) (specifying old criminal penalties).

<sup>77</sup> See CPSIA § 217(b) (identifying factors that the CPSC must consider when assessing civil penalties).

<sup>78</sup> See CPSIA § 217(a)(4) (stating the effective date for new penalties).



CPSC deems to constitute a “substantial product hazard.”<sup>79</sup> Given the statutory word “class,” the CPSC may prohibit importation of not merely individual products made by one manufacturer but entire groups made by numerous manufacturers.<sup>80</sup> Before designating “characteristics,” the CPSC must make two formal determinations:

- that the characteristics “are readily observable and have been addressed by voluntary standards”; and
- that “such standards have been effective in reducing the risk of injury from consumer products and that there is substantial compliance with such standards.”<sup>81</sup>

In other words, the CPSC may make a current voluntary standard mandatory, thus creating a new class of non-compliant goods. Lobbying the CPSC to make mandatory an existing voluntary safety standard with which they, but not foreign competitors, substantially comply, domestic producers could use this provision not only to save lives but also to ward off foreign competitors. Perhaps for this reason, any business that the Substantial Product Hazard List adversely affects may file a petition for judicial review within 60 days after a CPSC rule places that business’s products on the list.<sup>82</sup>

***Destruction Rather Than Re-Export of Unsafe Imports.*** The CPSIA now authorizes the CPSC to prohibit exports.<sup>83</sup> This authorization affects not only U.S. producers of recalled and noncompliant products but also importers whose goods the United States has refused to admit at the border. In the past, authorities would require the owner or consignee of noncompliant imported products to export them “within a reasonable time,” after which authorities had discretion to destroy any remaining goods.<sup>84</sup> The CPSIA, by contrast, requires authorities to destroy the inadmissible products, unless: (1) the owner, consignee or importer of record formally applies for permission to export them elsewhere in lieu of destruction; (2) the importing foreign country within 30 days notifies the Commission that it accepts the importation; and (3) the exportation occurs within 90 days.<sup>85</sup> In other words, a potentially expensive presumption of destruction has replaced the prior statute’s presumption of re-export.

***Other Enforcement Provisions.*** Further enhancing the CPSC’s enforcement powers, the CPSIA also provides for:

- Increased cooperation between the CPSC and other federal agencies—in particular, U.S. Customs and Border Protection (CBP), whose International Trade Data System,

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<sup>79</sup> CPSIA § 223(a) and 15 U.S.C. § 2064 (authorizing identification of substantial hazards).

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> CPSIA § 221 (authorizing safety-related export prohibitions).

<sup>84</sup> Old 15 U.S.C. § 2066(e) (2007) (providing a presumption of re-export).

<sup>85</sup> CPSIA §§ 221 (mandating destruction of noncompliant goods not admitted at the border) and 223(b) (allowing noncompliant products to be exported only under certain conditions).



- National Targeting Center and Automated Targeting System might help the CPSC evaluate safety information about U.S.-bound shipments;<sup>86</sup>
- Information-sharing with states and foreign governments;<sup>87</sup>
  - Authorization for state attorneys general, after notice of the CPSC, to bring actions in U.S. district courts, enforcing CPSIA provisions on behalf of state residents;<sup>88</sup>
  - Whistleblower protections;<sup>89</sup> and
  - Establishment of a publicly available, searchable, internet-accessible database providing, among other data, reports of harm relating to the use of consumer products.<sup>90</sup>

All these provisions aspire strategically to catch dangerous imports well before they reach U.S. borders.

## **The Future: Wise Importers Do Not Wait for Requirements to Take Effect**

Beyond the difficulty of finding funds to comply with this deluge of new regulations sits the even gloomier task of understanding them. The CPSC itself is still struggling with the latter task, particularly as the economic downturn gives new meaning to phrases like “to the extent practicable.” For now, importers should strictly follow requirements where they are clear and overcomply where they are still evolving. This usually means having imports tested before they arrive at a U.S. port, having them retested periodically and maintaining an organized, accessible, electronic supply-chain paper trail.

Over the last decade, imports of consumer products have both increased in volume and disproportionately accounted for recalls.<sup>91</sup> During this period, the value of imported consumer products has approximately doubled, and the value of those from China has nearly quadrupled.<sup>92</sup> In 2007, for example, approximately 42 percent of imported products under CPSC jurisdiction came from China.<sup>93</sup> Moreover, as shown in the graph below, some 82.7 percent of recalls announced by the CPSC during 2007 involved imports, and 74 percent of those recalls involved China.<sup>94</sup> In light of these numbers, anyone who imports consumer products should carefully review new regulations implementing the CPSIA. Though potentially costly and unpleasant, CPSIA compliance will ultimately save not only companies but also lives and limbs.

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<sup>86</sup> CPSIA §§ 222(b) (authorizing CPSC use of ITDS), (c) (authorizing CPSC use of the ATS and NTC) and 19 U.S.C. § 1411(d) (establishing ITDS).

<sup>87</sup> CPSIA § 207 (authorizing the sharing of information).

<sup>88</sup> CPSIA § 218 (authorizing CPSIA district court actions by state attorneys general).

<sup>89</sup> CPSIA § 219 (protecting whistleblowers).

<sup>90</sup> CPSIA § 212(a) (mandating establishment of a publicly available, consumer product safety database).

<sup>91</sup> See CPSC, Import Safety Strategy at 3 (July 2008), available at <http://www.cpsc.gov/businfo/importsafety.pdf> (last visited Mar. 9, 2009).

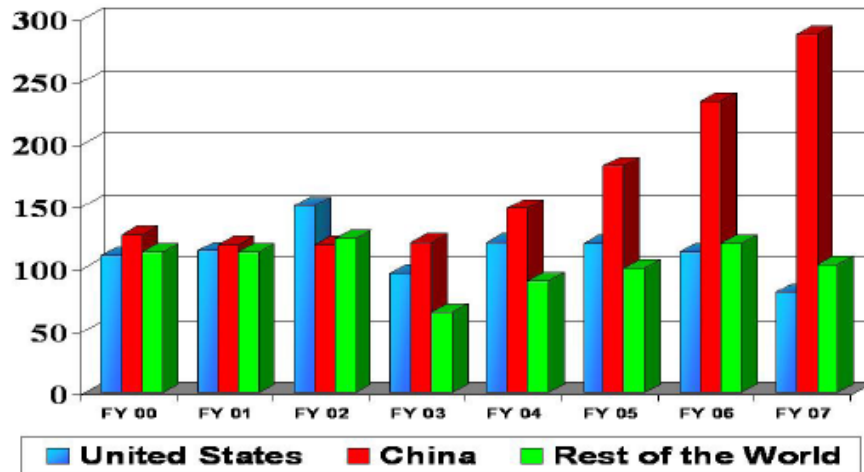
<sup>92</sup> See id.

<sup>93</sup> See id.

<sup>94</sup> See id.



## CPSC Recalls by Product Origin



Source: CPSC.<sup>95</sup>

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<sup>95</sup> Id.