Reporting to The Consumer Product Safety Commission

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A letter, phone call, on-going product safety research or lawsuit alleging that a product caused injury can signal a potential problem. But when, if ever, must a company report an incident to the Consumer Product Safety Commission? The recently enacted Consumer Product Safety Improvement Act of 2008 (“CPSIA”), Consumer Product Safety Act (“CPSA”), and the regulations promulgated by the Commission strongly favor early disclosure. But there are also measurable benefits to early reporting.

Unreasonable Risks of Injury

Reporting requirements were enacted in 1972 after Congress found an unacceptable number of consumer products presented unreasonable risks of injury. The growing complexity of consumer products and the gap in consumer abilities had made it difficult for the average consumer to anticipate risks associated with products and safeguard against hidden dangers. Congress passed the CPSA to protect the public from unreasonable risks of injury; to assist consumers in evaluating the safety of consumer products; to develop uniform safety standards; and to promote research and investigation to prevent product-related injuries and deaths.

The CPSA created the Commission and gave it broad powers to achieve these goals, including the ability to regulate consumer products. To protect United States consumers further, Congress enacted the CPSIA in August. Congress’ directives reinforce the predicate legislation: immediate reporting of potentially dangerous products to the Commission is paramount to prevent injury to the public.

Is It a Defective Consumer Product?

The Commission regulates only consumer products. A consumer product is any article or component part of such product that is produced or distributed for sale to a consumer or for personal use in a home, residence, school or for recreation or otherwise. Courts liberally construe a “consumer product” in accordance with the CPSA’s purpose. If a product’s distribution exposes a significant number of consumers to a product hazard, courts will most likely consider the product within the Commission’s jurisdiction.

A more difficult issue is whether a defect exists. The definition of a “defect” starts with its common meaning: a “fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function.” Legal concepts of manufacturing, design and failure to warn defects are subsumed within its definition. The Commission also considers risk-utility factors. If the available information does not reasonably support a finding that a consumer product could be defective, no reporting obligation exists. On the other hand, if available information reasonably supports the conclusion that a defect could exist, companies must inquire whether the defect could create a substantial product hazard.

Substantial Product Hazard

The existence of a substantial product hazard is characterized by the public’s exposure to significant numbers of defective products, or if the possible injury is serious or likely to occur. Any one of these factors could indicate the existence of a substantial product hazard and trigger a reporting event:

Pattern of defect. Where does the defect stem from — the design, composition, content, construction, finish, packaging, warnings or instructions?

Number of products in the stream of commerce. How many defective products are there that would result in serious injury?

Severity of risk. Is the injury that might occur serious? Are there numerous defective products, but which pose
no serious risk of injury?

**Likelihood of injury.** Is the injury likely to occur? How many injuries have already occurred? How many more are likely to occur? What is the intended or reasonably foreseeable use or misuse of the product?

**Vulnerable exposed to risk.** Is the population group exposed to risk vulnerable, such as the elderly, disabled or children?

The Commission urges evaluation of “all available information that can assist in evaluating potential hazards,” regardless of its geographic source. Such information includes incidents with the same or substantially similar product or component sold abroad. Analyses of product failures abroad could be relevant to the product’s performance within the United States and expedite corrective actions.

The regulations push companies further. A company must file a report with the Commission even if the existence of a defect is questionable. The extent of public exposure and severity of injury is typically unknown during the nascent phases of investigation; therefore reporting to the Commission is encouraged even if the company is uncertain whether a substantial product hazard exists. Where there is an unreasonable risk of serious injury or death and final determination of the risk is not possible, the Commission still requires notification. The test for reporting is based not on certainty of a defect or hazard but on a reasonableness standard: whether a reasonable person could conclude that a consumer product is defective or presents a hazard.

**Mandatory Reporting — 24 Hours**

Section 15 of the CPSA, 15 U.S.C. § 2064(b), requires manufacturers, distributors and retailers of consumer products or any other products over which the Commission has jurisdiction to notify the Commission when they have obtained information that reasonably supports the conclusion that their product:

- fails to comply with a consumer product safety rule or with a voluntary consumer product safety standard relied upon by the Commission;
- fails to comply with a similar rule, regulation, standard or ban under any other Act enforced by the Commission;
- contains a defect that could create a substantial product hazard to the public; or
- creates an unreasonable risk of serious injury or death.

Under any of these circumstances, reporting to the Commission must be completed within 24 hours of discovery unless the manufacturer, distributor or retailer has actual knowledge that the Commission has been adequately informed.

That 24-hour period may be extended. The regulations permit a short investigation and evaluation period not to exceed 10 days unless a company can demonstrate a longer period is reasonable. At the end of the 10-day period, the Commission presumes the company has received and considered all the available information. If reportable information becomes known during the course of investigation, a company cannot wait until the investigation terminates. As soon as the company discovers a reportable event, the Commission must be notified. Investigation by an insurance carrier is no excuse to delay or avoid reporting.

Waiting until a serious injury or death occurs is also prohibited; companies that obtain information indicating that their product presents an unreasonable risk of serious injury or death must report the risk immediately to the Commission. Companies must keep tabs on their products and, at the first sign of a possible defect that presents a potential hazard to the public, notify the Commission.

**Benefits of Early Disclosure**

Prompt reporting of potential hazards benefits companies. By conducting speedy and thorough investigations at the first sign of a product problem, companies can transmit the most accurate information to the Commission. Conversely, remaining silent enhances the risk that the Commission will receive distorted or inaccurate reports that could require the company to take costly and unnecessary remedial action. Under the whistleblower protections of the CPSA, the Commission encourages company employees to step forward with information about dangerous consumer products. The Commission receives consumer product information from too many unreliable sources for companies to keep quiet.

Submitting a report to the Commission does not automatically result in a determination that corrective action will be required. Indeed, even the regulations allow companies to deny that the information submitted reasonably supports the conclusion that its consumer product is noncomplying, contains a defect that could create a substantial product hazard, or creates an unreasonable risk of serious injury or death. The Commission works with the company to determine if corrective action is warranted and the extent of the corrective action. Often, companies negotiate with the Commission to determine the right level of remedial action. Many reports result in no further action because the product defect does not create a substantial product hazard. By reporting early a company can know sooner about whether remedial action is required.

Early action also allows companies to define the scope of the corrective action if one is required. Given the Commission’s broad authority to require remedial action, cooperation and communication with the Commission are the best ways to draft the most effective and cost-efficient corrective rem-
Companies are encouraged to draw upon the Commission’s experienced staff to draft the most stream-lined and effective corrective action. Prompt disclosure to the Commission can further blunt claims that punitive damages should be imposed because the company hid information about its product from the public. Also showing that a company reacted quickly and comprehensively can take the wind out of plaintiff’s sails.

Reporting to the Commission also avoids the risk of civil and criminal penalties. The CPSIA boosts civil penalties to $100,000 per violation, with a maximum penalty of $15,000,000 for a related series of violations. For the most egregious cases of noncompliance, the CPSIA provides for criminal penalties and forfeiture of assets associated with a criminal violation.

Finally, good corporate citizenship engenders customer loyalty. Customers are more likely to purchase more products from a company that accepts responsibility for errors (or even third-party contamination or tampering) and takes proactive measures to protect the public from potentially harmful products. Responsibility and pre-emptive steps to ensure safe products show the highest standard of product quality and restores consumers’ confidence in the product.

Conclusion

There have been an unprecedented number of recalls resulting from consumer products manufactured abroad and the call to protect consumers, especially children, has become urgent. Although the Commission has yet to draft the bulk of regulations mandated by Congress in the CPSIA, it is certain that the Commission’s efforts to ensure compliance with reporting regulations will become more rigorous. Consumer product companies must understand these changes and be prepared to react when the worst-case scenario occurs.