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Strictly Speaking
The Newsletter of the Product Liability Committee

December 23, 2013 Volume 10 Issue 4

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Featured Articles

CPSC Mandates Safety Programs for Manufacturers and Retailers – An Update

by Kenneth Ross

In July 2013, *Strictly Speaking*published an article authored by me entitled "I'm from the Government and I'm Here to Help – CPSC Gets "Helpful."" While I wouldn't normally update one that is so current, there have been several important developments since I wrote that articlethat warrant an update.

In the earlier article, I described where the CPSC has, in the past, provided guidance on how companies should establish safety programs. Below is a list:

1. Handbook for Manufacturing Safer Consumer Products (2006)
2. A new rule detailing factors that the staff will consider in connection with civil penalties (16 CFR §1119.4(b)(1) (2010))
3. Safety programs required in a civil penalty settlement agreement assessed against Daiso (2010)
4. Updated Recall Handbook (2012)
5. Safety program requirements inserted into two civil penalty settlement agreements with Kolcraft and Williams Sonoma (2013)

In addition, I quoted various statements that commissioners issued in connection with the inclusion of safety program requirements in thesesettlement agreements. Commissioner Adler, who will become Acting Chairman on December 1, 2013, responded to Commissioner Nord's concern and signaled how he views the future use of such safety requirements. He said, in part:

> Far from viewing this settlement as punishment, I view it as the Commission and the company mutually agreeing to a set of reasonable measures designed to lead to safer products and fewer recalls in the future. Indeed, I suspect that the reason that companies agree to such language is their sense that any conscientious, responsible firm should follow such procedures in their approach to compliance. And to the extent that their

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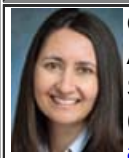

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past practices might have fallen short of these goals, they are eager to demonstrate that their future approach will be one of strict adherence to such provisions.

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The fact that the Commission has sought similar language in the two settlements says little at this point about whether there has been a shift in agency policy in the future. Even if it did, there is nothing improper about implementing the policy in individual case settlements. That said, I do not rule out asking for such clauses in future non-civil penalty settlement agreements nor do I rule out future expansions of the Commission's voluntary recall policies.

Since the July 2013 article was written, several interesting things have happened. First is that an additional settlement agreement was finalized in June involving Ross Stores that included safety compliance requirements. In the settlement agreement press release, the CPSC stated:

> In addition to paying a monetary penalty, Ross has agreed to implement and maintain a compliance program designed to ensure compliance with the reporting requirements of Section 15(b) of the Consumer Product Safety Act and the Final Rule. Ross also agreed to enhance its existing compliance policies by ensuring that its ongoing program contains written standards and policies, a mechanism for confidential employee reporting of compliance related questions or concerns, and appropriate communication of company compliance policies to all employees through training programs. Ross has designed and implemented a system of internal controls and procedures to ensure that the firm's reporting to the Commission is timely, truthful, complete, accurate, and in accordance with applicable law. The company will also take steps to ensure that prompt disclosure is made to management of any significant deficiencies or material weaknesses in the design or operation of such internal controls.

On the question of the enforcement of this agreement, the agreement says:

> Upon reasonable request of staff, Ross shall provide written documentation of its procedures, including, but not limited to, the effective dates of its procedures and improvements thereto, and shall cooperate fully and truthfully with staff and shall, upon reasonable notice, make available all non-privileged information and materials, and personnel with direct involvement in such procedures, if reasonably requested by staff in relation to an investigation of noncompliance by Ross with the Final Rule and/or CPSA §15(b).

Second, it didn't take long for Commissioner Adler's

statement above to come to fruition. In September, I received a letter from the CPSC saying that it did not intend to seek civil penalties from my client, but still expected it to set up a more robust safety program. The letter stated:

> Our decision not to proceed with a civil penalty is conditional upon the Firm agreeing to take the following corrective measures by establishing procedures for: (a) handling complaints and incidents; (b) corrective and preventive actions upon discovery of compliance deficiencies or violations; (c) appropriate internal controls to prevent future violations; (d) training and education of appropriate personnel on compliance procedures; (e) senior management-level responsibility for the compliance activities identified in this letter; and (f) periodic reporting to the Firm's board of directors (or equivalent governing body), including reporting of significant deficiencies or material weaknesses in the design or operation of compliance-related procedures described in this letter.

In checking around with CPSC lawyers in September, I was unable to find anyone else who had received such a request. Despite that, I suspect that such requests will be included in most, if not all, agreements where the CPSC decides not to seek penalties.

The last CPSC action concerning compliance programs is contained in a notice of proposed rulemaking dated September 18, 2013. This rule deals with voluntary recall notices, but also allows the CPSC to mandate compliance programs as part of corrective action programs. The staff description of the rule says:

> Negotiated corrective actions give Commission staff the opportunity to tailor remedies to a particular situation and the associated health and safety risks presented. The proposed rule would include language that would permit, in appropriate situations and at staff's discretion, staff to pursue compliance program requirements in the course of negotiating corrective action plans. The proposed rule contemplates that if appropriate, a corresponding reference to compliance program requirements may be included in the related voluntary recall notice. Inclusion of compliance program requirements as an element of voluntary corrective action plans would echo compliance program requirements incorporated as part of recent civil penalty settlement agreements.

This interpretative rule was approved by the Commissioners on November 13, 2013 but it has been put out for public comment. The rule was amended on November 13with a majority of the commissioners approving language that would make the corrective action, including an agreement as to the establishment of a safety program, to be legally binding. Therefore, the CPSC would be able to legally enforce the compliance program if the company does not

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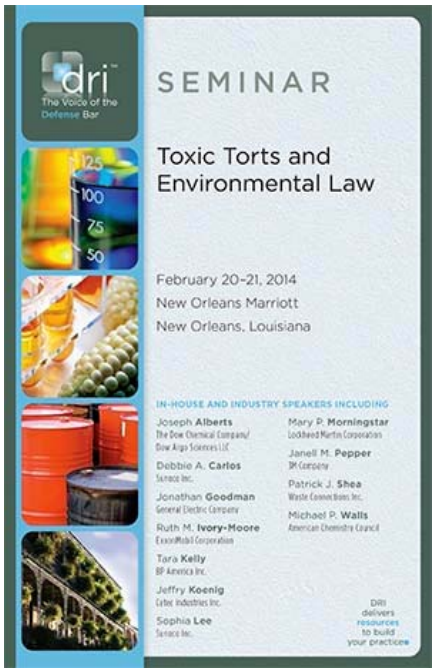

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The interesting question is how the CPSC is going to enforce such agreements. In the Daiso matter, the CPSC had Daiso hire an independent toy safety inspector to come in and do the audit. Daiso presumably had to provide the report to the CPSC. The Ross Stores agreement makes it clear that the company will have to provide documentation to the CPSC confirming compliance. While these documents will most likely contain confidential information and therefore not be given out by the CPSC in response to Freedom of Information Act requests, this report will exist in the company's files and will not be privileged since it was created at the request of a government agency and given to the government.

As I said in my earlier article, manufacturers should consider these CPSC requirements and guidelines and evaluate their own programs. Also, they should consider the guidelines provided in the new ISO standards or any requirementsnecessitated by the new or revised safety laws in the EU, Canada or Australia?

Hopefully, by adopting the best program appropriate for that company's risk, the companycan minimize the risk of safety problems in the field and minimize the necessity to do a recall. And, if a recall is necessary, it can be moresuccessful. Last, if the CPSC considers seeking civil penalties, the existence of such a program might minimize the chance they will do so or will lessen the amount of any penalty sought.

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