



AT THE TABLE

JANUARY 2011

Quarterly news from legislative and regulatory forums where AHFA is at the table, serving as the voice of the home furnishings industry.

In our first edition of *At the Table* for 2011, we have updates to several key regulatory issues impacting the home furnishings industry. Watch your email box for future issues of *At the Table*, an online newsletter designed to keep the AHFA membership engaged in the aggressive efforts taking place on their behalf on a wide range of regulatory and legislative issues.

AHFA Awaits Final Rule on CPSIA Testing and Labeling

AHFA spent considerable staff time and resources in 2011 dissecting the onerous requirements of the Consumer Product Safety Improvement Act of 2008 and identifying their potential impacts on home furnishings manufacturers. Provisions within the rule that were found to be hopelessly ambiguous or that promised to pose an unreasonable cost burden were addressed in formal comments submitted to the Commission, as well as in numerous face-to-face meetings with the commissioners and agency staffers.

Among the most hotly-debated provisions in the rule are the testing and labeling requirements pertaining to product certification. CPSIA required the Consumer Product Safety Commission (CPSC) to issue a rule clarifying the testing and labeling requirements within 15 months of the August 2008 date of enactment. However, by October 2009 – one month prior to the 15-month deadline – CPSC announced it was nowhere near being ready to offer such clarification.

Now, 29 months after enactment, CPSC appears ready to finalize the testing and labeling rules to support a Certificate of Conformity.

AHFA staff believes the final rule will not be significantly different from the original rule proposed in May 2010, in which the elements of a reasonable testing program for non-children's products included (1) product specifications; (2) certification tests; (3) a production testing plan; (4) a remedial action plan; and (5) record keeping.

The requirements for testing children's products included (1) periodic testing; (2) random samples; (3) material change; (4) undue influence; (5) remedial action; and (6) record keeping.

Also in May 2010, the Commission proposed conditions and requirements for testing component parts of consumer products to demonstrate compliance with the applicable CPSIA regulations. A component testing rule is of particular interest to furniture manufacturers, since virtually all furniture products are subject to the lead in paint and surface coatings regulation, 16 CFR 1303.

Furniture manufacturers typically thin down or blend many different paints or surface coatings to create their unique finishes, and the proposed component part rule appeared to require them to create a panel for each finish and have the panel tested for lead. For some in the industry, this would pose a tremendous cost burden.

AHFA staff and several member company executives visited the Commissioners and pointed out the problems inherent in this approach. In subsequent discussions with CPSC compliance staff, AHFA was assured that a single test of all paints, coatings and finishes found in a plant could be the basis for a valid Certificate of Conformity for all furniture finished with these materials.

In the example presented to CPSC staff, AHFA asked whether it was permissible for a furniture manufacturer to create a finish panel with at least one coat of each of the finishing materials used on 22 different finishes in a facility. In this example, we made clear that this would involve 61 different materials comprising 72 coats, or layers, of materials on the finish panel.

CPSC Compliance staff responded that this example fell within the proposed component testing rule and would be acceptable to the agency as the basis for a Certificate of Conformity. Of course, when new supplies of these materials come in, a new finish panel should be created and tested to confirm that all meet the 90 ppm lead limit. AHFA was pleased with this response because of the tremendous cost savings it represents for member companies.

Steps to Take NOW to Prepare for CPSIA Consumer Database

As part of the Consumer Product Safety Improvement Act of 2008, the Consumer Product Safety Commission (CPSC) is required to create a searchable database of product safety incidents. CPSC is prepared to launch the database on a new website, www.SaferProducts.gov, in March 2011.

AHFA members should take several steps **now** to control their risk exposure from this new public forum for consumers to air their product complaints and safety concerns.

1. **Consult your attorneys.** Discuss the repercussions of this database and how you can minimize your product liability exposure before the database becomes operational in March.
2. **Register with the CPSC.** Because of the Commission's limited resources and staff, it is hoping to completely automate the database system. Therefore, it is strongly encouraging manufacturers and private labelers to "register" to receive any "reports of harm" about their products through a specific email address. The registration process begins **Tuesday, January 18**. To register, you will need to designate one individual (or email address) within the company as the main point of contact for CPSC. Since manufacturers are only allowed one contact email, many companies are setting up addresses like cpscdatabase@xyzcompany.com and assigning the responsibility for checking that email address to several people. In addition to designating a main point of contact, you also need to ...
3. **Collect all brand names, models and/or style numbers of all products your company manufactures.** These product names will appear in a drop down box after the consumer types in the name of a manufacturer who is registered with the agency. This is intended to help manufacturers obtain sufficient information to investigate incident reports posted on the site.
4. **Establish an agreement with any private label manufacturers.** Many distributors are writing a registration requirement right into their private label contracts. Manufacturers with major brand names will want to assert control over them and assume the responsibility for registering for **all** their brands.

5. **Decide how your company will respond to each type of report.** Some companies are electing to use a form letter in response to each “report of harm.” Other companies may decide to investigate each report to the extent possible. Each report will require its own manufacturer response to the CPSC, but companies could develop template responses for certain types of reports. For example, reports detailing a television or furniture tip-over incident might receive a template response that describes industry and manufacturer efforts to prevent such tip-overs. Template responses should still include comments addressing the individual incident described in each report of harm.
6. **Decide who should receive copies of CPSC communications.** CPSC is offering up to five copies of electronic communications, and it might expand this to 10. Some companies are designating an attorney within each division, while others are naming the head of quality assurance within each division.

CPSC Defines ‘Children’s Product’

On October 14, 2010, the Consumer Product Safety Commission (CPSC) published its final interpretation of the term “children’s product” for purposes of enforcing the requirements of the Consumer Product Safety Improvement Act (CPSIA). The definition became effective immediately.

According to the CPSC, a “children’s product” is a consumer product designed or intended primarily for children 12 years of age or younger. Four criteria are used in determining whether a product meets this definition:

- 1) A manufacturer’s statement or label that the product is intended for children;
- 2) Advertising, promotion, packaging or display of the product as appropriate for children age 12 or under;
- 3) Common recognition by consumers as a product intended for children age 12 or under; and
- 4) Falling within the CPSC’s “Age Determination Guideline” as a product intended for children age 12 or under.

(The “Age Determination Guideline” is a 313-page document relating children’s ages to toy characteristics and play behavior.)

A couple of things about this rule are worth noting. First, it is an interpretive rule, as opposed to a substantive rule. That means it reflects the Commission’s interpretation of what Congress intended within the CPSIA. It is designed to give manufacturers a better understanding of how the Commission will evaluate children’s products. It does not have the force of law like a substantive rule. Of course, it is wise to stay as close to the interpretive rule as possible to avoid the costs of litigation.

Second, the Commission has stated that its determinations would be made on a case-by-case basis according to the facts unique to each product category. The rule provides some specific examples in categories that might be more ambiguous than others, including the category of “Furnishings and Fixtures.” Here, the rule finds that most home furnishings products are “General Use Products” unless they are decorated or embellished with a childish theme, are marketed to children and/or sized for a child. Accordingly, it offers small bean bag chairs with childish

decorations, beds with children's themes and child-sized desks as examples of furnishings that would be considered children's products.

Comments filed by AHFA received a good reception from the Commission, and many of AHFA's suggestions were adopted in the final rule.

For example, the Commission defined a General Purpose Product as one that an older child or adult is *as likely or more likely* to interact with as a child age 12 or younger.

In addition, per AHFA's recommendation, if a collection of "youth" or "juvenile" furniture is intended to be used by a child from birth or toddler years through teenage years, the Commission will consider such furniture to be children's products *only* if such furniture is sized for small children and has other characteristics – such as decorations or embellishments – that would be appealing to children. This allows most "youth furniture" – which is often *not* child-sized and absent of cartoon decorations or other childish embellishments – to be considered General Purpose.

Furniture manufacturers now have a clear choice to make. They can manufacture "youth furniture" that is sized for small children and made attractive to them by the use of cartoon or other childish themes. These pieces must comply with all CPSIA requirements for lead in the coating, lead in the substrate, phthalates, tracking labels and third party testing and certification.

Or, they can manufacture General Purpose furniture that is styled and sized to appeal to all ages and marketed to families as being appropriate for all ages. In this case, only compliance with the lead in paint regulation (1303) and the bunk bed regulations and the General Certificate of Compliance is necessary.

Companies that intend to claim their collections are General Purpose furniture would be wise to drop the term "youth furniture" from catalogs, advertising and promotions, or else divide their collections into smaller segments so that only pieces truly intended for small children are marketed as such.

California Attorney General Rules on Furniture Wood Dust Warning

In December, the State of California added "wood dust" to its list of chemicals "known to cause cancer" – which, under the state's Proposition 65, means any product containing wood dust that is sold in the state must contain a specific warning label.

Occupational exposure to wood dust is already regulated under federal and state occupational safety and health laws, but Proposition 65 applies beyond the workplace to consumer and other environmental exposures. "Environmental" exposure can include inhalation, ingestion or even skin contact.

In September the California attorney general's office provided informal guidance to the wood products industry, suggesting that the following warning, used in conjunction with other measures, would be adequate: "WARNING: Drilling, sawing, sanding or machining wood products generates wood dust, a substance known to the State of California to cause cancer."

AHFA subsequently requested clarification on whether *finished residential furniture* would require the wood dust warning.

Because finished furniture is ready for use and does not require that the consumer perform any type of activity that would produce wood dust, Deputy Attorney General Susan Fiering stated in a December 9 letter to AHFA that companies selling finished furniture do *not* need to provide a Proposition 65 warning for wood dust.

Background on the CPSC Public Database of Consumer Product Safety Concerns

The Consumer Product Safety Commission (CPSC) will launch a new public database of consumer product safety concerns, www.SaferProducts.gov, in March 2011. The searchable database of product safety incidents was required as part of the Consumer Product Safety Improvement Act of 2008.

The CPSC website, www.cpsc.gov, currently offers information on product recalls, but the new database will allow consumers to submit a “report of harm” any time they experience a safety incident involving a product they have purchased.

The goal of the CPSIA requirement was earlier detection of product safety hazards and quicker public notices of those hazards. But the resulting database leaves manufacturers powerless to prevent the posting of fraudulent information.

How the Database Will Work

When a consumer believes they have been harmed by a product, they can file a “report of harm” on the database. The term “harm” is defined by CPSC as meaning any “risk of injury, illness or death.” The CPSC rejected a proposed amendment that would have required that the risk be qualified as “substantial,” stating that it would rely instead upon its expertise to determine whether a reported risk supported the claim of “harm.”

At a minimum, the report must contain a description of the consumer product, the identity of the manufacturer or private labeler, a description of the harm, the incident date, the category of the submitter, contact information for the submitter, verification as to the truthfulness of the report and the consent of the submitter to publication in the database. CPSC has said it will not post any reports that do not contain all of this information.

From the time a consumer submits a report of harm, CPSC has five business days to send the report to the manufacturer for comment. Each report of harm will have a unique identifier which the manufacturer must reference in its response. The manufacturer of the named product will have 10 business days to review, investigate and respond to the report.

On the tenth day, CPSC is required to publish the report of harm in the database. If the Commission has received a response from the manufacturer or distributor, it will post that response alongside the report of harm. If the agency receives a response from the manufacturer *after* the tenth day, it will still post that response with the original report, but the rule provides no specific deadline for posting these late responses.

Even if the manufacturer objects to the consumer’s report on grounds of confidentiality or materially inaccurate information, the report still will be published on the tenth day. The CPSC will review the manufacturer’s objections, but there is no established timeline for doing so. If they agree with the objections, they will take down the report, correct it or edit it to remove the offending language.

Many Provisions Are Open to Interpretation

The majority of the Commissioners have chosen to give liberal interpretations to the various provisions of the database. The Commission has decided that virtually anyone can submit a report of harm. They rejected an amendment to limit reports to those from individuals with firsthand knowledge of the event. Furthermore, CPSC expanded the definition of “consumers” to include family members, relatives, friends, attorneys, investigators and even observers of the consumer products being used. Also, government agencies, health care professionals, child service providers and public safety entities may submit reports. The term “public safety entity” has been defined to include consumer advocates and individuals who work for non-governmental organizations and trade associations.

Conversely, the commissioners set a fairly high bar for what constitutes “materially inaccurate information,” defining this as information that is false or misleading and which is so substantial and important as to affect a reasonable consumer’s decision-making about the product.

Confidential information is narrowly defined so that only information from a company employee or insider, past or present, would likely qualify for this objection.

It is worth noting what information CPSC will NOT provide to the manufacturer. The name and contact information of the submitter of a report of harm will not be released to the public nor to the manufacturer unless the submitter specifically checks a box authorizing CPSC to release the information. Therefore, manufacturers may have little information upon which to begin their investigation of the report.

Interestingly, any person may claim that a manufacturer comment contains “materially inaccurate information” including class action attorneys, competitors and others who might have inappropriate motives to challenge the comments. However, if the manufacturer claims that the report of harm contains materially inaccurate information and requests an expedited review, the manufacturer is limited to no more than five pages to prove its point, and there are no deadlines for CPSC staff to perform its review.

Summary

As is clear from the above description, the CPSC public database has the potential to create havoc for you and your company. There is virtually nothing you can do about reports of harm about products that you do not make or that may be counterfeits of your products. The Commission has made it exceedingly difficult for you to commence an investigation and submit a meaningful response, since you will have only 10 days, potentially no contact information, and only the submitter’s description of the problem. However, if you do not investigate each report, it will be difficult to convince the CPSC to correct inaccurate information or to remove a fraudulent report. Because the CPSC does not bear the responsibility of verifying the legitimacy of the reports in the database, you could be subject to a campaign of false and fraudulent reports designed to damage your reputation. These could come from a competitor, a consumer advocacy group or a trial attorney. It is the latter group that stands to benefit the most from the public database, because they will be able to mine the database for potential product liability cases and unfair business competition actions.