

The Increasing Importance Of Timely Reports To CPSC

Law360, New York (June 04, 2012, 1:44 PM ET) -

- Since the 2008 enactment of the Consumer Product Safety Improvement Act (CPSIA), manufacturers, distributors, importers and retailers have noticed more aggressive enforcement of Consumer Product Safety Commission (CPSC) regulations.

In 2011-2012, for example, companies faced intensified scrutiny and increased penalties for allegedly failing to timely report product defects under § 15(b) of the Consumer Product Safety Act (CPSA). 15 U.S.C. § 2064(b).

Now, more than ever, businesses need to understand the law and develop strong CPSC compliance programs.

The Changing Landscape

The CPSIA dramatically increased civil penalties for violations of the CPSA, including those for failing to timely report under § 15(b). Civil penalties increased from \$8,000 to \$100,000 for each violation and from \$1.825 million to \$15 million for any related series of violations. 15 U.S.C. § 2069.

Each separate unit of a consumer product in violation and each failure to report constitutes a separate offense. Moreover, for continuing

violations, each day the violation continues constitutes a separate penalty. Clearly, the potential for large civil penalties is enormous.

Criminal penalties — which include fines, imprisonment or both — for knowing and willful reporting violations also have increased. 15 U.S.C. § 2070(c)(2).

The penalty for a knowing or willful violation has increased from one year to five years in prison; furthermore, knowingly is defined under a reasonable-person standard that creates a broad group of potential violators. 15 U.S.C. § 2070; 18 U.S.C. § 3571; 15 U.S.C. § 2069(d); 15 U.S.C. § 1264(c)(5).

In addition, companies, directors and officers now face criminal liability or forfeiture of assets for failing to report, even if they did not have prior notice from the CPSC of the violation. 15 U.S.C. § 2070(c)(1).

Complicating matters is the CPSC's new public website, saferproducts.gov, launched in March 2011. Consumers now post product incidents and risks of harm on the website for all to see.

The stakes for businesses are higher than ever — more reports of harm are being published, and the CPSC is watching every move.

If a company fails to investigate a report of harm posted on the website, which should have precipitated filing a § 15(b) report, it faces civil or criminal liability and large penalties. Businesses must stay vigilant and submit § 15(b) reports promptly.

Over the past six months alone, the CPSC vigorously pursued many enforcement actions. Settlements for alleged § 15(b) reporting violations include:

- Black & Decker Co., weed trimmer/edger: \$960,000.
- Build-A-Bear Workshop Inc., toy bear beach chair: \$600,000.
- Henry Gordy International Inc., dart target set: \$1.1 million.
- Hewlett-Packard Co., lithium batteries: \$425,000.
- Nordic USA, ski binding plates: \$214,000.
- Perfect Fitness, exercise equipment: \$425,000.
- Spin Master Ltd., Aqua Dots toys: \$1.3 million.

The CPSC also prevented some product sales even when no incidents or injuries were reported, unilaterally deeming the products defective and the companies at fault for failing to timely report.

On Jan. 19, 2012, when CPSC Chairwoman Inez Tenenbaum approved the Hewlett-Packard settlement, she warned that increased enforcement of § 15(b) reporting violations will continue:

"It is my strong hope and expectation that future enforcement actions, particularly those that arise under our enhanced authorities, will (as Congress intended) include civil penalty amounts that maximize the likelihood of deterring violations, providing just punishment, promoting respect for compliance with the law, reflecting the seriousness of the violation and ultimately protecting the public from unreasonable risks of injury and death."

Understand the Law on Reporting

Given this harsh new landscape, companies should refamiliarize themselves with § 15(b) reporting requirements, which require companies to notify the CPSC "immediately," i.e., within 24 hours, upon receipt of information that reasonably supports the conclusion that a product:

1. Fails to comply with an applicable consumer product safety rule, regulation, standard or ban, or any other act enforced by the commission;
2. Contains a defect which could create a substantial product hazard; or
3. Creates an unreasonable risk of serious injury or death. 15 U.S.C. § 2064(b).

Subsection (1) is seldom invoked because it is limited to specific situations, i.e., specific CPSC rules, regulations or bans relating to specific products.

By contrast, the CPSC frequently invokes subsections (2) and (3) — but they are ambiguous. How do companies know whether and when they must report under § 15(b)? How do they know their products contain a “defect” that “could create a substantial product hazard,” or whether their products create an “unreasonable risk of serious injury or death” — both of which trigger a duty to report?

Although there are interpretive provisions of key terms, those are ambiguous too. For example, “defect” is not defined specifically, but is often equated with its common dictionary meaning. Its meaning under the CPSA, however, often parallels the definition of “defect” found in product liability law. 16 C.F.R. §§ 1115.4 and 1115.6.

The factors applied in determining whether a defect “could create a substantial product hazard” are also nebulous and include considering the “pattern of defect, number of products distributed in commerce, severity of the risk, likelihood of injury and other considerations.” 16 C.F.R. § 1115.12(g).

And whether there is “unreasonable risk of injury” depends on factors such as the “utility of the product, level of exposure to consumers, nature and severity of risks, likelihood of resulting serious injury or death, state of the manufacturing or scientific art, availability of alternative designs or products, and feasibility of eliminating the risk.” 16 C.F.R. § 1115.6(b) and (c).

Unfortunately, the statutes and interpreting regulations do not clearly define what triggers the

duty to report under § 15(b); it is all subjective and left up to the CPSC’s discretion. There also are no bright line rules or court decisions to help define these terms or apply these factors.

In fact, of the few cases on § 15(b) reporting over the past 40 years, none has discussed the meaning of these terms in detail. Why not? Because most businesses are reluctant to let enforcement cases play out in the courts. Most, including the companies listed above, prefer to settle so that they can deny all charges and negotiate the penalties.

What to Do?

Companies should involve experienced CPSC counsel as soon as they first become aware of product incidents or risks to ensure proper evaluation of their § 15(b) reporting obligations.

The regulations and recent enforcement activity demand that companies report early and often, whenever they are in doubt that a product is defective, poses a substantial product hazard or creates an unreasonable risk of serious injury or death.

As the regulations state, “[f]irms should not delay reporting in order to determine to a certainty the existence of a reportable noncompliance, defect or unreasonable risk.” 16 C.F.R. § 1115.12(c).

Moreover, businesses can be fined if they fail to file reports even if the product is later found not to have been defective. *United States v. Mirame Enterprises*, 387 F. 3d 983, 988 (9th Cir. 2004).

Adopt Procedures to Monitor and Report Product Defects

Companies also should adopt effective risk-management procedures to monitor the safety of their products in the field. Specific steps to take include the following:

- Designate someone to be in charge of all reportable incidents and to interface with management and counsel on reporting issues.
 - Organize, maintain and review all notices of claims, accidents, lawsuits, complaints, warranty returns, sales and service reports, competitor product safety issues, and Internet and consumer blog reports.
 - Develop a plan to address complaints, claims and lawsuits, and identify any trends or similar problems being reported.
 - Establish effective communication channels within the company and with those in the distribution chain about product safety issues.
 - Create a plan for investigating product returns or other information provided by business partners and others in the distribution chain.
 - Organize and maintain all records that will help identify and isolate potentially defective products when problems are reported and found. This includes design, manufacturing, production, distribution, quality control and marketing records. It is important to know when and where the product at issue was manufactured, the number of products or specific batches affected, the distribution chain of the product and all applicable quality control or performance testing.
- Establish protocols for involving upper management and in-house and outside counsel, as well as when and how the CPSC will be notified, and under what circumstances.
 - Develop procedures for communicating with consumers, retailers, distributors and suppliers during the investigation process and after a § 15(b) report is filed. Contracts with those in the distribution chain should require cooperation on safety issues and recalls.
 - Instruct company personnel about “smart writing” and involving counsel to invoke the attorney-client privilege to protect communications from use as evidence in litigation.
 - Develop procedures to halt production if a defect is found, isolate inventory to determine appropriate corrective action to take, test the new design and prevent future occurrences.
 - Create mock incident reports and conduct dress rehearsals to ensure the company is prepared to submit timely § 15(b) reports.

These steps can go a long way in reducing penalties for failing to report. Remember, one of the other mitigation factors the CPSC considers is whether a company has a reasonable and effective CPSC compliance program in place to investigate safety-related issues. 15 U.S.C. § 2069(b).

Monitor and Respond to Reports on SaferProducts.gov

Companies also should be prepared to respond to reports of harm posted on saferproducts.gov. A best practice is to appoint a leader and team to develop internal procedures, respond to all incident reports and determine whether a § 15(b) report is necessary.

During the past year, most businesses responded to reports of harm on saferproducts.gov within the 10 business days allotted, either on the website or offline with the CPSC.

By acknowledging a report of harm and stating that an investigation is under way, companies can preclude the CPSC from taking action until the relevant facts have been investigated fully.

As the investigation proceeds and more information becomes available, companies also can supplement their responses. Some of the most effective responses to reports of harm posted on saferproducts.gov have included:

- Responding within 10 business days, regardless of whether the report has been investigated fully.
- Noting an investigation has just begun and will be supplemented promptly as additional information becomes available.
- Supplementing responses promptly and regularly as more information becomes known.
- Advising consumers to contact customer service and/or provide the company with the product.
- Communicating directly with the CPSC separately and offline instead of on the public website.
- Posting nothing online if the consumer has already contacted the company about the incident, but advising the CPSC of this fact offline and promptly.
- Stressing that all complaints are taken seriously and that the company seeks to investigate them to the fullest extent possible.
- Where applicable, stating that the submitter failed to provide contact information or the product for inspection, which prevents the company from responding completely.
- Stating that the product complied with all applicable standards.
- Confirming that the product was recently subjected to rigorous third-party, expert or other testing and analysis, and that no problems were found.
- Commenting that the product was misused or that warnings and inspections were not followed.
- Explaining the product is safe when used properly, e.g., according to instructions and warnings.
- Stating, where applicable, that the product was not manufactured by the company.

- Stressing that the company does not believe, based upon the information provided, that the report of harm presents a “substantial product hazard” or “unreasonable risk of serious injury or death.”

This approach, a strong CPSC compliance program, and guidance from trusted counsel will greatly help companies determine whether and when they must submit a § 15(b) report to the CPSC.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2014, Portfolio Media, Inc.



--By Gary M. Glass, Thompson Hine LLP

Gary Glass is a partner in Thompson Hine's Cincinnati office.