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Author:**Eric L. Stone**

eric.stone@klgates.com

+1.202.778.9014

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Not So “Voluntary” Standards?

At a meeting on October 7, 2009, the Consumer Product Safety Commission (“CPSC” or “Commission”) staff discussed with the Commission its plans to begin using its new authority under section 15(j) of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064(j), as amended by section 223(a) of the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016 (August 14, 2008) (CPSIA), to determine by rule that violations of voluntary standards for drawstrings in children’s garments and immersion protection in hair dryers present a “substantial product hazard.” Just like that, a voluntary standard can become mandatory, and non-compliance with such a “voluntary” standard may trigger seizures at ports, recalls, and possibly other enforcement action including civil and criminal penalties.¹

What Is the Basis for a Substantial Hazard Rule?

Section 223(a) of the CPSIA amended the “substantial hazard” provisions of section 15 of the CPSA to add a new section 15(j). That provision says

The Commission may specify, by rule, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard under subsection (a)(2), if the Commission determines that—

(A) such characteristics are readily observable and have been addressed by voluntary standards; and

(B) such standards have been effective in reducing the risk of injury from consumer products and that there is substantial compliance with such standards.

Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), defines a “substantial product hazard” as “a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.”

Because section 15(j) provides for identification of “characteristics whose existence or absence shall be deemed a substantial product hazard under subsection (a)(2),” it appears that in addition to the 15(j) requirements that the characteristic be

¹ At the public meeting, Cheryl Falvey, the CPSC General Counsel, noted that her office would provide a separate privileged briefing to the CPSC on the various legal issues presented by the statute. In her presentation, she did say that a violation of such a substantial hazard rule is not a “prohibited act” under section 19 of the CPSA, 15 U.S.C. 2068, although a failure to report the violation could trigger a “failure to report” violation. This suggests the CPSC may not read the “or similar rule” language of section 19(a)(1) to encompass 15(j) violations, or view violations of such rules as a violation of an “order issued under section 12 or 15 of this Act,” section 19(a)(2) of the CPSA, 15 U.S.C. § 2068(a)(2).

“observable,” the standard be “effective,” that there be “substantial compliance,” the product must also present a “substantial product hazard” as defined in section 15(a)(2). Put another way, one would expect the CPSC to only issue such a “substantial hazard rule” if it can make a finding that the product presents a substantial hazard based on the factors in section 15(a)(2).

The statute provides no criteria for the CPSC to apply in determining whether product characteristics are “readily observable,” whether a voluntary standard is “effective in reducing the risk of injury,”² or as to what “substantial compliance” means. In rulemaking actions to establish standards or bans, the CPSC has frequently debated these issues, and has failed to establish a consistent, solid base of precedent for these determinations. Whether that means the CPSC will devise such criteria or proceed cautiously to establish such precedent remains to be seen.

What Procedures Apply?

The Commission has not revealed its thinking regarding the procedures and the extent of the “due process” that should apply to this rulemaking. If the agency were proceeding against an individual product under section 15, it would have to afford interested persons an opportunity for a hearing under section 15(f) of the CPSA. Such a proceeding would be an administrative trial type hearing under 5 U.S.C. 554. The CPSIA does not specify whether this “substantial hazard rule” is to be developed through a “notice and comment” approach under 5 U.S.C. 553 or through the more formal process specified in section 15(f) of the CPSA and 5 U.S.C. 554. While that lack of specificity usually leads to an assumption that Congress intended that the more informal process apply, making generic hazard findings by rule in lieu of the normal hearing process raises unique due process questions for the CPSC. However, CPSC may prefer the informal notice and

² At the Commission meeting, Jay Howell, Assistant Executive Director, Hazard Identification and Reduction, discussed the impact the UL voluntary standard had had over a 20-year period of time on electrocution deaths and the ease of identifying the safety feature—an oversized plug with test buttons. Whether every voluntary standard will have such histories and obvious characteristics remains to be seen.

comment approach because of its relative speed and limited procedural requirements.

Section 15(j)(2) of the CPSA provides that judicial review of such a “hazard listing rule” may occur not later than 60 days after promulgation of the rule, and requires a petition for review “under the procedures set forth in section 11 of this Act.” Section 11 of the CPSA governs judicial review of “consumer product safety rules” and provides that such rules must be supported by “substantial evidence on the record taken as a whole.”³

What Are the Implications of This Provision?

The CPSC has a history of “enforcing” some voluntary standards such as the drawstring and hair dryer provisions through use of the substantial product hazard provisions of section 15 of the CPSA. While the CPSA forces the CPSC to rely on voluntary standards in lieu of standards or bans in instances where they are effective and there is substantial conformance, in the real world there are outliers that fail to comply. Where the hazard and risk are severe enough, the CPSC has used its substantial hazard authority to deal with those outliers.

Although most of those recalls have been arrived at through agreements between the staff and the firms involved, those agreements saved the parties from going through a formal administrative hearing process where the agency would have had to prove that the voluntary standard violation was a defect that presented a substantial risk of injury. The new section 15(j) of the CPSIA seeks to substitute a more generic rulemaking proceeding for this trial process.

As the CPSC staff stated at the October 7, 2009 meeting, one primary reason for adopting such

³ Section 11 previously applied only to standards or bans promulgated under sections 7, 8 and 9 of the CPSA. Those provisions preclude the CPSC from adopting standards or bans in the event there are voluntary standards that address a risk of injury and for which there is substantial conformance. In considering standards and bans, CPSC must apply various criteria including the costs and benefits of the rule. Section 9(f) of the CPSA. One might expect the CPSC to argue they do not have to do so for “substantial hazard rules.”

“substantial hazard” rules” is to allow the Department of Homeland Security’s Customs and Border Protection (CBP) and the CPSC the ability to stop products deemed hazardous at the port of entry.⁴ While it could be argued that this authority always existed under section 17(a)(4) of the CPSA, 15 U.S.C. § 2066(a)(4), the procedural burden in any hearing is much easier. Rather than having to prove that a product contains a defect which creates a substantial risk of injury, the CPSC and CBP need only prove that the product is subject to, but fails to comply with, the voluntary standard in the manner specified.

Given the CPSC’s history of going after hair dryers and children’s upper garments with drawstrings, a rule listing such products may not be particularly controversial. However, the CPSC staff indicated at the briefing that it already has extension cords and holiday lights in its sights. Of course, the staff need not stop there and may extend this authority to make substantial hazard findings for some of the several hundred other voluntary standards affecting safety. This may allow the agency to—with minimal due process and little consideration of costs and benefits of its actions—adopt voluntary standards and give them more effect than even mandatory standards.

Under the CPSA, a mandatory standard or ban is based on an “unreasonable risk” of injury and the CPSC may take action to give public notice and to recall the product under sections 15(c) and (d) of the CPSA *only* if it proves the violation creates a substantial product hazard based on the factors enumerated in section 15(a) of the CPSA and after affording interested persons an opportunity for a trial-like hearing. However, simply by listing a voluntary standard under section 15(j) of the CPSA, the CPSC generically determines that the product meets the substantial product hazard threshold. Recalls become virtually automatic.

⁴ An August 2009 GAO Report titled “Consumer Safety—Better Information and Planning Would Strengthen CPSC’s Oversight of Imported Products” critically examined CPSC’s import program and suggested broader use of rulemaking options. At the briefing, John “Gib” Mullan, the Assistant Executive Director for Compliance and Field Operations, noted that these generic defect rules would eliminate the need to prove a substantial hazard in a lengthy hearing at the time of a seizure of the product at the ports.

While violating a “substantial hazard rule” may not be a prohibited act, the failure to report the violation could be pursued under section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).⁵ Further, the failure to participate in a voluntary recall of one of these products⁶ or one ordered by the Commission⁷ is a prohibited act and could lead to enforcement by the CPSC or state attorneys general and penalties could be sought for such violation.

Another question about such “substantial hazard rules” is whether they have pre-emptive effect on state or local regulations. Section 26 of the CPSA, 15 U.S.C. § 2075, appears to only pre-empt state or local requirements when the CPSC has issued a “consumer product safety standard.” Such standards are issued under the provisions of section 7 of the CPSA, 15 U.S.C. § 2056. A substantial hazard rule is not such a standard and that makes a pre-emption argument difficult.

Conclusion

It remains to be seen whether the adoption of such voluntary standards as “substantial hazard rules” becomes widespread. Abraham Maslow⁸ famously remarked, “If the only tool you have is a hammer, you tend to see every problem as a nail.” Given that the procedures and standards for “substantial hazard rules” may in some ways be easier than for writing a standard or ban, and the remedy is in some respects stronger, it is possible that the CPSC will be tempted to broadly use such rules to enforce voluntary standards. While in some ways this option is beguiling to a regulatory agency, CPSC must take care not to enforce such standards when there is not really a substantial hazard present. Too frequent resort to such “substantial hazard rules” might distort the impact of voluntary standards and affect the willingness of industry to join into the creation of such standards in the future.⁹ In the long

⁵ The CPSC has already settled several defect reporting matters for children’s garments with drawstrings.

⁶ Section 19(a)(2) of the CPSA, 15 U.S.C. § 2068(a)(2).

⁷ Sections 19(a)(2) and (5) of the CPSA, 15 U.S.C. § 2068(a)(2) and (5).

⁸ Maslow, a psychologist, was perhaps best known as the father of “humanistic psychology” and for his theory of the “hierarchy of needs.”

⁹ Among other things, private litigants may attempt to apply the CPSC findings in product liability and other contexts.

term, such actions might lead to reduction of such standards activity and negatively impact consumer safety, or they might lead to attempted manipulation of the substantial hazard rule-making process for anti-competitive or other purposes. At this point,

however, it is impossible to assess the breadth and scope of the CPSC's use of the substantial hazard rulemaking authority and the ultimate impact of such rules.

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