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## ENFORCEMENT

### IMPORT SAFETY

The posting of Consumer Product Safety Commission inspectors at U.S. ports of entry, for the purpose of enforcing product safety statutes and regulations, was triggered by congressional concern that products coming in from China might contain toxic ingredients, say attorney Robin E. Harvey and law student Lourdes Perrino in this BNA Insight. The authors examine the new procedures and penalties, and offer guidance for importers and exporters.

## Consumer Product Safety Commission Inspectors Now Responsible For Enforcement of Product Safety Laws at U.S. Ports of Entry

BY ROBIN E. HARVEY AND LOURDES PERRINO

**A**s of June 2010, the Consumer Product Safety Commission has been posting inspectors at U.S. ports of entry for the purpose of enforcing product safety statutes and regulations. Before, screening always had been performed by Customs inspectors, who could call in CPSC inspectors when they thought it necessary or appropriate.

Containers are being seized at both air and sea ports, requiring importers and customs brokers to produce general conformity certificates for all products, and product testing compliance certificates for products specifically identified under the Consumer Product Safety Improvement Act ("CPSIA") as requiring specialized testing for lead and phthalate content. So far, reports from the field indicate that seized goods are being released almost immediately after the proper certificates are produced. However, seized products not in-

tended for use by children and not tested in conformity with CPSIA requirements are being detained by the CPSC as alleged non-conforming goods, until inspectors are satisfied that the seized goods should not be considered children's products. Importers and customs brokers benefit from having on hand documentation to support the position that seized merchandise are not children's products.

A series of problems with Chinese goods triggered this increased vigilance, leading to the posting of CPSC inspectors directly at ports of entry in the United States. Issues over lead paint in 2007 in toys, compounded by other incidents including problems with tainted pet food, galvanized Congress, which learned quickly that the CPSC was an understaffed and underfunded bureaucracy incapable of policing all the products coming in from China that might be consumed by Americans, especially children and family pets, and might contain

toxic levels of ingredients. Congress increased the CPSC budget authorization from \$80 million to \$136 million by 2014 and ordered the agency to be more aggressive and vigilant in protecting American consumers.

## Cooperation With Customs

The move to police ports directly includes procedures for CPSC independent of Customs and increases penalties for consumer safety violations very substantially. These steps are intended to reassure Americans that the CPSC is serious about consumer protection, particularly as to imported goods. They also communicate to American trade partners, however, that increased vigilance and tougher penalties do not necessarily mean the exclusion of goods. U.S. agencies have been meticulous in establishing the new practice as an act of protection, not protectionism. Properly tested and certified goods remain welcome and free of penalties.

The posting of CPSC inspectors requires close cooperation with Customs and Border Protection (“CBP”), which began April 26, 2010, with a Memorandum of Understanding signed by CBP Commissioner Alan Bersin and CPSC Chairman Inez Tenenbaum.<sup>1</sup> The MOU gave CPSC access to CBP’s Import Safety Commercial Targeting Analysis Center (“CTAC”), enabling CPSC inspectors to identify the nature of incoming products and utilize hand-held XRF (X-ray fluorescence technology) units to immediately scan for lead content. The agreement also granted the CPSC power to contact importers directly; in the past, the CPSC could contact importers only through the CBP.

The developing collaboration between the CBP and the CPSC is part of a larger effort by U.S. administrative agencies to cooperate in enforcing the mandates of the CPSIA. That cooperation has been aided by the formation of CTAC in 2009, which initially advised President Obama on ways to improve the food safety system in the United States. Other agencies participating in CTAC include the Federal Food and Drug Administration (“FDA”) and the U.S. Department of Agriculture’s Food Safety Inspection Service.<sup>2</sup>

## Detention Procedures

Newly empowered, the CPSC has introduced several new procedures at U.S. ports of entry. It is issuing its own Notices of Detention, and expects to change both detention periods and conditional releases within weeks. The new notices will soon contain a description of the alleged violation, its statutory basis, and the contact information for the CPSC inspector who examined the goods.<sup>3</sup>

CBP inspectors will continue to issue their own detention notices, so the same goods likely will become

subject to two different notices involving different procedures whenever a reason for detention is product safety. The CPSC has announced that it will send copies of its notices to both importers and customs brokers. Anyone receiving a notice will have five business days to respond with the required certificates (general conformity and/or testing certification) showing compliance with product safety requirements. Extensions may be available on a case by case basis, and in those instances where there is a dispute over whether a product is intended for children, extensions probably will be necessary.

CPSC inspection and detention procedures are not only applicable to CPSIA, but to all statutes enforced by the CPSC, including the Consumer Product Safety Act itself (CPSA), the Federal Hazardous Substances Act (FHSA), the Flammable Fabrics Act (FFA), the Poison Prevention Packaging Act (PPPA), the Refrigerator Safety Act (RSA), the Virginia Graeme Baker Pool and Spa Safety Act, and the Children’s Gasoline Burn Prevention Act. They are all enforceable now by CPSC inspectors at ports of entry.

## Penalties and Releases

Some of the changes within CPSC discretionary power include the conditional release of goods and increased monetary penalties. For products determined not to present an immediate threat to public health, the CPSC may issue a conditional release of goods requiring customs bonds during the tentative 30-day detention period in which the CPSC decides whether to release, seize, or deny altogether entry of the goods. Goods released conditionally may not be sold or distributed in the U.S. before a final determination concerning safety has been made.

The CPSC will issue a Notice of Recovery for goods granted conditional release that are determined to be in violation of product safety laws. A Notice of Recovery requires the owner to redeliver the goods to the CPSC or risk liquidated treble damages based on the value of the goods. The CPSIA gives the CPSC authority to add civil penalties when goods contain safety marks that have not been authorized for use on a product by a certified third-party testing facility. The CPSIA increases the maximum penalty for violating CPSC safety standards from \$8,000 to \$100,000 for each violation and from \$1.8 million to \$15 million for a related series of such violations.

The CPSC is utilizing its authority in enforcement to seek higher penalties, as the \$2.3 million penalty assessed against Mattel in 2009 for lead in paint on children’s toys indicates.<sup>4</sup> It is also examining for any unauthorized use of safety marks, such as an Underwriters Laboratories “UL” or the Canadian Standards Association’s “CSA” affixed to goods sold for use, consumption, or enjoyment in or around a permanent or temporary household or residence, a school, or in recreation. There are exceptions, but the objective is to inspect products destined for individual or personal use or consumption rather than factory or other production. CPSC, thus, is empowered to assure that foreign products destined for personal consumption do not enter the United States pretending to have been certified as safe.

<sup>1</sup> CBP Pub. Affairs, *CBP, CPSC Sign Agreement to Promote Consumer Safety*, [http://www.cpsc.gov/pr/cbp\\_cpsc04262010.html](http://www.cpsc.gov/pr/cbp_cpsc04262010.html) (last updated Apr. 26, 2010).

<sup>2</sup> U.S. Dept. of Homeland Sec., *Secretary Napolitano Announces the Creation of New Center to Ensure the Safety of Imported Goods*, [http://www.dhs.gov/ynews/releases/pr\\_1260296299666.shtm](http://www.dhs.gov/ynews/releases/pr_1260296299666.shtm) (last updated Dec. 8, 2009).

<sup>3</sup> U.S. Dept. of Homeland Sec., *Trade Outreach via Webinar*, [http://www.cbp.gov/xp/cgov/trade/trade\\_outreach/outreach\\_webinar.xml](http://www.cbp.gov/xp/cgov/trade/trade_outreach/outreach_webinar.xml) (last updated Jun. 8, 2010).

<sup>4</sup> *Mattel Fined \$2.3 Million for Toy Hazard*, <http://www.msnbc.msn.com/id/31129127/> (last updated Jun. 5, 2009).

Products found to display such safety marks illegitimately are now subject to both CPSC and CBP detention. The CPSC may levy twice the amount of civil penalties, in these circumstances, under its detention order.

Goods not conditionally released are now detained at a CBP bonding facility during the 30-day detention period. Under the new procedure, the CPSC is not required to resolve the detention in 30 days; rather, the 30 day time frame is merely a target. Previously, when the CBP did not make a decision as to whether it would release, seize, or deny entry of goods in 30 days, the goods automatically were deemed excluded from entry and the importer was allowed to protest the result. Under the new procedure, goods are not automatically deemed to be excluded entry on the 30<sup>th</sup> day. Consequently, the importer cannot protest the detention until the CPSC makes a final determination as to the status of the goods.

Indeterminate detention could lead to constitutional disputes over takings and due process, so the immediate situation surely will not continue for long. The CPSC will have to establish time limits for their inspectors in issuing decisions. The first indicator of the time limit will be a note on the CPSC website in the form of a Q&A response, ultimately to be followed by CPSC regulations. CPSC, however, will try to develop some experience with its inspectors before it fixes a time limit with a rule.

Whereas CBP historically has encouraged re-exportation of rejected goods, the CPSC's primary mechanism is destruction rather than exportation.<sup>5</sup> An importer must apply to the Secretary of the Treasury in order to get a special exemption to have the goods exported rather than destroyed. Under the CPSIA, exported non-conforming goods can be sent only to a country seeking them for the purpose of destroying the goods in conformity with hazardous material regulations.

This change in policy, making destruction of the goods the default instead of re-exportation, signals a broader change in U.S. policy. Previously, the United States was willing to reject goods, for whatever reason, but did not aggressively inhibit other countries from receiving them. Now, when the United States decides a foreign product seeking entry is not safe, it acts to pro-

tect not only Americans, but people in all parts of the world. A foreign product found not safe for Americans no longer is to be exported as if it were safe for someone else.

## Impact of CPSC Agents at U.S. Ports

The addition of an agency charged with vigilance at U.S. ports and armed with new powers and penalties may cause concern for foreign exporters and for importers, especially in the handling of Chinese goods because goods from China triggered these developments. Certainly the general move to greater vigilance and penalties was intended to persuade exporters and importers alike to be more vigilant themselves. In addition, despite the increased budget and staffing, the CPSC remains shorthanded for its new tasks. It has been able to deploy only a small number of inspectors at each of the ten largest ports in the U.S.

Importers and exporters might deduce that consumer goods and food will be delayed at major ports. So far, that concern would be misplaced. Early reports from New York's Kennedy International Airport and the port at Savannah, Ga., indicate that release of detained goods generally has been prompt. The key is to have the proper documentation ready. Inspectors are proving cooperative and responsible. They are not bottling up goods unnecessarily, but they do represent a greater commitment in the United States to protect against unsafe products being imported from other countries.

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<sup>5</sup> U.S. Consumer Prod. Safety Commn., *Import Safety Strategy*, <http://www.cpsc.gov/businfo/importsafety.pdf> (last updated July 2008).; Pub.L.No. 110-314, § 221, 122 Stat. 3016, 3065 (2008).