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Subject: CPSIA - Information Overload

In a break with past practice, I am passing along a blogpost of mine, rather than writing you and posting it in my blog. I hope you will follow my blog as there is often information featured there that you might find useful.

<http://learningresourcesinc.blogspot.com/2009/02/cpsia-information-overload.html>

Is it just me (okay, it's probably just me), or are we being overwhelmed with critical information and rulings on a daily basis, to the point where it is impossible on a practical basis to even READ them? I have noticed my hours of operation becoming more and more odd (check out the hours that I post my blogs, keeping in mind that I live in Chicago and not by nature nocturnal) and as I attempt to keep abreast of developments (impossible) and do my day job (what day job?), I fall further and further behind. As anyone who knows me will attest, I am able to manage a fairly robust workload - but this is simply ridiculous, especially if you consider the absolutely critical nature of the challenge.

This has been on my mind increasingly in recent days as the deluge of releases from the CPSC cascade over my inbox. There are critical rules I have not read that directly affect our business and this effort. I am running out of hours. . . .

Then I read an article from a few ago on the BNA Product Safety & Liability Reporter by Ellen Byerrum in the Jan. 26 (?) issue. Ms. Byerrum writes:

"In any case, 2009 promises to be a year of intense activity at the commission, as the CPSIA's demand for regulatory action far outpaces CPSC previous years' standards output. The new law will significantly affect the regulated community, and products available to consumers, in 2009 and in years to come.

'In the agency's history we've issued 35 or 40 final product safety rules--in a 30-year history,' CPSC Acting Chairman Nancy A. Nord told BNA. Before Congress took aim at product safety, there were 13 ongoing product safety rulemakings.

'That was more than we ever had in our agency's history,' Nord said, 'so we were very, very busy pushing forward on a pretty aggressive safety agenda.'

The new law requires CPSC to promulgate about 40 rulemakings over the next several years. In 2009 alone, CPSC expects to work on close to two dozen rulemakings, a number that could increase, according to commission officials."

I had a sense of this. . . .

As if Ms. Nord's observations about rulemaking were not alarming enough, she continues: "I cannot overstate the concern I feel about the agency's ability to implement this law--given our resource constraints--in a way that both advances safety and does not result in regulations that are not well thought through." I share that concern. . . .

[We will post this article at www.learningresources.com/CPSIA shortly, if you want to read it.]

I have long railed against the complexity of the CPSIA and the practical issues posed by the design of the law. The overload of simultaneous rulemaking processes is part of our practical disenfranchisement by the design of this law. The volume of events is so great that we cannot, as a practical matter, participate. For instance, I have not submitted a comment letter to the CPSC since the request for comments on penalties in mid-December. You can probably safely assume I want to submit comment letters in every rulemaking process under the CPSIA. By running so many rulemaking processes at once, I am excluded because I cannot keep up. This is a serious issue.

In addition, consider the challenge of complying with this law. Before now, we had to concern ourselves with one "per se" violation of law (Lead-in-paint), plus a range of voluntary standards,

and mainly, our "duty of care" to consumers. By "we", I refer to toy companies. Clothing companies, publishers and many other industries swept up in the CPSIA had no comparable standard to meet. In other words, for toymakers, there was ONE rule we were never to violate (I-i-p) and could administer the rest by common sense and a sense of consideration toward our valued customers. This system had several advantages: (a) it tended to align safety resources around "real" risks (actual risk of injury in proportion to the probability of injury), (b) it was simple and UNDERSTANDABLE (it was basically governed by common sense, not arbitrary rules that were unrelated to our real world experience) and (c) it was TEACHABLE. The latter point is quite important. Operating businesses have an ever-changing roster of employees/associates. We have new managers, line employees, quality folks, customer service reps, warehouse employees, purchasing assistants, you name it. Every time someone new joins us in one of several departments and numerous functions, we have to teach them how to administer our business, in this case from a safety perspective. In the old scheme, we had one "stop the presses" issue (I-i-p) and designed a quick response/quick notice process to address our duty of care responsibilities. We could teach this system pretty easily and effectively.

What about now? According to the CPSIA, EVERY VIOLATION is now reportable IMMEDIATELY to the CPSC. This means every violation of any provision of the Act exposes our company to potential penalty liability, recalls costs and associated humiliation, and incredibly, CRIMINAL charges. Yes, because every violation can lead to criminal charges if done "knowingly". The "knowingly" standard includes what a "reasonable man" would know if he were exercising "due care". You can imagine how sweeping the knowledge base is of a "reasonable man". [He no doubt gets less sleep than me.] Okay, how does this compare to the old system? A few thoughts:

A. It is incredibly complex and difficult to understand. Ask five people to explain how the law works, and see if there is even ONE point they agree on. Won't happen. This tells you how difficult the law is to understand. We call this "empirical evidence" - data from the real world. Consumer groups and legislators claim to have superior knowledge that allows them to understand the law "perfectly" but we mere mortals can't get it right. I admit it - in the real world, I GUARANTEE no one will completely understand this law, and therefore their failure to fully comply is ASSURED. Should keep the CPSC satisfyingly busy

B. It's infinitely more risky. Any violation of ANY provision (and there are a lot of provisions now) can be the subject of a recall. The recent releases from the CPSC suggest that they intend to exercise caution in allowing violative products to remain in the market - get ready for a big jump in recalls. This change in atmosphere won't exactly be free, either. And as noted, these violations can also result in criminal charges. I am on record for months that someone will be going to JAIL in our industry at some point. I don't know who (hope it's not me) but someone's going to the pokey under the law. Is that appropriate? I think not except under the most egregious circumstances, sight unseen. With 51 CPSCs now (State Attorneys General definitely count), the odds of rationality prevailing are poor.

C. The law has become detached from consideration of risk and thus no longer corresponds to common sense. To administer this law in the real world, we need to keep it simple (stupid). The real world is comprised of ordinary people, not just lawyers. Education levels vary, sophistication varies, knowledge varies. To produce a uniform safety performance, we need a simple message that our people can grasp without a law degree and months of intensive study. By designing a law that does not correspond to our everyday experiences and perception of risk, Congress has created a set of rules that can't be governed by common sense. Hello Congress, the world cannot manage arbitrary rules of this complexity. If you want to rule by arbitrary fiat, you need to limit your rules to just a few (ex.: lead-in-paint ONLY). Otherwise, your regulator construct won't work - in a world of real people, a tangle of complex rules will discourage compliant behavior by encouraging capitulation or scofflaw behavior (e.g., black markets).

D. Finally, and most importantly, these laws are so complex that they cannot be taught. EVERYONE facing this law as a fact of life will admit this point. IF you can grasp how the law

works, can you possibly teach it to your co-workers upon whom you depend? Can you create circumstances where you ACTUALLY believe your organization will be conforming to this maze of complicated and inconsistent rules, thus saving you from the risk of jail time? I, for one, am not there yet. With the changing face of the workplace, if you ever succeed to in teaching this complex and evolving set of rules (it seems to change every day right now), the know-how walks out the door every day. At what point do you give up? Has ANYONE in Congress considered this issue, even for a second???

Welcome to my world.

I will (someday) riff on the economic incentives of such a regulatory scheme. It is making our business model obsolete, and I can prove it. I haven't given up on our business, please note, but this law makes the job of making it successful infinitely more difficult - for no particular benefit to anyone. Thanks, Congress!

Sincerely,

Richard Woldenberg

Chairman

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