

CPSC's Regulatory Robot 2.0 improves over original, but it is still only a starting point

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MAY 21, 2019

The Consumer Product Safety Commission exercises regulatory authority over a vast array of products, including toys, lawn equipment, furniture and nearly all other consumer products other than automotive vehicles and medical devices.

Among the CPSC's key objectives has been making its labyrinth of requirements accessible to regulated businesses and the public. Toward that end, in 2016 the CPSC's small-business ombudsman launched its Regulatory Robot, an online tool geared toward businesses that do not have dedicated product safety professionals.

The Robot underwent a reboot in late 2018, resulting in the launch of Regulatory Robot 2.0. Regulatory Robot 2.0 is an online form, available at <https://business.cpsc.gov/robot/>, that produces a list of potentially applicable federal product safety requirements based on information a business enters about its product.

The report may provide information about whether the product requires third-party testing; whether it must meet certain size thresholds (e.g., small-part regulations for children's toys); whether it is subject to lead-content requirements; whether certificates of conformity or particular labeling are required; and whether it is also subject to other federal requirements.

The CPSC says it does not maintain the information entered into Regulatory Robot 2.0 or the report that is generated. The report can be printed as a PDF once prepared.

Regulatory Robot 2.0 is more user-friendly than the original, and is a helpful starting point for assessing the scope of federal product safety requirements to which a product may be subject. But product-safety rules are complex, and running afoul of the law can be costly. For this reason, users should exercise caution before relying on the Regulatory Robot 2.0 report as the sole tool to assess their regulatory exposure.

Businesses should still seek the advice of product safety counsel to understand how to apply the rules to a given product, fully appreciate the business risks associated with making, distributing and selling consumer products, and develop proactive product safety programs and recall plans.

The Consumer Product Safety Act of 1972 and the Consumer Product Safety Improvement Act of 2008 (collectively, the CPSA) set minimum safety standards for consumer products, ban

certain hazardous products, establish testing and certification requirements on categories of products with a particular focus on children's products, and require businesses to report possible product hazards to the federal government.¹

Through the CPSA, Congress established the Consumer Product Safety Commission and granted it a broad mandate to improve the safety of consumer products through rulemaking, research and testing, dissemination of product safety information to the public, product screening at ports, and civil and criminal enforcement actions.

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From small businesses to multinational corporations, companies that make, distribute, import or sell consumer products are subject to the CPSC's regulations and enforcement authority.

The legislation is credited with reducing injuries and deaths from the use of consumer products and ushering in dramatic design changes to products as ubiquitous as window blind cords, hoodies and baby cribs.

But the legislation and the CPSC's flood of rules, regulations, standards and bans that have flowed from it — particularly since the 2008 amendments — have also imposed substantial compliance burdens on businesses with respect to product design and development, manufacturing, distribution and sale, and service and support.

The burden is perhaps heaviest for makers and sellers of children's products. Before they can be distributed in the United States, all children's products must be tested by a CPSC-approved third-party testing laboratory for compliance with applicable product safety requirements.

A children's product certificate confirming compliance with applicable product safety rules is required; staff of the regulated business must undergo approved training on avoiding the exercise of undue influence over third-party laboratories; and products must meet stringent packaging and labeling requirements.²

Before developing a new gadget or agreeing to distribute or sell a new toy, therefore, businesses must understand which mandatory product specifications, testing regimes or certifications are implicated. And these are just the requirements that apply before the first unit leaves the factory.

In fact, knowledge of applicable CPSC requirements should inform decisions about the manufacturing process and selection of raw materials. Lead content and surface-coating limits and the ban on phthalates for children's products, for example, apply to accessible component parts in addition to finished products.

REGULATORY ROBOT

Enter the Regulatory Robot. The first iteration of the tool forced users to answer more than a dozen questions about a potential product to receive a customized report of possibly applicable federal product safety requirements.

Despite its complexity, the Regulatory Robot was popular, attracting more than 11,500 views in fiscal year 2017, according to the CPSC.³ The agency launched Regulatory Robot 2.0 in late 2018, simplifying the user experience and reducing the number of questions to less than a handful in most instances.

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Regulatory Robot 2.0 also improved performance of the tool on smartphones and tablets, and it added multilingual capability for certain product categories in Chinese (simplified), Spanish, Vietnamese and Bahasa Indonesian, according to the CPSC's fiscal year 2018 annual performance report.⁴

CPSC head Ann Marie Buerkle heralded the reboot in prepared remarks to the International Consumer Product Health and Safety Organization in February. "The Robot helps industry understand the product safety requirements that should be reviewed BEFORE a company begins manufacturing or importing, helping to ensure sure their products are safe and compliant for consumers,"⁵ Buerkle said.

Regulatory Robot was not the CPSC's first effort to synthesize the various key responsibilities manufacturers, retailers and others have under the CPSA into an accessible format for the regulated community. The Regulated Products Handbook, published in 2013 by the CPSC's Office of Compliance and Field Operations, was, and remains, a go-to source for

product safety professionals and counsel who interact with the CPSC.⁶

The small-business ombudsman maintains a "business education" playlist on the CPSC's YouTube channel with more than a dozen webinars on compliance with CPSC standards and operates a toll-free hotline for businesses unfamiliar with product safety requirements.⁷

The 2010 establishment of the small-business ombudsman post itself within a new Office of Education, Global Outreach, and the ombudsman was part of the CPSC's effort to improve accessibility and respond to concerns over increased regulation arising out of the 2008 amendments.

But former CPSC Commissioner Anne M. Northrup, the lone vote against establishing the new office in 2010, predicted it would not relieve businesses of the need to retain legal counsel to understand their federal product-safety obligations.

"No matter how successful this new office may be, small businesses will still have to hire their own lawyers to fully grasp their particular obligations under the complex, far-reaching new regulations being promulgated by the commission,"⁸ she said.

A review of a report generated by Regulatory Robot 2.0 illustrates that Northrup's prediction about the continuing need for legal counsel remains prescient even with the newly updated tool. For a fictional new product — a child's bracelet that lights up and rattles when shaken — initial choices by the user about how to categorize the product substantially affect the scope of the resulting report.

After giving the report a title, the user is required to choose one of several categories for the product — apparel, jewelry, toy, furniture, etc. The program permits only one choice at this step. For the fictional bracelet, whether the user selects "jewelry" or "toy" determines the flow of options that follows.

Selecting "jewelry" leads the user to a page asking if the item is intended for use by children. The resulting report is four pages in length and includes general requirements applicable to children's products including inclusion of a tracking label, lead testing and small-parts testing.

It also lists, and includes links to, voluntary industry standard specifications for adult and children's jewelry, published by ASTM International, while noting there are no specific federal product safety requirements for jewelry.

Selecting "toy" at the first step, however, generates additional options and a seven-page report with material differences from the report created by selecting "jewelry." The user must make several additional choices, including answering a question about whether the manufacturer may qualify as a small-batch manufacturer.

Small-batch manufacturers — which must qualify as such based on maximum sales volume and gross income

— are relieved of certain third-party testing requirements for children’s products. The user also is prompted to select whether the product may be considered a “rattle,” if it has batteries, and whether it includes small balls, all of which could be answered in the affirmative for the fictional child’s bracelet.

The resulting report includes instructions for qualifying as a small-batch manufacturer and links to a list of tests from which small-batch manufacturers are exempted. A small-batch manufacturer that categorized the product initially as jewelry would not have been advised of this regulatory relief.

The report also includes discussion of the federal safety standards for rattles and toys. Again, these requirements would not have appeared in the report for users who selected “jewelry” initially. But missing from the report was the reference to the voluntary standards for adult and children’s jewelry.

For a user, the risk of inconsistencies between the reports may be resolved by trying different combinations of Regulatory Robot choices to capture a larger pool of potentially applicable federal safety requirements.

Both versions of the report include information on mandatory reporting under Sections 15(b) and 37 of the CPSA. Manufacturers, importers, distributors and retailers are required to immediately report to the CPSC if a product fails to comply with any requirement enforced by the commission, contains a defect that could pose a hazard to consumers, or creates an unreasonable risk of injury or death.⁹

Businesses are required to report to the CPSC if a product is the subject of three adjudicated or settled lawsuits alleging grievous bodily injury or death within designated two-year time periods.¹⁰ The reporting requirements apply even to so-called “unregulated products” not otherwise subject to a specific product safety rule, regulation, standard or ban.

The inconsistency in results based on initial categorization choices is a significant limitation to the effectiveness of Regulatory Robot 2.0. Even more significant is the lack of individualized guidance and risk analysis for regulated businesses that must invest in design, testing, labeling and marketing based on their assessment of their regulatory exposure.

Regulatory Robot 2.0’s terms and conditions, to which the user must agree before generating a report, acknowledge these limitations. Among the stated terms are that the tool is “for generational informational purposes,” not legal advice, and that “no information conveyed by the Robot or otherwise on the CPSC website or in other CPSC materials should be used as a substitute for advice of competent counsel as to legal requirements.”

Ultimately, businesses considering using Regulatory Robot 2.0 should keep a few things in mind. First, the utility of the

report is necessarily limited by the user’s ability to interpret and apply the legal regulations to a given product.

Second, CPSC regulations, guidance and applicable case law change from time to time, so the results may not reflect the most current law. Finally, the report does not constitute an opinion from a regulatory agency and cannot be cited as a defense if a company fails to comply with federal product-safety rules.

Obtaining a Regulatory Robot 2.0 report does not provide a safe harbor.

In other words, obtaining a Regulatory Robot 2.0 report does not provide a safe harbor. As explained by the terms and conditions of using the tool, “No reports or other information generated or conveyed by the Regulatory Robot (including results, conclusions, references or recommendations) are binding on CPSC or CPSC staff, nor do any such reports or information have any legal effect.”

Application of CPSC regulations often involves analysis of gray areas in the law — such as whether a product is intended for children — that requires specialized knowledge of the product and market, knowledge of the CPSC’s prior regulatory emphases and, ultimately, an assessment of the business’s regulatory risk tolerance. A Regulatory Robot 2.0 report provides little assistance in making these determinations.

The reports generated do not advise a business of other proactive steps it should take to reduce civil penalty risk and potential future recall costs, such as implementing a product safety plan, designating a recall coordinator and maintaining records of a product’s distribution and sales channels.

Businesses should consider product safety issues early during product development, distribution or sale, and Regulatory Robot 2.0 is a good starting point. That early investment in time and research, supplemented by the advice of product safety counsel, can head off expensive remediation (including a public recall) and will pay off if a company learns of safety issues after sales have begun.

NOTES

¹ 15 U.S.C.A. ch. 47 § 2051.

² A summary of federal product safety requirements applicable to children’s products is available on the CPSC’s website at <https://bit.ly/2VUQHGR>.

³ U.S. Consumer Prod. Safety Comm’n, Fiscal Year 2019 Performance Budget Request to Congress 11 (Feb. 12, 2018), at <https://www.cpsc.gov/s3fs-public/FY2019PBR.pdf>.

⁴ U.S. Consumer Prod. Safety Comm’n, Fiscal Year 2018 Annual Performance Report 15 (Mar. 18, 2019), <https://bit.ly/2LrSuPA>.

⁵ Acting Chairman Ann Marie Buerkle Prepared Remarks for the 2019 International Consumer Product Health and Safety Organization Annual Symposium, CPSC, Feb. 27, 2019, <https://bit.ly/2XltiMm>.

⁶ Office of Compliance and Field Operations, U.S. Consumer Prod. Safety Comm'n, Regulated Products Handbook, May 6, 2013, available at <https://bit.ly/2YeFe2j>.

⁷ U.S. Consumer Prod. Safety Comm'n YouTube Page, <https://www.youtube.com/user/USCPSC>.

⁸ Press Release, U.S. Consumer Prod. Safety Comm'n, *Statement of Commissioner Anne M. Northrup on the Creation of the Office of Education, Global Outreach, and Small Business Ombudsman* (Sept. 23, 2010), <https://bit.ly/30i9kDG>.

⁹ 15 U.S.C.A. § 2064; 16 C.F.R. § 1115.

¹⁰ 15 U.S.C.A. § 2084; 16 C.F.R. § 1116.

This article first appeared in the May 21, 2019, edition of Westlaw Journal Products Liability.

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