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on product safety



## GAME CHANGE:

By Mark A. Kinzie

### **CPSC Prohibits Retailer from Selling Children's Products & Requires Comprehensive Product Safety Program.**

*United States of America v. Daiso Holding USA Inc., et al.*, Case No. 4:10-cv-00795-PJH, N.D.Ca. (March 2, 2010).

**The Facts.** Daiso is a retail store chain based in Japan, where it operates some 2,500 stores and where it reported some \$3.4 billion in corporate revenues as of March 2009. From 2005 through 2008, Daiso opened 9 stores in the United States in Washington state and California, where it reported some \$27 million in revenue during that same period. "The Daiso" offers nearly 100,000 products, most of which are private-label house wares and Children's Products and all of which are sold for no more than \$1 to \$15.

**The Court's Injunction and Findings.** On March 2, 2010, the United States District Court for the Northern District of California entered its order and consent decree, via the U.S. Attorney General, against Daiso directing the retailer to pay \$2.05 million in civil penalties and "*permanently enjoining*" the retailer "*from importing in the United States, directly or indirectly . . . any toy or other consumer product intended primarily for children 12 years of age or younger.*" The Court found that Daiso had distributed toys and other children's articles in violation of Consumer Product Safety Commission ("CPSC") statutes, regulations, and standards with excessive lead-containing paint, offering for sale and distributing children's toys or child care articles that contained phthalate concentrations in excess of the allowable threshold limit, and selling and distributing products without a general conformity certificate, delivering for sale toys that presented a choking hazard because of small parts, and misbranding toys or games that included a small part without the required cautionary statements, and

delivering into interstate commerce art materials that had the potential to produce chronic adverse health effects that did not comply with product labeling requirements. Other CPSC contact with Daiso suggested that the retailer had earlier received notification about other violations.

**The Product Safety Program.** The Court ordered that the injunction was permanent "unless and until" Daiso met the following conditions, including: (a) creation of a comprehensive product safety program that includes a reasonable testing program, a third party conformity assessment body, guidance materials for managers and employees, product labeling instructions, and company procedures to recall products; (b) establishment of standard operating procedures designed to ensure continuous compliance with CPSC statutes, regulations, and standards; (c) issuance of general conformity certificates for each consumer product that passes applicable testing; (d) begin testing children's products to assure compliance with small parts, lead paint, and phthalate requirements; and (e) recall of all defective and non-compliant products distributed or received in commerce since January 1, 2010.

**The Game Change.** In the CPSC press release of March 2<sup>nd</sup>, Chair Inez Tenenbaum said, "This landmark agreement for an injunction sets a precedent for any firm attempting to distribute hazardous products to our nation's children." Moreover, in her February 18, 2010 Washington, D.C. address to the International Consumer Product Health & Safety Organization, Chair



Tenenbaum warned industry to put safety first or be prepared to face fines, lawsuits, or other actions. There, the Chairwoman declared, "If you resist our efforts to recall children's products, be forewarned: This commission stands ready to be creative in the use of our enforcement authorities." Her statement referenced the several new enforcement authorities granted the CPSC under the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). In that same speech, Ms. Tenenbaum also declared 2010 as the "Year of the Consumer."

The Court Order against the retailer Daiso seems to be the first such example of the CPSC exercising its new enforcement authorities under the CPSIA. It is an example of the CPSC using

nearly all its enforcement tools—a civil penalty, a permanent injunction, mandatory recalls, and a product safety program. For the first time, the CPSC proscribed the sale of products as part of its enforcement efforts. Further, for the first time, the CPSC proscribed the implementation of a product safety program as a condition to lifting an injunction against the sale of those products and made clear that retailers also must have such a program. Certainly, the CPSC has lived up to its declaration of February 18, 2010 and will use as much of its enforcement authority as necessary to effect CPSC statutes, regulations, and standards.

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