Toying With Businesses

By Gary A. Wolensky, Elizabeth V. McNulty and Jessica Charles

The new Obama administration, Congress, the Consumer Product Safety Commission and states' attorneys general have promised a new chapter of strict regulatory compliance with consumer laws, stringent enforcement of the rules, bans, regulations and laws regulated by the commission, and harsh penalties for businesses and individuals who fail to comply. The Consumer Product Safety Improvement Act, signed into law by President Bush on Aug.14, 2008, is the platform for the first round of enhanced consumer protection and change.

Since its inception, the act has caused endless confusion and angst for large and small businesses alike. Manufacturers, importers and retailers have been tasked with understanding the complex provisions of the act and ensuring compliance with an ever-changing set of deadlines and regulatory requirements. Unlike its predecessor legislation, the Consumer Product Safety Act, the Consumer Product Safety Improvement Act provides the necessary power to effect the promised change, expanding the enforcement powers of the commission, deputizing state attorney generals and increasing the potential criminal and civil penalties for violations. Legal theorists and experts alike project a boon for plaintiffs' attorneys taking advantage of the changing landscape with an increase in litigation. This new environment will have a profound effect on regulatory interpretation and the enforcement against, and accountability of, businesses struggling to survive the worst economy in decades.

One of the greatest difficulties for businesses in this new heightened regulatory environment is determining how to comply with the regulations and requirements under the new act. It is "children's products," any consumer product designed or intended primarily for children 12 or younger. Section 101 regulates the allowable levels of lead and lead paint in "children's products." Section 108, regarding acceptable phthalate levels, applies to a subsection of "children's products": "children's toys," those products designed or intended for use by a child 12 or younger, and "child care articles," products designed or intended to facilitate sleep or the feeding of children 3 and younger or help them with sucking or teething. The confusion faced by companies in attempting to comply with these provisions is due to lack of direction from the commission and the changing interpretation of the applicability of the central provisions of the act, most notably Section 108.

More than any other section of the act, compliance with Section 108 has caused a vast amount of confusion for businesses, with a lack of clear direction for compliance and ambiguity over its application.

On Nov. 17, 2008, Cheryl Falvey, the general counsel for the commission, issued an advisory opinion proclaiming that Section 108 would *not* be applied retroactively, meaning that existing inventory manufactured before Feb. 10, 2009, could still be sold from inventory or stores after Feb.10, even if it contained more than 0.1 percent of the restricted phthalates. Manufacturers, importers and retailers rejoiced at the prospect of some relief from the immediate and harsh requirements under the act, while continuing to undertake measures to achieve compliance. Unfortunately, the relief was short lived.

Shortly after the Consumer Product Safety Commission advisory opinion was issued, there was an onslaught of criticism of Falvey, culminating with a lawsuit filed against the commission by two consumer advocacy groups, the Natural Resources Defense Council and Public Citizen Inc. The suit sought, and achieved, declaratory relief against Falvey's decision. The court issued its decision on Feb. 5, 2009 — a mere four days prior to the effective date — declaring that the phthalate decision was illegal and in violation of the Consumer Product Safety Improvement Act, issuing a serious economic reversal to thousands of businesses with non-compliant inventory.

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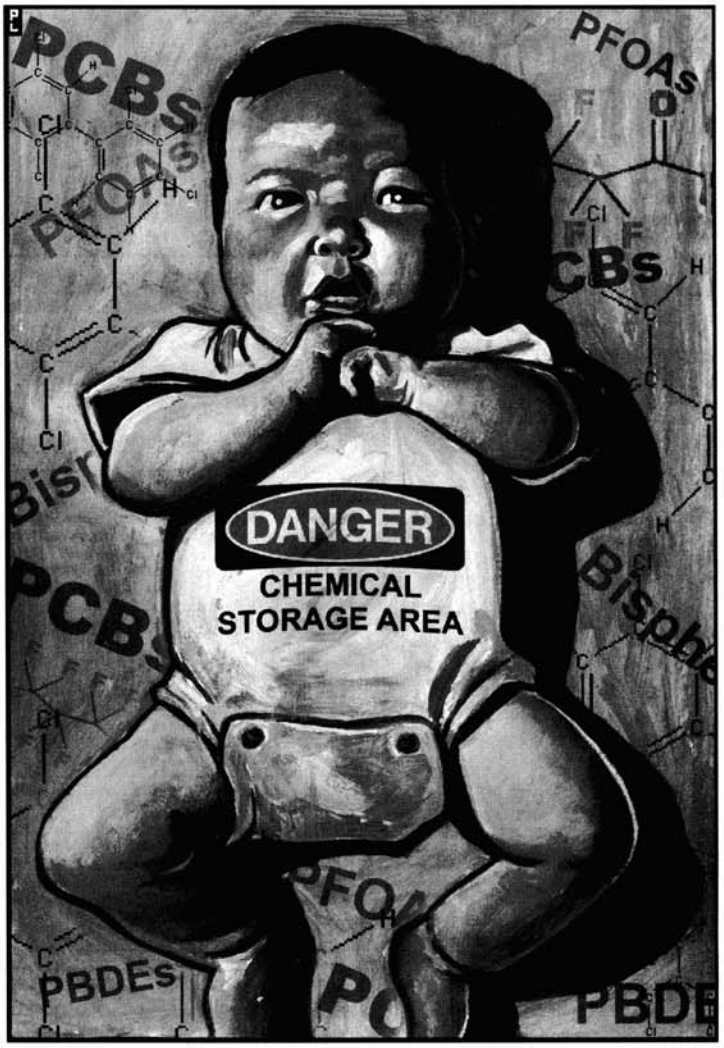
In issuing the ruling, the court declared that the language and the structure of the act unambiguously states that the phthalate provisions of Section 108 apply to all products offered for sale after Feb. 10, including existing inventory. The court held that the statutory purpose and legislative history of the act supported its conclusion. Retroactive application of Section 108 is now the law.

As a result of the court ruling, all non-compliant phthalate inventory was to have been removed from the chain of commerce by Feb. 10. The ruling took manufacturers and retailers by surprise, many having justifiably relied on the commission's opinion in moving forward with ensuring compliance with the act. Given the short time frame between the court's reversal and the compliance date, most companies were not in a position to be fully compliant with Section 108 by the deadline. As a result, millions of dollars of inventory will be lost and, businesses facing an already dire economic environment are faced with excessive inventory losses and monumental costs of compliance going forward.

The only small window of hope for some manufacturers, importers and retailers following the court's crushing reversal of the commission's phthalate opinion, came on Feb. 6, when it adopted the definition of "toy" in the ASTM mandatory toy standard. In so doing, the commission carved out specific wholesale exemptions from the phthalate ban under Section 108 including products such as bikes, playground equipment, musical instruments and sporting goods (except for their toy counterparts). Stated more simply, because these products are not considered toys under the ASTM definition, they are not subject to the phthalate provisions of Section 108. This adopted definition and resultant exemptions offer some relief to a small segment of businesses dealing with applicable products. For the others, Feb. 10 was likely a black day.

Recognizing the monumental effect of the deadline requiring that all "children's products" met the new lead content and phthalate limits imposed by the act and the concurrent lack of definitive guidance regarding the accepted testing procedures to determine compliance, on Jan. 30, the commissions issued a stay of third-party testing and certification for the lead content and phthalate limits. Unfortunately, the stay offered only partial relief as companies manufacturing children's products, toys, and child care articles must still comply with the effective substantive provisions of lead content and phthalates.

Shortly after the stay was enacted, and in recognition that the one-year stay of testing and certification requirements offered only limited relief to an ailing business community, a request for emergency stay of the effective date of Section 101(a)(2) was filed with the commission on behalf of the Consumer Product Safety Commission coalition of the National Association of Manufacturers, and over 60 associations. The request, for an immediate emergency rule staying the effective date of the limits on lead in accessible parts and components in children's products, sought a stay of 185 days, or until 90 days after final comprehensive rules and interpretative regulations implementing Section 101 are issued, if later. Not surprisingly, the commission unanimously voted to deny the request, citing the strict statutory language of the act, which bound its hands forbidding a change in the date of the ban. The thwarted attempt at a delay was a warning and an invitation for Congress to act.



At least two senators, Jim DeMint, R-S.C., and Robert Bennett, R-Utah, heard the message and penned legislation focused on changing the act. If passed, the proposed legislation would greatly ease the burden of compliance for all businesses. Unfortunately, given the current climate in Washington and the larger issues Congress is dealing with, both bills will both likely die in conference.

The past and anticipated future economic and business costs associated with the act are overwhelming for many businesses — so much so that consumer product manufacturers and activists have affectionately named Feb. 10 "National Bankruptcy Day." It is presumed that untold numbers of children's products manufacturers and retailers will be closing their doors. These numbers do not even touch on the untold costs of compliance testing, layoffs, material losses, repurchase demands, attorney fees and costs and the impending future recalls of noncompliant product.

Even though the February deadline was perceived to be one of the most devastating deadlines under the act, the effects are far from over. There are future limit reductions for lead content and lead paint, tracking labels for children's products and third-party testing and certification requirements, just to name a few future landmarks. Further, any product in the chain of commerce that is not in compliant with the Consumer Product Safety Improvement Act is arguably subject to recall — the costs of which will be exorbitant.

Manufacturers and importers should ensure that they consider all future limits, standards and dates for their future product specifications and composition, while remaining mindful of non-compliant product already in the chain of commerce that was manufactured or sold on or after Aug. 14, 2008, that may be now subject to recall.

Businesses can no longer ignore the act or they will be subjecting themselves to the risk of extreme civil and criminal penalties. The realities of economic viability and survival should encourage businesses to adopt a global view of the act and the changing regulatory landscape, to identify and understand all of the applicable deadlines and to know what it all means to their companies. Businesses must be proactive in understanding the commissionor consult with those who have such knowledge.

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