



LEGAL ALERT

CONSUMER PRODUCT SAFETY UPDATE

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CPSC Announces Proposed Determinations Regarding Section 101 and Lead: Inaccessibility, Exemptions, and Electronic Devices

As many of us prepare for the holidays, the Consumer Product Safety Commission (CPSC) is preparing for the effect of the Consumer Product Safety Improvement Act (CPSIA) in the New Year. Just December 24, the CPSC posted several new items to their website regarding Children's Products Containing Lead and Section 101.

CPSIA Exclusions and Exemptions from Compliance with Limits for Lead: Inaccessibility and Certain Electronic Devices

Section 101(b)(2) states that the lead limits do not apply to component parts of a product that are not accessible to a child. The Commission is to determine what product components or classes of components will be considered inaccessible and has promised guidance on the issue.

Initially, the Commission has determined that paint, coatings, or electroplating may not be considered to be a barrier that would render lead in the substrate to be inaccessible to a child per Section 101(b)(3).

Accessibility is defined as physical contact with lead-containing component parts. An accessible component part of a children's



product is one that a child may touch, and an inaccessible component part is one that is located inside the product, whether or not such part is visible to a user of the product, and cannot be touched by a child. The CPSC staff proposes that the accessibility probes for determining accessibility of sharp points or edges (16 CFR 1500.48-1500.49) be designated as appropriate for determining whether a lead-containing component part of a product is accessible to a child. Under the provisions of the CPSIA, a lead-containing component part is not subject to the lead limits if it is not accessible to a child.

In regard to certain electronic devices, in many cases the Commission acknowledges that it is not technologically feasible for them to comply with the lead limits. If a component is not accessible to a child, it is not subject to the lead limits. However, certain components cannot be produced without lead for safety reasons and cannot be made physically inaccessible. In these instances, the CPSC recommends that the exemptions published in the Annex to the Directive 2002/95/EC also be exempted under the CPSIA, provided that the exemption is based on a functional requirement both for the use of a lead-containing component and for the use of lead in such component. The EU RoHS exemptions are listed in Appendix B to the Commission posted memo. Furthermore, the CPSC staff recommends that spare parts or other removable components (such as batteries) be considered inaccessible under the provisions of the CPSIA, provided that the lead-containing component is

inaccessible when the product is assembled in functional form or if the component meets the criteria for exemption, such as the possible exemptions with respect to EU RoHS.

These inaccessibility and electronic device proposed rules should provide manufacturers and importers with more guidance on how to proceed in light of the new CPSIA requirements regarding lead limits in children's products. This rule would allow the continued use of some lead-containing electronic devices intended for use by children, when it is not technologically feasible to produce the devices without lead. Even though this may expose children to some amount of lead from these products, the risk of any lead exposure is low, and it allows the manufacturers and importers to continue making and providing these products as they are.

Children's Products Containing Lead; Proposed Determinations Regarding Lead Content Limits on Certain Materials or Products; Notice of Proposed Rulemaking

Subsection 101(a) of the CPSIA establishes that as of February 10, 2009, the limit for lead of 600 parts per million by weight for any part of a children's product. The limit drops to 300 ppm on August 14, 2009 and 100 ppm on August 14, 2011, if technologically feasible. The Proposed Determinations published by the CPSC December 24 present findings that certain naturally occurring materials and certain metals and their alloys inherently do not exceed the lead content limits in Section 101(a) of the CPSIA. However, these findings only apply to



a material that is untreated or unadulterated by the addition of materials or chemicals.

The CPSC staff recommends that the following natural materials be found not to exceed the CPSIA lead limits based on the fact that such materials do not contain lead or contain lead at levels that do not exceed the CPSIA lead limits:

- Precious gemstones
- Certain semiprecious gemstones
- Natural or cultured pearls
- Wood
- Natural fibers; including cotton, silk, wool, hemp, flax, and linen
- Other natural materials including coral, amber, feathers, fur, and untreated leather

The CPSC staff also recommends that the following metals and alloys be found not to exceed the CPSIA lead limits based on the fact that such materials do not contain lead or contain lead at levels that do not exceed the CPSIA lead limits:

- Surgical steel
- Precious metals: gold, sterling silver, platinum, palladium, rhodium, osmium, iridium, and ruthenium

The effect of the determinations listed above is to relieve the materials or products from the testing and certification requirements established by Section 102 of the CPSIA.

Therefore, this would relieve manufacturers

and importers of the materials listed from testing and certification, and would reduce many of the associated costs. The ballot due date for the Commission to vote on the staff's recommendations is January 5, 2009. We will keep you posted!

Children's Products Containing Lead; Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion

Subsection 101(b)(1) of the CPSIA provides that the Commission may, by regulation, exclude a specific product or material from the lead content limits if the Commission, after notice and hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will not result in the absorption of any lead into the body, taking into account normal and reasonably foreseeable use and abuse by a child, nor have any other adverse impact on health or safety. Additionally, under Section 3 of the CPSIA, the Commission could make a formal determination as to the likelihood or lack thereof that a particular material or product does not and would not exceed the applicable lead limit.

In making a request for a determination that a product or material does not and would not exceed the lead limits specified under the CPSIA, the request should be supported by reliable test results or other scientific evidence, and the justification submitted by an interested party should also include:



- A detailed description of the product or material;
- Data on the lead content of parts of the product or materials used in the production of the product;
- Data or information on manufacturing processes through which lead may be introduced into the product or material;
- Any other information relevant to the potential for lead content of the product or material to exceed the CPSIA lead limits;
- Detailed information on the relied upon test methods for measuring lead content of products or materials or assessing manufacturing processes.

Additionally, any request for an exemption under Section 101(b)(1) for a product or material that contains lead at a level that exceeds the CPSIA lead limits must be accompanied by the best-available, objective, peer-reviewed, scientific evidence that addresses these issues, such as test results indicating how much lead is present in the product, how much lead comes out of the product and the conditions under which that may happen, and information relating to a child's interaction, if any, with the product.

If a product or material is specially exempted by either of the procedures outlined above, then it would not be subject to the testing and certification requirements for lead content. Again, the ballot due date for the Commission to vote on the staff's recommendations is January 5, 2009. We will keep you posted!

The CPSC staff also posted a Memorandum entitled "Response to Public Comments," in which they summarize all of the comments they received regarding Section 101(b) (2) and (4). They also provide responses to these comments based on their analysis and findings discussed above. This memo is publicly available on their website.

The complete postings and determinations by the CPSC can be found on their website at: <http://cpsc.gov/about/cpsia/cpsia.html>