

# Lead

## **Consumer Product Safety Improvement Act: Compliance Requirements And Clarifications**

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# Commentary

## Consumer Product Safety Improvement Act: Compliance Requirements And Clarifications

By  
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Concerns over the safety of imports into the U.S. have exploded over the past few years in the aftermath of multiple high-profile recalls of consumer goods from overseas, including children's toys and other products. Because of the slew of recalls, the United States Consumer Product Safety Commission ("CPSC") came under heavy fire in 2008.

A broad and sweeping law was passed to strengthen consumer product safety rules, overhaul the CPSC, and provide it more funding. The Consumer Product Safety Improvement Act of 2008 ("CPSIA") was passed on August 14, 2008. The CPSIA's reach will impact virtually all manufacturers, importers, distributors, resellers, and retailers of consumer products.

Over the past few months since the CPSIA was enacted, there have been thousands of requests to the CPSC expressing "substantial confusion." Compa-

nies have been unclear about how to comply with the new law, when to comply, and what is required for documentation. As a result, the CPSC has issued several clarifications on the law. Its Office of General Counsel has also issued several advisory opinions.<sup>1</sup>

The major highlights of the CPSIA include:

- Stricter lead limits in children's products;
- Ban on phthalates in children's toys and child care articles;
- Lab testing of certain children's products;
- Certification of consumer products by manufacturer/importer; and
- Regulation of imports and exports of consumer products.

### Major Highlights Of The CPSIA

**Lead Limits and Deadlines.** A major component of the CPSIA is to impose stricter limits on lead in children's products. "Children's products" are defined as consumer products which are designed or intended primarily for children 12 years of age or younger. A key deadline is set for February 10, 2009 regarding lead limits. As of February 10, 2009, products designed or intended primarily for children 12 and younger may not contain more than **600 parts per million ("ppm") of lead**. Each separate part of the product must meet the ppm limits, except for electrical and non-accessible components. An independent

and accredited lab must test products which are subject to the ppm lead limits. Testing for various limits and products is required under a particular schedule set by the CPSC.

The 600 ppm limit applies to all existing products, including those in inventory or on retail shelves. Products having above this lead limit cannot be sold, held in inventory or exist on store shelves *and* cannot be exported as of February 10, 2009. The existing non-compliant product must be destroyed.

Approximately six months later, the lead limits become even stricter. For the following dates, lead limits will be similarly retroactively applied to inventory and to products already manufactured. As of August 14, 2009, products designed or intended primarily for children 12 and younger may not contain more than **300 parts per million of lead content**, and may not contain more than **90 parts per million of lead in paint** and similar surface-coating materials. Each product must be in compliance with both the lead paint limit and lead content limit.

Two years later, as of August 14, 2011, the lead limits increase yet again. Products designed or intended primarily for children 12 and younger may not contain more than **100 parts per million of lead**, unless the CPSC determines that is not technologically feasible.

Manufacturers should ensure that all product in inventory or in stores meet the legal limit by the relevant deadlines. For products that don't comply, manufacturers and retailers need to ensure that all non-compliant inventory is removed from circulation and from shelves by the deadlines and destroyed. Care must be taken to evaluate inventory, especially with respect to products meant for younger children.

Resellers of used children's products need not certify products, but cannot sell products that exceed lead limits. Thrift stores, charities and consignment stores are examples of such resellers. Resellers are also not required to test children's products in inventory for compliance with the lead limits. However, resellers cannot sell children's products that exceed the lead limits. The CPSC has cautioned resellers to avoid products that are likely to have lead content, unless they have testing or other information to indicate the products have less than the new limits. Those resell-

ers that sell products in violation of the new limits could face civil and criminal penalties. The new law also makes it illegal to sell recalled products, with the responsibility on resellers to check the CPSC website and look for recalled products before selling them.

The lead limits apply to the following types of products intended for use by a child: shoes, sporting goods, children's jewelry (rings, bracelets, necklaces), decorative room accessories, key chains, painting easels, and clothing.<sup>2</sup> Other examples of products to which the lead limits apply include children's cassettes and CD's, and game boards and game pieces.

Lead limits also apply to some printed materials.<sup>3</sup> They do not apply to ordinary books intended for readers of all ages. Further, for those designed primarily for children, books are not subject to the ban on lead-in-paint. Books designed primarily for children do, however, need to meet the total lead content limits. The same analysis applies to educational magazines, posters, bookmarks, and other materials which have no play value and are printed on paper or cardboard.

The CPSIA's lead limits do not apply to medical devices, drugs and cosmetics, even to products designed or intended for use by children, because they are not "consumer products" regulated by the CPSC. Similarly, the lead provisions do not apply to toothbrushes or early intervention dental products. The lead limits do not apply to educational materials such as chemistry sets and science education kits, if they are adequately labeled and meet other parameters.<sup>4</sup>

Electronics products with lead-containing parts that are considered inaccessible to children are not subject to the lead requirements. "Inaccessible" is defined as not accessible to children because the lead is fully enclosed within a component that is itself within the electronic device. Other lead exemptions may be finalized in the future. The CPSC has proposed exempting electronics components which parallel the European Union's exemptions, 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.

*Phthalate Ban.* Another major provision of the CPSIA imposes a ban on phthalates in children's

toys and child care articles. "Children's toys" are defined as products designed or intended by the manufacturer for children 12 and younger for use by the child when the child plays. "Child care articles" are defined as products which facilitate sleep, feeding or teething of children 3 or younger. Phthalates are chemical liquid compounds used in a variety of consumer products. They are used as softeners or plasticizers in toys, home products, and personal care products.

The phthalate ban also starts in February 2009. As of February 10, 2009, children's toys and child care articles may not contain more than 0.1% concentration of certain phthalates (DEHP, DBP and BBP). Children's toys that are "mouthable" or child care articles may not contain more than 0.1% concentration of other certain phthalates (DINP, DIDP, and DnOP). An independent and accredited lab must test products which are subject to the phthalate limits.

The phthalates prohibitions are similarly retroactive. Although the CPSC, in an advisory opinion, initially concluded that the phthalates limits did not apply to existing inventory and were not retroactive, it received extensive criticism and a lawsuit was filed against it seeking retroactive application of the ban. On February 5, 2009, the court held that the phthalates ban unambiguously does apply to inventory.<sup>5</sup> There may be further developments on this issue, so stay tuned.

As it currently stands, the phthalate limits in Section 108 of the CPSIA are retroactive. As of February 10, 2009, all non-complaint toys and child care articles must be removed from store shelves and inventory and destroyed. Children's toys and child care articles that contain the prohibited phthalates can no longer be sold, stored or transported after that date.

For the same reasons as above, after February 10, 2009, resellers cannot sell children's toys or child care articles that exceed the phthalate limits. This also applies to inventory. Resellers are similarly not required to test or certify as to the new phthalates ban.

The phthalates ban applies to some printed materials.<sup>6</sup> They do not apply to ordinary books but, if the book is a toy, the phthalates provisions apply. This same

analysis applies to educational magazines, posters, bookmarks, and other materials which have no play value and are printed on paper or cardboard.

The phthalates prohibition also applies to some types of clothing, sporting goods and jewelry.<sup>7</sup> It applies to children's sleepwear, bibs, and child care articles. Separately, if children's clothing is a toy, the phthalates ban would also apply. An example is a costume sold as part of a toy set and intended to be worn during play. Otherwise, children's wearing apparel, such as rainwear for example, is generally not considered a toy. The phthalates ban *may* apply to some sporting goods (such as toy replicas) and children's jewelry, and decorative room accessories. The phthalates ban applies to pool toys, beach balls, blow up rafts, and inner tubes designed or intended for children 12 years of age or younger.

The phthalates ban does not apply to decorative room accessories or to shoes because they are not toys, unless the shoe has some play value (ex. a shoe made for a doll).<sup>8</sup> The phthalates prohibition does not apply to adult wearing apparel. For the same reasons as the lead limits, the phthalates ban does not apply to medical devices, drugs and cosmetics, even to products designed or intended for use by children. One exception which the CPSC has noted is that if a cosmetic material is included in a toy set, it is required to meet the requirements of the phthalates ban.

*Requires Lab Testing of Certain Children's Products.* Manufacturers must have certain children's products tested to assess conformity with one or more of the children's product safety rules. An independent and accredited lab must perform the relevant testing. The testing requirements apply to children's products which are distributed in commerce or imported. The testing is mandatory.

There are two types of labs which may conduct testing: separate third parties and a company's own proprietary lab. Both must be accredited by the CPSC. There is a specific process for a manufacturer or labeler to seek accreditation of its own lab.

The CPSC maintains on its website a list of laboratories which it has accredited for such product testing. Thus far, labs have been accredited to test the following rules: lead paint, full-size cribs, non full-size cribs,

pacifiers, and the small parts rule. Approximately 100 labs are currently listed, but only twenty-three are located in the U.S. The CPSC will continue to update its list.

Testing is required for particular children's products on a phased-in schedule. Testing requirements began on December 21, 2008 for lead paint levels. Cribs and pacifiers were required to be tested starting January 20, 2009. There are more firm deadlines for testing of small parts (February 15, 2009) and children's metal jewelry (March 23, 2009). These deadlines remain in effect. Eventually, by a date yet to be determined, testing will be required for all other "children's products" which are distributed in commerce or imported, other than those already specified above.

The CPSC has stayed testing deadlines for testing for lead content, phthalates and toy standards until February 10, 2010.<sup>9</sup> The CPSC granted the stay in light of "the chaos and confusion" that the CPSIA has created in the marketplace. It described the stay as "a limited 'time-out'" so that the CPSC can develop and issue rules defining responsibilities of manufacturers, importers, retailers, and testing labs. It will give the CPSC time to rule on exemptions and exclusions and develop appropriate testing protocols.

*Requires Product Certification.* The new certification requirements apply to **all** products subject to CPSC standards, bans, rules or regulations. This provision is not limited to children's products. Domestic manufacturers or importers must certify compliance of products which are distributed into domestic commerce and which are subject to an existing CPSC standard, ban, rule or regulation. The domestic manufacturer or importer is charged with the duty of issuing a General Conformity Certificate certifying that the product complies with all applicable requirements and standards. Certification must be based on a test of each product or on a reasonable testing program. Certification is mandatory and is required for affected consumer products as they are phased in, according to the CPSC's schedule.

The General Conformity Certificate must contain particular identified items and must accompany the product through the chain of distribution. The General Conformity Certificate must accompany each

product and/or shipment of products if all the products are covered by the same certificate. If imported, and a General Conformity Certificate is required, the product will not be allowed to enter the U.S. without a certificate.

For products manufactured overseas, the importer is charged with the obligation to issue the General Conformity Certificate. For products manufactured in the United States, the domestic manufacturer is required to issue the General Conformity Certificate. Private labelers do not need to issue certificates, and do not need to be listed as parties on certificates. As noted above, resellers of used products do not have to issue certificates.

Electronic methods can be used to meet the certification requirement. General Conformity Certificates can accompany the product and be furnished to distributors and retailers by a variety of electronic means. Electronic certificates can also be posted on a website for inspection or included with other electronic documents accompanying shipments through U.S. Customs, so long as the certificates can be produced immediately for inspection.

The General Conformity Certificate does not have to be filed with the government. The importer or domestic manufacturer is required to "furnish" the General Conformity Certificate to its distributors and retailers. This requirement is satisfied if the importer or domestic manufacturer provides its distributors and retailers a reasonable means to access the certificate. The CPSC has stated that it intends to focus initially more on compliance with the safety rules underlying the certificate, rather than on the form of the certificate itself. The CPSC has a sample General Conformity Certificate posted on its website.

The temporary one-year stay noted above also applies to certification requirements. The stay only applies to testing and certification, and not to the **sale** of products. All businesses must still be sure that their products comply with all applicable children's product safety rules, including the limits on lead and phthalates. The CPSC has said that the stay of enforcement provides some "temporary and limited relief" to businesses. *Id.* The stay should be viewed by companies as an opportunity to learn what is required of them

and bring their products into compliance before the future deadlines. Having granted that extension, the CPSC can be expected to take an even harder line on enforcement once the future deadlines pass.

### **Other Provisions Of The CPSIA**

The Consumer Product Safety Improvement Act of 2008 also does the following:

*Expands Recall Authority.* The CPSC now has the power to order manufacturers, distributors and retailers to stop distributing a product that it believes violates a product safety rule. The CPSC can do so if it determines that a product presents a "substantial product hazard" or one that is "imminently hazardous." The CPSC may also order all participants in the supply chain to cease distributing a product. If a recall or voluntary corrective action is already in progress, the CPSC may amend it if it finds that the action plan is not effective. The CPSC may revoke its approval of an action plan if a party fails to substantially comply with its obligations.

*Requires Identification of Complete Supply Chain on Demand.* The complete supply chain must be identified upon CPSC request. Manufacturers must identify each retailer or distributor to which they directly supplied a consumer product, as well as each subcontractor involved in production or from which the manufacturer obtained a component. Importers, retailers, and distributors must identify the manufacturers of their consumer products.

*Increases Civil and Criminal Penalties.* New civil and criminal penalties take effect on August 14, 2009 or the date the CPSC issues a final regulation interpreting the penalty factors, whichever is earlier. Civil penalties increase to \$100,000 per violation, with a maximum of \$15 million for a series of related violations. Criminal penalties for knowing and willful violations of consumer product safety laws also increase. Penalties per violation are up to five years in prison, a fine, or both.

*Creates Right of Action by State Attorneys General.* State Attorneys General may bring civil actions against manufacturers, distributors, importers and retailers to enforce certain product safety laws and to obtain damages. The state may seek injunctive relief to stop the manufacture and sale of products it determines

present a "substantial product hazard" to its residents. State Attorneys General can be expected to be aggressive in bringing such suits and have started already. As but one example, a settlement of \$12 million was announced in late 2008 between 39 state attorneys general and two toy manufacturers related to toys with unsafe lead content.

*Protects Whistleblowers.* No manufacturer, distributor, or retailer may discharge or discriminate against an employee because s/he provided information regarding a violation of the product safety laws. Such an employee can file a complaint with the Secretary of Labor. Potential relief includes back pay, compensatory damages, attorneys' fees and reinstatement.

*Establishes Consumer Product Safety Information Database.* The CPSC will develop and maintain a publicly-accessible and searchable database. The database will include reports of "harm relating to the use of consumer products," a very broad and potentially over-inclusive definition. "Harm" is defined to mean injury, illness or death or the risk of the same as determined by the CPSC. Reports can be made by consumers, agencies, health care professionals, child service providers and public safety entities. The database will be accessible on the CPSC's website. It was intended to be available in approximately August 2010, but the CPSC has stated it has not started the process to establish the database due to other imminent deadlines and limited resources.

*Increases CPSC Staff and Budget.* The number of full-time CPSC employees will increase to 500 in the next five years. This includes staff to be dedicated to ports of entry or to inspect overseas manufacturing facilities. The CPSC's budget will also be expanded over the next several years from its current \$80 million to \$136 million in 2014.

### **Future Considerations**

The CPSC intends to aggressively enforce these new laws and deadlines. It plans to require more product recalls and seek more civil penalties. It has established a new import surveillance group and tripled the number of samples being inspected. It plans to coordinate with U.S. Customs and Border Protection on import and export issues. The CPSC will likely

use its increased funding and staff to pursue corporate compliance and disclosure. With their new enforcement authority, state attorneys general are likely to become even more active in prosecuting consumer products laws as well.

The interpretation and execution of these new laws continues to evolve every week. Some regulations are already in effect and others have upcoming deadlines. The CPSC has issued notices of proposed rulemaking on multiple issues and invited public and industry comment. Certain date-specific deadlines are triggered by future CPSC action and thus some particular deadlines are not yet set. The CPSC provides regular updates on its website and has been holding periodic public meetings on various issues. Affected companies should keep a close eye on the CPSC for additional changes.

The CPSIA is a complicated web of laws and to comply, you need to stay on the cutting edge. Exceptions to exceptions are rampant. Please contact Snell & Wilmer L.L.P.'s Consumer Product Safety Industry Group for further details or if we may help you or your company in any way.

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## Endnotes

1. The advisory opinions are non-binding on the CPSC and they may be superseded at any time by the Office of the General Counsel, the CPSC, or by operation of law.
2. Op. Off. General Counsel, U.S. Consumer Product Safety Commission, Oct. 17, 2008.
3. Op. Off. General Counsel, U.S. Consumer Product Safety Commission, Jan. 15, 2009.
4. 16 C.F.R. § 1500.85 provides that certain articles that are intended for children for educational purposes are exempt for classification under the CPSIA lead limits if the functional purpose of the particular educational item requires inclusion of the hazardous substance, and it bears labeling giving adequate directions and warnings for safe use, and is intended for use by children who have attained sufficient maturity, and may reasonably be expected to read and heed such directions and warnings.
5. *Nat'l Res. Def. Council, Inc. et al. v. U.S. Consumer Prod. Safety Comm'n*, No. 08 Civ. 10507 (S.D.N.Y. February 5, 2009).
6. Op. Off. General Counsel, U.S. Consumer Product Safety Commission, Jan. 15, 2009.
7. Op. Off. General Counsel, U.S. Consumer Product Safety Commission, Nov. 25, 2008.
8. Op. Off. General Counsel, U.S. Consumer Product Safety Commission, Oct. 17, 2008.
9. Statement of Acting Chairman N. Nord on the Stay of Enforcement of Certain Testing and Certification Requirements of the Consumer Product Safety Improvement Act of 2008, U.S. Consumer Product Safety Commission, Jan. 30, 2009. ■

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