

# Hot Topics Regarding the Consumer Product Safety Improvement Act and Related State Laws

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# Hot Topics Regarding the Consumer Product Safety Improvement Act and Related State Laws

## **I. Introduction and Update**

On August 14, 2008, President George W. Bush signed into law the Consumer Product Safety Improvement Act of 2008, referred to in the industry as the “CPSIA.” By all accounts, the CPSIA is sweeping legislation that makes significant changes to the existing product safety laws. The CPSIA potentially affects not only manufacturers but importers, distributors, retailers, and the second-hand market as well. The CPSIA has altered the responsibilities, duties, and accountability of these parties with respect to the performance, testing, advertising, and tracking of consumer products, particularly children’s products and has changed the Consumer Products Safety Commission’s enforcement powers, in part by deputizing state attorneys general, and increases the potential criminal and civil penalties for violations. The impact on businesses of all sizes has been profound and will continue to affect businesses for years to come in terms of compliance, enforcement, and litigation.

## **II. Changes in the Political and Regulatory Landscape: The CPSC and CPSIA**

### **A. Changes at the CPSC and the Effect on Regulatory Interpretation, Enforcement, and Penalties**

With the inauguration of President Obama, came a changing of the guard in Washington. The new Obama administration, together with the head of the CPSC, have promised that a new chapter of strict regulatory compliance with consumer laws for the protection of the consumer, stringent enforcement of the rules, bans, regulations and laws regulated by the CPSC, including the CPSIA and harsh penalties for businesses and individuals who fail to comply are here. These changes at the CPSC will have a profound effect on regulatory interpretation and the enforcement against and accountability of businesses hoping to survive these tough economic times.

### **B. Effect of the CPSIA on Day-to-Day Business**

The CPSIA changes the Consumer Products Safety Commission’s enforcement powers, in part by deputizing state attorneys general, and increases the potential criminal and civil penalties for violations. Based on these and other changes in the consumer product landscape, legal experts and commentators expect the CPSIA to be a “boon” for plaintiffs’ lawyers and believe there will be an increase in new lawsuits. The impact of the governmental and private interest lawsuits, as well as the costs of compliance will make operating small to large businesses a challenge in the years to come.

## **III. Recent Developments Relating to Phthalates under Section 108 of the CPSIA**

### **A. Effective Date & Limits**

As of February 10, 2009, section 108 restricts the amount of certain phthalates to 0.1 percent in children’s toys and child care articles.

## **B. CPSC Advisory Opinion**

On November 17, 2008, Cheryl Flavey of the CPSC issued an advisory opinion indicating that section 108 will *not* be applied retroactively. This means that toys and child care articles manufactured before February 10, 2009, can still be sold from inventory and store shelves even if they contain more than 0.1 percent of the restricted phthalates.

## **C. The Negative Reaction to the CPSC's Advisory Opinion**

Shortly after the CPSC advisory opinion was issued, there was a severe backlash. In fact, the CPSC was sued by two consumer advocacy groups, the Natural Resources Defense Council and Public Citizen Inc., seeking declaratory relief stating that the phthalate decision issued by the CPSC is not in accordance with the CPSIA. The hearing on this declaratory judgment action is now set for February 2, 2009. Of course, this runs right up to the effective date of section 108, which is February 10, 2009. If the court overturns Cheryl Flavey's decision regarding the nonretroactivity of section 108, then it is possible that eight days later, section 108, like section 101, will be applied retroactively. This would mean that all noncompliant toys and child care articles must be removed from inventory and taken off shelves by February 10, 2009.

# **IV. Recent Developments Relating to Phthalates & Legislation in California**

## **A. Phthalates—AB 1108**

Effective January 1, 2009, in California, pursuant to AB 1108, it is illegal to make, import, distribute, or sell "toys" and certain "child care articles" with more than 0.1 percent of the restricted phthalates, as outlined in the phthalate provision of the Act. The definitions of *toys* and *child care articles* are different under AB 1108 from those in the CPSIA 2008. Further, unlike section 108, the phthalate ban has always been interpreted as retroactive in California meaning that all noncompliant inventory should have been removed from inventory and taken off of store shelves. Although there is some uncertainty regarding the preemptive effect of the CPSIA on AB 1108, California Attorney General Gerry Brown has made it clear that he will be enforcing the provisions of AB 1108 effective January 1, 2009.

## **B. Proposition 65**

The CPSIA leaves in place and does not preempt many state laws such as California's Prop 65. Prop 65 was enacted as a ballot initiative in 1986 and was intended by its authors to protect California citizens and the state's drinking water sources from chemicals known to cause cancer, birth defects, or other reproductive harm, and to inform citizens about exposures to such chemicals. There are now 775 chemicals listed, including many that are used in consumer products, including phthalates and lead, which are now the subjects of CPSIA regulation as well. The enforcement of Prop 65 is generally by private lawsuit in the name of public interest. Lawsuits and claims regarding Prop 65 violations for consumer products are increasing and can be very costly. California Attorney General Gerry Brown has made it clear that as with AB 1108, he will be enforcing Proposition 65.

# **V. Recent CPSC Determinations Relating to Lead**

## **A. Lead Content**

Under section 101 of the CPSIA, as of February 10, 2009, no children's product or part thereof may contain lead in excess of 600 parts *per* million. The lead limit drops to 300 ppm on August 14, 2009, and 100

ppm on August 14, 2011, if technologically feasible. Unlike the current interpretation of section 108, section 101 is retroactive in its application, meaning that all noncompliant product must be off store shelves and out of inventory by February 10, 2009. The CPSC recently issued proposed rulemakings regarding the process for seeking an exemption or exclusion for certain products under section 101. In addition, the lead limits do not apply to component parts of a product that are inaccessible to a child, and the CPSC has recently issued proposed guidelines indicating when a component part is inaccessible. The CPSC has also proposed an exemption for certain electronic products and natural materials under section 101. These proposed guidelines will be finalized by the end of January 2009.

## **B. Lead Paint**

Section 101 of the CPSIA also provides that as of August 14, 2009, paint and similar surface-coating materials for consumer use must be reduced from 600 ppm to 90 ppm.

# **VI. Testing Issues**

## **A. General Conformity Certification**

The CPSIA increases the range of products that require testing and certification. General certification is now required for all products subject to any existing rule, standard, ban, or regulation enforced by the Commission. These general conformity certifications do not need to be based on testing done by a third party laboratory, however, certification must be based on a test of the product or a “reasonable testing program.” This new general certification requirement went into effect on November 12, 2008.

## **B. Third Party Testing**

The CPSIA imposes an additional third party testing requirement for all consumer products *primarily intended* for children 12 years of age or younger. Every domestic manufacturer or importer of a children’s product must have its product tested by an accredited independent testing lab and, based on the testing, must issue a certificate that the product meets all applicable CPSC requirements. The CPSC issues accreditation procedures and posts the accredited laboratories on its web site. The third party testing and certification requirements for children’s products are phased in on a rolling schedule.

# **VII. Looking Into the Future—Labeling & Additional Standards**

## **A. Labeling for Children’s Products**

Effective August 14, 2009, section 103 of the CPSIA requires manufacturers to have a tracking label or other distinguishing permanent mark on any consumer product *primarily intended* for children 12 and younger. The tracking label must contain certain basic information, including the source of the product, the date of manufacture and more detailed information on the manufacturing process such as a batch or run number. The scope of this provision is quite broad in that it applies to all children’s products, including, but not limited to, items such as clothing or shoes, not just toys. Congress modified the requirement for tracking labels with the phrase “to the extent practicable” recognizing that it may not be practical for permanent distinguishing marks to be printed on small toys and other small products that are manufactured and shipped without individual packaging.

## **B. ASTM F963-07 Toy Standard**

Effective February 10, 2009, the ASTM F963-07 toy safety standard becomes a mandatory standard under the CPSIA. ASTM F963 contains the requirements and test methods for toys intended for use by children under 14 years of age. It also requires additional testing, safety requirements, and labeling for toys. There are specific exemptions for certain products under ASTM F963, including sporting goods. These exempted products are not subject to additional testing and certification under ASTM F963.

## **C. Advertising & Choking Hazard Warnings**

Under section 105 of the CPSIA, the packaging for certain toys and games intended for use by children is required to contain a label, or cautionary statement, regarding choking hazards. This section of the new law requires that advertising for these products that provide a direct means of purchase or order of the product must contain an appropriate cautionary statement. When a product's packaging requires a cautionary statement, the advertising for the product, including Internet sites and catalogues, must bear the same cautionary statement. There are requirements as to the layout, type, language, color, and placement of the statement.

The requirement with respect to advertisements on Internet web sites was December 12, 2008. The requirement with respect to catalogues and other printed materials printed on or after February 10, 2009, is February 10, 2009. The effective date for all catalogs and other printed materials, regardless of print date is August 9, 2009.

## **VIII. Effect on Business**

Further, there will be a discussion that will focus on the Act's effects on business, especially to the sporting goods industry.

Since many of the CPSIA deadlines and decisions are implemented on a rolling basis this presentation will need to be flexible. It is important to keep updated on any new postings or decisions made by the CPSC. The CPSC has created a separate, very informative web site dedicated solely to the CPSIA: <http://www.cpsc.gov/about/cpsia/cpsia.html>.

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