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Late Breaking Changes to the CPSIA: Significant Compliance and Business Implications for Importers, Distributors, and Retailers

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by [Robert L. Falk](#), [Linda L. Lane](#), [Stacy Kaplan](#)

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The Consumer Product Safety Improvement Act of 2008 (“CPSIA”) was signed into law on August 14, 2008. The CPSIA represents a major overhaul of the earlier Consumer Product Safety Act (“CPSC”) and was drafted in the wake of strong public concern arising from recalls of a variety of consumer products, including toys, manufactured in Asia. Among other things, the CPSIA imposed stringent new lead and phthalate content restrictions on toys and childcare articles offered for sale anywhere in the U.S. after February 10, 2009. (For additional general information on the CPSIA, please see earlier [Product Liability updates](#).)

February 6, 2009 CPSC Clarification of CPSIA Requirements Taking Effect on February 10, 2009

Since its enactment in August 2008, there has been a flurry of clarifications and refinements with respect to the U.S. Consumer Product Safety Commission (“CPSC”) implementation of the CPSIA. On January 30, 2009, it effectively put off for at least a year the CPSIA’s requirements for obtaining accredited third party certification that its new lead and phthalate content restrictions are being met. On February 6, 2009, the CPSC clarified its enforcement policy with regard to other aspects of the CPSIA scheduled to take effect on February 10, 2009.

First, the CPSC stated that it will **not** prosecute any manufacturer, importer, distributor or retailer for making, selling or distributing children’s products in the following categories, even if such products are later found to contain “accessible” components that exceed the CPSIA’s new lead content limits:

- children’s products made of all natural materials, including wood, cotton, and certain fine metals and fine metal alloys that the CPSC has recognized rarely, if ever, contain lead;
- children’s books printed after 1985; and
- most dyed or undyed textiles, including non-metallic thread and trim on apparel, blankets, and other fabric products (without plastic or metal fasteners).

Second, the CPSC established alternative lead limits for electronic components of toys and other children’s products. If a lead-containing electronic component is deemed “inaccessible” to children it will be exempted from the lead content limits established in the CPSIA. Even accessible electronic components may be exempted from the CPSIA’s lead content restrictions if they fall into one of nine specific categories of newly announced exemptions.

Application of CPSIA’s Phthalate Limits Expanded to Previously Manufactured Inventory

Perhaps the most significant change the CPSC announced concerned a reversal of its prior position on the reach of the CPSIA’s phthalate restrictions. The CPSC’s General Counsel had previously issued an Opinion Letter on November 17, 2008, stating that, unlike the CPSIA’s lead content restrictions, its phthalate prohibitions would *not* apply to a company’s existing inventory. The CPSC

reversed this position on February 6, 2009, based on a decision issued in *National Resources Defense Council, Inc. et al. v. CPSC*, 08-civ-10507 (S.D.N.Y. Feb. 5, 2009) (holding that the phthalate prohibitions contained in the CPSIA apply to existing inventory of children's products and child care articles, even if manufactured prior to February 10, 2009). As a consequence, much to the surprise and dismay of retailers and their suppliers who had relied on the prior General Counsel opinion, the CPSIA's phthalate prohibitions are now applied to existing inventory as of February 10, 2009.

Conclusion

Affected businesses may have to scramble to address (or take advantage of) the CPSC's late breaking announcements concerning implementation of the CPSIA. They can also likely expect more changes, refinements and clarifications concerning the CPSIA's requirements and exemptions over the next months and years. Many deadlines under the original CPSIA are looming, including deadlines for required tracking labels, mandatory standards for durable nursery products, registration of nursery products, further reduced lead content limits, and required procedures for labeling. Morrison & Foerster will continue to monitor these developments for its clients and advise them on their implications.

For further information, please contact [Robert Falk](#) in our San Francisco office, [Linda Lane](#) in our San Diego office, or [Chet Kerr](#) in our New York office.