

[Alerts and Updates]

CPSC Delays Enforcement of Lead and Phthalate Testing and Certification Requirements

February 2, 2009

In a move that took many by surprise, the U.S. Consumer Product Safety Commission (the "CPSC") voted on January 30, 2009, to issue a one-year stay of enforcement for lead and phthalate testing and certification requirements for manufacturers and importers of regulated products that were imposed by the Consumer Product Safety Improvement Act ("CPSIA"). The CPSC made this move less than two weeks before the new lead and phthalates limits in children's products are scheduled to become effective on February 10, 2009. In recent weeks, the CPSC has been deluged with petitions from a wide-ranging variety of groups that highlighted the need for more guidance. The CPSC's decision may not cure all of the compliance problems associated with the CPSIA, but it is likely to provide breathing room that should provide for more orderly implementation.

The CPSIA, which was signed into law on August 14, 2008, established certification and testing requirements for manufacturers and importers of consumer products subject to CPSC standards or bans. In addition, the CPSIA mandates a host of other new regulations intended to improve product safety, particularly for children. The CPSIA's original implementation schedule was so compressed that it called for the new lead and phthalate limits to become effective before regulations could be adopted regarding test procedures, test lab accreditation and exemptions for products that should not require testing or that do not pose health risks.

The decision by the CPSC is intended to give CPSC staff adequate time to finalize proposed rules that may exempt certain materials and products from lead testing and to issue more guidance on when testing is required and how it is to be conducted. The stay will remain in effect until February 10, 2010. However, the stay still leaves significant uncertainties because it is only a stay of testing and certification requirements – it does not stay requirements that lead and phthalates be reduced to the levels ordered by the CPSIA. For many products that clearly do not contain lead, such as textiles, the stay is likely to offer real relief from the potentially burdensome and expensive testing requirements. However, for manufacturers, importers, distributors and retailers of children's products that may exceed the lead limits, the stay may encourage a "don't test, don't tell" policy, compelling them to put blind faith in the CPSC that it ultimately will agree with the manufacturers' exemption requests or to simply hope for the best until the smoke clears. Alternatively, they may attempt compliance with uncertain testing techniques.

The new lead and phthalate limits have engendered considerable confusion and controversy, and the short implementation schedule caught many manufacturers and retailers off guard because it potentially applied to existing inventory and did not allow sufficient time to incorporate the new limits and test procedures into the production and distribution cycle. Without the contemplated regulations, the new lead and phthalate bans have threatened to render billions of dollars of new products worthless, to mandate costly testing of products that are inherently lead free, and to outlaw the sale of lead-bearing products that do not pose a safety threat, such as electrical and technical components that are not readily accessible or where exposure will not result in the absorption of lead into the human body.

The CPSC action does not stay enforcement of regulations already implemented under the CPSIA, such as rules for testing and certification involving lead paint, cribs and pacifiers, ATVs, pool drain covers, the ban on small parts effective for products made after February 15, 2009, and the limits on lead content of metal components of children's jewelry.

In issuing its decision, the CPSC noted that the CPSIA has given new enforcement authority to state attorneys

general, but the CPSC's press release states that "[t]he Commission trusts that State Attorneys General will respect the Commission's judgment that it is necessary to stay certain testing and certification requirements and will focus their own enforcement efforts on other provisions of the law, e.g. the sale of recalled products." It is expected that certain state attorneys general (including California and Connecticut) who have been pushing the CPSC to strictly and quickly enforce the bans associated with the CPSIA will strongly criticize this new enforcement stay.

Much uncertainty remains, but the CPSC's decision nevertheless should better enable manufacturers, importers, distributors and retailers of consumer products to plan and prepare for their compliance obligations.

About Duane Morris

The Duane Morris Product Safety, Compliance, and Recalls Group is actively advising clients regarding the Consumer Product Safety Improvement Act of 2008 and its impact upon their operations, and is working with them to develop compliance tools and programs. The firm's compliance advice is unique to each client's circumstances and products, and has covered a wide range of topics, including:

- Identifying CPSC regulations that apply to the company's products, and determining when and how each regulation must be implemented;
- Developing systems of documenting compliance with CPSC regulations, including testing and inspections (internal and third party) and conformity certificates;
- Import, export and customs issues;
- Communicating with customers, as well as with subcontractors and suppliers, regarding the parties' expectations on product safety and CPSC compliance issues, and negotiating terms for warranties, indemnities, insurance and other compliance matters;
- Training employees and industry groups regarding product safety and risk management issues;
- Communicating with CPSC management and compliance staff regarding proposed regulations and to obtain rulings and interpretations on exemptions and other compliance issues;
- Advising companies regarding possible reporting obligations to the CPSC under Sections 15 and 37 of the Consumer Product Safety Act and preparing and presenting product hazard reports as appropriate; and
- Advising companies regarding possible obligations to recall products, negotiating the terms of recalls with CPSC compliance staff, advising clients regarding logistics, public relations and other issues that arise in product recalls, and assisting clients with international compliance issues when their products are distributed in multiple countries.

For Further Information

If you have questions about this Alert or would like more information, please contact Paul S. Rosenlund, Robert B. Hopkins, Andrew E. Mishkin, Sharon L. Caffrey, Karen Shichman Crawford, any other member of the Products Liability and Toxic Torts Practice Group or the attorney in the firm with whom you are regularly in contact.