

With Consumer Product Industry Struggling to Comply with New Safety Law, CPSC Holds Fast on Lead Ban But Eases Other Compliance Positions

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In the last few months, those involved with the manufacture, sale and importation of consumer products have been scrambling to comply with the many new requirements set forth in the recently enacted Consumer Product Safety Improvement Act (the "Act"). The Consumer Product Safety Commission (the "CPSC"), the federal agency that oversees the Act, has in recent weeks held fast to its strict interpretation of the new lead ban set forth in the Act, but has also backed away from certain compliance positions with which many in the consumer product industry were struggling.

February 2009 Lead Ban Is Retroactive As to Inventory

Under the Act, effective February 10, 2009, children's products with a lead content of more than 600 parts per million ("ppm") in each accessible part are banned. Many in the industry have asked whether this lead ban will apply to pre-existing inventory, noting that the ban could result in the destruction of millions of dollars of product inventory. Despite significant industry pressure, the CPSC's general counsel has consistently stated that the lead ban is retroactive and any inventory in commerce as of February 10, 2009, that exceeds the 600 ppm lead limit will be considered banned.

Proposed Rules As to Possible Exemptions from Lead Ban Offer Little Immediate Relief

By rule, the CPSC may exempt certain items from the lead ban as to children's products, including products that are unlikely to pose a risk of lead exposure. On January 15, 2009, the CPSC published various proposed rules with regard to this, including: (1) a proposed rule that would make certain unadulterated natural materials exempt from lead compliance testing; (2) a proposed rule setting forth lengthy procedures on how a company could apply for an exemption from the lead ban; (3) a proposed rule providing guidance on what would be considered an inaccessible part (inaccessible parts are exempt from the lead ban); and (4) a proposed rule that would exempt certain electronic components from the lead ban.

While such proposed rules may provide some relief to the consumer electronics industry, they are likely to offer little immediate relief to the majority of the players in the consumer products industry. For instance, most in the clothing industry may not be able to take advantage of the natural material exemption because most natural fiber clothes are treated with chemicals, such as pigments, dyes, coatings, finishes or other substances. In what may further complicate things, on January 21, 2009, the Obama Administration requested that all federal agencies not take any further action on most pending rules until further review by agency heads appointed or designated by President Obama.

Resellers of Children's Products Not Required to Test or Certify

On January 8, 2009, the CPSC clarified that resellers of used children's products (aka thrift or consignment stores) are not required to test for compliance with CPSC standards, including compliance with the new lead and phthalate standards. The CPSC also noted that such entities are not required to issue General Conformity Certificates.

February 2009 Phthalate Ban Not Retroactive As to Inventory

Beginning February 10, 2009, children's toys and child care articles containing certain levels of phthalates are also banned. Phthalates have in the past been widely used as plasticizers. On November 17, 2008, the CPSC's General Counsel issued an advisory opinion that is contrary to the above lead position. Specifically, the advisory opinion notes that the phthalate ban will not apply to existing inventory as of February 10, 2009.

This ruling on phthalates has been heavily criticized by some legislators, consumer groups and state officials. Two consumer groups have filed a suit in U.S. District Court in New York that asks the court to reverse the CPSC general counsel's ruling. The court in that case has ordered expedited briefing and may issue a ruling before the effective date of the new statute. Additionally, California Attorney General Brown has issued a public letter to the CPSC challenging its determination that the phthalates rules are not retroactive, and also asserting that California's state laws on phthalates, including AB 1108 and Proposition 65, are not preempted by the federal laws, and that California would begin enforcing its own laws on January 1, 2009. The limits on phthalates stated in the California laws are inconsistent with those in the updated Act.

February 2009 Phthalate Ban Does Not Apply to Children's Wearing Apparel

While the ban on lead applies to all children's products, the pending ban on phthalates will apply only to children's toys and child care products. Under Section 108 of the Act, a children's toy is a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays. This definition is vague, and

the CPSC has taken the general position that the issue must be decided on a product-by-product basis, depending upon factors such as labeling, marketing, packaging, consumer recognition and the CPSC's age determination guidelines for toys.

On November 25, 2008, the general counsel for the CPSC issued an advisory opinion that the phthalate ban is generally not applicable to children's shoes and wearing apparel because they are not toys. The CPSC described a few exceptions that are covered by the phthalate ban, including sleepwear for children age three and under, bibs and children's dress-up or play costumes.

Sporting goods is another category that has generated confusion and concern. The CPSC has taken the position that sporting goods can include toys but not all sporting goods are toys. The CPSC reports that its staff plans to use the definition of "toy" in the ASTM F963-07 standard for guidance. ASTM F963-07 is a comprehensive safety rule applying to most toys and many child care articles; it specifically exempts sporting goods, camping goods, bicycles, athletic equipment, musical instruments, furniture and a variety of other specified items, but it will cover "toy counterparts" of such items.

Only Importers and Domestic Manufacturers Required to Issue General Conformity Certificates

Pursuant to the Act, a General Conformity Certificate must accompany certain consumer product shipments and certify that the product complies with all applicable CPSC rules, bans, standards and regulations based on a test of each product or upon a reasonable testing program. It was originally the CPSC's position that the importer, foreign manufacturer and private labeler of the product were all required to issue such a certificate. Because of the logistical problems involved, many in the industry were having difficulty arranging for certification by all such parties. In recognition of this problem and in reversal of its earlier position, the CPSC on November 18, 2008, published an immediate Rule (16 C.F.R. Part 1110, the "Rule") with no notice or comment period, noting that only the importer is now required to issue a General Conformity Certificate on imported shipments. For products manufactured in the United States, the Rule states that only a manufacturer is required to certify.

Name of Foreign Manufacturer Not Required on General Conformity Certificate

Prior to the issuance of the Rule, the CPSC took the position that the name of the foreign manufacturer must appear on the General Conformity Certificate. Many importers were concerned that this would reveal confidential sourcing information to potential competitors. Under the Rule, only the country and city where the product was produced must be identified.

General Conformity Certificate Not Required to Physically Accompany a Shipment

The CPSC originally indicated that a General Conformity Certificate must accompany a shipment (*i.e.*, physically in the shipping container). The CPSC received many comments that in the electronic age, this was both impractical and a waste of paper. Accordingly, the CPSC has backed away from this position and in the Rule notes that a certificate does not have to physically accompany a shipment as long as it can be electronically accessed, meaning that a certificate must be available on the World Wide Web.

CPSC and Other Agencies Issue Draft Guidance for Good Importer Practices

On January 13, 2009, the CPSC and other federal agencies issued draft guidance for good importer practices as to U.S. safety and security laws. This document should serve as a useful tool for anyone importing consumer goods.

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 a variety of 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 [Robert B. Hopkins](#), [Paul S. Rosenlund](#), [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.