

Consumer Product Safety Commission Advisory: New CPSC Product Testing and Classification Rules Will Significantly Impact U.S. Retailers, Importers, and Manufacturers of Consumer Products

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Recently, the U.S. Consumer Product Safety Commission (CPSC) proposed several new sweeping regulations interpreting the product classification and testing requirements imposed by the Consumer Product Safety Improvement Act of 2008 (CPSIA). These constitute the most significant CPSC mandates since the enactment of this landmark legislation in 2008.

As proposed, these regulations will impose a number of new testing and certification requirements on those who make, import, and sell consumer products subject to mandatory requirements, including recertification under certain circumstances, periodic and “verification” testing, “remedial action plans” if a product sample fails a test to such standards, and extensive new record-keeping requirements.

In addition, the agency is proposing a new interpretive rule that may change which products are considered to be “children’s products.” And all of this comes at a time when the CPSC is assessing record penalties (*including a record two-million-dollar penalty last month that includes provisions of CPSC oversight of the firm’s business operations*), and just as Congress is beginning to consider even **more** changes to the CPSIA.

Attorneys in Mintz Levin’s Consumer Product Safety Practice Group are devoted exclusively to CPSC law. We stand ready to assist your company not only to comply with the law, but also to meet the expectations and requirements of your customers, in the most efficient and least burdensome manner possible.

Proposed New Testing and Certification Rule

The draft proposed rule contains the following key provisions:

- For non-children’s products subject to mandatory standards, the rule would require that certification of those products be based on a “reasonable testing program,” consisting of the following five elements: 1) product “specification;” 2) certification tests; 3) production testing plan; 4) remedial action plan upon a failed test report or safety standard violation; and 5) documentation of all of the above.
- For children’s products subject to mandatory standards (and all children’s products are subject to at least one standard—the ban on lead content in excess of 300 parts per million), the proposed rule requires: 1) certification testing by third-party labs approved for such testing by the CPSC; 2) periodic testing (after certification testing); 3) testing of

random product samples; 4) new testing if there is a “material change” to the product; 5) verification of certification test results; 6) procedures to prevent undue influence over test labs; 7) a remedial action plan following a failed test report; and 8) documentation of all of the above.

- Finally, a separate proposed rule would allow certification, under limited circumstances, of a product to mandatory CPSC standards based upon testing and certification of component parts or materials, rather than of the final product.

New Interpretive Rule on “Children’s Product”

The CPSC also issued a proposed interpretative rule on the meaning of “children’s product” under the CPSIA. The proposed rule elaborates on the four statutory factors that must be considered when evaluating what is a “children’s product,” and includes specific product examples.

Understanding the difference between a children’s product and a general use product is critical, as the CPSIA subjects children’s products to stringent lead limits (currently 300 ppm for accessible lead content and 90 ppm for lead in paint and other surface coatings), the tracking label mandate, and testing and certification requirements, among other product safety regulations and requirements.

How Can You Prepare for These New Regulations?

While these new CPSC regulations and definitions are not expected to go into effect for several months, product manufacturers and sellers should now begin to evaluate whether their products are “children’s products,” and to anticipate adjusting their product testing and certification procedures to what will undoubtedly be new requirements, in order to adequately demonstrate compliance with U.S. safety standards.

Mintz Levin can assist your company with:

- Preventing and responding to CPSC enforcement actions, including determinations under the CPSC self-reporting obligation.
- Evaluating products and product lines for CPSC compliance and classification, including whether they are likely to be considered “children’s products,” “toys,” or “child care articles” and thereby become subject to additional regulations.
- Assessing your current product testing practices and policies, and advising on how to bring them into compliance with existing and likely new requirements.
- Advising your company on the many other CPSC regulations, guidance documents, and enforcement policies, including those dealing with the lead paint and substrate limits; limits on phthalates in certain children’s products; whistleblower protection for employees of product makers and sellers; new restrictions on the exportation of potentially violative products; a new CPSC public database of consumer complaints; new durable nursery product standards; and the transformation of voluntary into mandatory standards by the CPSC.

- Advocating for your company or industry group before the CPSC Office of Compliance, the Commission, and, if necessary, Congress, to ensure that your interests and rights under the law are fully protected.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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