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## Legal Updates & News

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#### **President Bush Signs Consumer Product Safety Improvement Act of 2008, Imposing Sweeping New Safety and Enforcement Standards for Children's Products**

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Following a wave of product recalls in 2007, President Bush signed the Consumer Product Safety Improvement Act of 2008 ('the Act') on August 14, imposing more stringent safety standards for consumer products. The Act targets children's products, restricting the use of lead and phthalates and creating new safety standards altogether for certain infant and toddler products such as cribs. In addition, the Act mandates independent third party testing of all products subject to children's product safety rules, new tracking labels and registration requirements for children's products, and new rules for advertising children's products.

This client alert highlights some of the Act's key new standards and the sweeping provisions designed to enforce them, including heightened criminal and civil penalties, so that clients may begin to assess the impact of the Act on their business.

#### **A Slew of New Safety Requirements**

##### ***Lead Limits***

The Act bans the sale of children's products containing lead outside approved limits. Lead content limits in products for children age 12 and younger will be phased in as follows:

600 ppm 180 days after enactment

300 ppm 1 year after enactment

100 ppm 3 years after enactment, unless limit is technologically infeasible

The Act provides for several additional exceptions to these lead limits, such as for products whose lead cannot be absorbed by the human body and does not have other adverse impacts on public health or safety, or whose lead is contained within an inaccessible component part. Such exceptions may only be granted by the Consumer Product Safety Commission (CPSC).

The Act also reduces longstanding limits for lead paint and surface coatings. Effective one year after enactment, no children's product may contain paint with more than .009 percent lead, a significant reduction from the previous limit of 0.06 percent.

##### ***Phthalates Ban***

The Act also bans the use of certain phthalates, used to soften plastics and make them more durable. Effective 180 days after enactment, the Act bans three particular phthalates – DEHP, DBO, and BBP – in concentrations greater than 0.1 percent, and temporarily bans three additional phthalates – DINP, DIDP, and DnOP – with the same concentrations, pending further study. The CPSC will also appoint a panel to study the effects of all phthalates and phthalate alternatives. The

Act does not preempt state laws on phthalates not specifically regulated under the Act.

### ***Infant and Toddler Products***

Within one year of enactment, the Act requires the CPSC to promulgate new safety standards that are the same as, or more stringent than, currently voluntary standards for various durable infant or toddler products, including cribs, toddler beds, high chairs, bath seats, gates, play yards, stationary activity centers, infant carriers, strollers, walkers, swings, and bassinets and cradles. The Act contains specific enforcement provisions for these standards with respect to crib manufacturers and vendors.

The Act also requires each manufacturer of a durable infant or toddler product to maintain a product registration database to use in the event of a recall or safety alert. The manufacturer must maintain such records for a minimum of six years after the date of manufacture.

### ***ASTM Standards and Broad Exemption from Federal Preemption***

The Act adopts ASTM Voluntary Standard F963-07, previously a voluntary safety standard for toys, as a mandatory CPSC standard. The CPSC will assess this ASTM standard (as well as flammability standards under ASTM F963) and may promulgate more stringent standards if it deems necessary.

Like Section 26 of the Consumer Product Safety Act, the Act provides that states may apply for an exemption from the federal requirements if their rules provide a 'significantly higher degree of protection' and do not 'unduly burden interstate commerce.' Moreover, the Act provides that existing state laws and regulations regarding consumer product safety may remain in effect provided the state files a copy of those requirements with the CPSC within 90 days after enactment.

The Act also provides that the preemption provisions of sections 25 and 26 of the Consumer Product Safety Act – as well as section 18 of the Federal Hazardous Substances Act, section 16 of the Flammable Fabrics Act (15 U.S.C. 1203), and section 7 of the Poison Packaging Prevention Act of 1970 (15 U.S.C. 1476) – are to remain in effect. This provision further supports the non-preempted nature of state tort laws that are designed to deal with the same risk of injury as the consumer product safety standards established by these Acts and which provide a higher degree of protection than the federal standards. The provision also ensures that there is no preemption of state warning standards implemented before August 31, 2003. Thus, any federal standard of care preemption under the Act is likely to be extremely limited.

### ***Third Party Testing***

The Act requires, within 90 days of enactment, that children's products manufacturers certify that the product complies with all rules, bans, standards, and regulations applicable to the product under the Act or other Acts enforced by the CPSC. Moreover, manufacturers must submit to independent third party testing all products subject to children's product safety rules, effective within 90 days after the CPSC establishes and publishes notice of the accreditation requirements for such testing facilities. The CPSC must publish requirements for accreditation of facilities testing children's product no later than 10 months after enactment of the legislation (with earlier timeframes for certain products such as lead paint and cribs).

### ***Tracking Labels, Registration, and Advertising***

Effective one year after enactment, all children's products must be labeled, "to the extent practicable," with tracking information to enable identification of recalled products. The ultimate purchaser must be able to determine the name of the manufacturer or private labeler, the location and date of production, and any other information necessary to identify the product. Both the product and any packaging must be labeled accordingly.

Within 180 days after enactment, the CPSC is required to submit a detailed implementation plan to the appropriate Congressional committees regarding the establishment of a public, searchable database. The database must be operational 18 months thereafter and will include reports of injuries, illness, death or risk related to consumer products, as well as complaints filed (including manufacturer responses thereto).

The Act prohibits advertising that references a consumer products safety standard unless the product being advertised conforms to all applicable safety requirements of such standard. The Act also requires that toy advertisements that provide a direct means of purchase of children's toys and games must prominently display certain cautionary statements.

### **Import/Export Provisions**

The Act also provides new restrictions on the import and export of non-conforming products. The CPSC may prohibit the exportation of products that are not in compliance with applicable consumer product safety rules, unless the importing country notifies the CPSC that it accepts the importation of the non-conforming product. With respect to imported products, the Act provides that non-compliant products shall be destroyed, unless the owner applies and is granted permission to export the product in lieu of destruction. The Act also adds new inspection and recordkeeping requirements for manufacturers of imported products – the requirements are prerequisites to the sale, offer for sale, distribution or importation of such products.

### **Enforcement Provisions**

The Act enhances the CPSC's authority to issue product recalls and enforce such recalls. The Act also allows the CPSC to promulgate new requirements for recall notices. In addition to enforcement by the CPSC, the Act provides that state attorneys general may bring civil actions against companies for violations.

Civil penalties for violations of the Act are capped at \$100,000 per individual violation, and \$15 million for aggregate violations. Previously the penalties were \$5,000 and \$1.25 million, respectively. The penalty provisions are effective on the earlier of the date on which the CPSC issues final regulations, or one year after enactment. Criminal penalties under the Act are increased from three to five years in jail for knowing and willful violations.

The Act includes whistleblower protection, providing that an employer may not discharge or otherwise discriminate against an employee who provides information or testimony regarding a violation of the Act.

### **Conclusion**

The extent of the reforms under the Consumer Product Safety Improvement Act of 2008 are uncertain, depending on the CPSC's many anticipated implementing regulations, and the interpretation of numerous exceptions to the Act. What is clear is that the numerous new safety standards will speedily affect many manufacturers, distributors, and retailers of both imported and exported children's products, with certain rules coming into effect as soon as 90 days from enactment.

Morrison & Foerster LLP is at the forefront of law firms with experience in lead issues, particularly with regard to consumer products, including those intended for use by children of varying age groups. We represent a variety of companies and trade associations with interests in this area and assist them with legislative, regulatory, and litigation matters involving lead content and exposure issues.

For further information or assistance in matters concerning lead, including this rulemaking by EPA, CPSC regulation, California's unique Proposition 65 statute and other federal, state, and local initiatives addressing lead, please contact Michèle Corash or Robert Falk in our San Francisco office at [MCorash@mofocom](mailto:MCorash@mofocom) or [RFalk@mofocom](mailto:RFalk@mofocom), or Peter Hsiao in our Los Angeles office at [PHsiao@mofocom](mailto:PHsiao@mofocom).

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