

Client Alert

A report
for clients
and friends
of the Firm April 2009

Consumer Product Safety Commission Adjusts Enforcement Plan for New Children's Product Safety Standards

In recent weeks, the Consumer Product Safety Commission ("CPSC") has taken several steps to adjust its policies for enforcing the new product safety requirements put in place by the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). Under the CPSIA, manufacturers and importers of children's products are now subject to civil and criminal penalties for failing to meet enhanced product safety requirements such as stricter limits on lead content in children's products and mandatory steps for product safety testing and certification. Rather than taking immediate effect, the CPSIA's new rules have been implemented on a rolling basis and according to a schedule which continues to change. Although several important elements of the CPSIA regulatory regime went into effect on February 10, 2009, the CPSC has recently granted a stay of enforcement as to certain requirements, and has begun to identify various regulatory exceptions that will be applicable to certain defined categories of children's products. On March 5, 2009, the CPSC issued a final rule on procedures and requirements for making requests to obtain Commission determinations that a given class of materials or specific product does not exceed the Act's new lead limits or for an approved exclusion from the lead limit rule.

The CPSIA's New Requirements

The CPSIA requires members of the children's product industries to ensure product compliance with safety standards such as lowered limits for lead and phthalate content and rules for product labeling. The broad class

of "children's products" covered by the CPSIA is defined to include those products that are primarily designed for use by children under 12, and may encompass goods ranging from cribs and pacifiers to items such as books and DVDs. Not all children's products are treated the same under the Act, as some may be subject to added requirements depending on factors such as date of manufacture, or whether the products fall under specified categories such as "child care articles" or "durable infant and toddler products." Since the CPSIA first took effect in November 2008, the CPSC has taken steps to provide guidance on a number of these children's product classifications, clarifying issues such as the specific categories of children's clothing that may be subject to the Act's ban on products containing phthalates under Section 108, and how to determine whether a product is a "children's toy" that will be subject to additional toy safety requirements under Section 106. Examples of the CPSIA's new rules include:

Lead limits. Among the CPSIA provisions already in effect, Section 101 now bans the manufacture and sale of children's products which contain more than 600 parts per million (ppm) of lead. This limit is scheduled to drop to lower permitted levels in August 2009, and to even lower levels in August 2011 if deemed feasible. Although products surpassing these lead limits will be considered banned hazardous substances under the Federal Hazardous Substances Act, the CPSIA provides the CPSC with the authority to exclude a specific product or material exceeding the limit if a review of scientific evidence meets certain conditions showing no risk of lead absorption by children or other adverse health effects. For instance, on February 6, 2009, the CPSC identified "ordinary children's books published after 1985" as one class of children's product under investigation and announced that as part of an interim enforcement policy, the Commission would not prosecute any person for manufacturing or selling books that surpassed the lead limit unless the manufacturer or importer had notice that the product did not meet the requirement.

Phthalates limits. Section 108 provides that certain children's products cannot be sold if they contain more than 1000 ppm of certain phthalates. Three particular phthalates are prohibited in concentration of more than 0.1 percent in products that could be considered children's toys under the statute. Pending further study, three additional phthalates are prohibited in the same concentration in toys that can be "placed in a child's mouth."

Mandatory Testing and Certification. Section 102 requires that manufacturers certify, based on testing, that any children's product manufactured after November 12, 2008 complies with all applicable standards or rules enforced by the CPSC. The CPSC is also continuing to publish notice of its requirements for accrediting third-party assessment bodies, through which certification must be obtained for certain children's products. The implementation timing and enforcement policy for the third-party testing requirement varies depending on product type and continues to change.

Labeling Requirements. Section 103 requires children's product manufacturers to meet certain standards for providing certain identifying production information such as date and location. Section 105 mandates further labeling requirements for the advertising of toys and games.

Recent and Ongoing Developments for CPSIA Enforcement

The CPSC's timeframe for implementing the CPSIA requirements has recently been in flux because the Commission has recognized a need to provide its staff more time to finalize proposed rules which could relieve certain materials and products from testing and to issue more guidance on when testing is required and how it is to be conducted. Although the current implementation and enforcement plan may continue to change in coming months, a number of recent CPSC actions and legal developments should be noted by manufacturers and importers of children's products who are currently seeking to develop an effective strategy for complying with the CPSIA requirements as they take effect. Examples of recent developments include:

Stay of testing/certification requirements. On January 30, 2009, the CPSC granted a one-year stay of testing and certification requirements for manufacturers and importers of certain children's products. Although testing and certification requirements under the CPSIA were scheduled to go into effect on February 10, 2009 for the lead and phthalates content limits for certain products, manufacturers and importers of children's products will not need to test or certify to these new requirements until at least February 10, 2010 (at which time a Commission vote will be taken to terminate the stay).

Request for emergency stay of lead limits denied. On February 5, the CPSC voted to deny a request that the new lead limits taking effect on February 10, 2009 be stayed for 185 days. Citing its lack of authority for changing the date of effectiveness, the CPSC confirmed that as of February 10, 2009, no products can be sold that do not meet the lead limit, regardless of when they were manufactured.

Commission policy on phthalates limits overturned. On February 5, the U.S. District Court for the Southern District of New York issued a decision in the case of *Natural Resources Defense Council v. CPSC*, which made it clear that manufacturers and importers must ensure that all inventory sold in the U.S. meets the phthalates limit regardless of the product's date of manufacture. Although the CPSC General Counsel had earlier issued an advisory opinion maintaining that Congress had intended the CPSIA's phthalates limits to apply only to products manufactured after Feb. 10, 2009, the *Natural Resources* decision overturned this interpretation. The court found that the language and structure of the CPSIA showed that Congress intended to enforce the phthalates limits in the same manner as the Act's lead limits and that the rule would therefore apply to all inventory imported, distributed, or sold after February 10, even if manufactured prior to the rule's implementation.

Standard operating procedure for phthalates testing. On February 9, the CPSC released a detailed overview of the test methods and standard operating procedure that will be used by the CPSC for the analysis of phthalates content in children's products. These are the test methods that the CPSC staff deems sufficient in order to certify compliance with the phthalates limits, which will be required once the stay of those requirements ends.

Final rule issued: how to obtain an exception from lead limit requirements. On March 5, the CPSC issued a final rule detailing the necessary steps involved in seeking a Commission determination that a given class of materials or a specific children's product does not exceed the CPSIA's new lead limits and explaining the requirements involved in attaining an approved exclusion from the lead limit rule. The rule in part requires that such requests be supported by objectively reasonable and representative test results or other scientific evidence and that applicants also provide the Commission various forms of data such as information on completed product testing methods and manufacturing processes.

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The Trademark and False Advertising Practice Group litigates trademark and false advertising cases and provides expert counseling concerning the establishment and maintenance of trademarks and the propriety of contemplated advertising claims.

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