

Client Advisory | November 2008

New Federal Consumer Protection Law

Requires Certifications and Testing, Lowers Limits on Lead and Phthalates in Toys and Children's Products, Increases Fines, Penalties and Enforcement Powers of CPSC



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The Consumer Product Safety Improvement Act of 2008 was signed into law August 14, 2008. It greatly expands the powers of the Consumer Product Safety Commission (CPSC) to protect the public from harmful products. The Act provides for the virtual elimination of lead and phthalates in toys and children's products over the next three years and imposes substantial new requirements on manufacturers, importers, distributors and retailers. New definitions for "children's products," "children's toys" and "child care articles" must be carefully reviewed and understood by manufacturers, contract manufacturers, importers, distributors and retailers.

New General Certification Requirements

Beginning November 12, 2008, every manufacturer, importer and private labeler of a product which is subject to any consumer product safety rule under any law enforced by the CPSC must certify that the product complies with all applicable CPSC rules. There are some limited exceptions to the application of the new requirement. However, the coverage of the new certification requirement is not limited to imported products nor is it limited to children's products or toys. It applies to goods imported for use or distribution in the United States as well as goods manufactured domestically. The certificate must accompany the product, be provided to retailers and distributors and be available for inspection by the CPSC. The certificate must be based upon a test or a testing program. For imported products, both the manufacturer and the importer must provide the certification. The form and contents of the certificate are covered by the law and guidance issued by the CPSC.

Toys and Children's Products

In addition, manufacturers, distributors, importers and retailers of children's toys and children's products should immediately implement programs to assure compliance with the provisions of the Act that become effective in 2009. This will ordinarily mean that product specifications, production and order cycles must be changed with sufficient lead times to meet the new requirements. Products should be tested or re-tested and test results preserved.

The CPSC has determined that the new Act applies to merchandise on retailers' shelves, in production, in inventory and in transit as of February 10, 2009. Accordingly, non-conforming products on the effective date of the new requirements will need to be removed from distribution. Since vendor agreements and supply contracts often provide that products must meet regulatory requirements that will go into effect after delivery of the products to the retailer, customers may attempt to reject non-conforming products before the effective date of the new lower thresholds or may seek to return non-conforming products before or after the effective dates.

Beginning February 10, 2009:

- Lead levels in toys and children's products may not exceed 600 parts per million. This level is more restrictive than the European Union's RoHS Directive (2002/95-80) limitations.
- Phthalates in toys, children's products and "child care articles" with concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP) dibutyl phthalate (DBP) or benzyl butyl phthalate (BBP) are prohibited.
- The sale of children's toys that can be placed in a child's mouth and all child

care articles that contain more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP) or di-n-octyl phthalate (DnOP) are prohibited.

- ASTM International Standard F963-07 Consumer Safety Specifications for Toy Safety becomes a mandatory consumer product safety standard.

Effective August 14, 2009:

- Permitted lead levels are reduced to 300 parts per million.
- A registration card will be required for durable infant and toddler products. These products include cribs, high chairs, strollers, infant carriers, bath seats, gates, swings and other items.
- Permanent tracking labels will be required to be placed on children's products, including their manufacturer or private labeler, place and date of production and batch information to enable tracking and identification.

Other Significant Provisions of the Act

- Permitted lead levels fall to 100 parts per million on August 14, 2011.
- Mandatory testing for imported products.
- Mandatory certification for imported children's products.
- Expanded warning requirements for choking hazards for children's toys and games.
- State attorneys general are granted authority to seek injunctive relief.
- California Proposition 65 and other state warning statutes enacted prior to August 31, 2003 will continue to apply.
- A searchable public database that will include manufacturers' names, product names and other information.
- The CPSC is granted the authority to control the remedial action to be taken by the manufacturer, distributor or retailer with respect to recalled products.
- The CPSC may require recall notices in languages other than English.
- Banned or recalled products, or any products that violate product safety regulations, may not be resold unless they can come within strict limitations.

The Act authorizes increased staffing and funding for the CPSC, provides for the establishment of new laboratory facilities and greatly increases the ability of the CPSC

to enforce the law. Requirements for laboratory accreditation and the use of labs owned or controlled by manufacturers are also provided. Pursuant to the Act, the CPSC has issued a Notice of Proposed Rulemaking for toy and game advertising requirements that apply to print, internet and catalogue advertisements. It is important that manufacturers, importers and retailers confirm that the laboratories that they use will be accredited and that the test results will be sufficient to meet the new requirements. In addition, it is important that concerned parties monitor the application of the new rules, guides and regulations as they are adopted.

Whistleblower protection is expressly granted to employees who report violations, testify or otherwise provide assistance in consumer product safety. This protection covers employees who provide information to the CPSC, testify or offer to testify, assist in a proceeding or object to, or refused to participate in, any activity, policy or practice or were assigned any task that they (or another person) reasonably believed to be a violation of the Act or any other law enforced by the CPSC, or any order, rule, regulation, standard, or ban under such laws.

Enforcement

Civil penalties for failures to report and for other violations of the Consumer Product Safety Act, the Flammable Fabrics Act and the Federal Hazardous Substances Act are significantly increased. The fines can reach \$100,000 for each violation, with a maximum penalty of \$15 million for a related series of violations.

Increased criminal fines, forfeitures of assets associated with the violation and imprisonment of responsible parties (including employees, officers, directors and agents) for up to five years are among the penalties now provided for. With the elimination of the so called "knowledge requirement" for criminal prosecution, the law now takes on the veil of a strict liability statute.

Increased and coordinated action by Customs and Border Protection and CPSC inspectors assigned to major US ports of entry is anticipated and delays in clearing customs may result. New procedures for the destruction of goods that have been refused entry and new restrictions on the ability to resell recalled or non-conforming products will likely be adopted before February 10, 2009.

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What to Do Now

1. Review and update product specifications, terms of sale and purchase, inspection procedures, and practices.
2. Advise suppliers in writing of new rules and product requirements.
3. Require confirmation of compliance, copies of test results and certifications from suppliers.
4. Test existing products and products in development and production for compliance.
5. Negotiate contracts with approved third-party product testing laboratories.
6. Make sure that testing certificates accompany all shipments and are provided to distributors and retailers.
7. Review customer complaint records, warranty returns, consumer complaints, consumer message boards, blogs, public sources and prior tests for compliance issues.
8. Update, adopt and test the effectiveness of corporate compliance programs, document retention programs and crisis management manuals and strategies.
9. Assign responsibilities for compliance to high level employees.

The CPSC will be issuing guidance and regulations interpreting the new law. The CPSC

web site (www.cpsc.gov) provides current information on the new law and other important regulatory issues involving consumer product safety.

The effective dates and permitted levels discussed above may change over time. If you would like any further information, please contact any of our attorneys listed below or another EAPD lawyer with whom you have consulted in the past on similar matters.

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