



Navigating the CPSIA: What All Participants in the Consumer Products Industry Need to Know

A Webinar Presentation by the Attorneys of Dorsey & Whitney LLP

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Introduction

- **Welcome and Panel Introductions**
- **Some quick housekeeping:**
 - **If you experience any technical difficulties during the webinar, use the help button on your screen.**
 - **You can e-mail questions to the panel using the chat function on your screen. We will answer questions as they come up and during the Q&A.**

Today's Topics

- **How the CPSIA Affects Consumer Products**
- **How the CPSIA Affects Children's Products**
- **How the CPSIA Applies to Children's Toys and Child Care Articles**
- **How the CPSIA Will Be Enforced**
- **Federal vs. State Laws**
- **Where Do We Go From Here**

Practice Pointers

We will explain:

- **Who must comply**
- **What is required for compliance**
- **Exceptions to the requirements**
- **When compliance is required**
- **Penalties for noncompliance**
- **Practical tips and best practices**

Background

The CPSIA was passed on August 14, 2008

- **Law is well-intentioned, but too much - too fast**
- **Applies to consumer products generally, and children's products specifically**
- **Full impact continues to evolve**
- **Companies may be exposed to significant legal risk from both enforcement actions and private litigation**

What's New – Consumer Products

New Consumer Product Requirements

- **Certifications for any product subject to a CPSC rule under any of the laws for which CPSC has authority**
- **Enhanced recall authority**
- **Enhanced penalties**
- **Whistleblower protections**
- **Public consumer product safety database**

What's New – Children's Products

New Children's Products Requirements

- **Lead in Substrates and Paints/Surface Coatings**
- **Mandatory Testing and Certifications**
- **Tracking labels**
- **Labeling requirements for advertising**
- **Mandatory Toy Standards (ASTM F-963)**
- **Prohibitions on products with Phthalates**

CPSIA and Consumer Products Generally

General Conformity Certification Requirement CPSIA § 102(a)(1)(A)

- **Domestic manufacturers and U.S. importers of**
- **Products subject to any rule, ban, standard or regulation within CPSC’s jurisdiction**
- **Manufactured on or after November 12, 2008**
- **Must provide a certificate accompanying each product confirming that the product was:**
 - **tested using a “reasonable testing program” and**
 - **conforms with the relevant CPSC requirements**

CPSIA and Consumer Products Generally

General Compliance Certification Issues

- **Required content of certificate**
- **Scope of required testing**
- **Electronic distribution of certificate**
- **Stay of enforcement**

CPSIA and Consumer Products Generally

Lead Paint Limit – CPSIA § 101

- **Applies to:**
 - **paint or similar surface-coating materials for consumer use;**
 - **children’s products (discussed below);**
and
 - **furniture articles for consumer use that bear lead-containing paint**
- **Exception: “Paint” does not include printing inks or materials bonded to the substrate, such as by electroplating or ceramic glazing**

CPSIA and Consumer Products Generally

Lead Paint Limit

- **Current limit is 600 ppm of the total weight of:**
 - **the nonvolatile content of the paint, or**
 - **the weight of the dried paint film**
- **On August 14, 2009, the limit will be reduced to 90 ppm**
- **Subject to the stay of enforcement**

CPSIA and Children's Products

Children's Products Defined

“A consumer product designed or intended primarily for children 12 years of age or younger.”

- a) Manufacturer's statement & product label**
- b) Packaging, display, promotion, or advertising**
- c) Children's view**
- d) Age Determination Guidelines**

Play is NOT a factor

CPSIA and Children's Products

Third Party Testing Requirements

- **Manufacturer or importer**
- **Submit for testing, then certify**
- **Rolling phase-in / Stay of Enforcement**

CPSIA and Children's Products

Lead Content Limit

- **Content measured by weight for any part of the product**
- **Exceptions: absorption, inaccessible parts, electronic devices**
- **Retroactive application to inventory**
 - **February 10, 2009 (to 600 ppm)**
 - **August 14, 2009 (300 ppm);**
 - **August 14, 2011 (100 ppm—if technologically feasible)**

CPSIA and Children's Products

Other New Requirements

- **Lead Paint**
- **Tracking Labels**
- **Standards and Consumer Registration of Durable Nursery Products**
- **Labeling Requirements for Advertising Toys and Games**

Definitions

Children's Toy: 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.**

Child Care Article: a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children **age 3 and younger, or to help such children with sucking or teething.**

Phthalates Ban (CPSIA § 108)

- **Beginning on February 10, 2009, unlawful to manufacture any children's toy or child care article that contains more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP)**
- **No retroactive application as interpreted by CPSC, but lawsuit is pending which challenges this interpretation**

Phthalates Ban

- **Also on February 10, 2009, and until a final law is promulgated, unlawful to manufacture any children's toy or child care article that (i) can be placed in a child's mouth, and (ii) contains concentrations of more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).**
 - **Toys that can be put in the mouth are defined to include toys or parts smaller than five centimeters in dimension, but exclude toys that can only be licked.**

Phthalates Ban

- **CPSC will form a panel to study the effects on children's health of all phthalates and phthalate alternatives**
- **After receiving the report of the panel, the Commission shall promulgate a final rule**
- **Significant scientific debate regarding exposure criteria and long term effects of phthalates**
- **States are moving forward with their own phthalate bans**

Phthalates Ban

- **CA AG's office has opined that there is no preemption and CA phthalate ban is valid. CA banned sale of children's toys and child care articles with phthalates on 1/1/09**
- **Other states, including ME, VT and WA have passed laws that regulate phthalates**
- **CT, HI, MD, MN, MI, NJ, NY, RI, WV have proposed laws that would regulate phthalates**

PRACTICE POINTER: Some state laws are not limited to children's toys and child care articles, but apply to "children's products"

Prohibited Acts

- **Manufacture, import, sell or distribute any non-conforming consumer product**
- **Manufacture, import, sell, distribute, or export any consumer product subject to an order or corrective action, or any banned hazardous substance**
- **Knowingly import any consumer product with an unauthorized safety certification mark**
- **Exercise or attempt to exercise undue influence on third-party testing agency**

Recalls and Corrective Action Plans

- **CPSC now has greater authority to dictate corrective action**
- **New authority to order manufacturers, distributors and retailers to cease distribution, notify state and local officials, provide public notice**
- **Guidelines imminent for uniform class of notice information**

Whistleblower Protection and Database

- **Unlawful to discharge or discriminate against an employee who provides information regarding potential violation of law enforced by CPSC, participates in proceeding concerning potential violation, or refuses to participate in potential violation**
- **Consumer Product Safety Database to be implemented within 18 months**

Civil Penalties

- **Up to \$100,000 (previously \$5,000) for each violation**
- **The maximum civil penalty may not exceed \$15,000,000 (previously \$1,250,000) for a series of related violations**
- **Final regulations regarding penalty factors not yet issued**

Criminal Penalties

- **Maximum of 5 years imprisonment (previously 1 year imprisonment)**
- **May include forfeiture of assets associated with the violation**
- **Directors, officers, and agents of the manufacturer do not need to have notice of a violation to be criminally liable**

Enforcement by States

- **State attorneys general may seek injunctive relief to stop the sale of products that do not meet federal requirements**
- **State attorneys general must provide 30 days' notice to the CPSC and generally may not duplicate a lawsuit filed by the CPSC**
- **States may prefer to enact their own identical standards to preserve flexibility and allow AGs to seek civil damages**

Preemption (CPSIA § 231(a))

- **The CPSIA leaves in place the preemption provisions in existing consumer protection laws**
- **Under existing laws, states may regulate consumer products if state requirements are identical to federal requirements**
- **The CPSIA prohibits the CPSC from expanding the preemptive effect of the statutes it enforces through rulemaking**

Preemption (continued)

- **The adoption of ASTM F-963 for toys and children’s products preempts state laws. States may petition for an exemption if:**
 - **Their rules provide a “significantly higher degree of protection” and do not “unduly burden interstate commerce” or**
 - **Their laws were in effect by August 13, 2008, and notice was filed with the CPSC by November 12, 2008**

Preemptive Provision

- **Limits on lead content in children's products**
- **Limits for lead paint**
- **Limits on phthalates (states may regulate chemicals that are used to replace phthalates as they are phased out)**
- **ATV standards**

PRACTICE POINTER: State warning requirements that were in effect August 31, 2003 or earlier (e.g. California's Proposition 65) are not preempted.

Proposed State Legislation: Minnesota

IMPORTANT ALERT

MN Legislature has proposed Toxic Free Kids Act:

- **Requires the Minnesota Pollution Control Agency (MPCA) to create a “priority chemicals list” based on children’s exposure and chemical toxicity**
- **Requires manufacturers to phase out priority chemicals when safer alternatives become available**
- **Facilitates information sharing with other states that have similar laws**

Minnesota has also proposed a ban on bisphenol A (BPA) in children’s products intended for children 3 and under



WHERE DO WE GO FROM HERE?



QUESTIONS?

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