

Intertek

The Consumer Product Safety Improvement Act What You Don't Know CAN Hurt You!

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Overview of the CPSIA: Immediate Impact

- Certification to all mandatory standards (Nov. 12, 2008, limited stay)
- Lead ban for children's products (Feb. 10, 2009)
- Third party testing for children's products (limited stay)
- State AG enforcement
- New rules for toys: (no phthalates; advertising must have warning label; voluntary standard mandatory)
- New civil and criminal penalties; new prohibited acts (selling recalled product; unauthorized use of safety mark; export of recalled/violative products...)
- Presumption of destruction for seized imports
- Must now always report substantial product hazard

- Tracking labels for all children's products (by Aug. 2009) (stay of enforcement denied)
- Public database of all product-related injury reports (probably 2 years)
- CPSC may "deem" a product/category to be a *per se* "substantial product hazard"
- "Health and safety" exception to 6(b) protection--may swallow the rule
- CBP has independent authority to enforce standards; test case is Importer Self-Assessment Pilot



New Civil and Criminal Liabilities Under CPSIA

- Can now be charged with a felony for willful violations of CPSC acts, without prior notice of violation
- Max civil penalty now \$15 million, up from \$1.8 mil
- Max penalty per violation (product) now \$100,000, up from \$5,000
- Destruction of imports at importer's expense (including government salaries); new port bonds soon to be required
- AGs can seek "injunctive relief" (but can cost more than you think)



Certification Requirements - Temporarily Stayed

- GCC Requirement: Importers and U.S. manufacturers of any *product* must certify (based on a “reasonable” testing program) compliance with all consumer product safety rules enforced by the Commission.
- Third Party Testing: Importers and U.S. manufacturers of any *children’s product* must certify (based on third party testing at an accredited lab) compliance with all children’s product safety rules
- Stay of Enforcement: CPSC issued a limited one year stay for certain testing and certification requirements under CPSIA section 102(a). Stay is scheduled to expire February 10, 2010.
 - Stay relates *only* to the certification requirements for lead content limit (not lead paint limit), not to the underlying substantive standards (including the toy standards, the phthalates limits and the retroactive lead ban).

- Stay of enforcement explicitly does not apply to:
 - i. Any and all testing and certification expressly required by CPSC regulations, including those in effect prior to enactment of CPSIA (garage door openers, bike helmets, metal-core wicks, lawnmowers, lighters, mattresses, and pool slides)
 - ii. Four CPSIA requirements already in effect:
 - Lead paint and other surface coating limits
 - Crib and pacifier standards
 - Small parts ban
 - Lead content limit for metal components of children's jewelry
 - iii. Certification required under Virginia Graeme Baker Pool & Spa Safety Act
 - iv. Certification required for ATV Mandatory Safety Standard
 - v. Any voluntary guarantees provided for in the Flammable Fabrics Act

- Employees of retailers, distributors, importers and manufacturers job status enshrined and absolute ability to leave to testify “at any proceeding”
- Employee can get all attorneys fees; employer only \$1,000!
- Employee must have reasonable belief of violation; to dismiss employer must have clear and convincing evidence
- Firms may be salted for union leverage
- Should have official company policy and hotline/other means for employee complaints

Children's Products: What the Heck Are They and What Must I Do?

- Primarily intended for 12 and under; four factors: label; marketing; common recognition; and CPSC Age Determination Guidelines (but key will likely be marketing and labeling)
- Must third party test at CPSC/ILAC accredited labs (at cpsc.gov)
- New “super standards” for durable children’s products: cribs; highchairs, etc.



Coming Down Heavy on Lead (and Phthalates too)!

- Lead Content Limits for “Children’s Products”
 - 600 ppm (0.06%) by weight for lead (Feb. 10, 2009); 300 ppm (Aug. 14, 2009); 100 ppm (Aug. 14, 2011)
 - More stringent lead paint limits (600 ppm; 90 ppm Aug. 14, 2009)
 - No “component part” of children’s product may exceed limit
 - Certain exclusions apply (specified products and materials, inaccessible component parts, certain electronic devices)
 - Applies Retroactively
- Phthalates Ban for “Children’s Toys” and “Child Care Articles”
 - 6 banned and will likely stay that way (DEHP, DBP, BBP, DINP, DIDP, DnOP)
 - SDNY Court Decision - phthalates ban also applies retroactively!

Recent Commission Guidance

- Statement of Enforcement Policy on Lead Limits
 - **Accessibility:** Until inaccessibility rule is finalized, Commission will accept manufacturer's determination of accessibility.
 - **Exclusions:** The Commission will not impose penalties against anyone form making, importing, distributing, or selling:
 - A children's product made of certain natural materials such as wood, cotton, wool, or certain metals and alloys which the CPSC has recognized rarely, if ever, contain lead
 - An ordinary children's book printed after 1985
 - Dyed or undyed textiles (cotton, wool, hemp, nylon) and non-metallic thread and trim used in children's apparel and fabric products (e.g., a baby blanket)
 - Does not apply if person has actual knowledge that lead limit is exceeded.
- Interim Enforcement Policy on Phthalates Ban
 - Until guidance is final, Commission will focus on products most likely to pose a risk (bath toys and other small, plastic toys).

Additional Commission Activity

- Recent Rule Making
 - **Final Rule:** Procedures and Requirements for a Commission Determination or Exclusion
 - **Notice of Proposed Rulemaking:** Mandatory Recalls
- Requests for Exclusions (Section 101(b))
 - Pen points in ball point pens
 - Crystal beads and rhinestones
 - Children's textiles, etc.

Requirements: Must use “best available, objective peer-reviewed scientific evidence” to demonstrate either:

1. Certain materials or products do not inherently exceed the lead content limits; *OR*
2. Certain materials or products under 101(b)(1) that exceed the lead content limits will not result in the absorption of **any** lead into the human body nor have **any** other “adverse impact on public health or safety.”

Votes on Requests for Exclusions

- ATVs
 - Request for exclusion under CPSIA section 101(b)(1) DENIED
 - **Stay of Enforcement** (until May 1, 2011)
 - ATVs, off-road motorcycles, and snowmobiles designed for children 12 and younger (“Youth Motorized Recreational Vehicles”)
 - Stay applies to: Battery terminals (up to 100% lead), metal alloys (steel up to 0.35% lead, aluminum and copper up to 0.4% lead); and parts sold as replacements for such parts, *provided that* the lead content in the replacement part is not more than the lead content in the original part.
 - Report (with data on each model) due 60 days after publication of Stay
 - Comprehensive Plan (for reduction of lead exposure from each part) due November 1, 2009
 - Manufacturers may seek extension of stay
- Bicycles (including jogger strollers and bicycle trailers)
 - Request for exclusion under CPSIA section 101(b)(1) DENIED
 - **Stay of Enforcement** (until May 1, 2011)

The Future of CPSIA: Congressional Activity

- Congress and the Commission are currently inundated with complaints from numerous industry and grassroots groups/individual companies.
- Chairman Waxman has not yet expressed a willingness to reopen CPSIA but the pressure is mounting.
- NAM Coalition and other groups are pursuing dual Hill/CPSC strategies to maximize flexibility/enforcement discretion and to pursue legislative adjustments where necessary.
- These issues are developing in real time.
- Several bills have been introduced in Congress to amend CPSIA.

What's Next for the CPSIA/CPSC?

- May be “technical corrections” bill this year: build your case now
- Obama nominated 2 new commissioners. They could dramatically change the direction and focus of the agency, and may impose significant new mandates and restrictions.
 - Inez Moore Tenenbaum (nominated as chair of CPSC)
 - Attorney on matters of public school finance (McNair Law Firm)
 - Former South Carolina Superintendent of Education
 - Robert S. Adler (nominated as commissioner of CPSC)
 - Professor of ethics, negotiation, business law, and consumer protection (University of North Carolina)
 - Former attorney-advisor to two previous CPSC Commissioners
 - 1 additional nominee remaining (Republican)

How Can I Protect Myself and My Company?

- Document everything: get explicit declarations/ indemnifications from suppliers
- Good faith efforts to comply have a good chance of protecting you from the CPSC, but not necessarily AGs: reach out/monitor
- Establish clear lines of internal communication and authority for product safety assurance and response: to prevent both issues and lawsuits
- Review insurance for coverage of recalls and related issues
- Make product safety a priority--internally and publicly
- When there's a problem, flush it out of the system as soon as possible--fewer than half of reports to CPSC result in recalls
- CPSC staff IS approachable--define your issue/question first

Top Ten Things to Remember about the CPSIA:

1. It is real and most provisions are here for good.
2. Get the lead out--obvious target of AGs.
3. You're better to make good faith effort and reach out to CPSC than bury your head in the sand.
4. Most penalties will still be for failure to report SPH.
5. You don't have to test everything, but you do have to test a lot (and Congress knows this).
6. Consider marketing/packaging/labeling closely for children's product classification.
7. Respond immediately to "holdings" at ports--attempt to intervene before seizure and destruction order.
8. Improve recall systems to prevent allegations of selling a recalled product.
9. Don't be afraid to fight if you're right!
10. Sign up for CPSIA web site updates: <http://www.cpsc.gov/about/cpsia>

The Intertek logo consists of the word "Intertek" in a white, sans-serif font, centered within a dark blue rounded rectangular background.

Thank you!

Questions?

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