

**ARE WE HAVING FUN YET?  
THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT –  
A YEAR IN REVIEW**

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Retail sales of traditional toys in 2007 totaled approximately \$22.2 billion according to the U.S. Toy Industry Association, the nation's leading toy trade association. The same source reports that sales of video games reached approximately \$21.4 billion in 2007. Add to these figures the nearly \$2 billion in products exported by the U.S. toy industry in that year and it becomes clear that the toy industry is not just kids' stuff.

In August 2008, Congress passed the Consumer Product Safety Improvement Act of 2008 (the "CPSIA"). This law was passed in response to the significant increase in the number of product recalls in 2007, particularly recalls of toys imported from China containing dangerous levels of lead.

Some of the requirements contained in the CPSIA are already in force, some are scheduled to go into effect in the coming months, and the implementation of some has been stayed for a year or more. To say the least, it has been a tumultuous year for the Consumer Product Safety Commission (the "CPSC") and the consumer product industry.

The CPSIA has had a sweeping impact on manufacturers and importers of consumer products. As required by the CPSIA, the CPSC quickly issued regulations interpreting the new legislation, with the promise of more regulations to come. The bulk of the new requirements imposed by the CPSIA involve children's products. In general, the CPSIA defines "children's products" as a consumer product primarily designed or intended for children age 12 or younger.

The following is a summary of the key components of this legislation.

**General Certification**

Section 102(a)(1) of the CPSIA requires manufacturers and/or importers to certify, based on a test of the product or a reasonable testing program, that the product complies with all applicable rules, bans, standards and regulations under the Consumer Product Safety Act (the "CPSA") or any other law that is enforced by the CPSC. This certificate is referred to as a "general conformity certificate." These rules were scheduled to go into effect on November 12, 2008, but enforcement by the CPSC was stayed in February 2009 for one year.

While certification was required for certain products under the prior law (the CPSA), the scope of the certification was broadened by the CPSIA to include other products. As a result, the certification will be required for many more consumer products. There are specific content and delivery requirements for the certificates. The penalties for failing to supply an adequate certificate upon request by the CPSC or the Customs and

Border Patrol are quite harsh. In addition to other civil and criminal penalties, the manufacturer risks that all products in the shipment will be destroyed.

Initially, there was confusion as to which parties were responsible for issuing the certificate: manufacturers, importers and/or private labelers. The CPSC issued a clarification: (i) for imported products, only the importer needs to issue the certificate; and (ii) for products manufactured in the United States, only the domestic manufacturer is required to issue the certificate (i.e., private labelers are not required to issue certificates).

The product testing may be done by the manufacturer itself, or the manufacturer may elect to have an independent third party laboratory test the product (unless the manufacturer creates children's products where, as discussed below, independent third party testing is or will be required). Although it is an added cost, one advantage of having an outside lab test the product is the potential defense it affords the manufacturer against product liability claims.

### **Required Third Party Testing**

One of the most controversial and confusing provisions of the CPSIA is the requirement that all children's products that are subject to a children's product safety rule be tested by an independent third party laboratory accredited by the CPSC to assure compliance with applicable safety rules. This requirement is found in Section 102(a)(2) of the CPSIA.

As noted above, "children's products" are generally products that are designed or intended primarily for children age 12 and younger. A list of accredited labs may be found on the CPSC's website ([www.cpsc.gov](http://www.cpsc.gov)). The law does permit the establishment of manufacturer in-house testing laboratories, but imposes stringent requirements on those laboratories (which are called "firewalled labs").

Because of the confusion and public outcry regarding this rule, the CPSC issued a one-year stay of enforcement (the "Stay") of the third party testing requirement for certain (but not all) products. The Stay is intended to enable the CPSC to refine and clarify its regulations, and it provides a much-needed (although decidedly imperfect) reprieve for the business community. Although the Stay temporarily relieves manufacturers from the obligation to have certain toys tested by an independent third party laboratory, manufacturers are still required to comply with the underlying bans as and when they become effective. For example, while a manufacturer is not required to certify, based on third party testing, that an item does not contain lead in excess of the acceptable level identified in the statute, the manufacturer is still prohibited from distributing products containing lead in excess of those levels. Similarly, importers are prohibited from distributing foreign-made products with excessive lead content. The only relief is that the CPSC will not enforce these regulations until February 2010.

As a result of the Stay, testing for total lead content and phthalate levels will go into effect in February 2010. The Stay does not affect the third party testing requirement

for the following products, which went into or will go into effect on the dates set forth below:

Product Rule	Third Party Testing Required
Lead paint	December 2008
Cribs and pacifiers	January 2009
Small parts	February 2009
Lead content in children's metal jewelry	March 2009
Baby bouncers, walkers and jumpers	June 2009
Children's product safety rules	September 2009

### **Tracking Labels**

Section 103 of the CPSIA requires that to the extent practicable, manufacturers must affix a tracking label or permanent mark on all children's products and their packaging that identifies the source of the product, the date of manufacture and more detailed information about the manufacturing process (such as a batch number). Note that this new provision applies not only to toys but also to other children's products such as clothing, accessories, and shoes. This requirement went into effect on August 14, 2009.

The tracking label requirement generated much controversy, as some manufacturers expressed concern about the feasibility of affixing a label or mark on small products, items sold in bulk, and items for which such permanent labels would be aesthetically displeasing (such as jewelry). Manufacturers producing smaller quantities of products were concerned about the expense to restructure their manufacturing processes to include lot, batch and run labeling systems.

In response to this industry uproar, the CPSC recently issued a policy statement to assist manufacturers in their compliance efforts. In this statement, the CPSC recognizes that the tracking label regulation is not a "one-size-fits-all" regulation; rather, the CPSC admits that compliance is up to the manufacturer's reasonable judgment. When evaluating a manufacturer's compliance, the CPSC will consider the individual manufacturer's situation, along with the practices of its peers. The CPSC also notes that the tracking label requirement is subject to a practicability standard and suggests that in the following situations, marking the product itself might not be practicable:

- If a product is too small to be marked;
- If a toy is meant to be stored in a box, such as a board game (the board itself and the box must be marked, but the individual game pieces need not be marked);
- If a product is sold through a bulk vending machine (similar to the vending machines selling capsules containing small toys in a supermarket lobby);
- If a physical mark would damage the product or impair its utility;
- If the aesthetics of the product would be adversely affected (for example, small pieces of jewelry); and
- If the product surface would be difficult to mark, such as small pieces of fabric, beads, and elastic (for example, hair ornaments, jewelry, etc.).

### **Lead in Paint Limits**

Many children's products have some kind of paint or surface coating. As noted above, manufacturers are presently required to have such products tested by a third party lab for lead in those coatings. The acceptable lead limits are contained in Section 101(f) of the CPSIA (which amends the Federal Hazardous Substances Act) and at 16 C.F.R. 1301.1. Prior to August 14, 2009, the acceptable limit was 600 ppm; thereafter, the acceptable limit is 90 ppm. This limit may be further reduced in the future to the lowest level of lead that the CPSC determines is technologically feasible to achieve.

### **Lead Content Rules**

Section 101(a) of the CPSIA prohibits children's products from containing lead content in excess of the prescribed limit. From February 2009 to August 2009, this limit was established at 600 ppm. In August 2009, this limit was reduced to 300 ppm, with yet a lower limit of 100 ppm scheduled to go into effect in August 2011, unless the CPSC determines that the 100 ppm limit is technologically unfeasible (in which case the CPSC is required to establish the lowest level technologically feasible as the maximum level).

As discussed above, the CPSC issued a Stay of enforcement for the lead content rules as they apply to products other than children's metal jewelry (those rules went into effect in March 2009). Nevertheless, manufacturers are still required to comply with the underlying lead content rules. Additionally, the CPSC has taken the position that the lead content ban applies to products in inventory as of February 2009, not merely to products manufactured after that date.

The lead content ban is subject to several exclusions. The CPSC is permitted to exempt from this prohibition specific products or materials if it can be shown by "best-available, objective, peer-reviewed, scientific evidence" that the lead levels in those products or materials will not result in the absorption of lead into the human body or have any other adverse impact on public health. In February 2009, the CPSC issued a press release that identified a variety of products and materials for which it would not impose penalties, including children's products made of natural materials (such as wood, cotton wool, or certain metals or alloys that the CPSC has recognized are not likely to contain lead); ordinary children's books printed after 1985 (but not including vinyl bath books or other novelty books), dyed or undyed textiles and non-metallic thread and trim used in children's products (such as apparel and baby blankets). Even if it is later demonstrated that one of the foregoing products contained excessive lead, the manufacturer or distributor will not be prosecuted unless that person had knowledge of the excessive lead level.

The statute also provides an exemption where lead in excess of the permitted levels is limited to an inaccessible component part of the product. A part is inaccessible if it is not physically exposed by reason of a sealed casing and does not become exposed through reasonably foreseeable use and abuse of the product. For example, a battery

compartment of a toy is inaccessible if a screwdriver is required to open it. The CPSC issued a final interpretive rule, effective August 14, 1009, to explain the statutory meaning of physical accessibility and to clarify the appropriate test methods for evaluating accessibility.

### **Ban on Phthalates**

Section 108 of the CPSIA prohibits the sale or distribution of any children's toy or child care article that contains certain levels of specified phthalates. Phthalates are chemical compounds added to plastics to enhance their durability and elasticity and have been shown in some studies to have adverse health effects. The phthalate ban applies to all toys (products designed and intended for children age 12 or younger for use by the child when he or she plays) and to all childcare articles (products designed or intended to facilitate sleep or feeding of children age three and younger or to help children with sucking or teething).

The CPSIA contains different acceptable levels for different types of phthalates. These standards went into effect in February 2009, although the CPSC stayed the enforcement of these rules until February 2010. As discussed above, this stay does not relieve manufacturers from their obligation to comply with the underlying standards. Notably, the CPSC has opined that the new standards apply only to products manufactured after the effective date and not to products in inventory on that date.

Section 108 also charges the CPSC with the task of establishing a Chronic Hazard Advisory Panel to study the effect of phthalates on children's health.

### **Other Requirements**

The CPSIA imposes a variety of other requirements in relation to children's products, including the following:

- Ø The CPSIA requires the CPSC to study and develop safety standards for infant and toddler products, such as cribs (including portable cribs, play pens and cribs used in hotels and child care facilities), toddler beds, high chairs, booster chairs, bath seats, gates and play yards, infant carriers, strollers, swings, and walkers. While Congress gave the CPSC some latitude in prioritizing its work, it directed the CPSC to begin issuing the new regulations in August 2009 and to continue to issue regulations at the pace of at least two per year. These requirements are contained in Section 104 of the CPSIA.
- Ø Section 104 of the CPSIA also requires the CPSC to issue new regulations mandating the use of postage-prepaid product registration cards, to be used in connection with product recalls and similar notifications.
- Ø Section 105 provides that the packaging for certain toys and games intended for use by children must contain a cautionary statement regarding choking hazards.

Further, if a product is required to carry this cautionary statement, all advertisements (including websites and catalogs) relating to the product must also contain the same cautionary statement.

- Ø Section 107 requires the Government Accounting Office to study the disparities in the risks and occurrences of preventable injuries and deaths among minority children. The study should culminate in a report containing findings, recommendations for public outreach and prevention programs, and recommendations for educational initiatives to reduce disparities.
- Ø As part of Section 106, the provisions of ASTM International Standard F963-08 Consumer Safety Specifications for Toy Safety (ASTM F963) have been adopted as mandatory consumer product safety standards issued by the CPSC under the CPSA.
- Ø The CPSIA also includes new required safety standards for all terrain vehicles (ATVs).

### **The Reseller Issue**

The passage of the CPSIA also stirred up quite a storm in the reseller community. Thrift stores and other resellers were concerned because children's products often comprise a significant portion of their inventory. Because their inventory consists of older, used items, there is a risk that the products were manufactured before the new requirements went into effect but could nevertheless be subject to the bans. Additionally, the chain of supply for resellers is different than in the retail industry. Retailers can (and often do) demand that their suppliers provide certificates evidencing compliance with the applicable product safety standards. Resellers typically receive their products from individuals who donate them or place them for consignment.

The CPSC responded to the concerns expressed by the reseller community by publishing a Handbook for Resale Stores and Other Product Resellers earlier this year, with an updated version published in August 2009. In general, the CPSC recommends that resellers familiarize themselves with the types of products they sell and their relative risks of noncompliance. The CPSC also warns resellers that they must confirm that the products they sell have not been the subject of a recall. The CPSC Handbook offers a variety of other suggestions and recommendations for resellers to assist them in complying with the CPSIA.

### **Conclusion**

The past year has been a chaotic year for the toy industry and for the CPSC. The CPSC has struggled to keep up with the ambitious regulatory schedule established by Congress in the CPSIA. Consumer groups, trade groups, manufacturers and other stakeholders have written hundreds of pages of comments on the various aspects of the CPSIA, and the CPSC has held several public meetings, most accessible via the internet,

to solicit public comment to help the CPSC with its mission. The Toy Industry Association is developing a Toy Safety Certification Program to assist manufacturers in complying with the CPSIA, and trade associations for other children's products are following suit. On the governmental front, at President Obama's urging, Congress increased the size of the CPSC's budget by 71% over its 2007 level and approved the expansion of the CPSC to include five commissioners (an increase from three). With the transition to the new administration, leadership of the CPSC also changed hands, with Acting Chair Nancy Nord stepping down (although remaining as a commissioner) and South Carolina State Superintendent of Education Inez Moore Tenenbaum being approved as Chair.

With the frenzy of consumer, lobbying, industry, and government activity, it is easy to lose sight of the ball, namely that the underlying purpose of these new rules (however onerous they may appear and however poorly drafted they may be) is to assure that the toys our children play with and the products they use are safe. And that's not child's play.

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