



JONES DAY  
**COMMENTARY**

## GETTING THE LEAD OUT: WHAT EVERY RETAILER AND MANUFACTURER SHOULD KNOW ABOUT THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

Thirty-five million consumer products were recalled in the United States in the summer of 2007. The Acting Chairman of the U.S. Consumer Product Safety Commission (“the Commission”) dubbed it the “summer of recalls.”<sup>1</sup> Civil litigation relating to those recalls continues.

Congress responded by passing the Consumer Product Safety Improvement Act of 2008 (“CPSIA”), which became law on August 14, 2008.<sup>2</sup> The Consumer Product Safety Act (“CPSA”), 15 U.S.C. § 2051 et. seq., already regulated the manufacture and sale of products intended for use by a consumer, except

for those specially regulated under other laws, such as tobacco, cars and aircraft, pesticides, and food and drugs. Consumer products include shoes, computers, apparel, bedding, jewelry and accessories, books, educational materials, consumer electronics, luggage, toys, housewares, sports equipment, bicycles, recreational vehicles, and home furnishings.

The CPSIA dramatically raised the stakes. As the Commission put it in January 2009, the CPSIA’s “extensive changes to the regulatory landscape cut a broad swath through the business community from books to children’s apparel to toys and sporting goods to

1. Kevin Drawbaugh, “Toy Recalls Fuel Momentum Toward U.S. Safety Reforms,” Reuters (Oct. 4, 2007).
2. The United States is not alone. Far-reaching consumer product safety legislation is pending in Canada, Bill C-6, Canada Consumer Product Safety Act. See <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3633883&>. The European Union adopted reforms of Directives that cover specific industries, including its Toy Safety Directive. See <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0626>. Several States also adopted legislation targeting products intended for children. See, e.g., Washington State’s Children’s Safe Products Act, Wash. Rev. Code §§ 70.240.010 et seq.; Maryland’s Chapter 483 (House Bill 62) of 2008. Many of the state law standards appear to be expressly preempted by the CPSIA, but other provisions may not be, and some States are considering attempts to avoid preemption by recasting their legislation to address nominally environmental issues.

children's electronic products," and new testing and certification requirements "affect companies that have not previously been regulated (or did not realize that they could be regulated) by the Commission."<sup>3</sup> The Commission itself has been overwhelmed with multiple statutory deadlines and the labor of issuing 14 proposed and final rules in the first six months under the CPSIA. Just keeping up with the Commission, much less understanding the CPSIA itself, is both a complex and ever-evolving task.

And February 10, 2009, is a critical day under the CPSIA, particularly for companies that manufacture or sell children's products—those intended for children age 12 and under. New restrictions on lead in products (not just in the paint) take effect—retroactively. An effective prohibition on the most common phthalates, a key ingredient in many soft plastics, takes effect—maybe, or maybe not, retroactively. Longstanding voluntary testing methodologies and safety standards for toys, known as ASTM F963, become mandatory. And some of the regulations recently issued under the CPSIA for print and catalog advertising of certain children's products take effect.<sup>4</sup>

Compounding these new requirements is another major portion of the CPSIA that requires manufacturers and importers to certify compliance with applicable safety standards. There are two such requirements. First, starting last November, the CPSIA broadened the requirement for General Conformity Certifications that applies to all consumer products. Certifications of compliance now are required with respect to standards, bans, and regulations applicable to the product under any statute that the Commission enforces, including not just the CPSA but also the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, the Refrigerator Safety Act, the Children's Gasoline Burn Prevention Act, and the Virginia Graeme Baker Pool and Spa Safety Act. These certifications must be based on a "reasonable testing program." Second, for children's products, an

additional certification of compliance with the same applicable standards, bans, or regulations is required. Children's Product Certifications must be based on testing of a "sufficient sample" by a "third party conformity assessment body," which may include accredited laboratories owned by manufacturers or governments.

These new, parallel certification requirements have created substantial confusion as to how to comply, when to comply, what is required for the various certifications, what form the required certificates must take, and who must issue them. For example, Children's Product Certifications are already required for some standards, such as lead in paint. For others, such as lead in substrates, phthalates, and ASTM F963, the Children's Product Certification and testing requirement was not scheduled to become effective until September 2009, 90 days after the Commission established criteria for approving laboratories to conduct the testing upon which certification must be based. However, General Conformity Certifications for these same standards for lead in substrates, phthalates, and ASTM F963 would have been required earlier, on February 10, 2009, when the underlying standards themselves took effect.

Reflecting this substantial confusion, the Commission reported at the end of January that it had received thousands of email, telephone, and written inquiries about the testing and certification requirements alone. In recognition of this reality, as explained below, on January 30, the Commission announced a partial but largely unsatisfactory (because of statutory constraints) attempt to narrow the "broad swath" that February 10 will cut.

Manufacturers, importers, and retailers thus must pay close attention to the statute and to the rapidly developing interpretive and regulatory regime under it, to ensure compliance and to reduce litigation risks. This *Commentary* highlights some of the key changes and issues.

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3. Consumer Product Safety Commission, Stay of Enforcement of Testing and Certification Requirements 7-8 (Feb. 2, 2009).

4. Regulations for internet advertising of children's products went into effect December 12, 2008. The regulations set to take effect on February 10, 2009, apply to catalogues and other printed materials published or distributed after that date. The Commission has, however, authorized a grace period of 180 days for catalogues and other printed materials printed prior to February 10, 2009. As of August 9, 2009, all internet and print advertisements, as well as catalogues and other printed materials, must comply. 16 C.F.R. § 1500 (73 Fed. Reg. 67730), available at <http://www.cpsc.gov/businfo/frnotices/fr09/lrtgafin.pdf>.

## RAISING THE STAKES FOR ALL MANUFACTURERS AND SELLERS OF CONSUMER PRODUCTS

Although Congress's immediate concern in enacting the CPSIA was children's products, the CPSIA has several sweeping changes that will affect all manufacturers and sellers of consumer products, regardless of the age of the intended consumer.

**Increased Sanctions.** The CPSIA expands both civil and criminal sanctions. It dramatically raises the maximum civil penalty for each knowing violation of the CPSA and other acts that the Commission enforces, from \$8,000 to \$100,000, and raises the maximum penalty for a related series of violations from \$1.825 million to \$15 million. 15 U.S.C. § 2069, as amended by CPSIA § 217. These changes take effect in August 2009, and the Commission is considering comments on the factors that should govern the amount of penalties. However that process turns out, Congress has high hopes for these elevated ceilings: The Congressional Budget Office estimated that penalty collection under the CPSIA would increase revenues at the Commission by \$43 million over the 2009–2018 period.<sup>5</sup>

In terms of its criminal impact on violators, the CPSIA, among other things, increases the maximum term of imprisonment for knowing violations from one to five years and adds as a punishment “forfeiture of assets associated with” the violations. 15 U.S.C. § 2070, as amended by CPSIA § 217. Criminal liability, previously unknown in practice under the CPSA, also no longer depends on the violation's having occurred after written notice from the Commission. *Id.* This change extends to individual directors, officers, and agents who knowingly and willfully perform any of the CPSA's prohibited acts. Moreover, a corporation can be charged with criminal liability for the conduct of its agents acting within the scope of employment. These changes are already in effect.

Even well-meaning firms may suffer significant penalties for inadvertent violations, such as a failure to timely report to the Commission. Preexisting reporting obligations are triggered by the actual or constructive receipt of information

that “reasonably supports the conclusion” that a product possesses a “defect” that creates “a substantial risk of injury to the public.” 15 U.S.C. § 2064(b); 16 C.F.R. § 1115.12. As the Acting Chairman of the Commission candidly testified on June 6, 2007, before the U.S. House of Representatives' Subcommittee on Commerce, Trade, and Consumer Protection, the reporting obligation “is written in very broad and somewhat imprecise terms and requires . . . judgment calls about its applicability in specific cases.” Governmental authorities will examine these “judgment calls,” with the benefit of 20/20 hindsight, to determine whether the newly enhanced penalties should attach.

To minimize this risk, industry should attempt to identify emerging safety issues by collecting and consolidating data from consumer reports and subjecting it to periodic reviews by senior personnel. Companies might also consider adopting or adapting the Commission's Retailer Reporting Model, whereby retailers are deemed to comply with their reporting obligations by automatically sending certain consumer report data to regulators should it meet thresholds for frequency and severity of risk or injuries. See, e.g., <http://www.cpsc.gov/BUSINFO/Retailreport3805.pdf>. Consumer data reported to the Commission pursuant to these programs, like reports, generally will remain confidential. 15 U.S.C. § 2055(a).

**State Attorney General Enforcement.** Under the CPSA, state attorneys general had authority to bring suit over violations of state law, including state consumer protection statutes. Under the CPSIA, they now also have authority to sue for injunctive relief for certain violations of that Act and to recover attorney's fees, including to reimburse private counsel. 15 U.S.C. § 2073, as amended by CPSIA § 218.

**Whistleblowers.** Although Congress had no evidence that manufacturers significantly under-report to the Commission, the CPSIA nevertheless prohibits them from taking adverse personnel actions against employees for providing information to a federal or state agency about “any act or omission that the employee ‘reasonably believe[d]’ [was] a violation” of any act that the Commission enforces. 15 U.S.C. § 2087(a), as amended by CPSIA § 219.

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5. Congressional Budget Office, *Cost Estimate Summary for H.R. 4040, Consumer Product Safety Improvement Act of 2008* (Aug. 8, 2008).

### Expanded Reporting, Recall, and Certification Obligations.

Previously, manufacturers had to certify compliance with applicable consumer product safety rules under the CPSA, report violations to the Commission, and recall products that, by reason of a violation, “create[] a substantial risk of injury to the public.” In conducting a recall, a manufacturer could choose whether to repair, replace, or refund the cost of the recalled product. 15 U.S.C. §§ 2063(a) & 2064.

The CPSIA, as noted above, expands these requirements to include applicable consumer product safety rules under any act that the Commission enforces, not just the CPSIA, and it also charges the Commission with deciding the appropriate method of recall. *Id.*, as amended by CPSIA §§ 102 & 214. To certify compliance, a General Certification of Conformity must be issued by the U.S. manufacturer or importer and accompany the product. The certificate must include the following: identification of the product it covers, citation of each Commission product-safety regulation to which the product is being certified, identification of the importer or domestic manufacturer certifying compliance, contact information for the custodian of records of the test results, date and place of manufacture, date and place of testing for compliance with the regulations cited, and identification of any third-party laboratory on whose testing the certificate depends. The certificate may be electronic. The certification regulation can be found at <http://www.cpsc.gov/businfo/frnotices/fr09/certification.pdf>. A sample general certification of conformity can be found at <http://www.cpsc.gov/ABOUT/Cpsia/faq/elecfaq.pdf>.

## SIGNIFICANT NEW REQUIREMENTS FOR CHILDREN’S PRODUCTS

In addition to the above changes, the CPSIA particularly singles out manufacturers and sellers of children’s products, defined as “consumer product[s] designed or intended primarily for children 12 years of age or younger.” 15 U.S.C. § 2052, as amended by CPSIA § 235. The new burdens are both substantive and procedural.

**New Lead Restrictions.** Most discussed have been the CPSIA’s new lead standards, which begin to take effect February 10, 2009, and include, for the first time, a federal standard for the lead content of substrates and components, plus

a reduced lead limit for surface coatings. 15 U.S.C. § 1278a(a) & (f), as amended by CPSIA § 101. Section 101(a) provides that, by that date, children’s products may not contain more than 600 parts per million (ppm) of lead. After August 14, 2009, that limit drops to 300 ppm, and, on August 14, 2011, it drops to 100 ppm, if technologically feasible. In addition, Section 101(f) lowers the longstanding 600 ppm limit for paint, under 16 C.F.R. § 1303, to 90 ppm effective August 14, 2009.

### New Lead Limits

Date	Lead Content	Lead Paint
February 10, 2009	600 ppm	600 ppm
August 14, 2009	300 ppm	90 ppm
August 14, 2011	100 ppm (if technologically feasible)	90 ppm

### Lead Restriction Retroactivity and Possible Exceptions.

Considerable concern surrounds the implementation of these new lead standards because of their retroactivity and the strict effective dates that Congress imposed.

On September 12, 2008, the Commission’s General Counsel issued an Advisory Opinion concluding that the new lead standards would apply to all children’s products in the stream of commerce on the effective dates, not just those manufactured after that date. This contrasts with the CPSA’s longstanding approach to new consumer product safety standards. 15 U.S.C. § 2058(g).

Section 101(b) of the CPSIA provides for several exceptions to the new limits on lead content, but some of these depend on the Commission’s issuing regulations, and all are subject to great uncertainty. The Commission has four rulemakings on this subject simultaneously pending—all were issued on January 15, 2009, and none will have produced a final rule by February 10. Even these are just the beginning of the complex scientific, technical, and procedural issues that the CPSIA presents, and many more such rules will follow.

The first of the four proposed rulemakings does not implement one of Section 101(b)’s exceptions but instead implements the lead-content limits by recognizing that certain materials naturally do not contain lead, and accordingly excludes them from the testing requirements under 15 U.S.C. § 2063, as amended by § 102 of the CPSIA. The proposed rule would exclude, in

their untreated and unadulterated state, precious and semi-precious gemstones, natural or cultured pearls, wood, natural fibers (such as cotton, wool, and silk), and other natural materials including feathers, fur, and untreated leather. Also excluded would be surgical steel and precious metals such as gold, sterling silver, and platinum, provided that these metals do not have lead or lead materials intentionally added. A copy of the proposed rule can be found at <http://www.cpsc.gov/businfo/frnotices/fr09/leadlimits.pdf>.

Second, the Commission has promulgated proposed procedures and requirements for making a determination under the exception in Section 101(b)(1) for specific products or materials that, even though exceeding the lead-content limits, will neither lead to anyone's absorbing any lead (taking into account a child's normal and reasonably foreseeable use and abuse of a product) nor have any other adverse impact on public health. This statutory exception does not apply until the Commission has issued an implementing regulation. The proposed procedures and requirements, which also cover exclusions of additional materials that do not contain lead, can be found at <http://www.cpsc.gov/businfo/frnotices/fr09/leadprocedures.pdf>.

Third, the Commission has issued a proposed interpretive rule for Section 101(b)(2), which excepts from the lead-content limits component parts of a product that are not accessible to a child. Under the statute, a component part is not accessible if it is not physically exposed, by reason of a sealed covering or casing, for example, and does not become physically exposed through reasonably foreseeable use and abuse. The proposed rule seeks to define accessibility as physical contact with lead-containing component parts. It also provides guidance, using existing regulations, on how to determine whether a component part is inaccessible both in its original state (using regulations for accessing sharp points and edges, 16 C.F.R. §§ 1500.48 & 1500.49) and after use and abuse (§§ 1500.50–1500.53). The Commission developed the latter regulations for children under age eight, but the proposed rule preliminarily concludes that these use-and-abuse tests also should be used for older children (ages 9–12). A copy of the proposed rule can be found at <http://www.cpsc.gov/businfo/frnotices/fr09/leadinaccessibility.pdf>. Manufacturers and retailers may take advantage of this statutory exception even in the absence of final guidance, which

provides some relief with the arrival of February 10, especially if they comply with the proposed guidance.

Finally, the Commission on January 15 issued a proposed rulemaking to implement the exception for electronic devices in Section 101(b)(4), which takes effect only upon the Commission's issuance of a regulation. For electronic devices containing component parts that are accessible and could not be made physically inaccessible, the Commission proposed to adopt the European Union's exemptions, as they are or may be published in the Annex to EU Directive 2002/95/EC. The EU established these exemptions, commonly known as RoHS (for "Restrictions on Hazardous Substances"), in considering the technological feasibility of limiting lead in products. They are available at <http://www.rohs.eu/english/index.html>. The Commission's proposed rule is available at <http://www.cpsc.gov/businfo/frnotices/fr09/lead-electronic.pdf>.

The comment period for each of these four notices runs until February 17, 2009, a week after the lead-content limits take effect. Final rules presumably will issue several weeks after that, at the earliest. This "gap" creates a particular bind for manufacturers who would otherwise avail themselves of the "no absorption" exception in Section 101(b)(1) or the electronic-device exception in Section 101(b)(4). Without the benefit of a regulation under those exceptions, the companies must comply with the new limits. To drive home the difficulty, 15 U.S.C. § 1278a, as amended by § 101(e) of the CPSIA, provides that the "pendency of a rulemaking proceeding" granting exemptions "shall not delay the effect of any provision or limit under" Section 101, "nor shall it stay general enforcement of this section." This gap, particularly when combined with retroactivity, may require companies to pull inventory from the shelves and, in some instances, destroy it.

On February 6, 2009, the Commission issued an interim final rule, effective February 10, 2009, eliminating the "gap" for certain electronic devices, in order to prevent unnecessary removal of certain children's products from the shelves, but there are other issues that remain. The Commission has indicated that there are other products, such as bicycles, that raise difficult issues because they contain parts, like spokes and tire inflation valves, that may contain lead, and so will require time and resources to resolve.

**New Phthalates Restrictions.** Phthalates are a group of widely used chemicals most known for being added to polyvinyl chloride (“PVC”) to soften it and make it flexible. Since the 1980s, the Commission and industry have cooperated in limiting the use of certain phthalates in teething rings, rattles, and pacifiers.

Section 108 of the CPSIA imposes mandates regarding phthalates and reaches well beyond this narrow set of products. It regulates the use in certain children’s products of six specified phthalates, which the statute treats in two groups of three phthalates each. The first group consists of the phthalates known as DEHP, DBP, and BBP. Section 108(a) makes it unlawful for a children’s toy or child care article to “contain[ ] concentrations of more than 0.1 percent” of any of these three. This restriction is permanent. The second group of regulated phthalates consists of those known as DINP, DIDP, and DnOP. DINP has been widely used in recent years as a substitute for DEHP. It is unlawful under Section 108(b) for a “children’s toy that can be placed in a child’s mouth or child care article” to “contain[ ] concentrations of more than 0.1 percent” of each of these. This restriction is interim, pending the creation and report of a Chronic Hazard Advisory Panel and the Commission’s promulgation of a rule in response to the Panel’s report. It also is, as to child care articles, arguably stricter than the phthalates restrictions that the European Union has imposed in Directive 2005/84/EC.

The phthalates restrictions, like the lead-content ones, take effect February 10, 2009. The Commission solicited comments on various issues that Section 108 presents, which were due January 12. Its request can be found at <http://www.cpsc.gov/ABOUT/Cpsia/108rfc.pdf>. The Commission has not issued any proposed guidance related to phthalates, apart from posting some FAQs on its web site, nor has it appointed the panel. But, unlike with the lead-content limits, it has yet to be decided whether these restrictions apply retroactively. The Commission’s general counsel has advised that the phthalates restrictions will not apply retroactively, but a United States District Court in New York has found that they do.

**Children’s Product Testing and Certifications.** As new safety rules for children’s products take effect, such as the

lead-substrate and phthalate restrictions that become effective February 10, manufacturers and importers of children’s products must issue General Conformity Certificates. 15 U.S.C. § 2063, as amended by CPSIA § 102. Additionally, within 90 days after the CPSC establishes criteria for approving laboratories to conduct the testing necessary to support compliance with the new standards, Children’s Product Certifications would be required. *Id.* For some standards—e.g., lead in paint, cribs and pacifiers, small parts, and metal jewelry—certification requirements either are already in effect or will take effect by March 2009. The requirements that the Commission has promulgated to date can be found at <http://www.cpsc.gov/ABOUT/Cpsia.cpsia.HTML>.

The task facing the Commission is daunting. The Commission needs to develop and validate methodologies for testing for lead in various materials, as well as a workable and cost-effective methodology for testing for phthalates. Additionally, because of the number of large and small businesses that the new testing requirements affect, the Commission needs time to educate those businesses and to identify third-party laboratories to perform the testing, which may include an accredited laboratory owned by a manufacturer or government. It also must work with those laboratories to ensure sufficient understanding to support certifications of compliance. Well aware of these problems not only from its own efforts but also from the din of company inquiries, the Commission on January 30 adopted a one-year stay of enforcement for the new certification and testing requirements for children’s products, as well as for general certification requirements. See <http://www.cpsc.gov/library/foia/foia09/brief/stayenforce.pdf>.

This stay does not apply to all testing and certification requirements, however. General Conformity Certifications required under the Commission prior to its amendment by the CPSIA remain in effect. Children’s Product Certifications for lead in paint, cribs and pacifiers, small parts, and metal jewelry are exempt from the stay. Finally, certifications for ATVs, certifications required by Commission regulations, voluntary guarantees under the Flammable Fabrics Act, and certification required under the Virginia Graeme Baker Pool and Spa Safety Act are also outside the ambit of the stay.

This stay, while welcome, has an important limit and may create new difficulties. The key limit is that it does not affect the duty to comply with a new underlying safety regulation, such as the lead-substrate and phthalate limits. As the Commission emphasized: “All children’s products must comply with all applicable children’s product safety rules, including but not limited to, the upcoming limits on lead and phthalates in the CPSIA.” Thus, although companies will save costs and avoid what was becoming a frenzy, the underlying problem of compliance remains. A possible difficulty is that consumers and others may, in the absence of Commission and CPSIA-imposed testing and certification, demand some alternative assurance of compliance with the new rules from manufacturers and importers.

## CONCLUSION

As the stay on certification and testing starkly highlights, the CPSIA has produced much confusion and apprehension. The state of utter confusion grows by the day. Members of Congress who supported the CPSIA, including Congressman Henry Waxman, Senator John Rockefeller, and Congressman Bobby Rush, the Chairman of the House Subcommittee on Commerce, Trade, and Consumer Protection, became so displeased with the Commission’s implementation of the CPSIA that they wrote President Obama on February 3, 2009, requesting that he ask the Chairman of the Commission to resign. In their words, the Commission “continues to exhibit severe elements of dysfunction and is in need of a change in leadership,” and Nancy Nord, the Chairman, has “grossly mishandled” the implementation of the CPSIA. On February 5, 2009, five days before the phthalates ban was to take effect, a federal court ruled that the phthalates ban does apply retroactively and the Commission’s advisory opinion stating otherwise was not entitled to deference. These are but two examples that the confusion will continue. New rules may help clarify requirements and reduce the confusion, but they also will clearly impose new burdens and will increase both costs and risks for companies. It is critical that retailers, distributors, importers, and manufacturers of consumer products stay tuned and monitor this process to understand and ensure compliance with their new federal obligations.

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