

The Consumer Product Safety Improvement Act

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Manufacturers and importers are well-advised to familiarize themselves with new rules and begin implementing systems to ensure their compliance.

New Developments, Guidance, and Rulemaking

August 14, 2009, marked the one-year anniversary of the enactment of the Consumer Product Safety Improvement Act (CPSIA), which means that a number of the CPSIA's requirements became effective, including:

- The allowable lead content limit in children's products decreased from 600 parts per million to 300 parts per million (ppm);
- The permissible limit for lead in paint decreased from 600 ppm to 90 ppm;
- Civil penalties substantially increased to a maximum of \$100,000 per violation and up to a maximum of \$15 million for a related series of violations; and
- Permanent distinguishing marks, also known as "tracking labels," are required on children's products and packaging.

Since these and other regulations have become effective in recent months, the Consumer Product Safety Commission (CPSC) has been busy fielding an influx of inquiries from manufacturers regarding issues raised by these newly implemented CPSIA requirements. *For The Defense* has published a series of articles that have followed the act's evolution since its enactment. This article will address the guidance and rulemaking that the CPSC has issued regarding the CPSIA over the last few months.

Searchable Consumer Product Safety Incident Database

On September 10, 2009, the CPSC submitted a report to Congress regarding its plan for implementing the searchable consumer product safety incident database mandated by the CPSIA, which the CPSC has tentatively named "SaferProducts.gov." Consumer Product Safety Commission, *Report to Congress Pursuant to Section 212 of the Consumer Product Safety Improvement Act of 2008, Implementation of a Searchable Consumer Product Safety Incident Database* (Sept. 10, 2009), <http://www.cpsc.gov/cpsc/pub/pubs/reports/cpsia212.pdf>. The CPSC's objectives for the database are "to protect and inform the public" and to "improve the CPSC's ability to identify risks and respond quickly." The CPSC has begun having discussions with "key stakeholders... to solicit their feedback on the implementation requirements" and "to ensure the effectiveness of the public database." The CPSC plans to hold discussions with and seek input from government agen-



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cies, federal, state, and local, that protect consumers; manufacturers, retailers, and trade associations; consumer advocacy groups; and individual consumers regarding implementation of the database. The database will be released by March 11, 2011, as required by the CPSIA's 18 month deadline. Prior to public release of the database, the CPSC will conduct beta testing, making the database available to a small group of users for feedback.

The database will include a public consumer portal and an industry portal. The public consumer portal will provide consumers with the ability to report incidents and search previously reported incidents and related industry comments. The CPSC plans to verify incident reports:

All incident data submitted via SafeProducts.gov will be subject to CPSC review to verify its authenticity—that the submitters are who they say they are. Any data or incident reports found to be materially inaccurate will either be corrected or will not be published. Furthermore, CPSC will have the ability to remove or correct incident data that has already been published should it determine that the data is materially inaccurate.

While the CPSC did not provide specific details about how its verification procedure will operate, for instance if a consumer misidentifies or fails to identify a manufacturer in an incident report, it noted that it “will expand its current efforts to verify the accuracy of incident reports, both by using technology, and by continuing to investigate the most serious incidents,” also stating “[w]here the manufacturer is identifiable, incident reports will be sent to the manufacturer as quickly as possible to afford them the opportunity to investigate and respond to the report.” Manufacturers and retailers will be able to comment on public incident reports via the industry portal. The industry portal will be a secure environment that allows businesses and the CPSC to exchange information: “The Industry Portal will apply appropriate security and user-interface components to isolate partners and to segregate internal data. Companies will be authorized to use only sites and data that are necessary for their contributions, and will be restricted from viewing other firms’ data.” The CPSC did not comment in the report on whether

a company's information submitted to the CPSC via the industry portal would be protected from discovery.

Incident reports submitted to the consumer portal about a product will be forwarded to its manufacturer. Manufacturers that have registered their contact information will be able to receive e-mail and text message alerts “nearly instantaneously.” The CPSC plans to issue further guidance regarding procedures for commenting on incident reports “once the Industry Portal is on-line.”

Information Technology Modernization and Social Media Initiatives

The CPSC will undertake an Information Technology (IT) modernization effort over the next several years. The “core components” of this effort include the following: a data warehouse repository for all incident and case data, an early warning system tool providing CPSC staff with the ability to compare reported incidents to prior incidents and search for patterns indicating potential problems, external interfaces that allow automatic data transmission between the CPSC and industry partners, and a product database containing all consumer products falling under the CPSC's jurisdiction.

The CPSC has also begun executing a social media initiative to “dramatically increase the public's engagement with CPSC through use of social media, an agency blog, and other interactive tools.” The CPSC will have a presence on YouTube, Facebook, Twitter, and Flickr, and it will implement a “CPSC recall widget that users can add to their own web sites to automatically post product recalls.” Additionally, as part of its public awareness campaign, the CPSC will use various approaches “to ensure necessary repetition and reinforcement of campaign messages.” These approaches include online town hall meetings, press releases, fact sheets, television and radio public service announcements, targeted outreach to minority groups, and online efforts to drive traffic to CPSC.gov and SaferProducts.gov, such as interactive banner ads, Google and Yahoo ads, and blogger reviews. The CPSC's report to Congress provides the CPSC's implementation schedule for the database, social media initiatives, and public awareness campaign. Consumer Product Safety Commission, *Implemen-*

tation of a Searchable Consumer Product Safety Incident Database, at 10, <http://www.cpsc.gov/cpsc/pub/pubs/reports/cpsia212.pdf>.

Phthalates Limits: Plasticized Component Parts

Phthalates are chemicals used to make vinyl and other plastics soft and flexible. Section 108 of the CPSIA bans phthalates

Lead limits do not apply
to component parts
of a product that are
inaccessible to a child.

in concentrations of greater than .1 percent for children's toys and child care articles. The CPSIA defines “children's toys” as consumer products designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when he or she plays. “Child care articles” are consumer products designed or intended by a manufacturer to facilitate sleeping or feeding of children three and younger or to help these children with sucking or teething. Examples of children's toys and child care articles that may contain phthalates are balls, bath toys, dolls, inflatable pool toys, child placemats, and pacifiers.

In March 2009, the CPSC issued a phthalates testing method that required testing of an entire product to determine the product's phthalate concentration. However, the CPSC then changed direction, and in August 2009 it issued a statement of policy regarding component parts testing for phthalate concentration. *Notice of Availability of a Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act*, 74 FED. REG. 41,400 (Aug. 17, 2009); Consumer Product Safety Commission, *Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act*, <http://www.cpsc.gov/about/cpsia/componenttestingpolicy.pdf>. The CPSC recognized that testing the phthalate content of an entire child's toy or child care article could present certain chal-

lenges: dilution of the phthalate concentration compared with the concentration solely in a component part of a product, irreconcilability with similar regulations issued by states and foreign countries, and the expense associated with testing an entire product. Thus, the CPSC instructed that it will require manufacturers or importers to undertake phthalate testing only for the plastic parts or other parts of products that could conceivably contain phthalates. The CPSC named these parts “plasticized component parts.”

In a statement about the official policy, CPSC Chair Tenenbaum expressed the view that the disadvantages associated with the March 2009 testing methods outweighed the advantages because testing an entire product could result in regulation that does not effectively protect health, offering an example of the possible disadvantages of the initially proposed testing method: “A high chair with a teething toy that exceeds the phthalates limit could actually pass the phthalates test when all the other non plasticized parts of the high chair are used [in] the concentration calculation.” Statement from Inez M. Tenenbaum, Consumer Product Safety Commission Chair, on the Statement of Policy Regarding Component Part Testing for Phthalates, (Aug. 7, 2009), <http://www.cpsc.gov/pr/tenenbaum08072009phtthcomptest.pdf>.

The official CPSC policy statement also provided examples of materials that do not typically contain phthalates and that may not require testing or certification, including unfinished metal, natural wood, textiles made from natural fiber (cotton and wool), textiles made from common synthetic fibers (polyester, acrylic, and nylon), latex, and mineral products (sand, glass, and crystal). However, printed decorations, waterproof coatings or other surface treatments, back coatings, and elastic materials could possibly contain phthalates and thus, would need to be tested and certified as compliant.

Lead Content Limits for Children’s Products

Section 101 of the CPSIA lowers the lead content limits allowed in children’s products. A children’s product is defined in Section 235(a) of the CPSIA as a “consumer product designed or intended primarily for

children 12 years of age or younger.” Effective August 14, 2009, the allowable limit of lead in children’s products decreased from 600 ppm to 300 ppm.

Materials That Do Not Exceed Lead Limits

On August 26, 2009, the CPSC issued a final rule listing the following materials as generally not containing lead at levels that exceed the CPSIA lead content limits:

- Dyed or undyed natural fibers, such as cotton, wool, linen, or silk;
- Dyed or undyed manufactured fibers, such as rayon, spandex, rubber, or nylon;
- Plant-derived and animal-derived materials, such as feathers, amber, sea shells, or fur;
- Surgical steel and certain stainless steel;
- Precious metals, such as gold or platinum;
- Wood;
- Paper and similar cellulosic materials;
- Printing inks that use the four-color CMYK process; and
- Certain precious and semiprecious gemstones, most minerals, and natural or cultured pearls.

Children’s Products Containing Lead; Determinations Regarding Lead Content Limits on Certain Materials or Products, 74 FED. REG. 43,031 (Aug. 26, 2009) (to be codified at 16 C.F.R. pt. 1500).

In Chair Tenenbaum’s August 18, 2009, statement, she confirmed that these materials “are not subject to the lead limits in section 101(a) of the CPSIA or the testing requirements of section 102 of the CPSIA.” Statement of Chair Inez M. Tenenbaum on Determinations Regarding Lead Content Limits on Certain Materials or Products, <http://www.cpsc.gov/pr/tenenbaum08182009lead-determinations.pdf>.

The CPSC warned, however, that manufacturers and importers are still responsible for verifying that the materials or products that have been relieved from testing and certification requirements have not been altered, modified, or experienced changes in processing that could transmit lead to the materials or products. Additionally, the CPSC explained that items falling within the jurisdiction of the Federal Food, Drug, and Cosmetic Act, such as food, soaps, lotions, and dental floss, are not “consumer

products,” and therefore, are not subject to the CPSIA’s requirements.

Component Parts Testing

The CPSC’s general counsel’s August 6, 2009, Memorandum regarding the determination of lead content explained that for the purposes of testing a product the distinct parts of the product should be considered separately. In the August 26, 2009, final rule regarding lead content limits on certain materials or products, the CPSC confirmed that “not all component parts may need to be tested if they fall under the scope of the exclusions approved by the CPSC.” *Children’s Products Containing Lead; Determinations Regarding Lead Content Limits on Certain Materials or Products*, 74 FED. REG. 43,031. For instance, the textile parts of a child’s coat would not have to be tested but any plastic, metal, or painted parts of the coat, such as zippers and buttons, would have to be tested for lead content. The CPSC intends to issue guidance regarding component part testing in upcoming rules.

Inaccessible Component Parts

Section 101(b)(2) of the CPSIA provides that lead limits do not apply to component parts of a product that are inaccessible to a child. The CPSC issued a final rule regarding inaccessible component parts on August 7, 2009. *Children’s Products Containing Lead; Interpretive Rule on Inaccessible Component Parts*, 74 FED. REG. 39,535 (Aug. 7, 2009) (to be codified at 16 C.F.R. pt. 1500). The CPSC defined an “inaccessible component part” as a part that is located inside a product that a child cannot touch or mouth. In assessing whether a part is inaccessible, the CPSC requires manufacturers to use accessibility probes, as defined by the CPSC’s existing regulations for evaluating accessibility of sharp points and edges. A component part is considered accessible if any portion of the specified segment of the accessibility probe makes contact with the component part during testing. With effectively sealed products, manufacturers are not required to conduct accessibility probe tests. Manufacturers must test the material encasing an inaccessible component part, however, unless it is a material determined by the CPSC to fall below the CPSIA’s lead content limits. However, manufacturers

must evaluate fabric-covered components used in children's products to determine if a child could potentially place that component in his or her mouth. If a child can place a fabric-enclosed part in his or her mouth, lead could leach, and if a child could mouth or swallow a fabric-covered component part, the material beneath the fabric enclosure would be considered accessible, and the manufacturer must test that component part.

Stay of Enforcement for Lead Content: ATVs and Bicycles

All-terrain vehicles and bicycles are subject to the CPSIA's section 101(a) lead content limits. However, the CPSC stayed enforcement of section 101(a) for youth all-terrain vehicles (ATV), youth off-road motorcycles, and youth snowmobiles through May 1, 2011. *Notice of Stay of Enforcement Pertaining to Youth Motorized Recreational Vehicles*, 74 FED. REG. 22,154 (May 12, 2009). In addition, the CPSC stayed enforcement of section 101(a) for bicycles, jogger strollers, and bicycle trailers through July 1, 2011. *Notice of Stay of Enforcement Pertaining to Bicycles and Related Products*, 74 FED. REG. 31,254 (June 30, 2009).

The CPSC denied the ATV and bicycle industries' request for an exclusion from section 101's requirements because the CPSIA allows an exclusion only if lead in a product will neither (1) result in the absorption of any lead into the body nor (2) have any other adverse impact on public health or safety. The CPSC found that consumers could ingest lead in using ATVs and bicycles. According to the CPSC, lead ingestion, regardless of how small the amount, could result in absorption of lead. Therefore, under the first prong of the CPSIA's exclusion standard, the ATV and bicycle industries' request for exclusion was denied.

However, the CPSC stayed enforcement of the lead content limits for ATVs and bicycles because it concluded that parents may allow their children to ride adult models if youth models are unavailable. Also important to the CPSC's decision to stay enforcement was that a certain amount of lead is necessary for some component parts to make ATVs and bicycles functional and durable. In explaining the CPSC's decision to stay enforcement for ATVs, then Acting Chair Nord stated, "We must weigh the the-

oretical possibility of lead poisoning of a child from riding a youth ATV against the very real probability of death or severe injury from that child riding an adult ATV. . . . We cannot allow the rigid exclusion provisions of the law to somehow put children at greater risk of injury or death." Statement from Nancy Nord, Consumer Product Safety Commissioner, on the Stay of Enforcement for Youth Recreational Off-Highway Vehicles, (May 1, 2009), <http://www.cpsc.gov/PR/nordyouthatvstay05012009.pdf>. Commissioner Moore explained that it would be "unlikely that many other products would pose the same safety verses safety tradeoff, in the context of the lead provisions, which these vehicles pose." Statement from Thomas H. Moore, Consumer Product Safety Commissioner on the Notice of Stay of Enforcement Pertaining to Youth Motorized Recreational Vehicles (May 1, 2009), <http://www.cpsc.gov/pr/mooreyouthatvstay05012009.pdf>.

No Exclusion for Glass and Crystal Rhinestones

In July 2009, the Fashion Jewelry Trade Association requested exclusion from the lead content limit requirements for crystal and glass beads, including rhinestones and cubic zirconium, used in children's products such as jewelry, apparel, accessories, and footwear. The CPSC voted two to one to deny the request. In a July 17, 2009, statement explaining her vote, CPSC Chair Tenenbaum noted that mouthing and ingesting beads was reasonably foreseeable behavior for infants and young children. Statement from Inez M. Tenenbaum, Consumer Product Safety Commission Chair, on the Request to Exclude Crystal and Glass Beads in Children's Products from the CPSIA Lead Limits (July 17, 2009), <http://www.cpsc.gov/pr/tenenbaum071709.pdf>. She voted to deny the exclusion request even though "most crystal and glass beads do not appear to pose a serious health risk to children, because ingested crystal beads that leach lead will result in some lead absorption." *Id.* In addition, she mentioned that the CPSIA did not "use the term 'harmful' amount" or a similar term that would permit the CPSC "to utilize a risk based approach." *Id.* Chair Tenenbaum further explained that the CPSC plans to take a "common sense approach to enforcement," which means "focus[ing] our enforcement

activities on crystal and glass bead products designed and intended primarily for children six years of age and younger, the population most at risk of mouthing and swallowing small objects." *Id.*

Tracking Labels for Children's Products

Effective August 14, 2009, section 103(a) of the CPSIA requires manufacturers, to the extent practicable, to place permanent distinguishing marks on children's products made on or after August 14, 2009, and their packaging. The CPSC issued a policy statement regarding this tracking label requirement, which clarified that "label" does not mean a single collection of information in one location, but rather, manufacturers should examine the totality of the information permanently marked on products and packaging to achieve compliance with section 103(a). *Notice of Availability of a Statement of Policy: Interpretation and Enforcement of Section 103(a) of the CPSIA*, 74 FED. REG. 41,868 (Aug. 19, 2009); Consumer Product Safety Commission, Statement of Policy: Interpretation and Enforcement of Section 103(a) of the Consumer Product Safety Improvement Act, <http://www.cpsc.gov/about/cpsia/sect103policy.pdf>. Chair Tenenbaum noted in a statement regarding tracking labels that "[t]he primary purpose of the distinguishing marks is to aid in the quick and effective facilitation of recalls involving children's products" and assured that the CPSC "does not intend to penalize manufacturers for inadvertent violations of the statute when they have made a good faith effort in attempting to comply with the tracking label requirements." Statement from Inez M. Tenenbaum, Consumer Product Safety Commission Chair, on the Statement of Policy Concerning Section 103(a) of the CPSIA (July 20, 2009), <http://www.cpsc.gov/pr/tenenbaum07202009track.pdf>.

The CPSC also attempted to quell the fears of small volume manufacturers and crafters by explaining that they do not need to create a lot, batch, and run number labeling system, as long as they can keep adequate records of the components that they use in products. Chair Tenenbaum explained that the goal is not to implement a rigid labeling standard that applies uniformly to large and small manufacturers but rather, it "is to enable manufacturers and consumers alike

to ascertain pertinent information about a children's product in the event of a recall." *Id.* Thus, the CPSC will not require a uniform "one size fits all" labeling system.

Information to Include on Labels or Marks

Tracking labels must have distinguishing marks that make the production location,

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production date, and cohort information for products ascertainable so that manufacturers can determine the specific source of each product. Additionally, the name of the manufacturer or private labeler must be ascertainable from a product's marking. According to the information provided in the CPSC's frequently asked questions section of the CPSC website, the CPSC would deem this information ascertainable if a manufacturer marks a product and its packaging with a code and with a website address where all the information can be found, as long as the name of the manufacturer or private labeler is also identified so that a consumer without Internet access would know who to contact directly to obtain the required information.

Production Location, Production Date, and Cohort Information

The CPSC policy statement explained that the name of the country and the city and state where the product was manufactured would be sufficient to provide the location of production. Consumer Product Safety Commission, Statement of Policy: Interpretation and Enforcement of Section 103(a) of the Consumer Product Safety Improvement Act, <http://www.cpsc.gov/about/cpsia/sect103policy.pdf>. The production date can be a date

range if the product is made over a period of time. To comply with the cohort information requirement, according to the CPSC's policy statement, a manufacturer must have in place a reasonable means to ascertain detailed production information, including ways to distinguish among products made at different factories, with different components, at different times, or with other material differences that make a product nonidentical to previous products.

Permanent Mark

According to the CPSC's policy statement, a permanent mark is "a mark that can reasonably be expected to remain on the product during the useful life of the product." Consumer Product Safety Commission, Statement of Policy: Interpretation and Enforcement of Section 103(a) of the Consumer Product Safety Improvement Act, <http://www.cpsc.gov/about/cpsia/sect103policy.pdf>. Marks on disposable packaging must have the durability to reach the consumer, which means an adhesive label on disposable packaging may be sufficient for a packaging mark. Additionally, when a product's mark is visible through disposable packaging, no mark is required on the packaging.

Practicability

The CPSC's policy statement noted that sometimes marking the product might be impracticable, and it provided examples of some circumstances in which marking the packaging might suffice. For example, "some products are too small to be marked." Consumer Product Safety Commission, Statement of Policy: Interpretation and Enforcement of Section 103(a) of the Consumer Product Safety Improvement Act, <http://www.cpsc.gov/about/cpsia/sect103policy.pdf>. Additionally, some toys are "meant to be stored in a box or other packaging, such as games with a game board and small game pieces." *Id.* With these types of toys, a manufacturer should mark the board and the box but does not necessarily have to mark individual game pieces. When products such as marbles, buttons, or beads are packaged together, marking the package is sufficient. In addition, products that would be impossible to permanently mark, such as those made of elastics, beads, and small pieces of fabric, or those products whose aesthetics would

be ruined by a permanent mark, do not require a permanent mark on the product itself. Also, with items meant for sale as a set and that function only as a set, only one item in the set must be marked.

Civil Penalties

The CPSC recently issued an interim interpretive final rule regarding its interpretation of the civil penalty factors found in the CPSIA, Federal Hazardous Substances Act, and the Flammable Fabrics Act. *Civil Penalty Factors*, 74 FED. REG. 45,101 (Sept. 1, 2009) (to be codified at 16 C.F.R. pt. 1119). In this final rule, the CPSC specified that it will "consider the totality of the circumstances surrounding a violation, including how many provisions of law were violated." Among other things, the CPSC will also consider the potential for serious injury or death, the likelihood of injury, and the reasonably foreseeable use or misuse of a product, as well as the population at risk, whether injuries have occurred, and the number of products distributed. The CPSC will also bear in mind the size of a business when determining a penalty amount. These size determinations will consider the number of employees that a manufacturer employs, the manufacturer's net worth, and its annual business sales. Additionally, "[b]oth the CPSC and the violator are free to raise any other factors they believe are relevant in determining an appropriate penalty amount." *Id.* Examples of "other factors" include whether a business has a program in place for collecting and analyzing information related to safety issues, a history of noncompliance, gained an economic benefit from a delay in compliance, or failed "to respond in a timely and complete fashion to requests from the CPSC for information or for remedial action." *Id.* In an August 18, 2009, statement regarding the CPSC's official policy on civil penalties, Chair Tenenbaum reiterated that the CPSC will seek civil penalties only when a violation has been committed "knowingly" and clarified that civil penalty factors will be applied only after a decision has been made to impose a penalty. Tenenbaum Statement on the Interim Final Rule Interpreting Factors to Be Considered When Seeking Civil Penalties, <http://www.cpsc.gov/pr/tenenbaum08182009civilpenaltyfactors.pdf>.

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Conclusion

The CPSIA presents strict requirements and impacts a broad array of products, and product manufacturers and importers are well-advised to familiarize themselves with the new rules and begin implementing systems that will enable them to comply with these rules. Determining the reach of the CPSIA in a way that carries out Congress' in-

tent without placing a Herculean burden on manufacturers presents a challenge for the CPSC. As noted above, while the CPSIA apparently does not allow for risk assessment, the CPSC will do its best to apply a common sense approach to enforcing the CPSIA. See Tenenbaum Statement on the Request to Exclude Crystal and Glass Beads in Children's Products from the CPSIA Lead Limits, <http://www.cpsc.gov/pr/tenenbaum071709.pdf>. Consid-

ering this goal of applying a common sense approach, the CPSIA's inflexibility, and the addition of two new commissioners, Robert Adler and Anne Northup, the future is difficult to predict. However, manufacturers, sellers, and consumers alike will be watching to see how the CPSC strikes a balance between protecting consumers and implementing the CPSIA. 