



Consumer Product Safety Improvement Act of 2008

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On August 14, 2008, Congress enacted the Consumer Product Safety Improvement Act (the “Improvement Act”) which mandates a comprehensive overhaul of consumer product safety laws. While the full impact of the Improvement Act continues to evolve, the effects of the law will be felt by manufacturers, importers, warehouse, retailers, consumers, lenders and all facets of the consumer products industry, particularly the children’s products industry.

The Improvement Act is both historic and far-reaching. The Consumer Product Safety Commission will be promulgating new regulations throughout 2009. Your company may be affected and could be exposed to significant legal risks. We have highlighted some of the new developments for your review in this e-update. Contact us if you need additional information.



Increased scrutiny from the CPSC and State Attorneys General will likely lead to more product recalls and enforcement actions.

Highlights of the Improvement Act include:

- A lead content limit for children's products which will likely apply retroactively beginning on February 10, 2009, with lower lead content limits coming on line over the next few years;
- A Certificate of Conformity requirement for all consumer products that are regulated in any manner under U.S. consumer product safety laws;
- Mandatory third party testing and certification for all children's products;
- A ban on certain phthalates in children's toys and child care articles beginning on February 10, 2009;
- Permanent tracking label requirements for all children's products; and
- Hazard warning requirements for advertisements of certain toys and children's products.

All participants in the consumer products industry now face increased risk and scrutiny which will likely result in more frequent consumer product recalls and enforcement actions. The Improvement Act allows the Consumer Product Safety Commission (the "CPSC"), as well as State Attorneys General, to enforce its provisions. New regulations are being promulgated and the Improvement Act directs the CPSC to move quickly to promulgate new safety regulations to implement the Improvement Act. A summary of key provisions follows.

TITLE I – CHILDREN'S PRODUCT SAFETY

Section 101: Children's Products Containing Lead; Lead Paint Rule

The Improvement Act limits the lead content in children's products and the amount of lead in the paint on those products.

A "children's product" is defined under the Improvement Act as "a consumer product designed or intended primarily for children 12 years of age or younger." In determining whether a consumer product is primarily intended for children 12 years of age or younger, the following factors must be considered: (a) a manufacturer's statement about the intended use of the product, including a label on the product; (b) whether the product packaging, display, promotion, or advertising indicates it is for use by children age 12 or younger; (c) whether children in that age group commonly recognize the product as intended for their use; and (d) the Age Determination Guidelines issued by CPSC staff.

The scope of the definition of "children's product" has been subject to much discussion and debate as part of the CPSC rulemaking process. Companies must carefully evaluate whether a product is classified as a "children's product" since violations can lead to civil liability or potential criminal penalties as discussed below.

A. Lead Content Limit for Children's Products

1. Overview of Limits

The Improvement Act limits lead content for children's products and will be phased-in over the next three years. Beginning on February 10, 2009, the lead content limit will be 600 parts per million (ppm). On August 14, 2009, the limit will reduce to 300 ppm. Three years after enactment, on August 14, 2011, the lead content limit will reduce to 100 ppm, if technologically feasible. The Improvement Act provides that the 100 ppm limit will be found "technologically feasible" if any of the following are true: (a) a product that complies with the limit is commercially available in the product category; (b) the technology to comply with the limit is commercially available to manufacturers; (c) industrial strategies or devices have been developed which are capable of achieving the limit by the effective date and which companies acting in good faith are generally capable of adopting; or (d) alternative practices, best practices, or operational changes would allow manufacturers to comply with the limit.

Important Practice Pointer. The CPSC's General Counsel issued an Advisory Opinion on September 12, 2008, concluding that the 600 ppm lead content limit applies retroactively to all products in inventory or on store shelves as of the effective date of February 10, 2009. Unless this interpretation is overturned, beginning on February 10, 2009, children's products in inventory or on store shelves may not contain more than 600 ppm lead content by weight for any part of the product.

2. Exceptions

There are three exceptions to the lead content limit.

Absorption Exception. The CPSC may, by regulation, exclude a specific product or material from the lead content limit if the CPSC determines that lead in the product will not result in absorption into the human body and will not have any other adverse impact on public health or safety. When assessing the risk of absorption, the CPSC must consider the normal and reasonably foreseeable use and abuse of the product by a child, including swallowing, mouthing, breaking, and other children's activities, as well as the aging of the product. The Improvement Act specifically provides that paint, coatings, or electroplating do not create barriers that will prevent absorption of any lead into the human body through reasonably foreseeable use and abuse of the product.

Inaccessible Parts Exception. Lead content limits will not apply to component parts of a children's product which are not accessible to a child through normal and reasonably foreseeable use and abuse. A component part is inaccessible if (a) it is not physically exposed by reason of a sealed covering or casing, and (b) does not become physically exposed through reasonably foreseeable use and abuse of the product. As with the absorption exception, when assessing whether a component part is inaccessible, the CPSC must consider the normal and reasonably foreseeable use and abuse of the product by a child, including swallowing, mouthing, breaking, and other children's activities, as well as the aging of the product.

Companies must carefully evaluate whether a product is a "children's product" subject to children's product safety regulations since violations can lead to civil and/or criminal penalties.



Beginning on February 10, 2009, children's products in inventory or on store shelves may not contain more than 600 ppm lead content by weight for any part of the product.



On August 14, 2009, the lead paint limit will be reduced to 90 ppm.

On November 6, 2008, the CPSC held a public meeting to discuss the lead rulemaking process. Participants discussed the definition of a “component part” and the meaning of “physically exposed” under the Improvement Act. By August 14, 2009, the CPSC must promulgate a rule regarding what product components or classes of components will be considered inaccessible. In the interim, the lead content limits summarized above will serve as guidance.

Electronic Device Exception. Lead content limits will not apply to certain electronic devices, such as those containing batteries, if the CPSC determines compliance is technologically infeasible. The CPSC must establish requirements to eliminate or minimize the potential for exposure to and accessibility of lead in such electronic devices, which may include a child-resistant cover or casing over the part of the product which contains lead. The Agency must also set a schedule by which the electronic devices must be in full compliance with the lead content limits, unless it determines that full compliance will be technologically infeasible.

The Improvement Act does not establish a deadline for the Agency's electronic device exception rulemaking. At the November 6, 2008, public meeting, participants discussed which electronic products are children's products, the treatment of lead in electronics under comparable European Union laws, and the overlap between this exception and the inaccessible part exception outlined above.

B. Lead Paints and Surface Coatings

The current limit for lead in paint and surface-coating materials is 600 ppm of the total weight of the nonvolatile content of the paint or the weight of the dried paint film. The lead paint limit applies to: (a) paint and other similar surface-coating materials for consumer use, (b) children's toys and other articles intended for use by children that bear lead-containing paint, and (c) furniture articles for consumer use that bear lead-containing paint. “Paint” does not include printing inks or those materials which are actually bonded to the substrate, such as by electroplating or ceramic glazing. On August 14, 2009, the lead paint limit will be reduced to 90 ppm.

Section 102: Mandatory Third-Party Testing for Certain Children's Products

Section 102 of the Improvement Act requires a certification of general conformity for all products regulated by the CPSC, and further adds third party testing requirements for children's products.

A. General Certification

The Improvement Act requires certification for all products subject to CPSC consumer product safety rules, or to any “similar rule, ban, standard, or regulation under any other Act enforced by the CPSC.” Under prior law, such certification was generally required only for consumer products that were subject to standards enacted by the CPSC under the Consumer Product Safety Act. As of November 12, 2008, the certification is required for all products which are “subject to” rules,

bans, standards or regulations by the CPSC under, *inter alia*, the Improvement Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, or the Poison Packaging Prevention Act.

The certification must be issued by “every manufacturer” of the product if it is “imported for consumption or warehousing or distributed in commerce.” The term “manufacturer” is defined to include importers, as well as foreign and domestic manufacturers. In addition, if the product bears a private label, the private labeler must also issue a certificate. The CPSC has already adopted a rule providing that for products manufactured overseas, the certificate must be issued by the importer. The party issuing the certificate must furnish it to its distributors and retailers. Certification must be based on “a test of each product or upon a reasonable testing program.” The CPSC may prescribe a reasonable testing program and may require that testing be done by an independent third party.

B. Third-Party Testing of Children’s Products

The Improvement Act imposes a third-party testing requirement for all consumer products primarily intended for children 12 years of age or younger. Every manufacturer or importer of a children’s product must submit sufficient samples of the children’s product to a third-party conformity assessment body accredited by the CPSC to be tested for compliance with the laws enforced by the CPSC. Then, the manufacturer must certify that the children’s product has been tested by a third-party conformity assessment body and found to be in compliance with applicable requirements.

Third-party testing requirements for children’s products are phased-in on a rolling schedule, and apply 90 days after the CPSC issues laboratory accreditation requirements for the product category. The Improvement Act offers the following schedule:

- Lead paint – Accreditation procedure on September 22, 2008; third-party testing on December 22, 2008.
- Cribs – Accreditation procedure in October 2008; third-party testing in January 2009.
- Small parts – Accreditation procedure in November 2008; third-party testing in February 2009.
- Children’s metal jewelry – Accreditation procedure in December 2008; third-party testing in March 2009.
- Baby bouncers, walkers, and jumpers – Accreditation procedure in March 2009; third-party testing in June 2009.
- All other children’s product safety rules – Accreditation procedure in June 2009; third-party testing in September 2009.

The Improvement Act requires certification for all products subject to CPSC consumer product safety rules, or to any “similar rule, ban, standard, or regulation under any other Act enforced by the CPSC.”

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Third-party testing requirements for children's products apply 90 days after the CPSC issues laboratory accreditation requirements for the product category.



Beginning on August 14, 2009, children's products must contain a permanent tracking label.

The CPSC must either make existing voluntary product safety standards mandatory or adopt stricter standards for "durable infant or toddler products."

By November 14, 2009, the CPSC must establish procedures to ensure that all children's products are subject to periodic testing, and are tested when there has been a material change in the product's design or manufacturing process, including the sourcing of a component part. The CPSC must test random samples to ensure continued compliance of the product. Finally, the procedures must safeguard against the exercise of undue influence on a third-party conformity assessment body by the manufacturer.

C. Certificates

Manufacturers and importers must issue Certificates of Conformity based on a reasonable program of testing to assure that their products meet all consumer product safety requirements. The CPSC will work with U.S. Customs and products that do not have proper or accurate certification will be refused entry into the United States and may have to be destroyed. Failure to comply with the certification requirement can lead to civil liability, criminal penalties, or both.

Section 103: Tracking Labels for Children's Products

Beginning on August 14, 2009, children's products must contain, to the extent practicable, a tracking label or other distinguishing permanent mark which contains the source of the product, the date of manufacture, and more detail on the manufacturing process such as a batch or run number. The CPSC may issue rules further defining the details required for track labels on children's products. The agency also has the authority to expand the tracking label requirements for all consumer products.

Section 104: Standards and Consumer Registration of Durable Nursery Products

A. Safety Standards for Durable Infant or Toddler Products

By August 14, 2009, the CPSC must either make existing voluntary product safety standards mandatory or adopt stricter standards for "durable infant or toddler products." Every six months thereafter, the CPSC must begin rulemaking for the product safety standards of at least two "durable infant or toddler products" until the CPSC has promulgated rules for all product categories.

A durable infant or toddler product is defined in the Improvement Act as "a durable product intended for use, or that may be reasonably expected to be used, by children under the age of five years; and includes full-size cribs and non full-size cribs; toddler beds; high chairs, booster chairs, and hook-on chairs; bath seats; gates and other enclosures for confining a child; play yards; stationary activity centers; infant carriers; strollers; walkers; swings; and bassinets and cradles."

B. Product Registration Cards

Also by August 14, 2009, the CPSC must promulgate a rule requiring each manufacturer of a durable infant or toddler product to provide customers with postage-paid consumer registration forms with each product. The manufacturer will need to store the consumer information for at least six years and use it only to contact consumers in the event of a product recall.

Section 105: Labeling Requirement for Advertising Toys and Games

The packaging and accompanying descriptive materials for toys and games containing balloons, small balls, and marbles must already include a cautionary statement that the toys and games present choking hazards and are not for children under the age of 3. Starting on December 12, 2008, the cautionary statements must also be included in all Internet advertisements that provide a direct means for the purchase or order of the product. Cautionary statements will be required for printed advertisements which provide a direct means of purchasing or ordering beginning on February 10, 2009. All retailers, manufacturers, importers, distributors, and private labelers that provide such advertisements are subject to this requirement. Retailers have a duty to ask the party providing the product whether such a warning is required.

Section 106: Mandatory Toy Safety Standards

Beginning on February 10, 2009, the ASTM International Standard F963-07 Consumer Safety Specifications for Toy Safety ("ASTM F963") will be mandatory and enforced by the CPSC (except for Section 4.2 and Annex 4). ASTM F963 is currently voluntary.

The CPSC must assess the effectiveness of ASTM F963 by August 14, 2009, and within a year of completing its assessment, the CPSC must promulgate its own regulations. The CPSC must take into account ASTM F963, and if the CPSC determines that more stringent standards would further reduce the risk of injury associated with such toys, then the CPSC's standards must likewise be made more stringent.



Hazard warning requirements must be included in Internet advertisements starting on December 12, 2008 and on printed advertisements beginning on February 10, 2009.

Beginning on February 10, 2009, the ASTM International Standard F963-07 Consumer Safety Specifications for Toy Safety will be mandatory and enforced by the CPSC.

Beginning on February 10, 2009, it will be unlawful to manufacture any children's toy or child care article that contains more than 0.1 percent of DEHP, DBP, BBP, DINP, DIDP, or DnOP.



Section 108: Prohibition on the Sale of Certain Products Containing Specified Phthalates

The Improvement Act contains a ban on certain phthalates in children's toys and child care articles. The term "children's toy" means 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. The term "child care article" means 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.

Beginning on February 10, 2009, it will be 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).

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

By February 10, 2009, the CPSC must begin the process of appointing a panel to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles. The panel must complete an examination of the full range of phthalates that are used in products for children within 18 months and must then report its results and make recommendations to the CPSC regarding any phthalates, combinations of phthalates, or phthalate alternatives that the panel determines should be declared banned hazardous substances. Within 180 days of receiving the report of the panel, the CPSC shall promulgate a final law to determine whether to continue the prohibition on DINP, DIDP, and DnOP. The CPSC must also evaluate the findings and recommendations of the panel and, as the CPSC determines necessary to protect the health of children, declare any children's product containing phthalates to be a banned hazardous product.

The Improvement Act provides that nothing in this section of the Improvement Act shall be construed to preempt or otherwise affect any state requirement with respect to any phthalate alternative not specifically addressed in the laws enforced by the CPSC.

The State of California adopted a ban on certain phthalates in October of 2007, and its restrictions were written to take effect on January 1, 2009. It is unclear whether and to what extent the Improvement Act preempts the California phthalate ban and both the California Attorney General and the CPSC's General Counsel have written advisory letters on the subject.

TITLE II – CONSUMER PRODUCT SAFETY CPSC REFORM

Section 217: Penalties

A. Civil

Any person who knowingly violates the Improvement Act or related consumer product safety laws shall be subject to a civil penalty not to exceed \$100,000 (previously \$5,000) for each violation. The maximum civil penalty shall not exceed \$15,000,000 (previously \$1,250,000) for a series of related violations. By August 14, 2009, the CPSC must issue a regulation of the factors to be considered in assessing a civil penalty.

B. Criminal

Willful and knowing violations of the Improvement Act or related consumer product safety laws are punishable by a maximum of five years imprisonment (previously one year imprisonment). The penalty for a criminal violation of the Improvement Act may include forfeiture of assets associated with the violation. Directors, officers, and agents of the manufacturer no longer must have notice of a violation to be criminally liable.

Section 219: Whistleblower Protections

The Improvement Act includes new whistleblower protections for employees of manufacturers, private labelers, distributors, or retailers of consumer products. Covered employees are protected from discharge or any other form of retaliation resulting after providing general information to their employer, the Federal Government, or a State Attorney General about any violations of statutes or regulations enforced by the CPSC. A covered employee who believes he or she has suffered adverse employment action as a result, may file a complaint with the Secretary of Labor seeking redress.

Section 231: Preemption

The Improvement Act preempts many, but not all, state and local laws related to children's product safety. The Improvement Act provides that it does not preempt or affect State warning requirements under state laws that were in effect August 31, 2003, or earlier. California's Proposition 65 is therefore not preempted. A determination of preemption under the Improvement Act will be complex and uncertain, and future challenges are expected.

Civil penalties up to \$100,000 for each violation or \$15 million for a series of related violations. Criminal penalties up to five years in prison.

Directors, officers, and agents of the manufacturer no longer must have notice of a violation to be criminally liable.

The Improvement Act includes new whistleblower protections for employees of manufacturers, private labelers, distributors, or retailers of consumer products.

California's Proposition 65 is not preempted by the Improvement Act, nor are any other State warning requirements in effect prior before September 1, 2003.

CONCLUSION

There is sure to be greater enforcement action and significant penalties for companies who do not follow the new safety requirements.

The new consumer product safety laws and regulations will dramatically change the way companies do business. There is sure to be greater enforcement action and significant penalties for companies who do not follow the new safety requirements. These requirements will have to be internalized at all levels of the company and to its over-seas manufacturers, factories, raw material suppliers, vendors, importers and customer base. Companies must rapidly evaluate their entire product lines and incorporate immediate actions to respond to the new Improvement Act's legal requirements. We will be monitoring the CPSC's rulemaking over the next 12 months and will provide further e-updates.

Dorsey & Whitney LLP can help you navigate the new regiment of consumer product safety laws and regulations. Call us if you have any questions about the Improvement Act.

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