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Update: Consumer Product Safety Improvement Act

The Consumer Product Safety Improvement Act ("CPSIA"), which amends the Consumer Product Safety Act ("CPSA") and the Federal Hazardous Substances Act ("FHSA"), affects virtually every level of the consumer product commerce stream. This includes manufacturers, importers, private labelers and retailers. The products affected are any consumer product that has the potential to contain lead paint; any product that is subject to a consumer product safety rule under the CPSA or similar rule, ban, standard or regulation under any other act enforced by the Consumer Product Safety Commission ("CPSC"); any children's product for which lead content is an issue; and any children's toy or childcare product where phthalate content is an issue. In summary, the CPSIA's reach is pervasive. Since the statute is new and its implementation is controversial, the CPSC is frequently issuing updates, interpretations and guidance on important compliance issues.

Essentially, the CPSIA requires manufacturers, private labelers and importers of products subject to a consumer product safety standard or rule to certify in writing that the product conforms to all applicable consumer product safety standards or rules, specifically naming each applicable standard. The certification must be based on a reasonable testing program, unless

there are specifically mandated testing requirements for the product. The CPSIA contains detailed requirements for what must be stated on the certificate, and the certificate must either be available in hard copy or electronically. Since August, the CPSC has said the private labelers do not have to comply with certification requirement for now, leaving the requirement for manufacturers and importers.

The CPSIA also declares all children's products that contain a certain percentage of lead to be "banned hazardous substances." Thus, any children's products containing more than the allowable lead limit, 600 ppm, even those manufactured prior to passage of the CPSIA, cannot be sold to consumers and must have been removed from commerce after February 10, 2009. The lead limit will be reduced on a set statutory schedule. Again, the CPSIA requires manufacturers and importers of children's products to certify that their products meet the total lead content requirement. This certification can be based on a reasonable testing program until the CPSC publishes its mandatory third-party testing requirements.

In addition, the CPSIA is lowering the acceptable lead limit for paint and other surface-coating materials on all products (not just children's products). As of August 14, 2009, no paint or surface-coating

material on any product may contain lead in excess of 0.009 percent by weight (or 90 parts per million) of the dried paint film. Until the CPSC publishes testing requirements for general testing of lead paint, it will be acceptable for manufacturers and importers to certify compliance with the lead content using reasonable testing programs. On December 22, 2008, mandatory third-party testing requirements went into effect for testing lead paint in *children's* products.

The CPSIA also created new standards for phthalates in children's toys and childcare products. These requirements went into effect on February 10, 2009. The CPSIA also increased penalties that the CPSC may impose for violations of the CPSA and the FHSA and also allows state attorneys general to enforce many of its provisions.

The new legislation created mass confusion in the products world regarding who must certify, what products are covered, how the testing is to be done and how certifications are to be made available. The unintended consequences from the legislation have been enormous. The CPSC has been flooded with inquiries. Congress has begun examining the impact of the legislation, and new legislation has been introduced. As a result, the CPSC recently announced, on January 30, a stay of enforcement of certain requirements in the CPSIA. The stay delays the testing and certification

(but not lead content) requirements of the CPSIA until February 10, 2010 — a period of one year, including those requirements for testing total lead content of children's products. Certain products are not subject to the stay: metal components of children's jewelry containing lead, manufactured after March 23, 2009; products containing lead paint or other surface-coating material, manufactured after December 21, 2008; cribs and pacifiers manufactured after January 20, 2009; small parts, as regulated by the CPSIA, manufactured after February 15, 2009; all products for which testing and certification were required prior to enactment of the CPSIA; and certain products regulated under the Virginia Graeme Baker Pool and Spa Safety Act. **IMPORTANT:** The stay affects the testing and certification requirements but not the prohibition on sale of products that violate the standards in the CPSIA. And, the standards for lead content apply retroactively.

Another new development is that the CPSC has issued "enforcement guidance" for lead limits in children's products. Under this guidance, the CPSC will not impose penalties against anyone for making, importing, distributing or selling:

- a children's product to the extent that it is made of certain natural materials, such as wood, cotton, wool or certain metals and alloys

that the CPSC has recognized rarely, if ever, contain lead;

- an ordinary children's book printed after 1985; or
- dyed or undyed textiles (not including leather, vinyl or PVC) and nonmetallic thread and trim used in children's apparel and other fabric products, such as baby blankets.

The CPSC generally will not prosecute someone for making, selling or distributing items in these categories even if it turns out that such an item actually contains more than 600 ppm lead. Sellers will not be immune from prosecution if CPSC's Office of Compliance finds that someone had actual knowledge that one of these children's products contained more than 600 ppm lead or continued to make, import, distribute or sell such a product after being put on notice. Agency staff will seek recalls of violative children's products or will take other corrective actions, where appropriate.

The CPSC has also very recently announced draft guidance for determining what qualifies as a children's toy or childcare article for purposes of the phthalate rules. In that guidance, the CPSC has asked for comments, and input, from industry to help draft the final rules.

The rules in this area are changing almost daily, so be especially vigilant about new announcements.