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CPSC Stays CPSIA Testing and Certification in Part

The Consumer Product Safety Commission (CPSC) approved a one-year stay of testing and certification requirements under Section 102(a) of the Consumer Product Safety Improvement Act (CPSIA) on January 30, 2009. However, the stay is of limited practical effect to children's product producers and retailers. It stays only the testing and certification requirements that have not yet been proposed, but not the substantive limits on lead and phthalate that go into effect February 10, 2009. For makers of non-children's products, the stay means that companies will not have to provide certificates of conformity for some requirements.

Industry Requests Final Rule on Lead in December

Although there are many issues and problems with the CPSIA, the most pressing involve the lead limits due to go into effect on February 10, 2009. Lead in substrate materials, like plastic, metal or textiles, in "children's products" may not exceed 600 parts per million (ppm). After August 14, 2009, products designed or intended primarily for children 12 and under cannot contain more than 300 ppm of lead. The lead limits must be further reduced by August 24, 2011, to 100 ppm, unless the CPSC determines that limit to be technologically infeasible.

Section 101(a) of the CPSIA makes any children's product that fails to meet the lead limits a "banned hazardous substance" under the Federal Hazardous Substance Act (FHSA) and thus prohibited from sale or distribution in commerce.¹ According to a September 12, 2008 Memorandum from the CPSC General Counsel, the lead limits apply retroactively to products currently on store shelves or in inventory.² Some products may meet these standards, while others may not. In some cases, the only way for companies to verify compliance with the lead limits is to conduct expensive testing, but the CPSC has not yet approved testing methods.

In response to these concerns, and with the deadline for many products on the shelves to be banned looming closer, the National Association of Manufacturers (NAM) CPSC Coalition (which includes retailers) submitted a petition in December urging the Commission to issue an immediate final rule adopting clarifying guidance on inaccessible component parts, on component testing, and on exemptions from the lead limits. The CPSC did not respond directly to the petition, but voted to issue several proposed lead rules in January.

CPSC Proposed Regulatory Actions

On January 15, 2009, the CPSC issued a series of Federal Register notices that seemed intended to clarify the scope of the testing and certification requirements:

- *Proposed Interpretive Rule on Inaccessible Component Parts.*³ Section 101(b)(2) of the CPSIA exempts from the lead limits component parts of a product that are not accessible to a child. A part is "inaccessible" if it cannot be touched by a child. This narrow interpretation means that many "touchable" components that might contain lead, above limits, must either be excluded by the CPSC through an exemption process or meet, and be tested and certified to meet, the lead limits of the Act.
- *Proposed Rule on Electronic Devices.*⁴ Section 101(b)(4) of the CPSIA authorizes the CPSC to exempt certain electronic devices from the lead limits if it is not technologically feasible to meet the lead limits.⁵ The CPSC would adopt virtually all of the RoHS exclusions,⁶ except decorative crystal, on the theory that the CPSIA allows the exclusion of lead only where lead serves a technological function from an electronic perspective.
- *Proposed Exclusions for Low-lead Materials.*⁷ Pursuant to its general authority under CPSIA § 3, the CPSC proposed to exclude from testing (but not the lead limits) certain materials that contain no or low lead that are "untreated and unadulterated" with respect to the addition of materials or chemicals, including pigments, dyes, coatings or finishes, or undergo any other processing that might result in the addition of lead. Precious metals (silver, gold, platinum), gemstones, pearls, surgical steel, and wood were included in the proposed exemption, but some materials excluded under a Proposition 65 settlement agreement on jewelry (e.g., elastic, ribbon, crystal), were not. Several natural fibers (cotton, silk, wool, hemp, linen) are also proposed for exemptions based on considerable effort and data submitted by the apparel industry. Manmade fibers are not covered, and the limit on dyeing and further "processing" could effectively eviscerate the exemption for all the materials.

³ See <http://www.cpsc.gov/businfo/frnotices/fr09/leadinaccessibility.pdf>.

⁴ See <http://www.cpsc.gov/businfo/frnotices/fr09/leadelectronic.pdf>.

⁵ See <http://www.cpsc.gov/businfo/frnotices/fr09/leadelectronic.pdf>.

⁶ Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment.

⁷ See <http://www.cpsc.gov/businfo/frnotices/fr09/leadlimits.pdf>.

¹ Pub. L. No. 110-314, 122 Stat. 3016, 3017(August 14, 2008).

² See <http://www.cpsc.gov/library/foia/advisory/317.pdf>.

- *Procedures for Exemptions from Lead Limits.*⁸ The CPSC also issued a proposal to establish procedures and requirements for petitions for exemptions under Section 101(b)(1) of the CPSIA. The proposed procedures cover two types of determinations: 1) a determination that a commodity or class of materials, or a specific material or product, not already proposed for exclusion does not exceed the lead content limits specified under section 101(a) of the CPSIA; and 2) exclusion of a commodity or class of materials or a specific material or product under section 101(b), that exceeds the lead content limits under section 101(a), but which will not result in the absorption of any lead into the human body nor have any other adverse impact on public health or safety.

Under the proposed rule, petitions must provide “best available scientific peer-reviewed evidence” that supports the petition, as well as information that does not. The agency has confirmed that the “hearing” referenced in the statute is basically a notice and comment procedure.

While industry asked for final action on issues, the deadline for comments on each of the proposals is February 17, 2009 – a week after the February 10 deadline.

Industry Request for Delay

With so many unfinished rules and limited exclusions, new questions continued to arise about the potential impact and scope of the CPSIA. The CPSC and Congress were inundated with requests from small businesses, thrift stores, libraries and others to address the unintended consequences and uncertainties of the CPSIA.

For instance, thrift and other second-hand stores, which belatedly realized that distribution in commerce included the sale or donation of used goods, and publishers and libraries began raising concerns about the impact. The CPSC “clarified” that resellers of children’s products need not test and certify products (they are not importers or manufacturers), however, all products must comply.⁹ The “clarification” did not address the retroactive effect of the lead limits.

In response to an inquiry from the book publishing industry, the CPSC confirmed that the CPSIA limits on lead do not apply to general interest books or other general products, only to products designed or intended primarily for children 12 and under.¹⁰ However, the agency indicated that it did not have adequate data to recommend a general exemption from testing for books and paper products based on meeting the lead limits, and needs data for all the components (paper, cardboard, adhesives, laminates, binding materials, etc.).

Given continuing uncertainties related to the various lead requirements, the NAM CPSC Coalition on January 28, 2009, filed a request for an emergency stay of the effective date of the lead requirements.

The Stay

On January 30, 2009, rather than responding to the request to stay the effective date of the lead requirements, the Commission voted to stay enforcement of the CPSIA § 102 certificate of conformity and third party testing requirements until February 10, 2010.¹¹ The stay does not respond to the NAM petition, but rather was touted by House and Senate staff as an effort to resolve all the problems with the Act. It does not.

The stay “does not alter or postpone the requirement that all products meet applicable consumer product safety rules.” As CPSC Chair Nancy Nord noted:

“It is important to clearly understand what the stay does and does not do. The stay of enforcement of the testing and certification provisions will give some temporary and limited relief to small manufacturers, home-based businesses and crafters who cannot comply with the law without incurring substantial testing costs. However, the stay does not relieve them of complying with the underlying requirements enacted by Congress and which go into effect on February 10, 2009, dealing with lead, phthalates and a number of other toy standards. Any changes to these requirements will need to be addressed by Congress.”

The net result is that the CPSC changed statutory deadlines and requirements related to Section 102 on testing, but not on the substantive requirements of Section 101. Critically, the CPSC announcement urged state Attorneys General “to respect the Commission’s judgment that it is necessary to stay certain testing and certification requirements and will focus their own enforcement efforts on other provisions of the law, e.g. the sale of recalled products.” In other words, the stay does not prevent states from enforcing the testing and certification provisions.

Indeed, the benefits from the stay are very limited as a practical matter for makers of children’s products facing new lead and phthalates limits. The CPSC specifically excludes the following tests from the stay:

- Four requirements for third-party testing and certification of certain children’s products subject to:
 - The ban on lead in paint and other surface coatings for products made after December 21, 2008;
 - The standards for full-size and non full-size cribs and pacifiers for products made after January 20, 2009;
 - The ban on small parts for products made after February 15, 2009; and
 - Lead content limits for metal components in children’s jewelry made after March 23, 2009.
- Certification requirements applicable to ATV’s manufactured after April 13, 2009.
- Pre-CPSIA testing and certification requirements, including: automatic residential garage door openers, bike helmets, candles with metal core wicks, lawnmowers, lighters, mattresses, and swimming pool slides; and

⁸ See <http://www.cpsc.gov/businfo/frnotices/fr09/leadprocedures.pdf>.

⁹ See <http://www.cpsc.gov/cpsc/pub/prerel/prhtml09/09086.html>.

¹⁰ See <http://www.cpsc.gov/library/foia/advisory/323.pdf>.

¹¹ See <http://www.cpsc.gov/cpsc/pub/prerel/prhtml09/09115.html>.

- Pool drain cover requirements of the Virginia Graeme Baker Pool & Spa Safety Act.

The stay will benefit some companies that do not make children's products. For example, companies should no longer have to create certificates of conformity for product labeling under the FHSA, child resistant packaging under the Poison Prevention Packaging Act (PPPA), or compliance with Refrigerator Safety Act (RSA) requirements. The retail industry has indicated that the stay does not provide adequate protection or address the many unknown aspects of the lead and phthalates limits (including the retroactivity opinion), especially given the ability of state Attorneys General to

enforce the requirements. The CPSC has now placed on the website a ballot on the question of the NAM petition for a stay of the effective date. Many small businesses continue to express grave concern that they are facing economic ruin if either the Commission or Congress fail to take action to resolve the issue by delaying the effective date of the lead limits in the coming days.

For more information, please contact Sheila A. Millar at (202) 434-4143, millar@khlaw.com; or Jean-Cyril (JC) Walker at (202) 434-4181, or walker@khlaw.com.