

February 9, 2009

CPSC Issues Enforcement Policy on Total Lead Content Limits and Other Key CPSIA Developments Last Week

Last week, there were several significant developments regarding the Consumer Product Safety Improvement Act of 2008 (CPSIA). The flurry of activity comes just before the new limits on total lead content and phthalates in certain children's products are set to go in effect on February 10, 2009.

With regard to lead content, the CPSIA gave the Consumer Product Safety Commission (CPSC) the authority to grant limited relief from the new limits, and the CPSC has taken steps to exercise that authority. However, that process could not be completed by February 10th. Thus, on February 6, 2009, the CPSC issued an enforcement policy on the total lead content limits established by the CPSIA. The enforcement policy states that until more definitive rules or guidance are finalized by the CPSC, the CPSC will not impose penalties against anyone for making, importing, distributing, or selling (i) a children's product to the extent that it contains materials that the CPSC preliminarily identified in its January 15, 2009 proposed rule as consistently having below 300 ppm of lead, including wood, cotton, wool, and certain metals and alloys; (ii) an "ordinary" children's book printed after 1985; or (iii) dyed or undyed textiles (not including leather, vinyl or PVC) and non-metallic thread and trim used in children's apparel and other fabric products, such as baby blankets, unless the product has undergone further treatment that could impart lead, or is ornamented with metal, rhinestones or other objects, or has plastic or metal fasteners possibly containing lead. The policy directs the CPSC's Office of Compliance to only prosecute in these cases if someone had actual knowledge that the product contained more than the 600 parts per million of lead (the limit in effect as of February 10, 2009, to be reduced to 300 parts per million on August 14, 2009) or continued to make, import, distribute or sell the product after being put on notice of its lead content by the CPSC staff.

The enforcement policy also notes that the CPSC has yet to issue guidance on what component parts of a children's product may be deemed "inaccessible," such that the parts do not need to comply with the total lead content limits. Pending further guidance, the CPSC will accept a manufacturer's determination that a lead-containing part

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on its product is inaccessible to a child if it is based on a “reasonable reading” of the CPSIA’s inaccessibility provision.

In another development, on February 5, 2009, in a case brought by two public interest groups in U.S. District Court for the Southern District of New York (*National Resources Defense Council, Inc. et al. v. U.S. Consumer Product Safety Commission*, 08 Civ. 10507), Judge Paul G. Gardephe issued an order granting the plaintiffs’ motion for summary judgment and declaring that the CPSIA section on phthalates in certain children’s products applies retroactively and regardless of when the products were manufactured. The CPSIA prohibits the sale of certain toys and child care articles containing more than 0.1% of six specified phthalates. In an opinion letter last November written in response to inquiries regarding the impact of the CPSIA phthalate prohibitions, the CPSC’s general counsel stated that existing inventory was exempted and that the prohibitions would only apply to products manufactured on or after February 10, 2009. Judge Gardephe, however, rejected the CPSC’s reasoning and found that the CPSIA phthalate prohibitions unambiguously do apply to existing inventory. The CPSC said it would not appeal the ruling, although it is possible that Congress may act to amend the CPSIA to provide some relief to distributors and retailers of covered products which now must be removed from store shelves. Phthalates are used to soften plastics and are commonly found in bath toys, teethingers, bibs, plastic figures and other plastic toys.

In still other CPSIA developments last week, the CPSC issued an interim final rule exempting certain lead-containing component parts in children’s electronic devices from the total lead content limits. The CPSC also denied a petition by a broad coalition of industry representatives requesting that the ban on children’s products exceeding these limits be stayed in its entirety.

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