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Consumer Law/Trade Regulation Practice

Federal District Court in New York Declares that CPSIA Ban on Phthalates in Children's Products Applies Retroactively

On February 5, 2009, in a case brought by two public interest groups in 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 Consumer Product Safety Improvement Act of 2008's (CPSIA) section on phthalates in certain children's products applies retroactively. Section 108, which prohibits the sale of certain children's products containing more than 0.1% of six specified phthalates, is scheduled to go into effect on February 10, 2009. 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's 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, teething rings, bibs, plastic figures and other plastic toys. Effective February 10, 2009, it will be unlawful to import, manufacture, distribute, or sell toys intended for children 12 or younger and "child care articles" for children 3 and under, containing more than 0.1% of three specified phthalates. The CPSIA also imposes an interim prohibition on any toy which can be placed in a child's mouth and any child care article that contains more than 0.1% of three other specified phthalates. The interim ban will be reviewed after an advisory panel review is completed.

In other CPSIA-related developments on Thursday, the CPSC issued an interim final rule exempting certain lead-containing component

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parts in children's electronic devices from the ban on total lead content in children's products, also scheduled to go into effect on February 10, 2009. The CPSC also denied a petition by a broad coalition of industry representatives requesting that the ban on total lead content in children's products be stayed in its entirety.

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