



ANSI Legal Issues Forum 2009

**STANDARDS FOR SAFETY  
AND SUSTAINABILITY**

Examining the Consumer  
Product Safety Improvement  
Act and Eco-labeling Issues



**KING & SPALDING**

# **The Consumer Product Safety Improvement Act of 2008**

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# The CPSIA

- Signed into law on August 14, 2008 in response to record number of consumer product recalls in 2007
- Considered the most comprehensive overhaul of U.S. consumer product safety laws since the enactment of the original Consumer Products Safety Act



# The CPSIA

- Increases the Power and Reach of the Consumer Product Safety Commission
  - Allocates more funding to the agency
  - Increases agency staffing
- Amends relevant product safety laws
  - Consumer Product Safety Act
  - Federal Hazardous Substances Act
  - Flammable Fabrics Act
  - Poison Prevention Packaging Act



# Four Fundamental Changes

- Changes in Product Safety Requirements
  - Lead
  - Certificates of Conformity
  - Children’s Products
  - Phthalates
- Changes in Enforcement Authority
  - Recalls
  - Rulemaking
  - Penalties
  - Information Disclosure and Collection
  - State-Level Enforcement
- Effects on Importers



## Changes in Product Safety Requirements



# Restrictions on Lead

- Lead in products
  - Original standard: products with lead greater than 600ppm are hazardous substances
  - As of August 14, 2009 lead in products must be reduced to 300ppm
  - As of August 14, 2011 lead amount must not exceed 100ppm, if technologically feasible
  - CPSC must review and revise at least every 5 years
- Lead in paint used on children's products/furniture
  - Must be reduced from 600ppm to 90ppm
  - Window blinds specifically exempted from definition of "furniture articles"



# Restrictions on Lead

- The following items do not exceed permissible lead levels:
  - precious gemstones
  - semiprecious gemstones and other minerals that are not based on lead or lead compounds
  - natural or cultured pearls
  - wood
  - paper and other materials made from wood or other cellulosic fiber
  - CMYK process printing inks
  - natural or manufactured fibers (dyed or undyed)
  - plant-derived or animal-derived materials
  - surgical steel and other stainless steel
  - precious metals



# Certificates of Conformity

- Manufacturers and importers have to issue certificates of conformity for products subject to an applicable CPSC rule, ban, standard, or regulation
  - This does not include voluntary safety standards, such as the ones governing corded window coverings
- Certificates verify that the products comply with all safety regulations and have undergone testing
- Must accompany product through the stream of commerce
- Must be issued either jointly or separately by importer and manufacturer





## SAMPLE GENERAL CERTIFICATION OF CONFORMITY

### CERTIFICATION OF COMPLIANCE

1. Identification of the product covered by this certificate:
2. Citation to each CPSC product safety regulation to which this product is being certified:
3. Identification of the U.S. importer or domestic manufacturer certifying compliance of the product:
4. Contact information for the individual maintaining records of test results:
5. Date and place where this product was manufactured:
6. Date and place where this product was tested for compliance with the regulation(s) cited above:
7. Identification of any third-party laboratory on whose testing the certificate depends:

*This form of certificate and instructions are staff interpretations and do not replace or supersede the statutory requirements of the new legislation. They were prepared by CPSC staff, have not been reviewed or approved by, and may not necessarily reflect the views of, the Commission. They may be subject to change based on Commission action.*



# Children's Products

- “[T]oys and other articles which are intended to be entrusted to or for use by children,” not to which children “might have access simply because they are present in the household”
- Subject to same testing/certification requirements
- Testing must be done by an independent third-party laboratory or one determined by CPSC to be neutral
- Section 103(a) Tracking Label Requirement -- must be labeled with permanent, identifying marks
  - Must be specific enough to enable end user to determine date, location, and batch in which product was manufactured
  - Marks make it easier to remove unsafe products from market and to hold manufacturer of unsafe products accountable
- Durable infant/toddler products require registration forms
- Requirements do not apply retroactively



# Restrictions on Phthalates

- Bans the use of other phthalates (DEHP, DBP, and BBP) entirely
- Interim ban on DINP, DIDP, and DnOP
  - Investigation will be conducted to determine whether the chemicals are harmful
- Requires that plasticized component parts be tested for phthalates, not the whole item
- Lead and phthalate restrictions apply to products in inventory.
- Unlike lead provision, phthalates provision does not contain an exclusion for inaccessible parts - it is silent



## Changes in Enforcement Authority



# Recalls

- CPSC can now order manufacturers, distributors, and retailers to cease production or distribution of non-conforming products
  - Must file lawsuit before taking corrective action
  - May only recall imminently hazardous products
- Important because previously had little power to mandate recalls
- CPSIA makes it illegal to sell recalled products, even if the recall is the result of voluntary negotiations between manufacturer and CPSC



# CPSIA and Rulemaking

- Decisions can be made more quickly
  - 2 of 5 commissioners constitutes a quorum if from different political parties
  - Eliminates requirement that CPSC give notice before proposing rules
  - No longer required to publish the text of rule in Federal Register 60 days before making decision





# Penalties

- New, higher civil penalties went into effect August 14, 2009
- Civil penalty for individual violation increased from \$5,000 to \$100,000
- Cap for related violations increased from \$1.25 million to \$15 million
- Criminal penalties increased from up to 1 year to up to 5 years
  - May be imposed even if corporate director, officer, or agent was unaware of the noncompliance
  - Allows CPSC to seek asset forfeiture

# Factors for Determining Civil Penalties

- The nature, circumstances, extent, and gravity of the violation, including circumstances of the violation and how many provisions were violated
- The nature of the product defect, including whether it is a substantial product hazard or a violation of a rule, regulation, standard, or ban
- The severity of the risk of injury, including the potential for death or injury, the likelihood of injury, the reasonable foreseeability of misuse, and population at risk
- The occurrence or absence of injury
- The number of defective products distributed
- Mitigating undue adverse economic impacts on small businesses
- Other appropriate factors





# Information Disclosure & Collection

- Disclosure
  - Manufacturers or private labelers may review reports for confidential information and request redaction
  - CPSC may disclose confidential information to a federal, state, local, or foreign government agency for official law enforcement or consumer protection purposes
  - May also disclose to Congress or to comply with a court order
- Collection
  - CPSIA mandates the creation of a complaint database for consumers, government entities, and others to provide complaints relating to the use of consumer products
  - Available to the public at large



# Enforcement by State Attorneys General

- State attorneys general may seek to enjoin manufacture, distribution, or sale of nonconforming products
  - Violations must affect state or state residents
- Gives state entities authority to enforce federal law
- State attorneys general have no authority to enjoin violations affecting exports or the CPSC's investigatory, oversight, or information-collecting authority



## Importers



# Importers

- Subject to the same testing/certification requirements
- Certificates must be presented when product is available for inspection in US
- Products without certificates or with false certificates may be destroyed or refused entry into US
- CPSIA also requires the U.S. GAO to assess the effectiveness of the CPSC's power over imports



# CPSIA in Summary

- Strengthens the CPSC
- Gives whistleblowers additional protections including the right to refuse to violate the Act
- Requires product testing and certification
- Reduces permissible lead and phthalates in children's products
- Requires collection of information and disclosure of information to appropriate authorities to further consumer protection

