

BB REVIEW

Product Liability and Casualty Update

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CONSUMER PRODUCT SAFETY IMPROVEMENT ACT IMPOSES NEW REQUIREMENTS UPON MANUFACTURERS, IMPORTERS AND RETAILERS

New Lead Requirements for Children's Products Effective February 10, 2009

President Bush signed the Consumer Product Safety Improvement Act of 2008 (the "Act") on August 14, 2008. The Act, prompted by the well-publicized recalls of imported toys with lead paint and other hazards, is the most comprehensive overhaul of consumer product safety laws since the Consumer Product Safety Act created the U.S. Consumer Product Safety Commission (the "CPSC") in 1972.

The Act imposes significant new requirements on children's toys and products, in addition to giving the CPSC increased staffing and funding, new laboratory facilities, increased enforcement mechanisms and greater oversight of imported goods. Of particular note is that, under the new law, children's products with more than 600 parts per million total lead cannot lawfully be sold in the United States on or after **February 10, 2009**, even if they were manufactured before that date.

Below are highlights of the Act.

I. New Definitions for Toys and Children's Products

Many of the Act's provisions, including bans on phthalates and lead, are tied to new definitions and general rules applicable to all children's products and more specific rules for toys and child care articles, including the following:

- "Children's products" are defined as "a consumer product designed or intended primarily for children 12 years of age or younger." The CPSC's 2002 age determination guidelines for children's products are referenced in the Act.
- "Children's toys" include products "designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays."
- "Child care articles" are defined as "a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething."

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II. Certification and Testing

The Act increases the range of products that require certification and testing. The Act extends the Consumer Product Safety Act's existing certification requirements to all products subject to bans and to products subject to any similar rule, standard, ban or regulation under any other law enforced by the CPSC. This general certification requirement is sometimes referred to as a "supplier's declaration of conformity." Third-party testing is not required for these general conformity certifications.

The Act imposes a third-party testing requirement for all children's products. Every manufacturer (including an importer) or private labeler of a children's product must have its product tested by an accredited independent testing lab and, based on the test results, must issue a certificate that the product meets all applicable CPSC requirements. The manufacturer or importer is required to furnish the certificate to its distributors and retailers. The CPSC has authorized the use of electronic certificates. The new testing requirements are to be phased-in by the types of products.

III. Ban on Lead in Toys and Children's Products

The Act mandates a phased-in ban on lead in all children's products, as follows: Reduced to 600 parts per million by February 10, 2009; reduced to 300 parts per million by August 14, 2009; and reduced to 100 parts per million by August 14, 2011. Electronic devices and inaccessible component parts will be subject to additional rules to be issued by August 14, 2009.

The new lead limits will apply to the total lead content by weight for any part of the product. Some children's products may be exempted from the new lead limits. The CPSC has tentatively exempted items with inaccessible lead parts; clothing toys and other goods made of natural materials such as cotton and wood; and electronics that are impossible to make without lead. A component part is not accessible if the component part is physically unexposed by reasons of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product. (Paint, coatings, or electroplating may not be considered a barrier that would render lead inaccessible.)

The CPSC has advised that children's products containing lead above the limits set forth in the Act cannot be sold from inventory or allowed to remain on store shelves after February 10, 2009.

Effective August 14, 2009, the Act also reduces permissible lead paint content from 0.06 percent to 0.009 percent. The Act also mandates changes in how lead content in paint is tested and calculated.

IV. Ban on Phthalates in Toys and Child Care Articles

Effective February 10, 2009, the Act prohibits the sale of children's toys and child care articles with concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP) or benzyl butyl phthalate (BBP). There is no inaccessibility exception as there is for lead in children's products. Also effective February 10, 2009, is an interim ban on the sale of children's toys that can be placed in a child's mouth (defined as toys or parts smaller than five centimeters in dimension and excluding toys that can only be licked)

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and all child care articles containing more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).

The CPSC has advised that, unlike the ban on lead products, the phthalates ban does not apply to inventory in existence on February 10, 2009, but instead only applies to products that are manufactured on or after February 10, 2009.

V. Prohibition on Sale of Recalled Products

When the Act was signed into law on August 14, 2008, it became unlawful to sell recalled products. Retailers should check the CPSC website (www.cpsc.gov) for information on recalled products before taking into inventory or selling a product. The selling of recalled products could carry significant civil and/or criminal penalties discussed below.

VI. Standards of Durable Nursery Products

The Act requires that the CPSC develop safety standards for infant and toddler products such as cribs, strollers and baby gates. The CPSC must either make the existing voluntary safety standards mandatory or provide for a stricter safety standard. Once the CPSC has issued these safety standards, it will be illegal to sell, manufacture or import a product that violates the new safety standard.

VII. Labeling Requirements for Packaging and Advertising Certain Toys and Games

Packaging and advertising for certain toys and games already must contain a label or cautionary statement regarding choking hazards. There are requirements as to the layout, type, language, color, and placement of the statement. Effective December 12, 2008, the cautionary statements must also be included in all Internet advertisements that provide a direct means for the purchase or order of the product. Cautionary statements will also be required for printed advertisements which provide a direct means of purchasing or ordering beginning on February 10, 2009. All retailers, manufacturers, importers, distributors, and private labelers that produce such advertisements are subject to this requirement.

Manufacturers, importers, distributors, or private labelers of such products must inform retailers if a cautionary statement is required. Conversely, retailers have a duty to ask the manufacturer, importer, distributor, or private labeler if a cautionary label is required for a particular product. If the retailer asks and receives no information or false information, the retailer is not liable.

VIII. Enforcement Penalties

The Act greatly increases the civil penalties for violations of the Act, as well as for violations of the Flammable Fabrics Act and the Federal Hazardous Substances Act, to \$100,000 for each violation, with a maximum cap of \$15 million for a related series of violations. (The existing limits are \$8,000 per violation with a maximum cap of \$1,825,000 for a related series of violations.)

Also increased are the criminal penalties, by permitting larger fines, imprisonment for up to five years and forfeiture of assets associated with a violation. The Act also removes a requirement that directors, officers and agents be aware of violations before being criminally charged.

The new law further authorizes state attorneys general to enforce the Act and related laws by seeking injunctive relief. It also provides whistleblower protection for employees who report violations, testify or otherwise provide assistance in consumer product safety enforcement proceedings, or who refuse to participate in an employer's illegal conduct. Aggrieved employees may seek injunctive relief, reinstatement, back pay (with interest), damages, litigation costs, expert witness fees and attorneys' fees.

Conclusion

Affected companies should immediately begin implementing measures to ascertain compliance with the provisions of the Act, including developing a plan as to existing inventory that has not been tested for lead. Balch & Bingham's Product Liability and Casualty attorneys are on top of this change in the law and have the experience and expertise to navigate clients through it.

Balch & Bingham, LLP – Product Liability and Casualty Litigation Practice Group

The attorneys in Balch & Bingham LLP's Product Liability and Casualty Litigation Practice Group have extensive experience in individual, mass, and class action environmental and toxic tort litigation, with specific experience in cases related to children's products or toys. They have litigated personal injury, property damage, and wrongful death claims relating to alleged exposures to and/or releases of lead-based paint, agricultural herbicides and pesticides, asbestos, benzene, boron trifluoride (BF₃), chlorinated solvents, formaldehyde, industrial waste water, carbon black, carbon dioxide, isocyanate compounds (MDI and TDI), Ilemite dust, maleic anhydride mercury, mixed-dust, polychlorinated biphenyls (PCBs), particulate matter, perlite, petroleum hydrocarbons, radioactive material and waste, rutile dust, silica, trimellitic anhydride Tordon, and welding fumes. Balch & Bingham LLP's Product Liability and Casualty Litigation Practice Group also has extensive experience in insurance coverage matters related to such exposures and releases.

Balch & Bingham attorneys enjoy membership in a number of professional associations, including the highly-selective American College of Trial Lawyers, the International Association of Defense Counsel (IADC), the Federation of Defense and Corporate Counsel (FDCC), Defense Research Institute (DRI), and the Alabama Defense Lawyers Association (ADLA), including one partner currently serving as President and two partners serving on its Board of Directors. A number of Balch & Bingham litigators are listed in *The Best Lawyers in America*, with several included in the new category of "Bet The Company" litigators. Balch & Bingham's more than 250 attorneys serve our clients from offices in Alabama, Georgia, Mississippi and Washington, D.C.