



**GOLDBERG SEGALLA<sup>LLP</sup>**

**Consumer Product Safety  
Commission Update**

**Consumer Product Safety Commission Legislative Update**

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**UNITED STATES DISTRICT COURT  
RETROACTIVELY APPLIES PHTHALATE  
PROHIBITIONS TO ALL EXISTING PRODUCTS**

In one of the first decisions interpreting the 2008 CPSIA, the Consumer Products Safety Commission's position on the breadth of phthalate prohibitions has been successfully challenged. The United States District Court for the Southern District of New York held that the prohibitions barring sales of products containing impermissible concentrations of phthalates after February 10, 2009 applies to products that were manufactured before the effective date.

Sections 108(a) and 108(b)(1) of the 2008 CPSIA makes it unlawful "to offer for sale . . . [or] distribute in commerce . . . any children's toy or child care article that contains concentrations of more than 0.1 percent of" chemicals known as phthalates.<sup>i</sup> These sections took effect February 10, 2009. However, there was a question as to whether this section applied only to products manufactured after that date or retroactively to all existing products that were offered for sale. On November 17, 2008, the CPSC's General Counsel issued an advisory opinion letter that any products containing impermissible concentrations of phthalates may continue to be sold and distributed in commerce after February 10, 2009 as long as they were manufactured prior to that date.

In response, the National Resources Defense Council, Inc. and Public Citizen, Inc. commenced an action against the CPSC in the United States District Court for the Southern District of New York challenging the CPSC position. In response to cross-motions for summary judgment, United States District Court Judge Paul Gardephie issued a decision rejecting the CPSC's position that the phthalate prohibitions do not apply to existing inventory as of February 10, 2009. The Court focused on the language "it shall be unlawful to . . . offer for sale . . . [or] distribute in commerce" and concluded that the sale or distribution of a product that was manufactured before February 10, 2009 would nevertheless violate section 108. The Court reasoned: "The plain text of the phthalate prohibitions unequivocally and unambiguously that no covered products may be sold as of February 10, 2009. Unless another section of the statute can be read as creating an express exception for existing inventory, the Commission may not interpret the phthalate prohibitions as containing such an exception."<sup>ii</sup> The Court went on to reject a series of arguments by the CPSC for a statutory exception. It then declared that the CPSC "violated the Consumer Product Safety Improvement Act and the Administrative Procedure Act" and ordered that the CPSC's November 17, 2008 advisory opinion be set aside. The effect of this decision has required all retailers and other sellers to remove from inventory all products that violate the phthalate prohibitions.

## CPSC ROLLS OUT PROCEDURES FOR LEAD CONTENT IN CHILDREN'S PRODUCTS

In accordance with its mandate from Congress, the CPSC has enacted procedures for manufacturers and importers to be relieved of third-party testing requirements for children's products that fall within the permissible lead content parameters and to qualify for exclusions for those children's products that exceed the lead content limitations.

In accordance with section 101(a) of the 2008 CSPIA, products designed or intended primarily for children twelve years of age or under may not contain more than 600 parts per million ("ppm") of lead by weight as of February 10, 2009, 300ppm after August 14, 1009, and 100ppm after August 14, 2011 (unless the CPSC determines it is not technologically feasible to do so). Any children's products that exceed these lead content limits are considered banned hazardous substances, subjecting the seller to substantially increased civil and criminal penalties contained in the 2008 CPSIA.<sup>iii</sup>

Even if a children's product meets the lead content requirements under section 101(a), it is still subject to the third-party testing requirements and set forth in section 102, unless the CPSC issues a lead content determination relieving the manufacturer or importer of a particular product of those requirements. The CPSC has promulgated regulations establishing the procedure and circumstances under which it would issue such as a determination.

Pursuant to 16 CFR §1500.89, any request for a determination that a product contains no lead or lead below the limit "must be supported by objectively reasonable and representative test results or other scientific evidence showing that the product or material does not, and would not, exceed the lead limit specified in the request."<sup>iv</sup> Any request must include: (1) a detailed description of the product and how it is used by children; (2) representative production data regarding lead content of the parts; (3) data on how lead is introduced into the product in the manufacturing process; (4) data on the likelihood of lead contamination of other parts of the product during the manufacturing process; (5) information on the facilities at which the product is made; (6) assessment as to whether use of lead in a facility would lead to contamination of other products or material; (7) assessment as to whether the lead content would exceed the statutory limit; (8) information on the test methods and why the resulting data is representative of the lead content; and (9) any unfavorable data.<sup>v</sup>

Even if a product exceeds the lead content limits under section 101(a), Congress granted the CPSC the discretion to grant an exclusion of a commodity or class of materials or a specific material or product that "will not result in the absorption of any lead into the human body nor have any other adverse impact on public health or safety." The CPSC established the procedure and standard for granting such an exclusion.

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Pursuant to 16 CFR §1500.90, any requests for an exclusion shall be “based on the best-available, objective, peer-reviewed, scientific evidence showing that lead in such product or material will not result in the absorption of any lead into the body, taking into account normal and reasonably foreseeable use and abuse by a child, including swallowing, mouthing, breaking, or other children’s activities, and the aging of the product, not have any adverse impact on health or safety.”<sup>vi</sup> Any interested party making a request for an exclusion shall include: (1) a detailed description of the product and how it is used by children; (2) representative production data regarding lead content of the parts; (3) data on how lead is introduced into the product in the manufacturing process; (4) any other information regarding the lead content available to the requestor; (5) information on the test methods and why the resulting data is representative of the lead content; (6) an assessment of the manufacturing process that “strongly supports” the conclusion they would not be a source of lead contamination of the product or material; (7) best available peer-reviewed evidence on absorption into the human body, including the conditions under which lead may come out of the product; and (8) any unfavorable evidence.<sup>vii</sup>

The procedure for relief from the testing requirements of section 102 or obtaining an exclusion under section 101(b) is the same. Upon receipt of a complete request, the Office of Hazard Identification and Reduction (“EXHR”) shall make an initial recommendation within thirty days to the extent practicable.<sup>viii</sup> Any request that does not contain this required information shall be rejected, with a notice as to any deficiencies.<sup>ix</sup> The EXHR shall provide a staff memo to the CPSC, either granting or denying the request, for ballot vote. If a request is granted, the CPSC will determine whether to publish a notice of proposed rule making for public comment in the Federal Register, in which case the EXHR shall evaluate and make a final recommendation.<sup>x</sup> If the CPSC determines that the product does not and would not exceed the lead content limits or qualifies for an exclusion, it shall then vote on whether to publish a final rule.<sup>xi</sup> However, the manufacturer or importer must continue to certify that the product has not been altered or modified, or has experienced any change in the processing, facility or supplier conditions that could impart lead into the product.

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<sup>i</sup> 15 U.S.C. §2068.

<sup>ii</sup> National Resource Defense Council, Inc. v. U.S. Consumer Product Safety Commission, 08-CV-10507, Memorandum Opinion and Order dated February 5, 2009, p. 12.

<sup>iii</sup> For a discussion of the substantially increased civil and criminal penalties, see All This and \$15 Million Penalties Too: Negotiating the Landscape of Increased Penalties under CPSIA, *For the Defense*, February 2009.

<sup>iv</sup> 16 CFR Part 1500, E., Procedures and Requirements Comments.

<sup>v</sup> 16 CFR §1500.89(d)(4).

<sup>vi</sup> 16 CFR §1500.90(b).

<sup>vii</sup> 16 CFR §1500.90(c)(4).

<sup>viii</sup> 16 CFR §1500.89(f); 16 CFR §1500.90(e).

<sup>ix</sup> 16 CFR §1500.89(e); 16 CFR §1500.90(d).

<sup>x</sup> 16 CFR §1500.89(h); 16 CFR §1500.90(g).

<sup>xi</sup> 16 CFR §1500.89(h); 16 CFR §1500.90(g).