

Client Alert.

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CPSIA: What to Expect in 2011

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While Congress enacted the Consumer Product Safety Improvement Act (“CPSIA”) in 2008, many of its requirements were stayed to give the U.S. Consumer Product Safety Commission (“CPSC”) more time to promulgate new implementing rules, and to allow product manufacturers, distributors, and importers more time to adapt their products and practices to the new rules. In 2011, many of the CPSIA regulations will finally go into effect, putting the consumer product industry to the task of complying with applicable regulations and giving the CPSC increasing grounds for enforcement. Businesses are well advised to keep up with the new requirements to avoid enforcement actions, both in recall and non-recall situations.

Below we have outlined a series of new requirements that are expected to issue in 2011, many of which are calendared for the year’s first quarter.

GENERAL CONFORMITY CERTIFICATION FOR CERTAIN NON-CHILDREN’S PRODUCTS: JANUARY 2011

In 2009, the CPSC announced a stay of enforcement of the CPSIA’s “15-month rule,” which, as the name implies, is a series of rules and requirements originally scheduled to go in to effect 15 months after the CPSIA’s initial 2008 enactment. The rule provides that domestic manufacturers and importers, including private labelers, of all consumer products issue General Certifications of Conformity (“GCC”) to accompany each shipment of their goods, whether or not these goods are intended primarily for use by children. The stay was subsequently lifted with respect to certain requirements for children’s products and a few select non-children’s items, such as all-terrain vehicles.

Effective January 26, 2011, the CPSC is lifting its enforcement stay with regard to the application of GCC requirements to carpets and rugs, vinyl plastic film, teen and adult “wearing apparel,” and associated clothing textiles. Lifting of the stay with respect to other specified categories of consumer products is expected to continue throughout the year.

A GCC is required to identify the CPSC product safety regulation, standard, and/or requirement to which the product is subject. The certification of the product must be based on a test of each product or a reasonable testing program (and, for some specified products, testing by an accredited third-party laboratory). In order to comply with the CPSC’s GCC requirements, a form containing requisite information about the product, the applicable regulation(s), the company certifying compliance, and the testing itself must be completed and “accompany” each shipment of products, either in hard copy or electronically via a printed reference to a URL where the information required for a GCC can be obtained on the World Wide Web. All required information must be provided, at a minimum, in English.

THIRD-PARTY TESTING & CERTIFICATION FOR LEAD LIMITS IN CHILDREN’S PRODUCTS: FEBRUARY 2011

On February 10, 2011, the stay of enforcement of the CPSIA’s third-party testing and certification requirements concerning the lead content of children’s products will be lifted (lead content refers to lead in substrates, that is the underlying materials rather than the lead in the paint or coating itself). While children’s products (primarily intended for children 12 and younger) have been required to meet the 300 ppm lead content limit since 2009, all children’s products

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manufactured after February 10, 2011 also will be required to meet the certification and third-party testing standards to prove compliance with the limit. By August 14, 2011, children's products may not contain more than 100 ppm of lead if "technologically feasible." If applicable, third-party testing and certification to the 100 ppm standard will be required for children's products manufactured after that date.

In addition to lead in substrates, the stay of enforcement is also expected to be lifted in 2011 for GCC and testing requirements for ASTM F963 and phthalate standards for children's products. Like lead in substrates, children's products are currently required to meet these substantive limits but certification and third-party testing will soon be required in order to establish compliance.

As they become enforceable, the chemical testing requirements (including lead and phthalates) can be met in one of two ways: (1) test reports from recognized independent third-party testing labs showing that each of the accessible component parts on the product complies with the chemical limits, or (2) certificates from part suppliers declaring that all accessible component parts on the product comply with the applicable limits based on testing by recognized independent third-party testing laboratories.

PUBLIC CONSUMER INCIDENT DATABASE: MARCH 2011

The CPSC's new "Consumer Product Safety Improvement Act Database" ("Database") is due to launch in March 2011. Instead of accessing consumer incident data through published reports, studies, or FOIA requests, reports of harm to consumers will be publicly available, searchable, and accessible to all at www.saferproducts.gov.

Those who may submit reports include consumers, government agencies, healthcare professionals, childcare service providers, and public safety entities. Within five business days of the receipt of an incident report, the CPSC will transmit the report to manufacturers or private labelers for comment, "whenever practicable." Comments made within 10 business days of receiving the report will be published with the report of harm. Thus, information will be published within 15 business days of submission, unless a determination is made that the report is "materially inaccurate." A report may be published even if there is an ongoing investigation into the report's material accuracy.

Given the potential for the publication of inaccurate reports, it is important for manufacturers and private labelers to register with the CPSC to ensure that they receive timely notifications of any report of harm relating to their products. This will provide companies with an opportunity to have their responses published along with the incident report. Companies should also develop a policy regarding their response to incident reports. Although each response will need separate consideration, developing a plan and procedure for response will make the load lighter during the tight 10-day response period.

On January 20, 2011, at 10:30 a.m. to 12:30 p.m. Eastern time, the CPSC is hosting a web conference to guide businesses through the incident reporting form, industry registration and comment features, and the search function of the database. Companies can register for the web conference at <http://www3.gotomeeting.com/register/396775014>.

OTHER CPSIA DEVELOPMENTS TO WATCH FOR IN 2011

Cadmium Limits in Toys

As noted above, the stay on GCC requirements is expected to be lifted in 2011 with regards to ASTM F963 toy standards. ASTM F963-07 currently provides for limits on surface coating materials not including lead, such as antimony, arsenic,

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barium, cadmium, chromium, mercury, and selenium. These ASTM standards for cadmium may become more stringent in 2011. Last year, the CPSC took particular interest in the hazards of cadmium in children's toys and jewelry (including a wave of cadmium-related recalls), and made recommendations for a new cadmium exposure standard and testing procedures, in addition to the limits already in place for cadmium in paint and coating on toys.

The CPSC's proposed revised cadmium standard would set a child's daily intake levels for cadmium at 0.1 µg per kg per day and 11 µg per kg per day for acute exposures. The CPSC has also called for ASTM International to revise its test for cadmium in metal alloys from a two-hour solubility test to one done over 24 hours. The CPSC recommendations came after the EPA announced it would seek data from manufacturers on cadmium in consumer products and would regulate the metal if CPSC did not act.

Drop-Side Cribs

New crib safety standards will go into effect June 28, 2011. The new crib regulations ban the sale, re-sale, manufacture, and distribution of drop-side cribs, and also prohibit drop-side cribs at motels, hotels and childcare facilities. However, hotels and childcare centers will have until December 2012 to replace their existing cribs. The new crib regulations also include additional design, testing, and labeling requirements for crib parts, new mattress support standards, and more stringent hardware standards.

Increased Enforcement by CPSC (and other agencies worldwide)

Since the Obama administration took office, the CPSC has stepped up its enforcement of the CPSIA's requirements and announced factors that it will consider in assessing civil penalties, including the following: the nature, circumstances, extent and gravity of the violation; the number of non-compliant products distributed; the appropriateness of the penalty in relation to the size of the business charged; and "other factors as appropriate." Businesses placing consumer products on the market can expect to see the CPSC and courts apply these factors in future enforcement actions. A tangible and recent example of the CPSC's focus on increased enforcement is the opening of a CPSC office in Beijing in an attempt to educate Chinese manufacturers about American safety standards and reduce the number of dangerous products entering the United States.

In addition to being alert to increased enforcement by the CPSC, the U.S. products industry will need to become more aware of new international products regulation, each with their own enforcement schemes. The Canada Consumer Products Safety Act took effect in December 2010. The Canadian Minister of Health has described the lead content regulations in this act as "among the strictest in the world." The Australian Consumer Law took effect on January 1, 2011. And the South African Consumer Protection Bill is set to take effect on April 1, 2011. These international safety standards and reporting requirements differ from those in the U.S., and will require companies to consider whether reporting potential safety issues or incidents of harm in one country merits reporting in other countries, too. (For example, in Australia, suppliers of certain goods and services must notify the Commonwealth Minister about a death, serious injury, or illness that was caused or "may have been" caused by a consumer good or product-related service they supplied.) The new international regulations may result in companies organizing data not only by product, but by country as well, to ensure appropriate internal protocols are in place to respond to international consumer complaints.

Morrison & Foerster LLP has closely followed the Consumer Product Safety Improvement Act as it evolved in Congress and was ultimately signed into law in 2008. We have since advised a variety of clients on its implementation and helped

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them keep abreast of developments emanating from the CPSC. In addition, we regularly represent children's and consumer product companies and trade associations and assist them with a variety of legislative, regulatory, administrative enforcement, and litigation matters. For further information or assistance, please contact Robert Falk or Linda Lane.

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