



Consumer Product Safety Improvement Act and Issues for U.S. Importers

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In what is arguably the most comprehensive overhaul of consumer product safety laws in decades, on August 14, 2008, the Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314 ("CPSIA") was enacted. Since its passage various provisions have been implemented by the Consumer Product Safety Commission ("CPSC") that have the potential to affect virtually all importers of consumer products, manufacturers, distributors and retailers. As the CPSIA is far-reaching legislation, summarized below are recently implemented provisions that may have a particular effect on the business of importing a range of "consumer products," as it is broadly defined under the CPSIA. We then discuss these provisions in greater detail.

• Effective in 2008

- Certificates of Compliance must accompany U.S. import of consumer products
- Customs Inspection and three-year recordkeeping requirements for importers and manufacturers of consumer products subject to the CPSIA
- Potential for Increase in U.S. Customs bond amount, where CPSC in consultation with CBP, "recommends" a financial bond amount sufficient to cover the cost of destruction for any imported CPSIA-regulated product

• Effective as of February 10, 2009

- 600 parts per million lead limits in children's products, Section 101
- Prohibition of sale of any "children's toys" or "child care articles" containing more than 0.1 percent of specified phthalates, Section 108
- Public Comments due on March 25, 2009 regarding a working definition of "children's toys" or "child care articles" under Section 108

Key Provisions: Importer Certificates of Compliance, CPSIA, § 102(a)

Effective as of November 18, 2008, Certificates of Compliance ("Certificate") must accompany U.S. imports of consumer products manufactured outside the U.S. and domestically manufactured products. The U.S. importer is the sole entity that must issue the Certificate in the case of an imported product.

- **Availability:** A Certificate must be "available" to the CPSC for imported consumer products *no later than the time when the product or shipment is available for inspection in the United States.*
- **Accompany or Furnish:** The Certificates must "accompany" each shipment of products subject to certification requirements and be "furnished" to each distributor or retailer. A copy of the Certificate must also be "furnished" to the CPSC upon request.
- **Form:** Electronic or Paper Certificates are suitable provided they meet the statutory content and availability requirements.
- **Enforcement:** The CPSC warns that "importers should be aware that...failure to abide by the Certificate requirement will subject shipments to refusal of admission into the country and potential destruction" and seizure.
- **Contents:** CPSIA defines specific content and recordkeeping requirements for Certificates, including specific citation to each CPSC regulation to which the product is being certified, and any other similar rule, ban, standard or regulation under any other Act enforced by the Commission that is applicable.

Prohibition on Sale of Any Imported or Domestically-Produced "Children's Toy" or "Child Care Article" that Exceeds Recently Implemented Lead Limits

Effective as of February 10, 2009, the CPSIA permanently bans products primarily designed or intended for use by children 12 years of age or younger that contain more than 600 parts per million of lead.

Also effective as of February 10, 2009, is a permanent prohibition on the *sale* of any "children's toy or child care article" containing more than 0.1 percent of three identified phthalates, and "toys that can be placed in a child's mouth" or "child care articles" containing more

than 0.1 percent of the three additional phthalates on an interim basis. The CPSC is currently seeking Public Comment on the guidance it has provided regarding its approach for determining which consumer products constitute a "children's toy or child care article," making such article subject to the Section 108 requirements.

Of particular interest to importers is the CPSC draft guidance proposing that the ASTM F963-07 toy safety standard definition of "toy" should be used as the basis for the CPSIA definition under Section 108. If adopted, the ASTM definition of "toys" which would be subject to phthalate testing would exclude: bicycles; tricycles; sling shots and sharp-pointed darts; playground equipment; non-powder guns; kites; art materials, model kits, and hobby items in which the finished products is not primarily of play value; sporting goods, camping goods, athletic equipment, musical instruments, and furniture, except for toy versions of these; and powered models of aircraft, rockets, boats, and land vehicles. Additionally, regulation-size baseballs, basketballs, footballs, and soccer balls (even if designed or sized for use by children) are defined as "athletic equipment" and would be excluded from Section 108 requirements *if this guidance is implemented as final*. Public Comments are due on **March 25, 2009**.

The CPSC proposes that "general purpose balls" and "toy versions of athletic equipment" are "toys." Other examples of "toys" include: bath toys, inflatable pool toys, dolls, action figures, dress-up costumes, masks, balloons and novelty books (such as plastic books marketed as bath toys, or books that incorporate sounds). "Child care articles" considered squarely within the phthalate limits are those used to facilitate feeding, (e.g., infant bottles and cups). The CPSC is currently limiting its enforcement effort to "bath toys and other small, plastic toys primarily made of polyvinyl chloride (PVC) that are intended for young children and are designed to be put in the mouth."

Other Customs Considerations: Financial Responsibility

CPSIA, § 41, allocates authority to the CPSC to identify any imported consumer product regulated under the CPSIA, where the cost of destruction would normally exceed Customs bond amounts, and "recommend," in

consultation with CBP, a financial bond amount that is sufficient to cover the cost of *destruction* of such products.

The requirement coordinates with U.S. Customs procedures that require a financial bond be posted if imported goods are released while still subject to possible CBP or other federal regulation. Under the CPSIA, the required bond amount may be increased from an amount previously required under the Tariff Act of 1930 (19 U.S.C. §§ 1623, 1624) to an amount sufficient to cover the cost of destruction (or recall), such that if a retailer or distributor imports a product subject to the CPSIA and that product was found to be non-compliant, these costs would be covered under the posted bond.

The potential increase in Customs bond amounts does not yet cover domestically-manufactured consumer products. Upon enactment, the CPSIA commissioned a study to be completed in six months from August 2008 by the Comptroller General to determine "the feasibility of requiring the posting of an escrow, proof of insurance, or security sufficient in amount to cover" the cost of destruction or of the effective recall of a domestically-produced product. CPSIA, § 41(b).

How and When Will the CPSIA Affect my Business?

Whether it is the Certificate of Compliance requirement or the potential that your company's consumer product may be considered under the definition of a "toy" and subject to phthalate testing, the CPSIA has broad-reaching regulations that effect domestic manufacturers and U.S. importers both. As discussed, these provisions may even increase the financial exposure of a U.S. importer of consumer products. The CPSC continues to issue new final and draft guidance on these provisions.

To find out how your business will be affected in the coming year and how Venable may be able to assist you, contact Lindsay B. Meyer, lbmeyer@venable.com, or at 202.344.4829 or Carrie A. Kroll, cakroll@venable.com, or at 202.344.4574.

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