

Consumer Protection

E-ALERT

February 3, 2009

CPSC GRANTS ONE YEAR STAY OF SOME TESTING AND CERTIFICATION REQUIREMENTS

On January 30, 2009, the Consumer Product Safety Commission ("CPSC" or "Commission") voted unanimously (2-0) to issue a stay of enforcement for most *testing and certification* requirements¹ under the Consumer Product Safety Improvement Act of 2008 ("CPSIA").² The vote not only provides specific relief for domestic manufacturers and importers of products intended for use by children 12 years old and younger from the testing and certification requirements that go into effect on February 10, 2009, but also nominally stays certain testing and certification requirements applicable to products subject to rules, bans, standards, or regulations under any Act enforced by the Commission, such as the Federal Hazardous Substances Act ("FHSA") and Poison Prevention Packaging Act ("PPPA").³ Several new safety standards for children's products will take effect February 10, 2009 under the CPSIA: a limit on total lead content of "children's products"⁴ (600 parts per million); limits on phthalates in "children's toys"⁵ and "child care articles"⁶ (1000 parts per million); and the mandatory ASTM F963 toy standards.

The stay does not alter or postpone, however, the requirement that all products comply with applicable CPSC-enforced rules, bans, standards, or regulations. As a result, manufacturers and importers still must ensure that their products will comply with the upcoming lead and phthalate limits, mandatory toy standards, and all other applicable standards or bans. The stay is effective February 10, 2009 and can only be lifted by affirmative vote of the Commission. The Commission will consider whether to terminate the stay on

¹ Draft Federal Register notice, Notice of Stay of Testing and Certification Requirements, <http://www.cpsc.gov/library/foia/foia09/brief/stayenforce.pdf> (Jan. 29, 2009) ("Federal Register notice"); CPSC Press Release, CPSC Grants One Year Stay of Testing and Certification Requirements for Certain Products, <http://www.cpsc.gov/cpscpub/prerel/prhtml09/09115.html> (Jan. 30, 2009).

² P.L. 110-314, 122 Stat. 3016 (Aug. 14, 2008).

³ This view is supported by footnote 6 of the Federal Register notice. That footnote states that the CPSC has yet to address numerous questions and issues related to general certification requirements for "all consumer product safety rules and similar rules which went into effect on November 12, 2008. ...*This stay provides relief from those certification requirements as well...*" <http://www.cpsc.gov/library/foia/foia09/brief/stayenforce.pdf> (Jan. 29, 2009) (emphasis added). Nonetheless, Commissioner Moore has expressed the expectation that companies already certifying or capable of certifying continue to do so. *See* note 18 *infra*.

⁴ CPSIA § 102(a)(2); 15 U.S.C. § 2063(a)(2). The CPSIA defines a children's product as a "consumer product designed or intended primarily for children 12 years of age or younger." CPSIA § 235(a); 15 U.S.C. § 2052(a)(16). The CPSA, in turn, defines a "consumer product" as "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise," with limited express exceptions. 15 U.S.C. § 2052(a)(1).

⁵ The term "children's toy" means a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays. CPSIA § 108(e)(1)(B); 15 U.S.C. § 2057c(e)(1)(B).

⁶ The term "child care article" means 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. CPSIA § 108(e)(1)(C); 15 U.S.C. § 2057c(e)(1)(C).

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Background on Certification and Third Party Testing Requirements

The CPSIA, which was signed into law on August 14, 2008, imposes a general conformity certification requirement on domestic manufacturers (for products manufactured in the United States) and importers (for products manufactured outside of the United States) of CPSC-regulated products.⁷ Such manufacturers and importers must certify, based on a "reasonable testing program," that the products they manufacture or import comply with the CPSC-enforced rules, bans, standards, and regulations applicable to those products. The certification requirement applies to imported and domestically manufactured products that are manufactured on or after November 12, 2008.⁸

In addition, the CPSIA mandates that testing performed by a CPSC-accredited third party eventually must serve as the basis of a certification for a "children's product." The CPSIA sets forth the deadlines by which third party testing is required for demonstrating compliance with specific standards and with regard to specific types of products.⁹ Certain of these third party testing-based certification requirements have already taken effect or will become effective shortly. The CPSC has issued requirements for acceptance of accreditation of third party testing laboratories to test for: (i) lead paint; (ii) full-size and non-full size cribs and pacifiers; (iii) small parts; and (iv) metal components of children's metal jewelry.

The Enforcement Stay

The CPSC staff-drafted Federal Register notice that was unanimously adopted by the Commission on January 30, 2009, states that the enforcement stay pertains to certain of the requirements in paragraphs 14(a), (1), (2), and (3) of the CPSIA-amended Consumer Product Safety Act ("CPA"). The CPSC's discussion of the stay in the draft notice and a CPSC press release has focused on the fact that the Commission is staying enforcement of the testing and certification requirements for the requirements that take effect on February 10, 2009: (i) the initial 600 ppm limit on the lead content of children's products (that will become more stringent over time);¹⁰ (ii) the 1000 ppm limit on phthalates in children's toys and child care articles;¹¹ and (iii) the ASTM F963 toy standards.¹² Nevertheless, the language of the stay itself indicates that the stay applies to all certification requirements not specifically retained by the CPSC.¹³ It thus applies to testing for and certifying to compliance with rules, bans, standards, and regulations under the FHSIA and the PPPA, among other Acts enforced by the CPSC.

⁷ CPSIA § 102(a)(1); 15 U.S.C. § 2063(a)(1). Although the statute also imposes the certification requirement on private labelers and foreign manufacturers, the CPSC issued a regulation in November 2008 that limited the requirement to domestic manufacturers and importers. 16 C.F.R. § 1110.7(a) & (b).

⁸ See Covington & Burling LLP Consumer Protection E-Alert, "[CPSC Issues Rule Relieving Foreign Manufacturers And Private Labelers From Certification Obligation And Allowing Electronic Certifications Under The Consumer Product Safety Improvement Act Of 2008.](#)" Nov. 18, 2008.

⁹ CPSIA § 102(a)(3); 15 U.S.C. § 2063(a)(3).

¹⁰ CPSIA § 101(a)(2); 15 U.S.C. § 1278a(a)(2).

¹¹ CPSIA § 108(a), (b)(1); 15 U.S.C. § 2057c(a), (b)(1).

¹² CPSIA § 106(a); 15 U.S.C. § 2056b(a). The CPSC notes that ASTM either has issued or intends to issue a new version of the F963 standard.

¹³ See *supra* note 3.

It appears that the stay does *not* relieve domestic manufacturers and importers from the requirement to certify applicable products for compliance with the following requirements:¹⁴

- children's product safety standards for which the CPSC has already issued requirements for acceptance of accreditation of third party testing laboratories to test for them:
 - lead paint (mandatory third party testing effective for products manufactured after December 21, 2008);
 - full-size and non-full size cribs and pacifiers (mandatory third party testing effective for products manufactured after January 20, 2009);
 - small parts (mandatory third party testing effective for products manufactured after February 15, 2009);
 - metal components of children's metal jewelry (mandatory third party testing effective for products manufactured after March 23, 2009);
- those standards for which testing and certification was required by subsection 14(a) of the CPSA prior to enactment of the CPSIA (e.g., certain standards concerning automatic residential garage door openers, bike helmets, candles with metal core wicks, lawnmowers, lighters, mattresses, and swimming pool slides);
- any and all certifications expressly required by CPSC regulations;
- any voluntary guarantees provided for in the Flammable Fabrics Act ("FFA") or otherwise (to the extent a guarantor wishes to issue one);
- pool drain cover requirements of the Virginia Graeme Baker Pool & Spa Act; and
- the certifications of compliance required for ATVs manufactured after April 13, 2009.

In the draft Federal Register notice, the CPSC emphasizes that "the stay only applies to **testing and certification**, not to the sale of products that do not comply with applicable mandatory safety requirements. **All children's products must comply with all applicable children's product safety rules, including, but not limited to, the upcoming limits on lead and phthalates in the CPSIA.**"¹⁵

In explaining its rationale for instituting the stay, the CPSC noted the prevalence of "substantial confusion" as to the applicability of CPSC-enforced provisions to various products, the types of testing necessary to support certification, and the source and format of certificates. The Commission also noted the receipt of "innumerable inquiries" seeking relief from the expense of testing children's products that are inherently lead-free or that may be exempted from testing by pending or future CPSC rulemaking.

The CPSC also highlighted the fact that the stay will allow the Commission more time to engage in crucial rulemaking that will provide more clear guidance for industries that will ultimately be affected by or exempted from CPSIA requirements. Currently, the CPSC is engaged in four rulemakings to address specific issues relating to lead in children's products: (i) determinations that certain materials inherently will not exceed the CPSIA lead limit; (ii) exemption of certain electronic devices from otherwise applicable lead limits in children's products; (iii) guidance on determining inaccessibility of components of children's products containing lead; and (iv) procedures for seeking determinations as to lead content of materials or products and exclusions from otherwise applicable limits on

¹⁴ The lists of exceptions to the stay that are provided in the Federal Register notice and the CPSC Press Release are somewhat different.

¹⁵ Federal Register notice, at 14, <http://www.cpsc.gov/library/foia/foia09/brief/stayenforce.pdf> (Jan. 29, 2009) (emphasis added). According to the CPSC, the lead content limit applies to applicable products *sold* on or after February 10, 2009, whereas the phthalate limits apply to applicable products *manufactured* on or after February 10, 2009.

lead content of children's products. The proposed rules in each case present complex scientific, technical, and procedural issues that the Commission believes would not be resolved by the February 10, 2009 effective date for multiple CPSIA requirements.

In the notice, the CPSC also cited the impact that compliance with testing requirements would have on the numerous small businesses that predominate the landscape of industries affected by the CPSIA, such as toy makers and apparel manufacturers. For example, because the CPSC has not yet released accreditation guidelines for third party laboratories to test for the ASTM F963 toy standards, the Commission concluded that to enforce the requirement for certification to the standards that take effect on February 10, 2009 would disadvantage small businesses and "could result in these businesses paying for testing twice if the accreditation of the laboratory they choose for testing is not later accepted by the Commission."¹⁶

The stay of enforcement will therefore provide some temporary, limited relief from CPSC enforcement of the CPSIA testing and certification requirements. The stay will also give the CPSC more time to finalize proposed rules that could eventually relieve certain products and materials from lead testing, and to issue more guidance on when testing is required and how it should be conducted. As the CPSC has noted, the stay "puts in place a limited 'time-out' so that the Commission and the Congress can address the issues with the law that have become so painfully apparent."¹⁷

Although the stay indicates that the CPSC has decided to formally exercise limited enforcement discretion, compliance with the testing and certification requirements -- *even for those requirements that are subject to the stay* -- is still required as a legal matter. The CPSC is simply stating that it will not seek to enforce those particular requirements for a year, but it still encourages compliance with those testing and certification requirements that are subject to the stay.¹⁸ In addition, State Attorneys General may still choose to bring suit to enforce the requirements of the CPSIA.¹⁹

Congressional Request for CPSC Action

On January 16, 2009, Representative Henry Waxman, Chairman of the Committee on Energy and Commerce of the U.S. House of Representatives, and three other Chairmen of Congressional Committees sent a letter to the CPSC concerning the requirements that take effect on February 10, 2009. The letter urged the CPSC to quickly resolve several pressing concerns before the effective date of the new lead limits, including by: considering making a determination that children's books with no unusual components and children's apparel that consists entirely of dyed or undyed fabric would not exceed the CPSIA's lead limits and would therefore not be subject to the requirement for third party testing; engaging in dialogue with resellers of children's products to ensure compliance with the lead limits while avoiding unnecessary testing of low-risk products; determining whether product component testing can be a sufficient basis for certification of products based on third

¹⁶ *Id.* at 10.

¹⁷ Statement of Acting Chairman Nancy Nord on the Stay of Enforcement of Certain Testing and Certification Requirements of the Consumer Product Safety Improvement Act of 2008, at 1, <http://www.cpsc.gov/cpsc/pub/prerel/prhtml09/09115nord.pdf> (Jan. 30, 2009).

¹⁸ See Statement of the Honorable Thomas H. Moore on the Stay of Enforcement of Certain of the Testing and Certification Requirements of the Consumer Product Safety Improvement Act of 2008, at 3, <http://www.cpsc.gov/cpsc/pub/prerel/prhtml09/09115moore.pdf> (Jan. 30, 2009) ("I would expect the companies that can do testing and certification, and who have positioned themselves to comply with the law, will do so regardless of the stay. They should not use this stay as an excuse to delay what they are already doing or have planned to do.")

¹⁹ See CPSC Press Release, <http://www.cpsc.gov/cpsc/pub/prerel/prhtml09/09115.html> (Jan. 30, 2009) ("The Commission trusts that State Attorneys General will respect the Commission's judgment that it is necessary to stay certain testing and certification requirements and will focus their own enforcement efforts on other provisions of the law, e.g. the sale of recalled products.")

party testing; and issuing guidance for small businesses concerning the new CPSIA requirements.

The Commission responded to this letter on January 30, 2009. The Commission explained that as it seeks to implement the CPSIA in a fair and efficient manner it is finding "problems and issues that were not discussed, and, presumably, not contemplated, by the Congress," and noted that "[t]he action taken today provides breathing space to get in place some of the rules needed for implementation, but it should not be viewed as a full solution to the many problems that have been raised."²⁰

Covington & Burling LLP has extensive experience with CPSC requirements for consumer products, and has been closely monitoring the implementation of the CPSIA. The firm's CPSC experts, identified below, would be happy to assist with any questions regarding the application of the Act to a company's products.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our food & drug practice group:

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Ms. Jijon is not yet a member of the District of Columbia bar. She is supervised by principals of the firm.

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²⁰ Statement of Acting Chairman Nancy Nord on the Stay of Enforcement of Certain of the Testing and Certification Requirements of the Consumer Product Safety Improvement Act of 2008, at 1,5, <http://www.cpsc.gov/cpsc/pub/prere/phtml09/09115nord.pdf> (Jan. 30, 2009).