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## Not-So-Smooth Sailing Under CPSIA

Law360, New York (March 27, 2009) -- In August of 2008, Congress passed the Consumer Product Safety Improvement Act<sup>[1]</sup> ("CPSIA" or "Act") in an effort to protect America's children from lead and phthalates.<sup>[2]</sup>

Prompted by the "toxic toy" scare in 2007 and 2008 where Mattel and other large manufacturers were forced to recall toys due to high lead content,<sup>[3]</sup> Congress' quick response served as a recognition that there was a gap between the public need for and the protections provided by the 1972 Consumer Product Safety Act.

Determining that more stringent laws were required, legislation was swiftly enacted to protect children from the risks associated with products containing lead and phthalates.

While such legislation initially received favorable consumer support, the Consumer Product Safety Commission ("CPSC") is now facing criticism from a broad range of legislators and constituents, leaving far more questions and concerns than applause for the laudable goal which initially heralded the legislation.

Since its enactment, the commission has struggled to interpret the CPSIA's scope, application, and time frame for implementation. Following an onslaught of demands for clarification, the commission stayed the third party testing and certification requirements imposed under the CPSIA for one year.<sup>[4]</sup>

Concerns about the wide-ranging impact of the CPSIA have been pointedly raised by members of Congress.

In response to a March 4, 2009, letter from The Honorable John D. Dingell, D-Mich., chair of the House Energy and Commerce Committee, the acting chair of the commission, Nancy A. Nord, provided information related to the scope of the law, CPSC's limited resources, the delayed implementation timeline and its effect on the agency's ability to effectively enforce

the CSPIA.[5]

As frankly disclosed in the March 20, 2009 Memo attached to Chairman Nord's responsive letter, Rep. Dingell was advised that the lack of initial funding and Agency obligations to implement other safety laws "has severely overstretched the agency staff and has begun resulting in delays in implementation that will continue until we are able to fully hire and otherwise maximize the resources that have just been provided to the agency for the second half of fiscal year 2009." [6]

While funding has now been approved by Congress, it was acknowledged that the six month delay would cause continued deferrals.

In sum, "...each of the various initiatives in the Act — whether it be the lead and phthalates limits, the testing and certification regime, the import provisions, or the new database and information technology upgrades — will require significantly more time to implement than anyone originally anticipated." [7]

## **Who is Affected by CPSIA and What Does That Mean?**

The commission acknowledges that the CPSIA is a "sweeping new law that impacts a broad spectrum of our economy." [8]

The new law indiscriminately affects anyone who makes products primarily for children who are 12 years of age or younger, from large manufacturers to small producers like the stay-at-home mom who makes children's clothes as a side business and the artisan who designs and sells hand-made dolls for children. [9]

In sum, anyone who makes, produces or assembles a product is considered to be a "manufacturer." [10] If products are intended primarily for children, they are governed by the Act.

Pursuant to the CPSIA, all "manufacturers" must test their products to ensure that they contain less than the minimum ppm levels of lead paint or content, and less than .1 percent of certain phthalates. [11]

In order to meet these requirements, materials identical to those used to fashion the products must be tested by an accredited testing lab.

To ensure compliance, manufacturers must develop quality assurance programs to screen

raw materials and component parts and then test the final product to ensure that the components are within the acceptable limits before the products are completed and sent to the third-party testing facilities.[12]

Even though the CPSC has stated that it may narrow the scope of manufacturers to whom the Act applies,[13] and may stay testing and certification requirements for the immediate future until the full scope is clarified,[14] compliance with the CPSIA is required now.[15]

Thus, all manufacturers of products intended for use by children — from metal jewelry, cribs, pacifiers, small parts for toys and books to baby bouncers, walkers, bicycles and jumpers — must comply with these laws. No question about it: the Act imposes an incredible burden on small and large businesses alike.

## **Commission Concerns And Negative Industry Impact**

Since the enactment of the CPSIA, the CPSC has been inundated with scores of inquiries from manufacturers seeking clarification about the scope and application of the Act.

In Chairman Nord's March 20, 2009 letter to Representative Dingell, she noted that:

"While the CPSIA mandates more than 40 separate action items for the Commission to undertake, that number understates the agency workload that results from each of those mandates.

"For example, there is no requirement to adopt an interpretative rule defining 'child care article' and 'toy' under section 108. Yet the commission has been inundated with thousands of product specific inquires about what type of products fall within those definitions, from shoes to sporting goods to electronic games.

"An interpretive rule is our recommended way to address this issue and adds to our rulemaking burden." [16]

This represents one of many enforcement issues the commission is now facing. In the absence of statutory clarify, manufacturers have been left to muddle through the Herculean task of achieving CPSIA compliance.

The commission has suggested increasing its budget and postponing all third party testing implementation deadlines in order to provide sufficient time to fully analyze the Act.

The other CPSC commissioner, Thomas H. Moore, although much more optimistic about the

commission's current ability to enforce the new regulations, has acknowledged that the agency needs to interpret the CPSIA and provide feedback to Congress before additional modifications to the Act can be promulgated.[17]

Both the commission and Congress are struggling to determine the fall out from the new law.

In response to Rep. Dingell's inquiry to the CPSC about the availability of quantitative data concerning the negative financial impact of the Act, Chairman Nord responded that while the Commission has no independent data, it has received reports from a variety of industries regarding the devastating fiscal impact of the CPSIA in an already dire economy.

For example, the Motorcycle Industry Council reported in February 2009 that the new lead rules would result in an annual impact of \$1 billion on their industry.[18]

Similarly, the American Chamber of Commerce in Hong Kong has estimated that the impact on their manufacturer members of children's apparel will run in excess of \$300 million annually.[19]

Further, the commission estimates that the cost for third-party testing of products for lead and phthalates will range from several hundred dollars to several thousand dollars per product.

In a recent public meeting, industry representatives stated that testing of the 233 various component parts of a bicycle, valued at \$50 per component (low end of testing cost) would cost one member approximately \$14,000 to test a single bicycle![20]

The testing costs for phthalates appear to vary widely from market to market. In a recent CPSC public meeting on phthalates, one participant stated that it received quotes for product testing ranging from \$7,000 in Asia to \$22,000 in the United States.[21]

Since these tests are destructive, manufacturers also bear the expense of lost material, labor, and overhead associated with production of the products tested.[22]

Economies of scale provide an advantage to larger volume manufacturers as compared to their smaller volume counterparts, because they are better able to absorb these testing costs over a larger production volume. The increased costs, however, will no doubt be passed on to consumers across the board.

## **Anticipated Changes To Come**

Congress and the commission are currently addressing the over breadth concerns regarding the imposition of identical phthalate and lead restrictions for the entire 12 and under age range, and whether different content limitations and exemptions should be utilized for products intended for use by children of different ages.

Faced with a barrage of concerns from large and small manufacturers, retailers and other business owners, numerous other modifications to the CPSIA are now being considered.

In the Memorandum provided to Rep. Dingell with her March 20, 2009, letter, Chairman Nord has made a series of recommended revisions to the Act, including:

- Narrowing the definition of "children's products" because the scope of products covered by the new regulation and the amount of inventory implicated is well beyond what was originally contemplated (i.e., in addition to toys, durable infant and toddler products, the Act applies to books, bicycles, clothing, youth-sized motorized off-road vehicles, school supplies and Scout equipment and accessories, etc.).[23]

- Creating exemptions for small businesses and home crafters.[24]

- Affording the commission more discretion to move testing deadlines for a given product or class of products in certain circumstances (i.e., a deadline where the risk of exposure is exceedingly small, such as bike tire valves) to allow manufacturers time to reengineer products with alternatives that meet new lead limits.[25]

- Enacting legislation to allow for the application of the new lead and phthalates limits prospectively in order to mitigate the negative impact on inventory existing prior to enactment of the Act.

This would allow for a more flexible exception process, thereby affording the commission with discretion to balance the risks associated with product usage against the burden and cost of testing and certification.[26]

- Allowing the commission the discretion to determine what children's products are subject to testing and certification, and which should be exempt.[27]

- Requiring manufacturers to meet statutory limits for products produced after the effective date of the CPSIA, but allow retailers and resellers to continue to sell the previously manufactured items (so long as products have not been previously recalled).[28]

- Affording greater discretion to the commission to grant exclusions from the lead or phthalate limits, and modify the exclusion criterion to allow de minimis levels of absorption.

## **Conclusion**

In its hasty but well-intentioned enactment of the CPSIA, Congress unfortunately created more questions than answers about the statutory scheme necessary to protect children from dangerous materials.

Over the coming months, it is anticipated that the commission and Congress will tackle these issues and advance new and more balanced amendments to the Act.

--By Karen Shichman Crawford (pictured) and Heather Guerena, Duane Morris LLP

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*The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*

[1] 15 U.S.C. § 2051 et seq.

[2] Public Law No: 110-314; H.R. 4040--110th Congress (2007): Consumer Product Safety Improvement Act of 2008 [[www.govtrack.us/congress/bill.xpd?bill=h110-4040](http://www.govtrack.us/congress/bill.xpd?bill=h110-4040)].

[3] Press Release, Northwestern Children's Business Alliance, Position Brief on Consumer Product Safety Improvement Act (Feb. 9, 2009) [[nwchildrensbusinessalliance.org/index.php?option=com\\_content&view=article&id=4:nwbc-cpsia-position&catid=1:document-cpsia](http://nwchildrensbusinessalliance.org/index.php?option=com_content&view=article&id=4:nwbc-cpsia-position&catid=1:document-cpsia)], ¶ 1.0.

[4] Press Release, Consumer Product Safety Commission, CPSC Grants One Year Stay of Testing and Certification Requirements for Certain Products (January 30, 2009) [[www.cpsc.gov/cpsc/pub/prerel/prhtml09/09115.html](http://www.cpsc.gov/cpsc/pub/prerel/prhtml09/09115.html)].

[5] Letter from Nancy A Nord, Acting Chairman, Consumer Product Safety Commission (March 20, 2009) [<http://www.cpsc.gov/about/cpsia/dingell032009.pdf>].

[6] *Id.* at p. 2.

[7] *Id.* at p.3.

[8] Memorandum from the Consumer Product Safety Commission, *Guide to the Consumer Product Safety Improvement Act (CPSIA) for Small Businesses, Resellers, Crafters and Charities* (March 2, 2009) [[www.cpsc.gov/about/cpsia/smbus/cpsiasbguide.pdf](http://www.cpsc.gov/about/cpsia/smbus/cpsiasbguide.pdf)], p. 1-3.

[9] *Id.*

[10] *Id.*

[11] *Id.* at p. 4.

[12] *Id.* at p. 5.

[13] Letter from Nancy A Nord, Acting Chairman, Consumer Product Safety Commission (March 20, 2009) [[www.cpsc.gov/about/cpsia/dingell032009.pdf](http://www.cpsc.gov/about/cpsia/dingell032009.pdf)] p. 3.

[14] Press Release, Consumer Product Safety Commission, *CPSC Grants One Year Stay of Testing and Certification Requirements for Certain Products* (Jan. 30, 2009) [[www.cpsc.gov/cpscpub/prerel/prhtml09/09115.html](http://www.cpsc.gov/cpscpub/prerel/prhtml09/09115.html)]

[15] Memorandum from the Consumer Product Safety Commission, *Guide to the Consumer Product Safety Improvement Act (CPSIA) for Small Businesses, Resellers, Crafters and Charities* (March 2, 2009) [[www.cpsc.gov/about/cpsia/smbus/cpsiasbguide.pdf](http://www.cpsc.gov/about/cpsia/smbus/cpsiasbguide.pdf)], p. 6.

[16] Letter from Nancy A Nord, Acting Chairman, Consumer Product Safety Commission (March 20, 2009) [[www.cpsc.gov/about/cpsia/dingell032009.pdf](http://www.cpsc.gov/about/cpsia/dingell032009.pdf)] p. 3.

[17] Letter from Thomas H. Moore, Commissioner, Consumer Product Safety Commission (March 20, 2009) [[www.cpsc.gov/about/cpsia/dingell032009a.pdf](http://www.cpsc.gov/about/cpsia/dingell032009a.pdf)] p. 1-2.

[18] Letter from Nancy A Nord, Acting Chairman, Consumer Product Safety Commission (March 20, 2009) [[www.cpsc.gov/about/cpsia/dingell032009.pdf](http://www.cpsc.gov/about/cpsia/dingell032009.pdf)] p. \_\_\_ .

[19] *Id.* at p. 6-7.

[20] *Id.* at p. 7.

[21] *Id.*

[22] *Id.*

[23] *Id.* at p. 6-7.

*[24] Id. at p. 3.*

*[25] Id. at p. 6.*

*[26] Id. at p. 10.*

*[27] Id. at p. 10.*

*[28] Id at p. 11.*