

## CPSC Action on New Product Safety Legislation Continues:

### Some Relief for Compliance with Certification, Advertising, and Phthalate Requirements

*Since the enactment of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”) just over three months ago, businesses and other affected entities have needed to act quickly to determine how the sweeping federal legislation affects their obligations. In response to widespread concern about the practical application of the statute – and in some cases, as required by the statute itself – the Consumer Product Safety Commission (“CPSC” or “Commission”) has issued a flurry of documents including proposed and final rules, requests for comments, opinion letters, and other guidance documents. For example, just in the last week, the Commission has issued at least four documents of widespread significance, including (1) a final rule on certificates of conformity; (2) a final rule on the print advertising of toys and games containing small parts; (3) an opinion letter regarding the retroactive enforcement of phthalates requirements; and (4) a request for comments on civil penalty factors.*

#### **CERTIFICATES OF CONFORMITY**

One of the most sweeping provisions of the CPSIA – which took effect November 12, 2008 – states that manufacturers, importers, and private labelers of consumer products subject to any standards enforced by CPSC and imported or distributed in U.S. commerce must issue certificates of conformity to accompany all shipments of such products and to be furnished to each distributor or retailer of the product. (The CPSIA certification requirements are discussed in the previous October 20, 2008 Kelley Drye advisory titled “New Requirements To Certify Certain Consumer Products Become Effective On November 12” and found [here](#).) On November 10, 2008, the Commission issued a Final Rule addressing several issues relating to the certification requirements, providing more flexibility in some areas and temporarily limiting their application in others. The rule was subsequently published in the Federal Register and took effect on November 18, 2008.<sup>1</sup> In the preamble to the rule, the Commission noted that the “staff has been deluged with hundreds and hundreds of requests to evaluate specific products” and that it was concerned by the apparent confusion among companies, because “[m]anufacturers and retailers have always been required to know which rules apply to their products and to assure that their products comply with those rules.” Nevertheless, in light of the ambiguities surrounding the requirements and the CPSC’s limited resources, the Commission recognized the need to streamline the certification requirements, at least during the initial implementation phase. More specifically, the rule states

<sup>1</sup> See Certificates of Compliance, 73 Fed. Reg. 68,328 (Nov. 18, 2008).

that for *imported* products, only the *importer* must issue the certificate and that, for *domestically-manufactured* products, only the *domestic* manufacturer must issue the certificate. In addition, the rule provides more detail regarding the actual content of certificates, including the specificity of information required for recording the date and location of manufacture and testing. The rule also recommends that issuers maintain test records supporting certification for at least three years.

The Commission also stated in its Final Rule that an electronic certificate satisfies the “accompany” requirement if the certificate is identified by a unique identifier and can be accessed via a World Wide Web URL or other electronic means, provided that the URL or other electronic means and the unique identifier are created in advance and are immediately available, along with access to the electronic certificate itself, to the CPSC or Customs authorities when the product or shipment is available for inspection in the United States. Similarly, an electronic certificate satisfies the “furnish” requirement if distributors and retailers of the product are provided “a reasonable means” to access the certificate. Finally, the Commission stated that while it “expects every company to make best efforts to comply promptly with the new general certificate requirements, the Commission’s resource limitations under the continuing resolution will force it to focus more on a product’s compliance with [the CPSC’s] safety rules.”

### SMALL PARTS ADVERTISING

In addition, on November 17, 2008, the CPSC published a Final Rule on print advertising for toys and games containing small parts.<sup>2</sup> More specifically, the rule addresses catalogue and other print materials that provide a direct means for purchasing products subject to the existing small parts warning requirements (*i.e.*, a

customer can call a phone number listed in the advertisement to order the product, or send an order form from the catalogue). Under the CPSIA, such advertisements, in addition to Internet advertisements, must include the appropriate small parts warning displayed on or immediately adjacent to the advertisement. The rule, which applies solely to print materials (not Internet advertisements), provides guidance on the precise content and appearance of the warnings as well as explaining advertisers’ various options to use abbreviated warnings accompanied by full cautionary statements or, in some instances, to combine warnings. The rule also provides for a 180-day grace period after the statutory date of February 10, 2009, bringing the new effective date to August 9, 2009.

### NO RETROACTIVITY OF PHTHALATES REQUIREMENTS

The same day, the CPSC General Counsel Cheryl Falvey responded by letter to an inquiry regarding the retroactive application of the CPSIA’s requirements for phthalates.<sup>3</sup> The General Counsel highlighted the differences between how Congress treated lead limits, which are applicable retroactively to products in inventory, and limits on phthalates. Specifically, the General Counsel noted that Congress had deemed the limit on lead to be a ban under the Federal Hazardous Substances Act, while making the limit on phthalates a consumer product safety standard under the Consumer Product Safety Act. Based on the provisions of those statutes regarding retroactivity (or lack thereof) and existing case law, she determined that the requirements for phthalates would apply only to those products *manufactured after* the effective date of the new standard – February 10, 2009 – and could not be applied retroactively to products already in inventory. California

---

<sup>2</sup> See Labeling Requirement for Toy and Game Advertisements; Final Rule, 73 Fed. Reg. 67,730 (Nov. 17, 2008) (to be codified at 16 C.F.R. pt. 1500).

<sup>3</sup> See Letter from Cheryl A. Falvey, General Counsel, Consumer Product Safety Commission, to Georgia C. Ravitz, Esq., Scott A. Cohn, Esq., Arent Fox LLP (Nov. 17, 2008) <http://www.cpsc.gov/ABOUT/Cpsia/cpsia.html>.

Senator Barbara Boxer, co-sponsor of the phthalates provision, has since sent a letter to the CPSC General Counsel asking for a withdrawal of the opinion because the interpretation is at odds with the Congressional intent, which was to make the phthalates requirements retroactive.

### **REQUEST FOR COMMENT ON CIVIL PENALTY FACTORS**

Also on November 17, the CPSC issued a request for comments regarding its interpretation of the criteria to be considered in determining the amount of civil penalties.<sup>4</sup> Specifically, the Commission has requested: (1) information the Commission should consider under each factor; (2) information about what other factors would be appropriate for consideration; (3) comments on whether the Commission should develop a formula or matrix to weigh the factors and what criteria it should use in any weighting formula or matrix; and (4) information the Commission should consider in determining how to mitigate the adverse economic impact of a particular penalty on a small business. Comments are due by December 18, 2008.

### **KELLEY DRYE & WARREN LLP**

Kelley Drye & Warren's Consumer Product Safety Practice Group is experienced in providing advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary, we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies.

**For more information about this Client Advisory, please contact:**

**CHRISTIE L. GRYMES**

(202) 342-8633

[cgrymes@kelleydrye.com](mailto:cgrymes@kelleydrye.com)

**JENNIFER NGAI**

(202) 342-8866

[jngai@kelleydrye.com](mailto:jngai@kelleydrye.com)

---

<sup>4</sup> See Request for Comment on Civil Penalty Factors, <http://www.cpsc.gov/about/cpsia/civilpenalties.pdf>.