

CPSC Issues Stay Of Enforcement For Certain Testing & Certification Requirements

Due primarily to the overwhelming number of comments and questions received, the Consumer Product Safety Commission (“CPSC” or “the Commission”) has issued a one-year stay of enforcement for the testing and certification requirements for lead, phthalates, and mandatory toy standards for manufacturers and importers of children’s products under the Consumer Product Safety Improvement Act (“CPSIA”). The one-year stay postpones these specific testing and certification requirements and is intended to give the Commission and affected businesses temporary relief while the Commission finalizes four proposed rules that could exempt certain products from testing and issues more guidance on when and how testing should be conducted. The Commission has acknowledged that the lack of uniform testing requirements, as well as laboratories accredited by the Commission to do such testing, could cause compliance to be extremely burdensome for small businesses.

As described below in more detail, the stay has significant limitations that companies must consider when evaluating how to proceed with CPSIA compliance efforts.

SCOPE OF THE STAY OF ENFORCEMENT

The stay of enforcement provides manufacturers and importers of children’s products with limited relief from the testing and certification requirements for the lead, phthalates, and mandatory toy standards scheduled to go

into effect February 10, 2009. Manufacturers and importers will not need to test or certify to these new requirements, but will *still be required to comply with them*. This means that, by February 10, 2009, children’s products must contain no more than 600 ppm lead by weight for any part of the product, and children’s toys and child care articles must contain no more than 1000 ppm of certain phthalates. The stay will remain in effect until February 10, 2010, at which time the Commission will vote to terminate the stay.

PROVISIONS NOT COVERED BY THE STAY

The stay does not apply to the underlying content requirements established by the CPSIA (e.g., the 600 ppm limit for lead content and 1000 ppm limit for phthalates), and products will still need to meet these requirements during the stay. In addition, the stay does not apply to the following requirements:

- Third-party testing and certification requirements for manufacturers and importers of certain children’s products subject to:
 - The ban on lead in paint and other surface coatings effective for products manufactured after December 21, 2008;
 - The standards for full-size and non-full-size cribs and pacifiers effective for products manufactured after January 20, 2009;
 - The ban on small parts effective for products manufactured after February 15, 2009; and
 - The limits on the lead content of metal components of children’s metal jewelry effective for products manufactured after March 23, 2009.

- Certification requirements applicable to ATVs manufactured after April 23, 2009.
- Pre-CPSIA testing and certification requirements, including requirements for automatic residential garage door openers, bicycle helmets, candles with metal core wicks, lawnmowers, lighters, mattresses, and swimming pool slides.
- Pool drain cover requirements of the Virginia Graeme Baker Pool & Spa Safety Act.

CONCLUSION

While the stay of enforcement provides some temporary relief, companies must ensure that their products still conform with applicable safety standards for children's products, including the lead and phthalates standards under the CPSIA. For example, during the stay, products not in compliance with the lead content and phthalates requirements still will be deemed "banned hazardous substances." In addition, state attorneys general will continue to have the statutory authority to enforce the testing and certification requirements under the CPSIA, although the Commission has encouraged them to continue to focus enforcement efforts on other provisions of the law, like the sale of recalled products.

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.

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