

CPSC ACTS ON LEAD CONTENT ISSUES WITH EFFECTIVE DATE IMMINENT

On February 5 and 6, 2009, the US Consumer Product Safety Commission (CPSC) voted unanimously to take three significant actions regarding the Consumer Product Safety Improvement Act (CPSIA) requirement that no children's product containing more than 600 parts per million (ppm) total lead in any part may be sold on or after February 10, 2009:

- A. The Commission denied an industry association request for a stay of the February 10 effective date of the lead content limit (<http://cpsc.gov/library/foia/ballot/ballot09/nam.pdf>);
- B. The Commission adopted a "Statement of Commission Enforcement Policy on Section 101 Lead Limits" (<http://cpsc.gov/library/foia/ballot/ballot09/101lead.pdf>); (<http://cpsc.gov/library/foia/foia09/brief/101lead.pdf>); and
- C. The Commission withdrew its January 14, 2009 proposed rulemaking concerning exemptions for certain electronic devices for which it is not technologically feasible to meet the CPSIA lead limits, and announced an interim final rule on the same matter (<http://cpsc.gov/library/foia/ballot/ballot09/electronics.pdf>); (<http://www.cpsc.gov/library/foia/foia09/brief/leadwithdrawal.pdf>).

These actions are summarized below.

BACKGROUND AND SUMMARY

The CPSIA establishes new lead limits for children's products, banning as a hazardous substance any children's product (i.e., any consumer product designed or intended primarily for children 12 years of age or younger) that exceeds the following limits:

- 600 ppm for any part of a children's product, effective 180 days after enactment (February 10, 2009);
- 300 ppm for any part of a children's product, effective one year after enactment (August 14, 2009); and
- 100 ppm for any part of a children's product, effective three years after enactment (August 14, 2011) (unless determined not technologically feasible by CPSC).

CPSC's General Counsel has opined that the lead content limits apply to inventory. In other words, starting February 10, no children's products containing more than 600 ppm in any part may be imported, distributed, or sold, regardless of when they were manufactured.

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CPSC's most recent actions with respect to the lead limits are summarized below.

A. Denial of Stay

On February 5, the Commission denied a request for a stay of the February 10 effective date of the lead content limit made by a coalition of manufacturers led by the National Association of Manufacturers. In their signing statements, Acting Chairman Nord and Commissioner Moore both stated that the Commission did not have the power to stay the effective date of the congressionally imposed ban. Commissioner Moore noted that while Congress gave CPSC the authority to make rules regarding exclusions and exemptions, the CPSIA also provides that the effective dates of the limits on lead content shall not be delayed while such rulemakings are pending. Thus, it appears that, absent action by Congress, the February 10 effective date will hold.

B. Statement of Commission Enforcement Policy on Section 101 Lead Limits

On February 6, CPSC announced the following policy regarding lead content limits:

1. **Accessibility:** Until finalization of the proposed rule regarding inaccessibility of component parts (74 Fed. Reg. 2439; Jan. 15, 2009), the Commission will accept a manufacturer's determination that a component part is not accessible to a child through normal and reasonably foreseeable use and abuse, so long as the manufacturer's determination is based on a reasonable interpretation of CPSIA section 101(b)(2).
2. **Electronics:** The interim final rule, summarized below and based on the proposed rule, takes effect February 10.
3. **Exclusions:** The proposed rule, which sets forth an application process to seek a product-specific exclusion from the lead content limit (74 Fed. Reg. 2433, Jan. 15, 2009), will be used unless and until it is amended by the final rule.
4. **Materials Presumed Compliant:** Until finalization of the proposed rule identifying certain materials—such as wood, cotton, wool, and certain metals and alloys—that are presumed to be below the lead content limits (74

Fed. Reg. 2433, Jan. 15, 2009), the Commission will not prosecute any person in a product's distribution chain on the basis that such a material exceeded the prescribed limit, unless that person had actual knowledge of the violation, or had been put on notice by the Commission.

5. **Product Classes Presumed Compliant:** The Commission staff has preliminarily determined that certain classes of children's products appear to fall consistently below prescribed limits: (1) ordinary children's books (i.e., without plastic, metal or electronic parts, printed after 1985); and (2) dyed or undyed textiles (excluding leather, vinyl, or PVC) and non-metallic thread and trim used in children's apparel and other children's fabric products like baby blankets, excluding any such products that (a) are ornamented with metal, rhinestones, or other objects; (b) have metal or plastic fasteners with possible lead content; or (c) have undergone further treatment that may impart lead. Until the Commission issues more detailed guidance, the Commission will not prosecute persons in such a product's distribution chain unless they had actual knowledge of violation of the lead content limits or were put on notice by the Commission.
6. **Reporting:** Any manufacturer, importer, distributor, or retailer must report to the Commission immediately under CPSA Section 15(b) if they become aware of a children's product that exceeds the applicable lead limits in any accessible part (including the higher limits for certain electronic components and devices) and that is being manufactured for sale in the United States, imported for sale, distributed, held for distribution or sale, offered for sale, or sold after February 10, 2009.
7. **Exports:** It is unlawful to export for sale any banned hazardous substance, including children's products exceeding the applicable lead limits after February 10, 2009. Those exporting such goods for some other reason, such as destruction, must notify the Commission more than 30 days in advance so that the Commission can notify other governments.

8. **Testing and Certification:** The Commission has stayed until February 10, 2010 the requirement that children's products be tested and certified to lead limits, with the exception of (1) children's products manufactured after December 21, 2008 bearing paint or another surface coating, and (2) children's metal jewelry manufactured after March 23, 2009. [Note that CPSC addresses here only the effect of the stay with respect to lead limits, and not other standards.]

C. Exemptions for Certain Children's Electronics for which Lead Content Compliance is Not Technologically Feasible—Interim Final Rule

On February 6, the Commission withdrew its proposed rule (74 Fed. Reg. 2435, Jan. 14, 2009), on which comments were due after the lead content limits take effect on February 10, and instead adopted an interim final rule based on the proposed rule, and comments already received on the proposed rule. The interim final rule is summarized in part below:

1. **Inaccessible Components:** The summary of the interim final rule states that lead-containing component parts are exempt from the lead limits of the CPSIA if they are not accessible using the probes described in 16 CFR §§ 1500.48 and .49, or before and after use and abuse tests (excluding bite tests) at 16 CFR § 1500.50 through § 1500.53. However, the rule itself does not discuss how inaccessibility should be determined. Therefore, it is unclear whether CPSC will require that the inaccessibility probes be used for electronic components, or whether CPSC will follow its enforcement policy (described in Part B.1.) for such components.
2. **Accessible Devices That Are Exempt:** The Commission staff has determined that it is not technologically feasible for the following to meet the lead content limits: (1) lead blended into the glass of cathode ray tubes, electronic components, and fluorescent tubes; (2) lead used as an alloying element in steel (3500 ppm limit); (3) lead used in the manufacture of aluminum (4000 ppm limit); (4) lead used in copper-based alloys (40,000 ppm limit); (5) lead used in lead-bronze bearing shells and bushings; (6) lead used in compliant pin connector systems; (7) lead used in optical and filter

glass; (8) lead oxide in plasma display panels and surface conduction electron emitter displays used in structural elements; (9) lead oxide in the glass envelope of Black Light Blue (BLB) lamps.

3. **Removable or Replaceable Component Parts:** Removable parts such as battery packs and light bulbs are considered inaccessible provided that the lead-containing component is inaccessible when the product is assembled in functional form or if the component itself meets the criteria for exemption.

The Commission is inviting comments on the interim final rule and will consider those comments before issuing final regulations.

We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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