

**LJN**LAW JOURNAL  
NEWSLETTERS

LJN's

# Product Liability

*Law & Strategy*<sup>®</sup>An **ALM** Publication

Volume 29, Number 7 • February 2010

## The CPSIA: One (Difficult) Year Later

### *Part Two of a Two-Part Article*

By **Jonathan I. Handler, William S. Rogers, Jr. and Meredith L. French**

Part One of this article described the background of the CPSIA and some of the developments since its passage. The conclusion herein addresses recent activity relating to products such as electronics, bicycles, and ATVs, the challenges imposed by implementation, and the future of the CPSIA.

#### **ELECTRONICS**

On Dec. 23, 2008, the Commission voted to exempt certain electronics and similar products from CPSIA lead limits and testing requirements. *See* Op. CPSC, Legal Counsel, No. 323 (Dec. 23, 2008). The CPSC issued an interim Final Rule on Feb. 6, 2009 exempting electronic devices that are "not accessible to children because the lead is fully enclosed within a component that is itself within the electronic device" as well as those accessible electronic devices in which certain parts "cannot be produced without lead due to the lack of technologically feasible substitutions ... ." *See* Children's Products Containing Lead; Exemptions for Certain Electronic Devices Interim Rule, 74 Fed. Reg. 6990 (Feb. 12, 2009) (amending 16 CFR § 1500). Inaccessible components include spare parts like batteries, but not CDs, which require placement in a device to function. Product components

---

**William S. Rogers, Jr.** is a partner resident in Day Pitney LLP's Boston Office, where he is a member of the Commercial Litigation, Product Liability, and Nanotechnology Practices. **Jonathan I. Handler** is also a partner in the Boston office, where, as part of his practice in complex commercial litigation, he represents product manufacturers in disputes and advises them on risk mitigation. **Meredith L. French** is an associate practicing in the area of product liability.

exempted include lead used inside the glass in cathode ray tubes, lead used to alloy steel or manufacture aluminum, lead used in lead-bronze bearing shells and bushings, and lead-oxide in plasma displays, to name a few. A complete list may be found at 16 CFR § 1500.88.

#### **BICYCLES AND ATVs**

The CPSIA, particularly Section 101 addressing permissible lead content, also applies to motorized and non-motorized bicycles despite the motorized bike industry's efforts to seek an exemption. The CPSC did provide some relief, however, the most recent of which was a two-year stay of enforcement as to permitted lead levels (currently at 300 ppm) issued on May 1, 2009. *See* Notice of Stay of Enforcement Pertaining to Bicycles and Related Products, 74 Fed. Reg. 31254 (June 30, 2009). The CPSC also voted to stay the enforcement of Section 101 as it pertains to bicycles, jogger strollers, and bicycle trailers from June 30, 2009 until July 11, 2011.

#### **INFANT/TODDLER PRODUCTS**

On Aug. 20, 2009, the CPSC approved two draft proposed rules on bath seats and infant walkers. *See* CPSC Ballot Vote, Notice of Proposed Rulemaking for Bath Seats Under Section 104(b) of the Consumer Product Safety Improvement Act (Aug. 20, 2009). The rules would revoke certain regulations under 16 CFR § 1500.18(a)(6) and § 1500.86(a)(4) pertaining to baby-bouncers, walker-jumpers, baby-walkers, and similar products that were issued in 1971. The CPSC expects new standards for such products by Feb. 14, 2010 that will incorporate, and largely be based on, the ASTM International voluntary standard, ASTM F977-07, which outlines standard materials to be used as well as the manner of construction. The Commission also proposed a new rule for baby bath seats under Section 104(b) of the CPSIA largely based on the ASTM International voluntary standard, ASTM F 1967-08a.

#### **THRIFT STORES AND RESELLERS**

The CPSIA's sweeping provisions also affected organizations unanticipated by Congress. For example, thrift shops and charities were adversely impacted because they must comply with lead and phthalate limits but have neither the resources nor the sophistication to implement a screening process. On Jan. 8, 2009, the CPSC clarified its requirements concerning resellers of children's products explaining that such entities are not subject to the certification requirements of the CPSIA. *See* Press Release, CPSC Clarifies Requirements of New Children's Product Safety Laws Taking Effect in February, Guidance Intended for Resellers of Children's Products, Thrift and Consignment Store (Jan. 8, 2009). However, those entities are responsible for selling and distributing products that do not exceed applicable lead and phthalate limits or face penalties for failing to comply.

#### **CIVIL AND CRIMINAL PENALTIES**

Previously, maximum civil penalties were \$8,000 per violation and \$1.825 million for a related series of violations. As of Aug. 14, 2009, the maximum per violation penalty under the CPSIA was increased to \$100,000, while the maximum penalty for a related series of violations was increased to \$15 million. Exposure to such civil penalties will result from a "knowing violation" of the CPSIA's mandates. Knowing and willful violations of the CPSIA may also subject corporate officers, directors, and agents who either authorized, ordered, or performed any acts in violation of the CPSIA to imprisonment for up to five years.

#### **OTHER SOURCES OF ENFORCEMENT: STATE ATTORNEYS GENERAL AND PRIVATE LITIGATION**

While the CPSC has enforcement power under the CPSIA, businesses must be aware that, pursuant to Section 218 of the CPSIA, State Attorneys General are now specifically authorized to commence suit in federal

court for alleged violations of the CPSIA, or its accompanying regulations, which affect their states' residents. A State Attorney General may enforce the CPSIA in accordance with his or her own interpretation of the Act and, therefore, could ignore a stay enacted by the CPSC or the CPSC's interpretation of the CPSIA's provisions.

Also, the CPSIA created a private right of action for violations of its provisions. This provision, combined with the requirement that the CPSC establish a database to track product recalls and reports of deaths or injuries caused by consumer products, creates a wealth of opportunities for both private and class action litigation. The CPSC's recent launching of a social networking site to make information on violations of the Act more accessible will increase these opportunities. The result will be significant expenditures on litigation and increased exposure to major damages awards.

#### **CHALLENGES POSED BY THE IMPLEMENTATION OF THE CPSIA**

Interpreting the CPSIA and enforcing its provisions has been an enormous challenge for the currently under-staffed and temporarily under-funded CPSC. Since the CPSIA's effective date, the CPSC has been inundated with appeals for relief from manufacturers, sellers, and retailers in all areas of the consumer products industry. It also has responded to numerous Congressional and consumer advocate inquiries and criticisms concerning the slow implementation of the CPSIA. Furthermore, after the Act's passage, the CPSC faced an enormous number of deadlines. This, coupled with the CPSIA's failure to provide the CPSC the "flexibility to respond to unanticipated" problems, have hindered the CPSC's ability to effectively implement the Act. *See* Testimony of the Honorable Nancy A. Nord, Acting Chairman, U.S. Consumer Product Safety Commission, Hearing on The Consumer Product Safety Information Act and Small Businesses. (May 14, 2009), available at [www.cpsc.gov/pr/nord05142009smbus.pdf](http://www.cpsc.gov/pr/nord05142009smbus.pdf). Since only Congress can alter the CPSIA, the CPSC has been forced to issue temporary stays to "avoid the damaging consequences that would result from application of the law as written." *See Id.*

#### **THE FUTURE OF THE CPSIA**

##### **Legislative Efforts**

Due to serious concerns surrounding the CPSIA, Legislators have worked to alter and clarify its provisions to ease its implementation. For example, Senate and

House Bills S. 374, H.R. 968, and H.R. 1510 would amend the CPSIA to relieve small businesses from third-party laboratory testing requirements and certain civil penalties. The drafters of S. 389 and H.R.1027 wish to exempt secondary sales and certain vehicles from the CPSIA lead ban and certification requirement. Pending House bills, H.R. 1510 and H.R. 1692, request exemptions for both all-terrain vehicles and ordinary books.

##### **CPSIA Dates and Deadlines**

Nov. 19, 2009 was the deadline for the CPSC to establish a product compliance label program. By that date, the CPSC was also to establish protocols and standards for random sample testing and for safeguarding against the exercise of undue influence on third-party laboratories certifying children's products. The CPSC was unable to meet this deadline. At the time of this article's publication, no regulations had been promulgated by the CPSC. Businesses and their counsel will have to monitor the CPSIA Web site for any regulations made available.

##### **Developments as of January 2010**

As previously described, Section 102 of the CPSIA requires manufacturers of consumer products to obtain certification that their products comply with the CPSIA standards governing children's products from third-party laboratories. The CPSC stayed this provision until Feb. 10, 2010, except as they applied to specific children's products. Recently, the CPSC issued a decision revising the terms of the stay. As set forth more fully in its decision, the certification requirements are being phased-in on a staggered basis, with some products subject to the certification requirements as of Feb. 10, 2010, and others on or before Feb. 10, 2011. *See* 74 Fed. Reg. 68588. Importantly, the stay does not relieve manufacturers from complying with the remaining provisions of the CPSIA including lead-limits and phthalate bans. Additionally, this stay does not apply to products subject to similar testing and certification requirements pursuant to regulations enacted before the CPSIA. A complete list of those products, and accompanying testing and certification requirements, affected by the CPSC's decision is available at 74 Fed. Reg. 68588.

The CPSC also recently announced an interim enforcement policy regarding component testing pursuant to the lead paint and lead limits established under the CPSIA. As outlined by the CPSC, the interim policy

permits a children's product to be tested by either conducting an analysis of the whole product's lead content or by conducting an analysis of samples of each component of the whole product. *See* 74 Fed. Reg. 68593. A product that complies under either testing method with the relevant lead limit will support a valid certification.

##### **The Obama Administration**

President Obama appears to be a strong proponent of greater regulation by the CPSC, insisting that "we must do more to protect the American public — especially our nation's children — from being harmed by unsafe products." *See* Press Release, Office of the Press Secretary, President Obama Fills New CPSC Posts (May 5, 2009). He has pledged to "revitalize" the CPSC by doubling its funding and increasing the number of sitting Commissioners from two to five. In 2009 alone, the CPSC received \$107 million, a 71% increase from its 2007 budget. This all suggests that the administration envisions a CPSC with greater oversight, power, and resources to regulate the consumer product industry. This trend should be monitored, as a well-funded and fully-staffed CPSC will likely lead to enhanced enforcement and the imposition of more frequent civil and criminal penalties.

##### **CONCLUSION**

As the foregoing overview illustrates, there has been much activity surrounding the CPSIA over the past year. Today, the CPSIA remains a powerful law that is extremely difficult to navigate. With the increased funding and staffing promised by the Obama Administration, more businesses may become subject to CPSIA prosecutions. Businesses large and small should ensure that they are abiding by the CPSIA's provisions or making good-faith efforts to work with the CPSC when unable to do so. Failure to comply may result in civil or criminal penalties as well as unwelcome publicity and expensive lawsuits.

---

Reprinted with permission from the February 2010 edition of the LAW JOURNAL NEWSLETTERS. © 2010 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877.257.3382 or [reprints@alm.com](mailto:reprints@alm.com). #055081-02-10-12