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CONSUMER PRODUCT SAFETY LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

CPSC Office of General Counsel Suggests that Companies Aggrieved by Retroactive Application of New Lead Limits to Inventory Petition the Commission for Relief; Phthalates Ban Does Not Apply Retroactively to Inventory

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In September 2008, shortly after the Consumer Product Safety Improvement Act of 2008 (CPSIA) was enacted, the Consumer Product Safety Commission Office of General Counsel (OGC) issued an opinion concluding that the more restrictive lead limit mandated by Section 101 of the CPSIA applies retroactively to inventory and product on shelves as of the February 10, 2009 effective date. In other words, after February 10, 2009, it will be considered a violation of the CPSIA to sell from inventory or store shelves any product designed or intended primarily for children 12 or younger that contains more than 600 ppm of lead, regardless of whether the product was made, imported, or distributed prior to the enactment of the CPSIA. The opinion was based on reasoning that the CPSIA makes it unlawful to make, import, distribute, sell or offer to sell any consumer product that is "a banned hazardous substance" under the Federal Hazardous Substances Act, and lead is "a banned hazardous substance." Click [here](#) to read OGC Section 101 (Lead) Opinion.

Citing ambiguous congressional intent, overwhelming logistical problems in attempting to test and certify products already in commerce, and the dire adverse economic and business implications of the retroactive application of the more restrictive lead limits, a number of companies requested that the OGC reconsider its opinion. Under well-established authority (*see, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)), retroactive application of the law is disfavored. If applying new CPSIA requirements to product

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inventory in the pipeline will result in irreparable economic harm, including the demise of some businesses, such an approach may be found to be unreasonably harsh and invalid. Courts are reluctant to find authority for such drastic action absent an unambiguous indication that Congress intended retroactive application.

On November 14, 2008, the OGC acknowledged the “potentially significant economic impact the new Act could have on any remaining inventory,” but said there is no flexibility to consider “policy issues” raised by the consequences of the retroactivity opinion and denied the request for reconsideration. The OGC suggested that if a company is unable to bring products in inventory into compliance with the new lead limits by February 10, 2009, it should consider petitioning the Commission for relief. Click [here](#) to read OGC Denial of Request for Reconsideration.

A successful petition for relief to the Commission would require the support of both Acting Chairman Nancy Nord and Commissioner Thomas Moore. As a practical matter, an aggrieved company would need to demonstrate the harsh and unfair impact of the generally disfavored retroactive application of the law and persuade the voting Commissioners that Congress’s intent is insufficiently clear to support the presumption against retroactive application of the law. Additionally, aggrieved companies should contact their congressional representatives to inform them of the impracticability or impossibility of retroactive compliance as well as the adverse impact of such an interpretation of the law, particularly amid daily news reports of layoffs, bankruptcies, and companies going out of business due to the current economic crisis.

In contrast to the lead opinion, the OGC has issued an opinion concluding that the phthalates ban mandated in Section 108 of the CPSIA *does not apply retroactively* to inventory or products on store shelves before February 10, 2009. In other words, the phthalates ban is applicable to products *manufactured after February 10, 2009*. According to the OGC, because Congress treated the phthalates ban as “a consumer product safety standard” under the Consumer Product Safety Act (CPSA) instead of “a banned hazardous substance” as it did with lead, the result is different. The CPSA expressly states that consumer product safety standards apply only to products manufactured after the effective date of a new standard. Click [here](#) to read OGC Section 108 (Phthalates) Opinion.

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Kerrie L. Campbell Ms. Campbell specializes in consumer product safety counseling and represents major manufacturers and retailers in investigation, enforcement and penalty proceedings before the U.S. Consumer Product Safety Commission (CPSC) and in matters referred to the U.S. Department of Justice. Ms. Campbell routinely counsels clients regarding compliance with the reporting requirements under the Consumer Product Safety Act, Flammable Fabrics Act and other statutes regulated by the CPSC. She advises clients on product recalls, corrective actions, responses to agency inquiries and Freedom of Information Act (FOIA) requests. She is a member of the Advisory Board for BNA's Product Safety and Liability Reporter.

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