

## Consumer Products Safety Act Advisory: Recently Enacted Product Safety Legislation Is Significantly Impacting Manufacturers, Importers, Retailers and Distributors of Consumer Products

1/8/2009

### Overview

A landmark new law—the Consumer Product Safety Improvement Act of 2008 (CPSIA or the “Act”)—has been in effect for only four months, but is already having a dramatic impact on a wide swath of American industry; namely, all firms involved in making, importing and selling consumer products.<sup>1</sup>

In short, every company that is involved with consumer products, and certainly every company involved with making or selling “children’s products,”<sup>2</sup> must understand and respond to this new law or face significant new civil and criminal liability, including maximum civil penalties of \$15 million and felony prosecution for willful violations of safety standards and prohibited acts. In addition, all 50 state attorneys general are now empowered to enforce not only their own rapidly expanding number of state product safety laws and regulations, but also all Consumer Product Safety Commission (CPSC) administered safety standards and several specified prohibited acts, many of which go into effect the first few months of 2009. In the wake of “the year of the recall” with many well-publicized toy and other product safety issues, many attorneys general (notably including those in CA, IL, NY, MA, CT, MI, DE, NJ and MD, among others) have made no secret of the fact that product safety is now a priority of their enforcement agendas.

As part of the Antitrust and Federal Regulation Section, Mintz Levin has assembled a team that is virtually unrivaled in the world in first-hand experience with CPSC-administered laws and regulations, in our ability to advise and assist clients to anticipate and respond to compliance issues under the new Act, and in experience with product safety issues generally. Chuck Samuels has represented clients in the product safety arena, including home appliance manufacturers, for almost 30 years and was a leader in the industry group that worked on the legislation. And new Of Counsel, Quin Dodd, as Chief of Staff at the CPSC, led the team that negotiated the provisions of the Act on behalf of the agency. We are presently advising trade associations, manufacturers, retailers, importers and testing labs on the new law to not only prevent problems from arising but also on how to capitalize on new opportunities the CPSIA may present.

### Immediate/Near-term Impact of the CPSIA

Current mandate that all products (for children *and* adults) manufactured after November 12, 2008 and covered by a mandatory (CPSC) safety regulation be tested and certified to those standards, including the new bans specified, below. This includes the requirement that such testing for children’s products be done by independent CPSC-approved labs.

Effective February 10, 2009: A ban on lead in excess of 600 parts per million (ppm) in all children’s products, *regardless* of when the product was manufactured.

Effective February 10, 2009: A ban on certain phthalates (plasticizers) in all toys and “child care articles” for such products manufactured on or after that date.

Effective February 10, 2009: Comprehensive voluntary toy safety standard (ASTM F-963) becomes mandatory.

Enhanced CPSC recall authority, making competent representation before the Commission essential.

Broad new whistleblower protection for all employees of consumer product manufacturers, private labelers, distributors and retailers, including the ability to remove complaints to federal courts and the award of back pay, attorneys fees and special damages.

New presumption of destruction of imports that violate CPSC safety regulations and new prohibition on re-exporting violative or recalled products.

Requirement that firms be able to disclose other companies in the chain of distribution of their products.

New mandates in effect now for how toys and games may be advertised.

### Longer-term Impact of CPSIA

Lowering from 600 ppm to 90 ppm the current limit for lead paint on children’s products and household furnishings.

Effective August 14, 2009: All children’s products must bear detailed tracking labels.

New publicly-searchable database of all consumer product safety incidents and reports of which the CPSC is made aware.

Ability of the CPSC to “deem” certain products to constitute *per se* “substantial product hazards” and thus illegal to import or sell.

Establishment of new “super standards” for all durable nursery products (cribs, highchairs, etc.).

Many other new standards on a number of products (e.g., ATVs, pools and spas, gasoline containers, etc.).

### How Mintz Levin Can Help

Areas in which we can advise and assist clients include:

Review of all client products, product lines, safety monitoring and response policies and procedures.

Counsel as to what constitute children’s products; which standards apply to which products; and what type of testing for both children’s and non-children’s products is advisable.

Specific guidance on compliance with the new certification mandates.

Real-time updates on the rapidly evolving implementation of the CPSIA, including tailored advice on how to respond (e.g., the extent to which lead ban may apply to children’s textile and apparel products).

Advocacy before the Commission on policy issues of importance to clients.

Representation in the context of recall discussions and negotiations with the CPSC.

Guidance on tighter control over the supply chain, particularly for imports, and tighter internal control and evaluations of safety-related incidents and complaints and information flow.

Re-evaluating insurance policies for possible recall and other coverage.

Specific guidance as to new CPSC advertising restrictions on toys and games.

Feel free to contact one of the attorneys listed above for further information on this or any CPSC-related topic. We’d be pleased to assist you with any concerns you may have.

### Endnotes

<sup>1</sup>Consumer products under the jurisdiction of the U.S. Consumer Product Safety Commission are defined broadly as effectively anything sold to consumers for personal, home, recreational or school use, other than those products under the direct jurisdiction of another agency (e.g., food, drugs, cosmetics and medical devices; guns and alcohol; or vehicles). See Consumer Product Safety Act, 15 U.S.C. § 2052(a)(5).

<sup>2</sup> “Children’s products” are likewise broadly defined as all consumer products “primarily intended” for children age 12 and under. See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 235(a) (2008). <http://www.jdsupra.com/post/documentViewer.aspx?fid=86b04852-fa45-46cb-a4f6-858456c08380>

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*For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

**Charles A. Samuels**  
(202) 434-7311  
CASamuels@mintz.com

**Quin Dodd**  
(202) 434-7435  
QDodd@mintz.com

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