

# Consumer Product Safety Commission Alert: Recent Major Decisions by the U.S. Consumer Product Safety Commission Impact Sellers of Children's Products

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## New Federal Policies Announced on Tracking Labels, Products with Crystal and Glass Beads and Rhinestones, and “Accessibility” of Lead

### Tracking Labels

On July 22, the U.S. Consumer Product Safety Commission (CPSC) issued a “Statement of Policy” to explain the obligations of manufacturers and importers of “children’s products” to place permanent “tracking labels” on those products *and* product packaging.<sup>1</sup> This requirement of Section 103(a) of the Consumer Product Safety Improvement Act (CPSIA) becomes effective for all children’s products manufactured on or after **August 14, 2009**. Section 103(a) requires that “permanent distinguishing marks” be placed on children’s products (defined as products primarily intended for children under 13)<sup>2</sup> and those products’ packaging. Such marks must allow both manufacturers and “ultimate purchasers” of those products “to ascertain” (1) the name of the manufacturer, importer, or private labeler; (2) the location and date of production; and (3) specific “cohort” information, like lot or batch number.

While the guidance issued by the CPSC may be altered in the future and is not legally binding on state Attorneys General (who are specifically empowered to independently enforce Section 103(a)), nor on retailers (who may maintain their own labeling requirements), it does indicate what the CPSC will and will not consider to constitute compliance with the tracking label mandate of the CPSIA. Key points of guidance issued by the CPSC last week, as well as general recommendations on how manufacturers and importers might consider responding are summarized below.

*What did the CPSC say?*

1. The CPSC said it will be flexible in enforcing Section 103(a). Good faith efforts to comply will generally be given deference and in any case will typically not result in a CPSC fine. A manufacturer's individual circumstances, as well as general industry practices, will be considered in determining whether a tracking label can be placed on a product/package at all, and whether that label is sufficient to meet the requirements of the CPSIA. For example, the Statement of Policy indicates that crafters and other small manufacturers likely do not have to develop a new, comprehensive record-keeping system in order to differently identify each "batch" of new products, if such is not currently done by similar businesses.
2. Labels can be a mere "distinguishing mark" and the specific information need only be "ascertainable." Thus, alphanumeric codes and even Web site URLs may be sufficient to comply with Section 103(a) if those marks allow both the manufacturer and consumers to ultimately determine the requisite information, "provided the name of a manufacturer or private labeler is also identified so a consumer without access to the Internet can know whom to contact directly to also obtain the required information."<sup>3</sup>
3. "Practicability" is more a function of physical ability and functionality, not cost. The agency lists a number of factors that may be properly considered in a manufacturer's determination of whether it is "practicable" to place a distinguishing mark on the product and packaging, including small size, difficult surface to place a mark, games and other products with multiple pieces, vending machine products, and effect on function and aesthetics of the product. However, the actual **cost** of placing these distinguishing marks on products and packaging was **not** listed as a permissible factor.

### *What steps should you take?*

1. Make a conscious effort to review your products/product lines and determine whether and how compliance with Section 103(a) is practicable. Document this effort and justify your determinations. If questioned later by the CPSC or others, demonstration of a conscious, reasonable review by your company will reduce the likelihood of any negative compliance action being taken against you.
2. Determine whether what you are doing now may be sufficient, or at least partially sufficient, to comply with Section 103(a). The guidance specifically contemplates situations where information already on a product/package and/or existing other government or industry standard labeling requirements may suffice, at least partially, for Section 103(a) compliance.
3. Document when your products were made. The agency made clear in its Statement of Policy that Section 103(a) applies only to products made on or after August 14, 2009. It specifically allows for differing, reasonable interpretations of what "date of production" actually means (e.g., factory manufacture vs. later assembly and packaging).
4. Make sure the "distinguishing marks" on your products and packaging are "permanent." Hang tags, stickers, etc., are not generally intended to last for "the useful life of the product," the definition being used by the CPSC, and therefore will not generally suffice.

## **Children's Products with Crystal and Glass Beads and Rhinestones**

## *What did the CPSC decide?*

Last week, the CPSC also denied a request to exclude crystal and glass beads, including rhinestones and cubic zirconium, used in children's products from the CPSIA lead ban.<sup>4</sup> This denial affects manufacturers, importers, and retailers of an array of children's products, including jewelry, apparel, accessories, footwear, picture frames, lamps, and figurines primarily intended for children under 13. Such crystal and glass beads often contain lead, although both the Commission and the professional CPSC staff acknowledged that this lead typically poses little exposure hazard to children.

Section 101(a) of the CPSIA currently requires that no part of a children's product may contain in excess of 600 parts per million (ppm) of lead, by weight. This limit drops to 300 ppm on August 14, 2009, regardless of when the product was manufactured. An industry trade group petitioned the CPSC for an exclusion from that ban under the provisions of Section 101(b) of the CPSIA. This petition was denied last week by a 2–1 vote. While the commissioners acknowledged the slight hazard posed, they nevertheless determined that since it was not shown that the use of products containing these rhinestones and beads would not result in the absorption of "any" lead (the standard under Section 101(b)), they could not grant the petition. The majority did, however, indicate that enforcement efforts against lead-bearing rhinestones and beads would be focused on those products primarily intended for children six and under, presumably due to the greater risk that such objects will be mouthed and swallowed.

## *What does this mean for your business?*

Any manufacturer, importer, distributor, or retailer of children's products that contain rhinestones or similar decorations should examine carefully whether to continue using such items in their products, unless reliable testing has definitively shown that these components do not contain impermissible levels of lead.

Not only do such components very often contain lead and have been the source of a number of CPSC product safety recalls, if intended for young children, they also may constitute impermissible "small parts," in violation of CPSC regulations. In addition, rhinestones and similar components can usually be tested relatively easily using x-ray fluorescence (XRF) hand-held scanning instruments, making them easy targets for in-store and other screenings.

## **Accessibility of Lead in Children's Products**

### *What did the CPSC issue?*

Finally, late last week the CPSC voted to issue a final draft of its interpretative rule providing guidance as to what product components or classes of components will be considered by the agency to be inaccessible to a child, for purposes of the CPSIA lead ban referred to above.<sup>5</sup> In

short, the agency will consider a part of a product to be accessible—and therefore any lead in that part to be accessible—if the child can physically contact it through reasonably foreseeable use and abuse of the product.

### *Key additional points in the Commission’s draft include:*

- Inaccessible component parts do not have to comply with the lead content limits **or** be tested and certified as meeting the lead content ban of Section 101(a).
- The long-standing and CPSC-recognized accessibility probes to determine the accessibility of sharp points and edges provide an objective means (and should be used) for evaluating accessibility based on such physical access.
- The existing CPSC use and abuse test methods are to be used to simulate the normal and reasonably foreseeable use, damage, or abuse of toys and other articles intended for children in different age groups.
- Fabric coverings of lead-bearing products **can** render those parts inaccessible **if** the fabric-covered part does not have the potential to be mouthed or swallowed, using the the “mouthability” standard for the ban on phthalates found in the CPSIA, *i.e.*, no part of the product in any dimension may exceed five centimeters.
- Lead in children’s CDs and DVDs is inaccessible if covered by an acrylic polymer layer.

### *What does this mean for your business?*

While not dramatically different from the agency’s interim rule on the same subject, there are significant changes, notably including the rendering of lead covered by fabric as inaccessible. If you should determine that a children’s product you make or sell contains lead, an analysis of whether in fact that lead is accessible or not is essential before determining what to do with that product. A proper determination could save your business from an unnecessary loss of product.

## **What Can Mintz Levin Do for Your Business?**

Mintz Levin has an extremely active and comprehensive consumer product safety practice. Our lawyers have extensive, first-hand experience with CPSC-administered laws and regulations. Chuck Samuels has represented clients in the product safety arena for nearly 30 years, and was a leader in the industry group that worked on the CPSIA legislation. Quin Dodd, former Chief of Staff at CPSC, led the team that negotiated provisions of the CPSIA on behalf of the agency. We are presently advising trade associations, manufacturers, retailers, importers, and testing labs on the new law and its implications to their business.

Services we provide our clients include recall and compliance advocacy and advice, product review and classification, timely information and analysis of CPSC and product safety developments, advocacy before the Commission on policy objectives, guidance on supply chain objectives, and advocacy on CPSIA reform and related objectives before Congress.

## Endnotes

<sup>1</sup> The Statement of Policy and other CPSC information about the tracking label mandate can be found [here](#).

<sup>2</sup> Note that a recent opinion from the General Counsel of the CPSC regarding whether writing instruments may be classified as children's products may have narrowed the scope of products that fall within this classification. The letter can be found [here](#).

<sup>3</sup> CPSC "FAQs" on tracking labels can be found [here](#).

<sup>4</sup> See [here](#) and [here](#).

<sup>5</sup> See [here](#).

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*Please feel free to contact us if you have questions regarding product safety regulatory advice.*

**Bruce D. Sokler**  
(202) 434-7303  
[BDSokler@mintz.com](mailto:BDSokler@mintz.com)

**Charles A. Samuels**  
(202) 434-7311  
[CASamuels@mintz.com](mailto:CASamuels@mintz.com)

**Quin Dodd**  
(202) 434-7435  
[QDodd@mintz.com](mailto:QDodd@mintz.com)

**Matthew Cohen**  
(202) 434-7348  
[MCohen@mintz.com](mailto:MCohen@mintz.com)

**Jennifer Ellis**  
(202) 585-3595  
[JCEllis@mintz.com](mailto:JCEllis@mintz.com)

**Farrah Short**  
(202) 585-3518  
[FShort@Mintz.com](mailto:FShort@Mintz.com)