

SCANDAGLIA & RYAN

Always know where you stand®



Product Liability Defense Group

*The Consumer Product Safety
Improvement Act of 2008*

By

Scott E. Rogers



SCANDAGLIA & RYAN

55 E. Monroe, Suite 3440
Chicago, IL 60603
(312) 580-2020
www.scandagliaryan.com

SCANDAGLIA & RYAN

Always know where you stand®

INTRODUCTION

On August 14, 2008, President Bush signed into law the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). The CPSIA introduces sweeping changes to the consumer product safety laws of the United States, requiring manufacturers of consumer products (specifically, manufacturers of children's products, children's toys and child care articles) to adopt new standards and requirements. It is important for these manufacturers to familiarize themselves with the CPSIA because it significantly broadens the powers of the Consumer Product Safety Commission ("CPSC") and expands the states' ability to enforce consumer product safety laws. For example, the CPSIA establishes much stricter safety standards for children's products, requires manufacturers of children's products to test such products for compliance with the stricter standards, imposes new obligations on such manufacturers to document the test results, and greatly increases potential criminal and civil penalties associated with violations. Although the CPSIA requires the CPSC to establish numerous new regulations, procedures and standards, the law itself imposes obligations on manufacturers in four main areas: (1) Safety Standards; (2) Testing and Certification; (3) Labeling and Advertising; and (4) Enforcement. The key provisions of the CPSIA are summarized below. In addition, a timeline is provided for easy reference to CPSIA compliance deadlines.

DEFINITIONS

In order to fully understand the CPSIA, it is important to keep in mind that the CPSIA applies to Consumer Products, Children's Products, Children's Toys and Child Care Articles.¹ By statute, those terms are defined as follows:

¹ The CPSIA also includes provisions relating to durable infant and toddler products such as cribs, toddler beds, high chairs, bath seats, strollers, walkers, bassinets and cradles. The law calls for the CPSC to promulgate safety standards with respect to such products by no later than one year after the date of enactment of the CPSIA.

SCANDAGLIA & RYAN

Always know where you stand®

Consumer Product: Any article or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise. The term "Consumer Product" does not include any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer. The definition also does not include tobacco, tobacco products, motor vehicles, motor vehicle equipment, pesticides, aircraft, boats, drugs, devices, or cosmetics or food.

Children's Product: A consumer product designed or intended primarily for children 12 years of age or younger.

Children's Toy: A consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.

Child Care Articles: A consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age three and younger, or to help such children with sucking or teething.

As defined, Children's Products, Children's Toys and Child Care Articles are subsets of the term Consumer Products. Children's Toys and Child Care Articles are subsets of the term Children's Products. Accordingly, any regulation addressed to Consumer Products would necessarily include within its scope Children's Products, Children's Toys and Child Care Articles. Any regulation addressed to Children's Products would necessarily include within its scope Children's Toys and/or Child Care Articles. The CPSIA establishes various obligations with respect to all of these defined product categories, and in understanding the Act it is important to distinguish what obligations correspond to these categories of goods.

SCANDAGLIA & RYAN

Always know where you stand®

KEY PROVISIONS OF THE CPSIA

SAFETY STANDARDS

Lead

The CPSIA mandates a phased-in ban on lead in all Children's Products as follows:

1. Beginning 180 days after the date of enactment of the CPSIA, Children's Products may contain no more than 600 parts per million total lead content by weight for any part of the product.
2. Beginning one year after enactment of the CPSIA, the limit is reduced to 300 parts per million.
3. Beginning three years after enactment of the CPSIA, the limit is reduced to 100 parts per million.

In the event the CPSC determines that such limits are not technologically feasible, the law gives the CPSC the right to set a higher limit as long as it is lower than 300 parts per million. In addition, the new law contains some language that suggests that the limits do not apply to any component part of a Children's Product that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product, and the CPSC has been ordered to promulgate a rule providing guidance on this exception within the next year. Until such regulations are promulgated, it is unclear, for example, if lead-containing but non-accessible vinyl would be excluded, but given the language contained within the CPSIA, it is unlikely that vinyl would be considered a barrier that would render the lead inaccessible to a child. Finally, the CPSC Office of the General Counsel issued an advisory opinion on September 12, 2008, concluding that products containing lead above the limits set forth above cannot be sold from inventory or on store shelves after the date set forth above. Simply put, the CPSC has taken the position that the CPSIA applies retroactively to pre-existing inventory.

SCANDAGLIA & RYAN

Always know where you stand®

Phthalates

Beginning 180 days after the date of enactment, the new law also prohibits the sale of Children's Toys or Child Care Articles that contain concentrations of more than 0.1% of six distinct phthalates (DEHP, DPB, BBP, DINP, DIDP and DnOP). By no later than 18 months after the enactment of the law, the CPSC will need to study the health impact of phthalates, determine whether the limits identified above adequately protect children, and if not, modify the law to ban the sale of any children's toys containing any level of these six phthalates. For DINP, DIDP and DnOP only, the CPSC may discontinue the prohibition, or ban any Children's Product containing any phthalates. While the stricter lead standards apply to all Children's Products, the prohibition on sale of certain products containing phthalates applies only to Children's Toys and Child Care Articles. However, the CPSIA requires a complete examination of the full range of phthalates that are used in Children's Products, with such examination to be completed within 18 months of the enactment of the CPSIA.

Phthalates are typically found in plastics, and manufacturers should ensure that any plastic materials used for Children's Toys or Child Care Articles contain no phthalates.

ASTM Toy Safety Standards

Beginning 180 days after the day of enactment of the CPSIA, the provisions of ASTM International Standard F963-07 shall be considered to be consumer product safety standards issued by the CPSC. In addition, the CPSIA requires the CPSC to examine and assess the effectiveness of ASTM F963-07 and promulgate safety rules that are more stringent than the ASTM F963-07 standards if such stringent standards "would further reduce the risk of injury associated with such toys."

SCANDAGLIA & RYAN

Always know where you stand®

TESTING AND CERTIFICATION

Mandatory Third Party Testing

The new law mandates that before a manufacturer may import for distribution in commerce any Children's Product, the manufacturer must test the product for compliance with CPSC safety regulations.² Based "upon a reasonable testing program", the manufacturer (not the testing agency) is required to issue a certificate that certifies that the Children's Product complies with all applicable safety rules, regulations or standards. Only one certificate need be issued for each separate product, but the certificate must specify each such rule, ban, standard or regulation applicable to the product. The certification requirements shall take effect ninety (90) days after the date of enactment of this Act.

The new law requires that every certificate:

1. Identify the manufacturer issuing the certificate;
2. Identify any third-party conformity assessment body on whose testing the certificate depends;
3. Include the date and place of manufacture;
4. Include the date and place where the product was tested; and
5. Provide contact information for the individual responsible for maintaining records of test results.

² Under the CPSIA, the CPSC is to publish requirements for accreditation of "third party conformity assessment bodies." With respect to testing for lead, the CPSC published such requirements in the September 22, 2008, Federal Register. Accordingly, effective December 22, 2008, all testing for lead in Children's Products must be conducted by accredited bodies. The CPSC is also required to establish requirements for the periodic audit of such conformity assessment bodies.

SCANDAGLIA & RYAN

Always know where you stand®

Dissemination of Certificates

The CPSIA contains a provision that states as follows:

Every certificate required under this section shall accompany the applicable product or shipment of products covered by the same certificate and a copy of the certificate shall be furnished to each distributor or retailer of the product.

Beginning on November 12, 2008, all certificates must accompany shipments of applicable products to retailers and distributors. We also believe the certificates will need to be delivered to U.S. Customs to permit the importation of covered products.

LABELING AND ADVERTISING

Labeling

The new law also requires that, by no later than 15 months after the date of enactment of the CPSIA, the CPSC initiate a program by which a manufacturer must label a consumer product as complying with the certification requirements set forth above. The CPSC regulation must also establish standards for ensuring that a children's product is tested for compliance with all applicable safety rules.

As such, we believe it is likely that manufacturers of Children's Products will be required to include on a label, hang tag or packaging some indication that the products have passed safety tests.

Tracking Labels

Effective one year after the date of enactment of the CPSIA, manufacturers of Children's Products will be required to place permanent, distinguishing marks on the product and its packaging, to the extent

SCANDAGLIA & RYAN

Always know where you stand®

practicable, that will enable:

1. The manufacturer to ascertain the location and date of production of the product, cohort information (including the batch, run number, or other identifying characteristic) and any other information determined by the manufacturer to facilitate ascertaining the specific source of the product by reference to those marks; and
2. The ultimate purchaser to ascertain the manufacturer, location and date of production of the product, and cohort information.

Cautionary Statements

For any Children's Product containing a cautionary statement, any advertisement by that manufacturer, and any advertisement by a retailer, including advertisements on internet websites, that provides a direct means for the purchase or order of a product for which a cautionary statement is required, must include the appropriate cautionary statement displayed on or immediately adjacent to that advertisement. This provision only applies to advertisements that provide a direct means for the purchase of the product; it does not apply to in-store sales.

Under the new law, if a Children's Product contains a cautionary statement, a manufacturer is required to inform any retailer of any cautionary statement requirement applicable to the product.

ENFORCEMENT

Penalties

The new Act contains significantly increased civil penalties, ranging between \$100,000 and \$1,250,000 for violations. In addition to significantly increased civil penalties, the CPSIA provides for criminal penalties, including imprisonment and asset forfeiture, for violations of the CPSIA.

SCANDAGLIA & RYAN

Always know where you stand®

Importation/Exportation

U.S. Customs may now require importers to post a bond sufficient to cover the cost of destruction of any products found to be in violation of CPSC regulations. In addition, the CPSC may prohibit the exportation from the United States of any product that the CPSC determines is not in conformity with the applicable standards or rules under the CPSIA.

Preemption

The new law specifically states that it does not preempt any state law in effect as of August 31, 2003. Further, if a state law was not preempted prior to the enactment of the CPSIA, the CPSIA cannot be read to preempt that law now. In short, any state law in existence that deals with lead or other hazardous materials will not be preempted by this new statute.

Whistleblower Protection

The CPSIA makes it illegal for a manufacturer to discharge an employee or otherwise discriminate against an employee should that employee provide information relating to a violation of the CPSIA, a statute enforced by the CPSC, or a regulation, standard or ban promulgated under any such statute. The CPSIA also protects whistleblowers who agree to testify or who assist or participate in any enforcement action.

Enforcement by State Attorney Generals

The CPSIA makes it clear that violations of CPSC regulations, standards, rules or bans may be enforced by the Attorney General of any State, or any other authorized state officer. The law provides that the CPSC may intervene in any such civil action brought by an Attorney General.

SCANDAGLIA & RYAN

Always know where you stand®

Recall

The CPSIA provides significantly enhanced enforcement authority to the CPSC. Most importantly, the CPSIA provides for an expedited recall procedure and grants to the CPSC enhanced recall authority. The new law requires that within 180 days after the date of enactment, the CPSC shall establish rules and guidelines setting forth the requirements of recall notices under its enhanced authority.

CONCLUSION

Like many federal statutes, how this statute is implemented and interpreted by the CPSC will determine exactly what new obligations and burdens manufacturers will face. Assuming this new law is interpreted by the CPSC according to its plain language, it is certain that in addition to complying with stricter safety standards, manufacturers of Children's Products will be required to:

1. Issue certificates certifying that their products comply with safety rules based on the assessment of an independent third party;
2. Furnish the certificate for each product to each and every distributor or retailer of the product;
3. Include additional information on the hang tag and labels; and
4. Include cautionary language on websites that provide for direct sales to consumers, and advise any of their retailers that sell online or advertise the products that they too must include the cautionary language.

Scandaglia & Ryan will continue to monitor the obligations of the CPSIA as well as the CPSC's implementation of new standards and requirements, and will provide periodic updates of the law as needed. For further information regarding the CPSIA, or if you would like assistance in maintaining compliance with the law, please contact Scott Rogers at 312.580.2022 or srogers@scandagliaryan.com.