

# The Consumer Product Safety Improvement Act, Its Implementation And Its Liability Implications

By **Frank Leone and  
Bruce J. Berger**

**A**LTHOUGH ENACTED before Election Day, the Consumer Product Safety Improvement Act of 2008 (CPSIA or the Act),<sup>1</sup> may be the first of a series of new legislative initiatives that will strengthen federal regulatory power, increase funding for federal agencies, impose new requirements on businesses, and assist plaintiffs in pursuit of product and toxics liability lawsuits. Because the scope of the CPSIA may be interpreted more broadly than was initially anticipated, defense lawyers should be aware of the many requirements of the Act. This article (1) provides a brief overview of the CPSIA and reviews some of the steps that the Consumer Product Safety Commission (CPSC) has taken already to implement the Act; (2) discusses the potentially broader impacts of provisions which were designed to address children's products; and (3) discusses provisions which affect all consumer products.

## I. CPSIA Overview

The CPSIA implements the most sweeping revision of United States consumer product safety laws since 1972, when Congress enacted the original Consumer Product Safety Act (CPSA).<sup>2</sup> The Act expands the regulatory and enforcement powers of the Consumer Product Safety Commission (CPSC or Commission) and imposes new obligations on manufacturers, importers, and retailers of



*Frank Leone is a partner at Hollingsworth LLP in Washington DC, where he has practiced since graduation from the University of Virginia Law School in 1985. His broad litigation practice encompasses environmental law, and defense of toxic tort, consumer product, asbestos, and pharmaceutical products liability claims. Mr. Leone has represented clients in CPSC enforcement actions, counseled on CPSC compliance, and lectured on CPSC issues.*



*IADC Member Bruce J. Berger is a partner with Hollingsworth LLP. Mr. Berger has expertise in pharmaceutical product liability defense, environmental litigation, and toxic tort defense. He has tried more than twenty cases to verdict. He represents manufacturers and industrial clients in a range of complex chemical-related cases.*

consumer products. Moreover, Congress has curbed CPSC's discretion by enacting specific product standards and setting 42 deadlines for agency action over the next five years.

Congress drafted the CPSIA as a reaction to a number of high-profile product safety recalls, most notably recalls of Chinese-manufactured jewelry and painted toys that contained excessive, and in some cases dangerous, amounts of lead.<sup>3</sup> The Act addresses toys and children's products, and, over a short time period, (1) lowers

<sup>1</sup> Pub. L. No. 110-314, 122 Stat. 3016 (codified in scattered sections of 15 U.S.C.).

<sup>2</sup> 15 U.S.C. §§ 2051-2089 (1972). The CPSIA also amended other statutes that CPSC administers, notably the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1276 (1960) (FHSA).

<sup>3</sup> The CPSC website lists approximately 50 recalls involving lead-containing products between July 2007 and June 2008. See <http://www.cpsc.gov/cgi-bin/haz.aspx>. In March 2006, it was reported that a four-year-old boy died of acute lead poisoning after swallowing a lead charm sold with sneakers, see Glenn Howatt, *Boy's Death Prompts Lead Bracelet Recall*, MINN. STAR TRIBUNE, March 24, 2006, at C-1.

permissible lead levels in paint; (2) imposes maximum permissible limits for lead in product substrates and components; (3) bans certain uses of six phthalates (plasticizers); and (4) incorporates an ASTM (American Society for Testing and Materials) toy standard as a CPSC rule. Furthermore, the CPSIA adds new requirements governing children's products, including for testing and certification of compliance with regulations, use of tracking labels, and warnings in connection with advertisements.

The CPSIA also imposes additional new requirements affecting all consumer products (not just children's products), including:

- greater CPSC recall authority,
- mandatory recall notice standards,
- broadened reporting requirements,
- adoption of a class-wide product hazard list, and
- creation of a publicly accessible Consumer Product Safety Database identifying harmful products.

The Act also weakens protections designed to prevent public disclosure of confidential business information, allows enhanced State Attorney General enforcement of standards through injunctive relief, increased civil and criminal penalties for violations, requires a GAO (Government Accountability Office) study of formaldehyde, and limits the preemptive effects of consumer protection statutes.

The numerous specific requirements and short deadlines the CPSIA imposed have placed a great burden on the CPSC staff, as well as on the regulated community. Although the CPSIA anticipates increased funding and staffing for the CPSC, Congress has been slow in adopting specific appropriations.<sup>4</sup> In

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<sup>4</sup> The CPSIA authorizes increased CPSC funding starting at \$118.2 million in FY 2010 to \$136.783 million by FY 2013 and authorizes increases staffing levels, including more agents at ports to

response to the CPSIA mandates, CPSC has engaged in a flurry of activity, including issuance of Office of General Counsel opinions, publication of guidance, accelerated rulemaking, and adoption of interim final rules.<sup>5</sup> CPSC established a new CPSIA website,<sup>6</sup> and provides almost daily e-mail notices of updates.<sup>7</sup>

In recent days, many members of Congress, unhappy with the public reaction to legislation that most of them supported, have introduced a variety of bills to amend the Act, primarily by postponing compliance dates or excepting specific products, such as ATVs, or specific industries, such as thrift stores, from lead limits.<sup>8</sup> CPSC, in fact, has taken the fairly extraordinary step of proposing changes to the Act, primarily to limit retroactive application to products where exposure poses a health and safety risk to children, lower the age limit of certain products, and allow CPSC to address certain requirements on a logical basis, using risk assessment to establish need and priorities.<sup>9</sup> President Obama has recently nominated, and the Senate has recently confirmed, Inez Tenenbaum as the new Chair of the Commission. Congress may consider statutory amendments this session.

From a product liability and toxic tort defense perspective, the general argument can be made that much of this legislative and regulatory action is not scientifically based (and therefore not admissible under

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address consumer product imports. CPSIA Sec. 201 (enacted at 15 U.S.C. § 2081).

<sup>5</sup> Indeed, CPSIA Sec. 204 allows CPSC to issue product safety rules without first using an Advance Notice of Proposed Rulemaking (which would request pre-proposed rule comments) and without having to publish a proposed product safety rule in the Federal Register for 60 days. 15 U.S.C. § 2058.

<sup>6</sup> <http://www.cpsc.gov/about/cpsia/cpsia.html>.

<sup>7</sup> Available at: <<https://www.cpsc.gov/about/cpsia/cpsialist.aspx>>.

<sup>8</sup> See, e.g., The Consumer Product Safety Solutions Act of 2009, H.R. 1813, 111th Congress (2009).

<sup>9</sup> Letter from Nancy Nord to Hon. John Dingell (March 20, 2009).

*Daubert v. Merrell Dow Pharms.*),<sup>10</sup> is not determinative of chemical hazard or product defect, and may not even be relevant to products liability or toxics litigation.<sup>11</sup> For example, although lead exposure can be harmful, setting strict limits on lead content of components that do not actually release any lead is not scientifically sound. Likewise, debate continues about the potential health hazards of phthalates. Nevertheless, many of the provisions discussed below will be encountered in litigation, and defense lawyers should be aware of them.

## II. CPSIA Provisions Relating to Children's Products and Their Potential Broader Impact

The CPSIA requirements for children's products are of great interest to the manufacturers, importers, retailers, and distributors of such products.<sup>12</sup> The provisions also are of more general interest because plaintiffs in civil litigation may contend that agency findings regarding chemicals and standards of care in the context of children's products may be

relevant to other products. Moreover, Congress may elect to extend legislative actions that begin with children's products to other areas of chemical manufacture, use, and disposal.

### A. Lead Ban, CPSIA Sec. 101<sup>13</sup>

The CPSIA greatly expands the universe of products subject to lead limitations and reduces acceptable levels of lead.<sup>14</sup> Specifically, the Act applies the current lead paint standard of 600 parts-per-million (ppm) to children's products for sale as of February 10, 2009.<sup>15</sup> This standard will be lowered to 300 ppm by August 14, 2009, and to as low as 100 ppm (if technologically feasible) by August 14, 2011.<sup>16</sup> The lead content limit applies to any

<sup>10</sup> *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

<sup>11</sup> *See, e.g.,* *Glastetter v. Novartis Pharms. Corp.*, 252 F.3d 986, 991 (8th Cir. 2001) (FDA withdrawal of drug approval reflects lower threshold of proof than required in litigation and does not provide reliable evidence of causation under *Daubert*); *Jones v. Stegman*, 625 N.Y.S.2d 934 (App. Div. 1995) (denying motion for new trial based on exclusion of subsequent regulatory action banning product); *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972 (S.D. Ohio 1992) (EPA listing of chemical as a carcinogen did not establish general causation), *aff'd*, 24 F.3d 809 (6th Cir. 1994).

<sup>12</sup> CPSIA's Sec. 101 lead standards apply to "children's products;" the CPSA defines a children's product as "a consumer product designed or intended primarily for a child 12 years of age or younger." 15 U.S.C. § 2052(a)(2). The definition goes beyond toys and includes any products that are primarily marketed to children. *Id.*; *see also* 15 U.S.C. § 2052(a)(5) (generally defining "consumer products" as any products used in a residence, school, or for recreational or personal use (subject to enumerated exceptions)).

<sup>13</sup> 15 U.S.C. § 1278a.

<sup>14</sup> Prior to the CPSIA, CPSC had banned paint with a lead content exceeding 600 ppm as a hazardous substance under the Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1261. *See* 16 C.F.R. § 1303. The CPSIA lowers that limit to 0.009% (90 ppm) as of August 14, 2009. CPSIA Sec. 101(f) (codified at 15 U.S.C. § 1278a). CPSC has issued a final rule implementing that change. 73 Fed. Reg. 77492-01 (Dec. 19, 2008). The CPSC regulations also ban toys, other children's products, and furniture containing lead-containing paint. 16 C.F.R. § 1303. Congress also enacted the lead content ban as a provision of the FHSA, not the CPSA. CPSIA Sec. 101(a)(1) (codified at 15 U.S.C. § 1278a).

<sup>15</sup> The CPSC rejected industry entreaties to apply the 600 ppm lead limits only to products manufactured after the effective date of February 10, 2009, not to products in inventory as of that date. The CPSC Office of General Counsel (OGC) determined that the Act, in stating that the lead standard was an FHSA standard, intended that the ban on sale of products containing over 600 ppm of lead apply to any products sold after February 10, 2009, regardless of date of manufacture. *See* OGC Letter (Sept. 12, 2008), *available at* <<http://www.cpsc.gov/LIBRARY/FOIA/advisory/317.pdf>>. The CPSC also rejected an industry petition seeking non-retroactive application. *See* CPSC Statement (Feb. 5, 2009) <[www.cpsc.gov/library/foia/ballot/ballot09/nam.pdf](http://www.cpsc.gov/library/foia/ballot/ballot09/nam.pdf)>.

<sup>16</sup> CPSIA Sec. 101(a)(2) (codified at 15 U.S.C. § 1278a).

component of a product, *e.g.*, a metal button would be evaluated separately from a jacket.<sup>17</sup> The Act does not apply risk assessment methodology that the agency would typically apply in determining the appropriate standards for protection of public health.<sup>18</sup> Congress circumvented this risk assessment process and determined on its own that any product that contains over 600 ppm lead is banned (with a few exceptions) – regardless of the potential for exposure or ingestion or consideration of dose or risk. The Act imposes this ban despite the absence of scientific evidence that correlates lead content of product substrates with actual lead exposure, ingestion, and risk.

The Act provides for exceptions for component parts that are not accessible and for electronic products (*e.g.*, those containing batteries) where elimination of lead is not technically feasible.<sup>19</sup> CPSC is currently evaluating the use of an “accessibility probe,” which is normally used to test products to see if children’s fingers will be exposed to sharp parts, to determine lead accessibility.<sup>20</sup> Thus, consistent with the Act, the agency seeks to ensure that children cannot even touch components containing over 600 ppm of lead, even if there is no actual lead exposure from such touching and even though there are disputes as to whether lead is likely to be absorbed by the skin even if there were some contact.

CPSC also may, by regulation, exclude a specific product or material from the lead ban if, after notice and a hearing, it

“determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will neither (A) result in the absorption of *any* lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child. . . ; nor (B) have any other adverse impact on public health or safety.”<sup>21</sup> CPSC, again restricted by the legislative language, stated that “any lead” means “any lead” no matter how little.<sup>22</sup> It will be challenging for a manufacturer to prove that an accessible lead component, not otherwise excluded, would not result in the absorption of “any lead.” In fact, manufacturers of youth ATVs recently submitted a scientific analysis, which, using conservative assumptions, concluded that lead ingested from exposure, *e.g.*, to brass (lead-containing) tire valves, was far less than acceptable lead levels in food and water.<sup>23</sup> CPSC, however, concluded that the study failed to show no absorption of “any lead” and denied the exception request.<sup>24</sup> CPSC, however, granted an enforcement stay until August 2011.<sup>25</sup>

On February 6, 2009, CPSC issued an enforcement policy which stated that certain products were not likely to contain lead levels exceeding regulatory standards, including products made of all natural materials, such as wood and cotton, children’s books printed after 1985 and (3) most dyed or undyed textiles (without plastic or metal fasteners). CPSC stated that it would not bring enforcement actions regarding these products, even if they

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<sup>17</sup> CPSIA Sec. 101(a)(2)(A) (codified at 15 U.S.C. § 1278a) (imposing lead limit of “600 ppm total lead content by weight for any part of the product”).

<sup>18</sup> *See, e.g.*, 15 U.S.C. § 2058(f)(3) (CPSC required to find that consumer product safety rule is reasonably necessary to eliminate or reduce unreasonable risk of injury associated with product).

<sup>19</sup> CPSIA Sec. 101(b)(2) (codified at 15 U.S.C. § 1278a).

<sup>20</sup> *See* 16 CFR § 1500.48 and § 1500.49 (accessibility probe testing).

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<sup>21</sup> CPSIA Sec. 101(b)(1) (codified at 15 U.S.C. § 1278a) (emphasis added).

<sup>22</sup> *See* Final Rule, 74 Fed. Reg. 10475 (March 11, 2009) (to be codified at 16 C.F.R. 1500).

<sup>23</sup> CPSC Staff Mem. re Request for Exclusion of Lead Limits (Apr. 1, 2009), *available at* <<http://www.cpsc.gov/LIBRARY/FOIA/FOIA09/brief/atvexclusion.pdf>>.

<sup>24</sup> Statement of Acting Chair Nancy Nord on Request for Exclusion (April 3, 2009), *available at* <<http://www.cpsc.gov/PR/nord040309exclusions.pdf>>.

<sup>25</sup> *Id.*

exceed lead limits, unless the seller had knowledge that the products did not comply with the ban.<sup>26</sup>

Although the CPSIA lead limits are based on legislative fiat, not scientific analysis, plaintiffs in civil litigation can be expected to invoke them in litigation as to classes of products primarily used by children. Moreover, Congress' aggressive regulation of lead content, without regard to risk, may presage new chemical-specific legislative initiatives. As with the phthalate ban (for which there is far less scientific support), the Congressional approach has been to ban first, research later. In contrast to agencies, Congress acts without any formalized notice and comment process.<sup>27</sup>

Moreover, Congressional enactments under the commerce clause to protect public health (and related findings) are subject to a very limited judicial review.<sup>28</sup> Courts,

<sup>26</sup> *Id.*

<sup>27</sup> Although CPSC may ban products under the CPSA, 15 U.S.C. § 2057, and the FHSA, 15 U.S.C. §§ 1261-1262, such bans may be adopted only through rulemaking processes, which carry certain procedural guarantees. In fact, courts have struck down product bans enacted by the CPSC (and other agencies) on grounds including failure to support the regulatory action with substantial evidence. *See, e.g., Gulf South Insulation v. CPSC*, 701 F. 2d 1137 (5th Cir. 1983) (invalidating CPSC urea-formaldehyde ban due to absence of substantial evidence supporting the ban, including evidence of unreasonable risk of injury, and quantification of that risk); *see also Corrosion Proof Fittings v. Environmental Protection Agency*, 947 F.2d 1201 (5th Cir. 1991) (court overturned EPA ban of asbestos-containing products issued under Toxic Substances Control Act because EPA lacked substantial evidence that it considered all necessary evidence and promulgated the least burdensome regulation necessary to protect the environment).

<sup>28</sup> *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (“we review congressional fact-finding under a deferential standard,” although courts do not place dispositive weight on those findings “when constitutional rights are at stake”); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319-320 (1985) (“This deference to Congressional judgment must be afforded even though the claim is that a statute . . . effects a denial of the procedural due process guaranteed by the Fifth Amendment.”).

likewise, may defer to Congressional findings in evaluating the constitutionality of legislation.<sup>29</sup> In any specific case, however, it may be argued that these Congressional actions and findings are no more reliable or scientifically valid than administrative decisions. Therefore, Congressional findings may be subject to exclusion from product liability cases under Federal Rules of Evidence 402 (irrelevant), 403 (prejudicial, confusing or waste of time), 802 (hearsay), and 702 and *Daubert v. Merrell Dow Pharms.* (as not scientifically reliable).<sup>30</sup>

### B. Phthalate Ban, CPSIA Sec. 108<sup>31</sup>

Phthalates comprise a group of more than 50 compounds used to make vinyl, polyvinyl chloride (PVC), and other plastics soft and flexible, as a solvent in paint, adhesives, cosmetics, and fragrances, and in personal care products, detergents and surfactants, printing inks, coatings, food products, and textiles. Chemicals may leach from these materials and be absorbed by the skin, ingested, or adhere to inhalable dusts. Phthalates are suspected of being “endocrine disruptors” which allegedly can

<sup>29</sup> *See, e.g., United States v. Silverman*, 132 F. Supp. 820, 830-31 (D. Conn. 1955) (congressional findings are entitled to great weight in considering the constitutionality of a statute, but do not establish essential elements of a case or relieve the government of the burden of proving those elements).

<sup>30</sup> *See, e.g., In re School Asbestos Litigation*, No. 83-0268 1991 WL 175819 (E.D. Pa. Sept. 4, 1991) (Court refused to take judicial notice under Fed. R. Evid. 201 of Congressional findings of asbestos hazard and rule that “asbestos is hazardous as a matter of law”); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 669-70 (S.D.N.Y. 2006) (Congressional finding of genocide in the Sudan Peace Act, unsupported by factual investigation, was excluded as inadmissible hearsay in case alleging that defendant aided and abetted genocide).

<sup>31</sup> Codified at 15 U.S.C. § 2057.

affect hormone levels and contribute to birth defects.<sup>32</sup>

The Act makes it unlawful for any person to manufacture for sale, distribute in commerce, or import into the U.S. any children's toy or child care article<sup>33</sup> that contains concentrations of more than 0.1% of three phthalates, DEHP (di-(2-ethylhexyl) phthalate), DBP (dibutyl phthalate), or BBP (benzyl butyl phthalate).<sup>34</sup> The Act also prohibits use of

three other phthalates, DINP (disononyl phthalate), DIDP (disodecyl phthalate), or DnOP (di-n-octyl phthalate) in any children's toy that can be placed in a child's mouth or child care article (presumably that also can be placed in the mouth, but the Act is unclear). The CPSIA authorizes CPSC to undertake rulemaking re these phthalates. CPSC staff currently takes the view – contrary to the CPSIA directives with respect to lead – that the percentage of phthalates is to be determined based on the mass of the *entire* product, not phthalate components.

The Act requires CPSC to appoint a Chronic Hazard Advisory Panel (CHAP) to “study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles.”<sup>35</sup> The CHAP has 24 months to prepare a report and CPSC has another six months to issue a rule.

CPSC has previously considered phthalate issues. In 1985, it convened a CHAP that resulted in a voluntary ban of DEHP for teething, rattles and pacifiers, a ban that the ASTM F963 toy standard (discussed below) now incorporates. Later, in response to a petition by environmental groups to ban PVC in children's products, a CHAP Report (June 2001) concluded that DINP in toys, teething, and rattles was not hazardous to children, and CPSC denied the petition in 2003.<sup>36</sup>

### C. Mandatory Adoption of ASTM Toy Safety Standard, CPSIA Sec. 106<sup>37</sup>

Section 106 of the CPSIA required CPSC to adopt the ASTM F963-07<sup>38</sup>

<sup>32</sup> See Bruce J. Berger, *et al.*, *Alleged Endocrine Disruptors: An Update on Legislation, Science, and Litigation concerning Bisphenol-A and Phthalate*, IADC Product Liability Committee Newsletter, July 2008. Available at <<http://www.iadclaw.org/pdfs/ProductLiab-July2008-1of2.pdf>>.

<sup>33</sup> As defined by the CPSIA (phthalate section), the term “children's toy” means “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” and the term “child care article” means “a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething.” CPSIA Sec. 108(e)(1)(B)-(C) (codified at 15 U.S.C. § 2057c).

<sup>34</sup> These provisions became effective on February 10, 2009. Congress enacted the phthalate prohibition as a consumer product safety rule, pursuant to CPSA Sec. 8, 15 U.S.C. 2057. The CPSC's General Counsel issued an Opinion Letter on November 17, 2008, stating that, unlike the CPSIA's lead content restrictions, its phthalate prohibitions would not apply to a company's existing inventory. The CPSC OGC determined that the phthalate ban should not apply retroactively because it was a consumer product safety rule which under the CPSA does not apply to existing inventory, not a federal hazardous substances ban under the FHSA, which typically prohibits all sales as of the effective date. OGC Opinion Letter (Nov. 17, 2008). The CPSC reversed this position on February 6, 2009, based on a decision issued in *National Resources Defense Council, Inc. v. CPSC*, 597 F.Supp.2d 370 (S.D.N.Y. 2009) (holding that CPSIA clearly prohibited sales of products containing phthalates as of the effective date, even if manufactured prior to that date, and restrictions on CPSC rules did not apply to consumer product safety standards “enacted by Congress”). Consequently, the CPSIA's phthalate prohibitions

applied to existing inventory as of February 10, 2009.

<sup>35</sup> CPSIA Sec. 108(b).

<sup>36</sup> Todd Stevenson (CPSC Secretary) Letter (Feb. 26, 2003), available at <<http://www.cpsc.gov/LIBRARY/FOIA/FOIA03/petition/Ageunder.pdf>>

<sup>37</sup> Codified at 15 U.S.C. § 2058.

<sup>38</sup> ASTM Standard F963-07, 2007, “Standard Consumer Safety Specification for Toy Safety,”

consumer safety specification for toy safety by February 2009. The ASTM standard sets forth material and design requirements and testing procedures, warning and labeling requirements, and limitations of concentrations of metals in “surface-coating materials.” CPSIA Section 104 requires CPSC to review the ASTM standard within one year and determine if stricter standards are needed. In fact, F963-07 has already been superseded by F963-08. Each subsequent ASTM standard becomes the mandatory standard in 180 days if CPSC does not disapprove.<sup>39</sup> Thus, through legislative action, Congress is making a voluntary industry standard, promulgated by an independent testing group, a mandatory federal standard. As such, compliance with the standard is subject to testing, certification, reporting, and other requirements discussed in this article. Moreover, plaintiffs in products liability litigation could contend that failure to comply with the standard could be viewed as negligence per se.

#### **D. Other CPSIA Provisions Currently Affecting Only Children’s Products**

**i. Third-Party Product Testing:** CPSIA Sec. 102<sup>40</sup> requires testing and certification of all children’s products (*e.g.*, cribs and pacifiers, metal jewelry, baby bouncers, walkers, and jumpers) by accredited independent testing laboratories. The testing is required to ensure compliance with all applicable standards including lead and phthalate requirements and will provide a basis for the compliance with the certificate of conformity requirement (discussed in Section III.A below).

**ii. Product Tracking Labels:** CPSIA Sec. 103<sup>41</sup> requires manufacturers to place a “tracking label” or other permanent distinguishing mark on children’s products “to the extent practicable” identifying the source of the product, the date of manufacture, and additional data regarding the manufacturing process, such as the batch number. The tracking requirement is intended is to facilitate recalls.

**iii. Advertising “Labeling” Requirements:** CPSIA Sec. 105<sup>42</sup> amends the FHSA to require that advertisements (including those on Internet websites or in catalogues) provide warnings that also are required to be included on the product labels. This provision may signal expansion of federal requirements for inclusion of warnings in advertising of consumer products.

### **III. Provisions Applicable to All Consumer Products**

#### **A. General Certification Requirements, CPSIA Sec. 102**

Prior to amendment, the CPSA required that manufacturers of products subject to CPSA standards issue certificates of compliance stating that the products met the standards.<sup>43</sup> The CPSIA significantly expands this requirement to apply to all consumer products that are subject to any rule, standard, ban, or regulation under the CPSA, as well as any other act CPSC enforces or administers (*e.g.*, the FHSA). The manufacturer must certify, based on a test of each product or upon a reasonable testing program, that its product complies with all CPSC requirements.<sup>44</sup>

The certification requirement extends beyond the lead and phthalate rule to all CPSC-administered rules governing

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ASTM International, West Conshohocken, PA, available at <www.astm.org>, is an international industry-derived that is voluntarily applied by toy manufacturers to their products.

<sup>39</sup> CPSIA Section 106(g).

<sup>40</sup> Codified at 15 U.S.C. § 2063(1)(2).

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<sup>41</sup> Codified at 15 U.S.C. § 2063(a)(5).

<sup>42</sup> Codified at 15 U.S.C. § 1278(c).

<sup>43</sup> 15 U.S.C. § 2063(a)(1), amended by CPSIA Section 102(a).

<sup>44</sup> 15 U.S.C. § 2063(a)(1).

consumer products. CPSC has granted a stay of enforcement as to new certification requirements (except for lead jewelry and paint).<sup>45</sup> Although manufacturers are excused from testing and certification requirements for a year, the products they sell must still comply with the new lead and phthalate standards. Manufacturers of products potentially containing lead or phthalates are relieved of the costs of testing and the paperwork burden of certification, but without testing they may risk violation of the Act. Moreover, retailers will want the assurance of compliance that comes with a conformity certificate. Thus, as a practical matter, many manufacturers are likely to comply with the Section 102 certification requirements as part of a quality assurance program.

### B. Recalls, CPSIA Sec. 214<sup>46</sup>

Prior to amendment, the CPSA gave CPSC the authority to require the manufacturer, distributor, or retailer of a consumer product that poses a “substantial product hazard” to give public notice of such hazard and repair, replace, or refund the purchase price of the product.<sup>47</sup> The CPSA defined a “substantial product hazard” as a failure to comply with a CPSA product safety rule or a product defect that poses a substantial risk of injury. The CPSIA expands this provision require recalls of products that fail to comply with other rules, regulations, standards, or bans CPSC enforces under other statutes, for example the FHSA (and therefore the lead ban).

The Act gives CPSC additional recall authority, including power to require recalls of “imminently hazardous consumer products.”<sup>48</sup>

CPSC may also require manufacturers to cease distribution of any product so described and provide notice to appropriate state and local public health officials. CPSC can order corrective actions of recall, repair, or refund. This also means that the manufacturer has lost the option to choose among those actions. CPSC also can withdraw its approval of a corrective action plan or order amendments to that plan.<sup>49</sup> Finally, the CPSIA prohibits the sale and export of recalled products.<sup>50</sup>

These changes collectively provide the CPSC with greater authority and flexibility regarding product recalls. It can now require recalls for products that violate FHSA or other CPSC-administered standards and has more power as to the details of mandatory corrective action plans. While as a practical matter, the vast majority of recalls have been, and will likely continue to be, “voluntary,” the CPSC will now be in a stronger position to carry out negotiations concerning corrective action plans for such recalls. From a litigation perspective, companies are likely to see more recalls, with attendant litigation risks. In addition, more companies may be subject to litigation risk, as the prohibition of sale of recalled products could impact retailers as well as manufacturers.

### C. Recall Notice Requirements, CPSIA Sec. 214(i)<sup>51</sup>

Section 214(i), introduced by then-Senator Barack Obama, sets forth notice requirements for mandatory CPSC recalls. Although most recalls are voluntary, the notice provisions may become required for future voluntary recalls and hence become the standards for exercise of reasonable care

<sup>45</sup> See Section II.A, *supra*.

<sup>46</sup> Codified at 15 U.S.C. § 2064 (CPSA Section 15).

<sup>47</sup> See 15 U.S.C. § 2064.

<sup>48</sup> See 15 U.S.C. § 2061(a). Under the statute, an “imminently hazardous product” is “a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal

injury.” *Id.*; see, e.g., *United States v. Althone*, 746 F.2d 977 (3d Cir. 1984) (CPSC contended that allegedly defective automatic baseball pitching machine was an imminently hazardous consumer product.).

<sup>49</sup> CPSIA Sec. 214(b).

<sup>50</sup> CPSIA Sec. 216, codified at 15 U.S.C. § 2068(a).

<sup>51</sup> Codified at 15 U.S.C. § 2064(i).



in connection with a recall.<sup>52</sup> The Act provide that notices must include specific product descriptions and photos; a description of the substantial product hazard and the reasons for the action; number and a description of any injuries or deaths associated with the product, including the ages of any individuals injured or killed, and the dates on which CPSC received information about such injuries or deaths; and a description of any remedy available to a consumer and actions a consumer must take to obtain a remedy.<sup>53</sup>

#### **D. Substantial Product Hazard Reporting, CPSIA Sec. 214(a)<sup>54</sup>**

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<sup>52</sup> RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY (1998), § 11, sets forth a theory of liability for “negligent recall” under which a seller could be held liable for harm resulting from failure to recall a product if the government requires a recall or a seller voluntarily undertakes a recall, and the seller “fails to act as a reasonable person in recalling the product.” Courts thus far generally have not embraced a separate negligent recall theory. *See, e.g., Eberts v. Kawasaki Motors Corp.*, Civil No. A1-02-43, 2004 WL 224683 (D.N.D. Feb. 2, 2004) (no duty to recall). Courts, have, however, found that when a manufacturer assumes a post-sale duty to remedy defects, it has an obligation to complete the remedy using reasonable means. *See, e.g., Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 532 (Tex. App. 1979). Some courts evaluated negligent recall claims within the framework of RESTATEMENT (SECOND) OF TORTS § 324A (1965), which imposes liability on parties who voluntarily perform services, fail to exercise reasonable care, and cause harm as a result. *See Tabieros v. Clark Equip. Co.*, 944 P.2d 1279 (Hawaii 1997) (no liability under § 324A because manufacturer had no independent duty to retrofit products and did not undertake such duty); *Blossman Gas Co. v. Williams*, 375 S.E.2d 117 (Ga. Ct. App. 1988) (once a gas company assumed the duty to inform its customers of gas-water-heater thermostat recall, it was liable for negligence in performance of that duty, *citing* § 324A).

<sup>53</sup> *See* Notice of Proposed Rulemaking, 74 Fed. Reg. 11883 (Mar. 20, 2009) (implementing CPSIA Sec. 214).

<sup>54</sup> Codified at 15 U.S.C. §§ 2064(b) (CPSA Sec. 15(b)).

Prior to the CPSIA, Section 15(b) of the CPSA required manufacturers, importers, distributors and retailers to notify CPSC immediately if they obtained information that reasonably supported the conclusion that a consumer product distributed in commerce (1) failed to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which CPSC has relied as a consumer product safety rule; (2) contained a defect which could create a substantial product hazard; or (3) created an unreasonable risk of serious injury or death.<sup>55</sup>

CPSIA Sec. 214 amended CPSA section 15(b) adding that companies must report products which “fail to comply with any other rule, regulation, standard, or ban under this Act or any other Act enforced by the CPSC.” For example, sellers must report a product if they become aware of a children’s product that exceeds the CPSIA applicable lead limits (which are banned under the FHSA). As a practical matter, the incorporation of voluntary standards will impose even broader reporting obligations. This is, in part, because the CPSC has taken the position that products that fail to comply with voluntary standards are considered defective.

#### **E. Substantial Product Hazard List, CPSIA Sec. 223<sup>56</sup>**

CPSIA also amends CPSA Section 15 by granting CPSC the authority to adopt rules to identify a consumer product or class of consumer products as a “substantial product hazard” under CPSA Sec. 15(a)(2). To determine that a product class poses a “substantial product hazard,” CPSC must determine that the hazardous characteristics of the product are readily observable and have been addressed by voluntary standards, such standards have been effective in reducing injury, and conclude there is

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<sup>55</sup> 15 U.S.C. § 2064(b), *amended by* CPSIA. § 214.

<sup>56</sup> Codified at 15 U.S.C. § 2064(j)(1).

substantial compliance with such standards. Thus, CPSC can now identify, through rulemaking, class-wide defects that constitute substantial product hazards (if the defects are subject to voluntary standards). The provision essentially allows the agency to say, from its perspective, that a class of products that do not comply with specific voluntary standards are defective, thereby essentially transforming voluntary standards into mandatory standards. For example, CPSC has been concerned about certain children's clothing with neck drawstrings that may pose a choking hazard. CPSC may now issue a rule finding any such products are defective if it determines that effective voluntary standards that address this type of danger are already in place.

#### **F. Consumer Product Safety Database, CPSIA Sec. 212**

CPSIA Sec. 212<sup>57</sup> creates a public, internet-accessible Consumer Product Safety Database, which can be used by consumers and public agencies to report information about harm allegedly caused by specific consumer products. Manufacturers will have a very limited time period (10 business days) to respond to these reports, but may seek to correct or redact them based on inaccuracies, trade secrets, or confidential business information. The names of the reporters will not be published, so plaintiffs' counsel will have no opportunity to contact consumers directly. The Database will likely be mined by aggressive plaintiffs' attorneys seeking new products about which to file lawsuits and thus have a significant litigation effect.

Further, the types of material included on the Database are not yet certain. The Database will contain "reports of harm related to the use of consumer products" submitted by consumers, local, state or federal agencies, health care professionals, child service providers, and public safety

entities.<sup>58</sup> The list of submitters does not include "plaintiffs' lawyers," but it is not clear whether CPSC will routinely post information contained in product liability lawsuit complaints or other information provided by plaintiffs' counsel. It is clear that the Database will not include information that manufacturers or retailers provided to CPSC in CPSA Section 15(b) or 37 reports.<sup>59</sup> CPSC has not yet established guidelines for operation of the Database, which is not anticipated to begin operations until 2010.

#### **G. Restrictions on Information Disclosure, CPSIA Sec. 211<sup>60</sup>**

CPSA Sec. 6(b) prohibited CPSC from disclosing information about a consumer product that identifies a manufacturer unless CPSC has taken "reasonable steps" to assure that (1) the information is accurate; 2) disclosure of the information is fair in the circumstances; and 3) disclosure of the information is reasonably related to effectuating the purposes of the CPSA and of the other laws CPSC administers.<sup>61</sup>

CPSIA Section 211 amends CPSA Section 6(b) and will require increased diligence by manufacturers to prevent the release of inaccurate information or the publication of trade secrets and other confidential information. The CPSIA halves the time periods for notice to the manufacturer and its opportunity to comment on information prior to CPSC's disclosure.<sup>62</sup> CPSIA Sec. 211(9) further provides that CPSC need not obtain manufacturer comments when it has reasonable cause to believe a product is in violation of any consumer product safety rule.<sup>63</sup> CPSIA Sec. 207 increases disclosure by allowing CPSC can share section 15(b) product hazard report information with any federal, state, local, or foreign government

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<sup>57</sup> Codified as 15 U.S.C. § 2055A (prior CPSA § 6A).

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<sup>58</sup> CPSA Sec. 6(b)(1)(A).

<sup>59</sup> 15 U.S.C. § 2055A(f)(2)(A), (B).

<sup>60</sup> Codified at 15 U.S.C. § 2055 (CPSA Sec. 6).

<sup>61</sup> 15 U.S.C. § 2055(b)(1).

<sup>62</sup> 15 U.S.C. § 2055(b)(1).

<sup>63</sup> 15 U.S.C. § 2055(b)(4).

agency with which CPSC has adopted information sharing agreements (subject to 15 U.S.C. § 2078(f)).

#### H. State Attorney General Enforcement, CPSIA Sec. 218<sup>64</sup>

The CPSIA provides that a State Attorney General who has reason to believe that a company has violated any consumer product safety rule, regulation, standard, certification, or labeling requirement, may bring an action to obtain injunctive relief in federal District Court (in the district where the defendant is found or transacts business).<sup>65</sup> CPSC must receive notice of the action and has the right to intervene. Attorneys General may not bring such actions if CPSC is pursuing civil or criminal actions for the same alleged violation.<sup>66</sup>

State Attorneys General do not have a right to sue for damages or penalties under the CPSIA, reducing financial incentives for state actions. State Attorneys General have previously pursued actions. However, under state consumer protection, deceptive trade practices, unfair trade practices and other similar state statutes. In 2007, 38 states sued toy manufacturers, which had already recalled lead-containing toys, under state consumer protection statutes; California filed an action also claiming a violation of Proposition 65.<sup>67</sup> Many of the defendants settled the cases in December 2008, with these manufacturers agreeing to pay \$12

million to the states and accelerate their compliance with the CPSIA lead deadlines.<sup>68</sup> Attorneys General may be expected to include actions for injunctive relief concerning alleged CPSA violations in future consumer production actions. Currently, CPSC may consult with state Attorneys General, but there is no formal restriction on state Attorneys General actions in connection with CPSC's enforcement scheme, and manufacturers may be faced with legal actions on various fronts. In particular, CPSC-issued stays of enforcement, e.g., of lead-related actions against ATV manufacturers discussed above are not binding on state Attorneys General.

#### I. Civil and Criminal Penalties, CPSIA Sec. 217<sup>69</sup>

The CPSIA increases civil penalties for violations of the CPSA with fines increased from \$5,000 per violation to \$100,000, and the maximum fine for a related series of violations increased from \$1.25 million to \$15 million. There are similar penalty increases for violations of the FHSA and other CPSC-administrated statutes. CPSIA Sec. 217(c) provides criminal penalties for knowing violations of up to five years in jail and deletes the requirement that CPSC provide notice before criminally prosecuting a company's officers, directors, or agents or individual for noncompliance.

#### J. Other Chemical or Product Specific Provisions

CPSIA Sec. 234 requires the Comptroller General, in consultation with CPSC, to conduct a study on the use of formaldehyde in the manufacture of textile and apparel articles and their components "to identify any risks to consumers caused by the use of formaldehyde in the

<sup>64</sup> Codified at 15 U.S.C. § 2073(b).

<sup>65</sup> *Id.*

<sup>66</sup> 15 U.S.C. § 2073(b)(5) (except for CPSIA Sec. 219 whistleblower protection).

<sup>67</sup> Proposition 65 (California Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 17200 *et seq.*) requires businesses to provide a "clear and reasonable" warning if their products contain 750 chemicals that allegedly pose a significant risk of causing cancer, birth defects, or reproductive toxicity. No warning is required if exposure to the chemical is low enough to pose no significant risk of cancer or is significantly below levels observed to cause birth defects or other reproductive harm. Proposition 65 may be enforced by consumer groups and private litigants as well as district attorneys and the California Attorney General.

<sup>68</sup> See, e.g., Press Release, Mass. Office of the Attorney General (Dec. 15, 2008), available at: <[http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2008\\_12\\_15\\_mattel\\_multistate\\_agreement&csid=Cago](http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2008_12_15_mattel_multistate_agreement&csid=Cago)>.

<sup>69</sup> Codified at 15 U.S.C. §§ 2069- 2070.

manufacturing of such articles, or components of such articles.” The General Accountability Office is to complete the study by August 2010. Formaldehyde is sometimes used in apparel manufacture (permanent press), and recent analyses disclosed measurable levels in clothing. This analysis led Sen. Robert Casey (D-Pa) to call for formaldehyde testing and standards in the CPSIA, but the Act’s final version merely called for a study. This provision is another example of concern about a specific chemical being addressed in legislation, prior to agency action. It is also interesting that the study is to be conducted by GAO, an agency that carries out and publishes analysis of other agency actions regarding chemicals, but does not typically perform independent risk assessments.

#### K. Preemption, CPSIA Sec. 231<sup>70</sup>

CPSA standards have preemptive effect over different state standards that apply to the “same risk of injury” associated with the same consumer product.<sup>71</sup> States may request approval from CPSC to enact stricter standards, and CPSC is authorized to grant approval.<sup>72</sup> Regulations enacted under the FHSA, such as the CPSIA Sec. 101 lead limits, are also preemptive.<sup>73</sup> Courts have found that CPSA’s preemptive effect, at least as it relates to tort litigation, is weakened by a “saving clause,” which states that compliance with consumer product safety rules “shall not relieve any person from liability at common law or under state statutory law to any other person.”<sup>74</sup>

Courts have given the CPSA limited preemptive effect. For example, in *Moe v. MTD Prods.*,<sup>75</sup> the court held that a CPSC labeling standard involving a lawn mower

expressly preempted plaintiff’s failure-to-warn claims, but plaintiff could pursue a design defect claim that would not create a different standard. In *Colon v. Bic, USA, Inc.*,<sup>76</sup> the court held that the savings clause prevented CPSC cigarette lighter standards from expressly preempting common law product liability claims and that the “minimum” CPSC standards did not impliedly preempt state liability claims.<sup>77</sup> Finally, in *In re Mattel*,<sup>78</sup> the court rejected the argument that a voluntary recall conducted pursuant to a CPSC-approved corrective action plan preempted a tort action seeking reimbursement for allegedly hazardous products.

The CPSIA specifically addresses two preemption issues. First, section 231(a) provides that CPSC rules, regulations, regulatory preambles may not expand, contract, limit, modify or extend the preemptive effect of the statutes that CPSC administers. This action apparently results from Congressional disapproval of the Bush Administration practice of having agencies set forth the anticipated preemptive effect of regulations in their preambles. CPSC stated in at least one a preamble that its standards preempted state regulations and civil

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<sup>76</sup> *Colon v. Bic, USA, Inc.*, 136 F. Supp. 2d 196 (S.D.N.Y. 2000).

<sup>77</sup> Courts have also held that state tort claims are not preempted when they rely on different, and higher, standards of care for design, manufacture and distribution of products than those imposed by applicable CPSC safety standards where there was no conflict with those standards. In *Leipart v. Guardian Ind., Inc.*, 234 F.3d 1063, 1069-70 (9th Cir. 2000), the court held that common law tort requirements were not “regulations” and therefore did not conflict with CPSC standards; more broadly the court considered the CPSC standards to be a floor – a minimum safety standard upon which state common law could impose further duties. The court also held that common law claims premised on violations of CPSC standards were not preempted. *Id.* at 1068. Recent jurisprudence, in particular, the Supreme Court decision in *Wyeth v. Levine*, 555 U.S. \_\_\_, 129 S.Ct. 1187 (2009) may pose additional hurdles to preemption arguments.

<sup>78</sup> *In re Mattel*, 588 F. Supp. 2d 1111, 1115-16 (C.D. Cal. 2008).

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<sup>70</sup> Codified at 15 U.S.C. §§ 2074 and 2075, 1261n.

<sup>71</sup> 15 U.S.C. § 2075(a).

<sup>72</sup> 15 U.S.C. § 2075(b), (c).

<sup>73</sup> FHSA Sec. 18, 15 U.S.C. § 1261n.

<sup>74</sup> 15 U.S.C. § 2074(a).

<sup>75</sup> *Moe v. MTD Prods., Inc.*, 73 F.3d 179 (8th Cir. 1995).

lawsuits.<sup>79</sup> The CPSIA says that such statements should not have any effect.

Second, CPSIA Sect. 231(b) states that: “Nothing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003.”<sup>80</sup> Because California’s Proposition 65, discussed *supra*, was in effect on that date, it is not preempted.

In general, the CPSA does not prevent states from adopting more aggressive regulatory schemes and states are not waiting for federal action. California, in addition to Proposition 65, has an expanded lead jewelry regulatory system, adopted its own phthalate ban (prior to CPSIA), imposed limits on formaldehyde release from composite wood products, and is evaluating a comprehensive “Green Chemistry Initiative.”<sup>81</sup>

The California phthalate ban<sup>82</sup> addresses the same six phthalates as CPSIA and imposes the same limits. The California statute also covers toys and child care articles, but there are some differences in how such products are defined (*i.e.*, California includes products used for “relaxation” as well as feeding and sleeping), and testing procedures and protocols may not be identical. The CPSIA expressly provides that states can impose additional requirements on “phthalate alternatives” that are not specifically regulated under the CPSIA, but this

provision seems to support preemption of state standards as to the six regulated phthalates. Whether the federal phthalate regulations actually preempt California standards, and their effect on products liability litigation has yet to be resolved.

#### IV. Conclusion

The enactment of the CPSIA, with its unintended consequences, poses both regulatory challenges and liability dangers to business. Litigation risks include a greater likelihood of regulatory violations (and negligence per se claims), increased product recalls with attendant publicity, a greater likelihood of public disclosure of potentially inaccurate information, and increased exposure to attorney general enforcement actions (with pendent state-based damages claims).

The Senate recently confirmed Inez Tenenbaum as the new Chair of the Commission. This appointment will improve the CPSC’s congressional relations and offers an opportunity for Congressional and CPSC leaders to work together to address the most objectionable parts of the Act. The new CPSC leadership, however, also reflects a more activist government approach and a likely increase in regulatory and enforcement actions.

<sup>79</sup> See CPSC Mattress Open Flame Standard, 71 Fed. Reg. 13472, 13496 (March 15, 2006) (“The Commission intends and expects that the new mattress flammability standard will preempt inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements.”).

<sup>80</sup> 15 U.S.C. § 2051.

<sup>81</sup> See <<http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/>>.

<sup>82</sup> Cal. Health & Saf. Codes §§ 108935-108939, Stats. 2007, c. 672, A.B. 1108 (adopted Oct. 2007, effective Jan. 1, 2009).