

---

---

# ❖ SPC&B Safety News ❖

---

A Newsletter for Clients of Sharretts, Paley, Carter & Blauvelt, P.C.

March 31, 2010

---

- I. CPSC Proposes Interpretative Rule on Definition of “Children’s Product”*
- II. Several States Ban BPA in Certain Products*
- III. Proposition 65 Claims on the Rise*
- IV. Draft Legislation to Amend CPSIA Under Discussion*
- V. Proposed Connecticut Legislation Would Regulate “Chemicals of Concern” in Children’s Products*
- VI. CPSC Finalizes Rule on Civil Penalty Factors and Looks Toward Enforcement of CPSIA’s Prohibited Acts*



---

## **I. CPSC Proposes Interpretative Rule on Definition of “Children’s Product”**

The Consumer Product Safety Improvement Act (CPSIA) created a new definition of “children’s product” (“a consumer product designed or intended primarily for children 12 years of age or younger”), and added a number of new requirements for articles that are covered by that definition. The statute specifies certain factors to be considered in determining whether a product is a “children’s product:”

- A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable;
- Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger;
- Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; and
- The Age Determination Guidelines issued by the Commission staff in September 2002

The proposed new Interpretative Rule would provide the following clarification of the factors set forth in the CPSIA:

- A manufacturer’s statement about the product’s intended use, including the product’s label, should be “reasonably consistent with the expected use patterns for a product.” A statement that the product is not intended for children does not preclude it from being a children’s product if it would commonly be used for children 12 years of age or younger.
- Representations in packaging, display, promotion, or advertising, whether express or implied, indicating that a product is appropriate for use by children 12 years of age or younger, may result in a determination that it is a children’s product. Advertising depicting children using the product, or the product’s physical location with other children’s products at retail can be significant factors.

*(Continued on page 2)*

---

75 Broad Street  
New York, New York 10004  
Phone: 212-425-0055  
Fax: 212-425-1797  
212-742-2180

SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.

*customs@sharretts-paley.com*

1660 L Street, N.W.  
Washington, D.C. 20036  
Phone: 202-223-4433  
Fax: 202-659-3904

---

*(Continued from page 1)*

- Products commonly recognized by consumers as being intended for use by children 12 years of age or younger. Factors to be considered include product size, exaggerated features simplifying the product's use, safety features, colors commonly associated with childhood, play value or features promoting interactive exploration and imagination, cost, etc.
- The Age Determination Guidelines provide product categories and products' appeal to different age groups, as well as the developmental stages of the different age groups

The proposed Interpretative Rule also provides more examples of the difference between children's products and products of general use. A decision meeting on the proposed rule is scheduled for tomorrow.

## **II. Several States Ban BPA in Certain Products**

The state of Washington is the latest of five states to enact legislation banning Bisphenol A (BPA) in certain children's products, while at least seven more states have similar legislation pending. Each state has its own variation on the ban, as follows:

Minnesota — Effective for manufacturers and wholesalers on January 1, 2010, and for retailers on January 1, 2011, bans the use of BPA in bottles and cups made for infants and children under three years of age.

Wisconsin — Bans the manufacture and sale of baby bottles and sippy cups containing BPA, for children ages three and under, effective June 15, 2010. All baby bottles and sippy cups for children ages three and under also must be labeled "BPA Free."

Washington — Plastic containers made with BPA that are designed to hold food or beverages for children under three will be banned effective July 1, 2011. The ban will be extended to plastic sports bottles on July 1, 2012.

Connecticut — Bans BPA from baby bottles, infant formula cans and reusable food containers effective October 1, 2011, although existing products may remain on the shelves until October 1, 2012.

Maryland — Effective in 2012, bans the use of BPA in baby bottles and sippy cups and requires the use of the least toxic alternative to BPA.

California currently is considering whether to list BPA under Proposition 65 and reportedly, various other states have legislation pending, including Missouri, New Jersey, New Mexico, New York, Pennsylvania, Vermont and Washington, DC. Chicago and Suffolk County of New York already have their own BPA bans in effect.

## **III. Proposition 65 Claims on the Rise**

California's "citizen enforcers" are issuing an increasing number of "60-Day Notices" advising manufacturers and retailers that their products have been found to be in violation of Proposition 65 and that lawsuits will ensue. Recent targets of these efforts have been lead found in footwear, handbags, wallets, tote bags, belts and other clothing accessories; phthalates in apparel, footwear, totes and backpacks; and cadmium in jewelry.

Under Proposition 65, warning labels are required for all products, whether for children or adults, containing lead, phthalates, cadmium, or any of a large number of other chemicals that the state has determined cause cancer or reproductive toxicity, unless it can be established that the levels present are below "daily exposure levels." Because of the extreme difficulty in proving compliance with the exposure levels, manufacturers and retailers are increasingly resorting to the use of warning labels to avoid being the subject of draconian penalty actions.

*(Continued on page 3)*

(Continued from page 2)

Anyone requiring assistance in complying with Proposition 65, including the drafting of warning labels, should contact us.

#### **IV. Draft Legislation to Amend CPSIA Under Discussion**

Draft legislation to amend the CPSIA, which according to two CPSC Commissioners was circulated for comment by Representative Waxman, Chair of the House Committee on Energy and Commerce, would address some, but certainly not all, of the many concerns that have been raised with respect to the implementation of the CPSIA. Commissioners Nord and Northup have published their comments on the proposed legislation.

The draft bill would create new exceptions to the lead in substrates standards for children's products that the CPSC could grant if the agency determined that:

- the product, material, or component part requires the inclusion of lead because it isn't practical or technologically feasible to remove the lead or make it inaccessible;
- the product, material, or component part is not likely to be placed in the mouth or ingested, taking into account normal and foreseeable use and abuse; and
- an exception for the product, component part, or material will have no measurable adverse effect on public health or safety.

Under this provision, the CPSC also would be granted the authority to require a warning label indicating that the product, material, or component part contains lead and that it is subject to an exception, and providing directions for safe use. Both Commissioners Nord and Northup stated that it is unnecessary to require the three-part determination described above and that the only important determination is the third — *i.e.*, whether the exception will have a measurable adverse effect on public health and safety. Further, they argue that most products could not meet all three requirements, which would make the exception meaningless.

The bill also would change the 100 parts per million (ppm) lead content limit scheduled under the CPSIA to go into effect in August of 2011 to be prospective, so as to avoid the problems with existing inventory that occurred with the retroactive implementation of the 600 and 300 ppm limits. Commissioners Nord and Northup both approved of the prospective nature of the limit, but recommended elimination of the 100 ppm limit in its entirety, since such low levels of lead generally do not pose any safety risks. Commissioner Nord also stated that the phthalates provisions should be made prospective to provide relief to resellers.

In addition, Commissioner Nord approved of the provision in the draft legislation that would exclude inaccessible component parts from the phthalates bans, although she indicated that the rulemaking required to implement the provision is unnecessarily complex. Under the bill as drafted, the CPSC would be required to issue a rule providing guidance on what components or classes of components would be considered inaccessible for this purpose.

Additional provisions include some relief for small volume manufacturers (a very restrictive provision that will have little impact) and for resellers of used products. Anyone interested in a copy of the entire draft bill should contact us.

#### **V. Proposed Connecticut Legislation Would Regulate “Chemicals of Concern” in Children’s Products**

Legislation is being considered in Connecticut that would require the state’s Commissioner of Consumer Protection to create a list of chemicals “of high concern to children’s health and development” by July 1,

(Continued on page 4)

(Continued from page 3)

2011. Manufacturers, distributors, wholesalers, and retailers would be banned from sale or distribution for use in the state of Connecticut any children's product or component of a children's product containing any chemical that has been listed for a period of three years or longer on the priority chemical list so created. Independent third-party testing would be required to prove that such chemicals are not present in any children's products the Commissioner of Consumer Protection has "reasonable grounds to believe" were manufactured, knowingly sold, distributed for sale or distributed for use in the state in violation of these requirements.

Unlike Proposition 65 in California, there is not even an attempt to establish acceptable levels of the chemicals in question and, therefore, the mere presence of a trace amount in a children's product conceivably could result in penalties. We will keep you apprised of further developments relating to the proposed legislation.

## **VI. CPSC Finalizes Rule on Civil Penalty Factors and Looks Toward Enforcement of CPSIA's Prohibited Acts**

As discussed in our *Safety Update* of March 11, 2010, the CPSC is set to start its enforcement phase of the new requirements under the CPSIA. The civil penalty factors that we summarized in the *Update*, which have been in effect on an interim basis since September 1, 2009, have now been incorporated and clarified in a final rule effective March 31, 2010. In addition to dramatically increasing the penalty amounts for violations of the Consumer Product Safety Act (CPSA), the Flammable Fabrics Act (FFA), and the Federal Hazardous Substances Act (FHSA) (see the March 11 *Update* for details), the CPSIA also introduced many new prohibited acts and expanded the CPSC's enforcement authority for "knowing violations" (actual presumed knowledge are treated the same), including but not limited to the following:

- Sale, offer for sale, manufacture for sale, distribution in commerce, or importation into the U.S. of a banned hazardous substance under the FHSA, FFA
- The failure to furnish a certificate under any act enforced by the CPSC
- The failure to comply with the children's product tracking label requirements
- The sale, offer for sale, distribution in commerce, or importation into the U.S. of any consumer product containing an unauthorized third-party certification mark
- Misrepresentation to CPSC officers or employees about the scope of consumer products subject to recall or material misrepresentation in the course of any investigation
- Exercise or attempt to exercise undue influence on a third-party conformity assessment body that tests products for compliance
- Export from the U.S. for purposes of sale any consumer product or other product or substance, unless specifically permitted by the Secretary of the Treasury, that is subject to court- or CPSC-ordered recall or that is banned under the FHSA or subject to a voluntary recall announced by the CPSC
- Violation of a CPSC order prohibiting export for sale of any consumer product not in conformity with an applicable consumer product safety rule

Anyone with questions regarding the above matters should contact us.