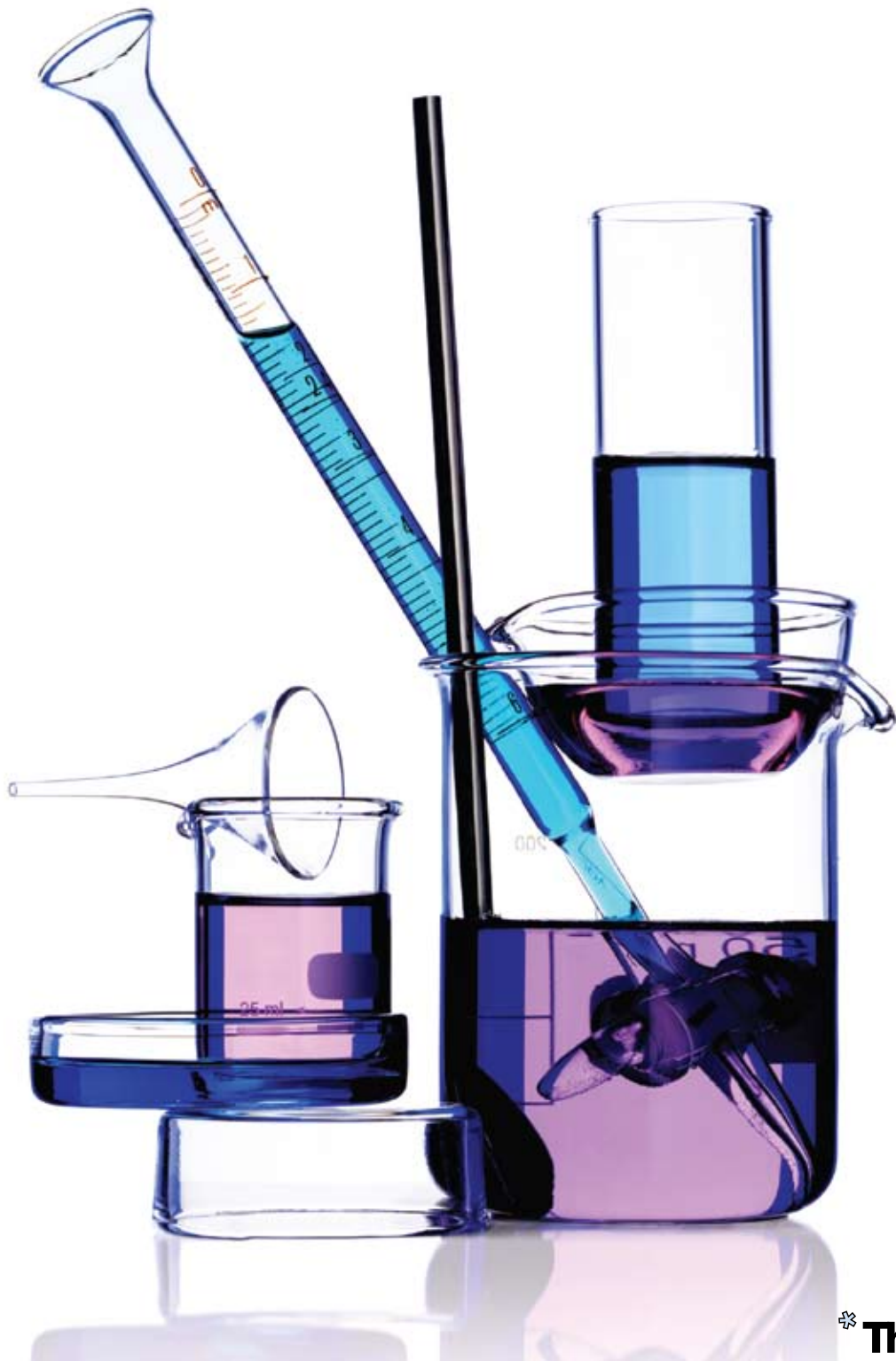


Guide To Navigating The Consumer Product Safety Improvement Act[®]



Guide To Navigating The Consumer Product Safety Improvement Act

Promotional Products Association International

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TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION | 5 |
| RECENT DEVELOPMENTS | 6 |
| <ul style="list-style-type: none"> • Stay of Enforcement • Guidance on Enforcement Policy on Lead Content Standard • Interim Final Rule on Electronic Components • Court Opinion on Phthalate Content • Responsibility for Compliance | |
| DEFINITION OF A CHILDREN’S PRODUCT | 8 |
| <ul style="list-style-type: none"> • Determining Children’s Products | |
| LEAD CONTENT | 9 |
| ARE THERE ANY EXEMPTIONS FROM THE LEAD CONTENT LIMITS? | 10 |
| OTHER NEW OR REVISED STANDARDS FOR CHILDREN’S PRODUCTS | 12 |
| <ul style="list-style-type: none"> • Lead in Paint/Surface Coatings • Toy Safety Standard • Phthalates | |
| TESTING AND CERTIFICATION | 14 |
| <ul style="list-style-type: none"> • Testing Laboratories | |
| GENERAL CONFORMITY CERTIFICATE (GCC) | 17 |
| <ul style="list-style-type: none"> • Testing To Support A GCC • Sample GCCs • GCCs For Imports • Electronic Certifications • Retention of GCCs • GCCs Versus Third-Party Certification | |
| ADDITIONAL GUIDANCE ON CHILDREN’S PRODUCTS | 20 |
| <ul style="list-style-type: none"> • Advertising For Toys And Games • Tracking Labels • Database | |
| RESPONSIBILITY FOR COMPLIANCE..... | 22 |
| CONSUMER PRODUCTS IN GENERAL | 23 |
| <ul style="list-style-type: none"> • Supply Chain Identification • Penalties | |

- Recall And Corrective Actions
- State Attorneys General
- Whistleblower Protections
- Pre-emption

PPAI IS WORKING FOR ITS MEMBERS25

RESOURCES26

SCHEDULE OF IMPLEMENTATION.....27

INTRODUCTION

Consumer Product Safety Improvement Act Of 2008

Last August, Congress signed into law the Consumer Product Safety Improvement Act of 2008 (CPSIA) as Public Law 110-314. This act makes significant changes to consumer product safety laws and gives the Consumer Product Safety Commission (CPSC) significant new responsibilities for ensuring the safety of consumer products.

The CPSIA established three new standards that have significant ramifications for our industry. The standards affect the amount of lead allowed in children's products, phthalates and safety requirements for all children's products. The CPSIA also made changes to a fourth existing standard, lead in paint and surface coatings. Also, some of the toy safety standards were already law.

This law changed many of the basic federal consumer product safety laws and created new responsibilities for those who make, distribute and sell consumer products. While the provisions that created new standards for children's products got most of the attention, there are some provisions that apply to any product that is subject to a federal consumer product safety ban, rule, regulation or standard. These range from new penalties for violations of federal consumer product safety laws to new recall responsibilities.

A major new responsibility requires the issuance of "General Conformity Certificates" by a manufacturer or importer for *any* product which is subject to a federal consumer product safety rule, ban, standard or regulation under any Act enforced by the CPSC, that the product meets or is conformance with the federal consumer product safety rule, ban, standard or regulation.

However, the new requirements regarding children's products have gained the most attention in the promotional products industry.

This guide will provide you with the tools to understand the implications of this new law on your business and the information you need to remain compliant within its new requirements for testing and certification. Given that elements of this law are still being determined by the CPSC, we will provide you with information on where to go to help fill in the blanks. We anticipate that as the CPSC issues more specific testing guidelines, identifies additional testing labs and issues new rulings, we will revise and improve upon this guide.

RECENT DEVELOPMENTS

Stay of Enforcement

The CPSC has issued a limited stay of enforcement for certain testing and certification provisions. For our industry, the stay affects the General Conformity Certification and the third party testing for lead content (except for jewelry), the elements of mandatory safety standard and phthalates in children's products. This stay provides relief from the general certification requirements for all consumer product safety rules and similar rules which went into effect on November 12, 2008 as well.

The stay is in effect until February 10, 2010 at which time the CPSC will reconsider it.

The stay does NOT apply to:

- The ban on lead in paint and other surface coatings effective for products made after December 21, 2008;
- The ban on small parts effective for products made after February 15, 2009; and
- The limits on lead content of metal components of children's jewelry effective for products made after March 23, 2009.

It is important to note that the stay does not apply to the standards themselves. Products must meet the lead content, phthalate and mandatory safety standards which went into effect on February 10, 2009.

Guidance on Enforcement Policy for Lead Content Standard

The CPSC issued a statement on how it will enforce the lead content standard set by the CPSIA until various regulatory projects are finished or until the stay of enforcement regarding third-party testing and certification for most children's products is reviewed on February 10, 2010.

Inaccessible Parts

Under the law, the lead content standard does not apply to components that the CPSC determines are inaccessible. According to the CPSC's enforcement guidance statement "until the inaccessibility guidance is finalized, the Commission staff will accept a manufacturer's determination that a part is inaccessible if it is based on a reasonable interpretation of section of the law."

Certain Items Excluded From Lead Content Standard

The CPSC also has a pending rulemaking to exclude certain items from the lead content standard. The guidance says, "The Commission staff has begun to identify materials whose lead content is consistently below the limit of 300 ppm (the limit that becomes applicable in August 2009). These include certain natural materials such as wood, cotton, and wool, as well as certain metals and alloys."

The guidance goes on to say, “Until the Commission promulgates a final rule announcing its determinations on these materials, the Commission’s Office of Compliance shall not prosecute any person for manufacturing, importing, distributing, selling or offering for sale a children’s product on the basis that it contains more than 600 ppm lead in any material as to which the Commission has made a preliminary determination in the January 15, 2009 proposed rulemaking.”

Regarding the application of the lead standard to ordinary books and certain textiles, the guidance states that “Commission staff has begun to identify classes of children’s products whose lead content appears to fall consistently below the prescribed limits. The staff is not aware of a single documented case in which a product falling within one of the following classes contained total lead above 300 ppm: Ordinary children’s books printed after 1985, and dyed or undyed textiles (not including leather, vinyl or PVC) and non-metallic thread and trim used in children’s apparel and other children’s fabric products such as baby blankets. This latter class (textiles, thread and trim) does not include such products if: (1) they have undergone further treatment that may impart lead (2) they are ornamented with metal, rhinestones or other objects; or (3) they have plastic or metal fasteners with possible lead content (such as snaps, grommets, zippers or buttons).”

Upon completion of the staff’s investigation of these product classes “the Commission intends to issue guidance addressing them in greater detail. In the meantime, the Commission’s Office of Compliance shall not prosecute any person for manufacturing, importing, distributing, selling or offering for sale a children’s product (or part thereof) that falls within the two classes described above on the basis that it contains more than 600 ppm lead.”

Interim Final Rule on Electronic Components

Separately, the CPSC also issued an “interim” final rule on electronic components and lead content in children’s products. The law directed the CPSC to formulate a rule to exclude certain electronic components when it was technologically infeasible to eliminate the lead. The final rule includes several exclusions. One that might be of particular interest to our industry states: “Components of electronic devices that are removable or replaceable such as battery packs and light bulbs that are inaccessible when the product is assembled in functional form or are otherwise granted an exemption are not subject to the lead limits “

Phthalate Inventory Opinion

The CPSC’s General Counsel had rendered an opinion that the phthalate ban applied to products manufactured after February 10, 2009. Consumer advocacy groups challenged the opinion in federal court. The court has ruled that the effective date applies to the sale of items and therefore existing inventories of children’s products must meet the phthalate content standard. The CPSC will not appeal the decision.

DEFINITION OF A CHILDREN'S PRODUCT

Understanding the requirements of the CPSIA as they apply to children's products begins with the definition. The term "children's product" means a consumer product designed or intended primarily for children 12 years of age or younger. In determining whether a consumer product is primarily intended for a child 12 years of age or younger, consider the following factors:

- A manufacturer's statement about the intended use of the product, including a product label if such a 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.
- The Age Determination Guidelines issued by the CPSC staff in September 2002 and any successor to such guidelines.

Determining Children's Products

Having laid out all these new standards and procedures, let's return to the central questions: Is my promotional product a children's product? How can I be sure? The big issue in our industry is that we have products clearly intended for use in adult settings—for example, tradeshow and workplaces. But the products end up in the hands of children.

The CPSC is never going to issue a list of products. It has already declared that. We have to go back to the definition and its four main points to sort out the options:

1. Label a product as "not intended for children."
2. Test everything for the appropriate standard (e.g. lead content or the toy safety standard.)
3. Test some products and hope for the best.
4. Take one of the pillars of the definition, turn it around and demonstrate that the product is represented in its packaging, display, promotion or advertising as not appropriate for use by children 12 years of age or younger. This is always going to be the grey area option that will be hard to manage.

PPAI has asked CPSC for some guidance and, while the CPSC staff is sympathetic to the particular challenges of our industry, it may not give that guidance. For now, it would seem that unless the product has been tested and certified, a prudent businessperson would want to document, as much as possible, that the product is being provided in adult situations such as tradeshow or in the workplace as employee awards.

LEAD CONTENT

Any children's product that contains more lead than the limit established by the CPSIA shall be treated as a banned hazardous substance under the existing Federal Hazardous Substances Act (FHSA).

The limits on the amount of lead in children's products are phased in over the course of three years. As of February 10, 2009, products designed or intended primarily for children 12 and younger may not contain more than 600 ppm of lead content by weight for any part of the product. Beginning August 14, 2009, the lead limit will be 300 ppm total lead content by weight for any part of the product. Beginning August 14, 2011, the level will be 100 ppm unless the CPSC determines that a limit of 100 parts per million is not technologically feasible for a product or product category. The CPSC may make such a determination only after notice and a hearing and after analyzing the public health.

The CPSC's General Counsel has rendered an opinion that existing inventories of children's products with lead content that exceeds 600 ppm may NOT be sold after February 10, 2009. According to the CPSC, "Children's products that contain more lead than 600 ppm are banned in the U.S. after February 10, 2009, and the sale of those products can result in significant civil and criminal liability."

ARE THERE ANY EXEMPTIONS FROM THE LEAD LIMITS?

The CPSC may, by regulation, exclude a specific product or material from the prohibition if lead in such product or material will neither 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, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product; nor have any other adverse impact on public health or safety.

The lead limits established shall 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.

Paint, coatings or electroplating may not be considered to be a barrier that would render lead in the substrate inaccessible to a child, or to prevent absorption of any lead into the human body, through normal and reasonably foreseeable use and abuse of the product. These protections are associated with substantially reducing lead in children's products.

If the CPSC determines that it is technologically infeasible for certain electronic devices, including those containing batteries, to comply with the lead limits, the CPSC, by regulation, will issue requirements to eliminate or minimize the potential for exposure to and accessibility of lead in such electronic devices. These may include requiring electronic devices be equipped with a child-resistant cover or casing that prevents exposure to and accessibility of the parts of the product that contain lead. The CPSC is working on guidance on this exception too.

By August 14, 2009, the CPSC shall promulgate a rule providing guidance with respect to what product components, or classes of components, will be considered to be inaccessible.

The CPSC issued a statement on how it will enforce the lead content standard set by the CPSIA until various regulatory projects are finished or until the stay of enforcement regarding third-party testing and certification for most children's products is reviewed on February 10, 2010.

Inaccessible Parts

Under the law, the lead content standard does not apply to components that the CPSC determines are inaccessible. According to the CPSC's enforcement guidance statement "until the inaccessibility guidance is finalized, the Commission staff will accept a manufacturer's determination that a part is inaccessible if it is based on a reasonable interpretation of section of the law."

Certain Items Excluded From Lead Content Standard

The CPSC also has a pending rulemaking to exclude certain items from the lead content standard. The guidance says, "The Commission staff has begun to identify materials whose lead content is consistently below the limit of 300 ppm (the limit that becomes

applicable in August 2009). These include certain natural materials such as wood, cotton, and wool, as well as certain metals and alloys.”

The guidance goes on to say, “Until the Commission promulgates a final rule announcing its determinations on these materials, the Commission’s Office of Compliance shall not prosecute any person for manufacturing, importing, distributing, selling or offering for sale a children’s product on the basis that it contains more than 600 ppm lead in any material as to which the Commission has made a preliminary determination in the January 15, 2009 proposed rulemaking.”

Regarding the application of the lead standard to ordinary books and certain textiles, the guidance states that “Commission staff has begun to identify classes of children’s products whose lead content appears to fall consistently below the prescribed limits. The staff is not aware of a single documented case in which a product falling within one of the following classes contained total lead above 300 ppm: Ordinary children’s books printed after 1985, and dyed or undyed textiles (not including leather, vinyl or PVC) and non-metallic thread and trim used in children’s apparel and other children’s fabric products such as baby blankets. This latter class (textiles, thread and trim) does not include such products if: (1) they have undergone further treatment that may impart lead (2) they are ornamented with metal, rhinestones or other objects; or (3) they have plastic or metal fasteners with possible lead content (such as snaps, grommets, zippers or buttons).”

Upon completion of the staff’s investigation of these product classes “the Commission intends to issue guidance addressing them in greater detail. In the meantime, the Commission’s Office of Compliance shall not prosecute any person for manufacturing, importing, distributing, selling or offering for sale a children’s product (or part thereof) that falls within the two classes described above on the basis that it contains more than 600 ppm lead.”

Interim Final Rule on Electronic Components

Separately, the CPSC also issued an “interim” final rule on electronic components and lead content in children’s products. The law directed the CPSC to formulate a rule to exclude certain electronic components when it was technologically infeasible to eliminate the lead. The final rule includes several exclusions. One that might be of particular interest to our industry states: “Components of electronic devices that are removable or replaceable such as battery packs and light bulbs that are inaccessible when the product is assembled in functional form or are otherwise granted an exemption are not subject to the lead limits “

OTHER NEW OR REVISED STANDARDS FOR CHILDREN'S PRODUCTS

The following are several other major additions or changes to standards for children's product made by the CPSIA

Lead In Paint And Surface Coatings

The lead in paint/surface coating limit is currently 600 ppm for children's products. It will be lowered to 90 ppm on August 14, 2009. As will be discussed later, third-party testing and certification for lead in paint/surface coating for children's products is already in effect.

According to the CPSC, the terms paint or similar-surface coating materials "apply generally to liquid or semi-liquid products that change to a solid film when you apply a thin coating to wood, stone, metal, cloth, plastic or a similar surface. Printing inks, materials such as pigments for plastic that become part of an article itself, and materials such as ceramic glaze which become bonded to the surface of a product are not paints or similar surface coating materials."

When referencing vitrified borosilicate enamels, the law and regulations provide that paint and other similar surface-coating materials does not include printing inks or those materials which actually become a part of the substrate, such as the pigment in a plastic article, or those materials which are actually bonded to the substrate, such as by electroplating or ceramic glazing. In most instances, when vitrification has occurred, the materials would be considered to be part of the substrate of the product as one whole part for testing purposes.

The CPSC has additional information on the lead in paint/surface coating and lead content; see CPSC Lead in Paint and Lead Content Questions. Click [HERE](#).

Toy Safety Standard

One big requirement that will have an impact on our industry went into effect on February 10, 2009. The American Society for Testing and Materials (ASTM) International Standard F963-07 Consumer Safety Specifications for Toy Safety (ASTM F963) is now a mandatory standard and promotional products that fall within the definition of a children's product must comply with that standard. ASTM F963-07 is a proprietary standard. It must be purchased. The standard covers an array of potential hazards including mechanical, chemical, electrical and flammability.

For a business in the promotional products industry interested in finding standards, ANSI is a recommended source. *It should be noted that most standards are proprietary documents. It is very difficult to find a free copy of a standard as most standards are available for purchase.* A useful site to search for standards and purchase them, if necessary, is ANSI's eStandards Store at www.ansi.org.

Phthalates

The CPSIA states “beginning February 10, 2009, it will be unlawful to manufacture for sale, offer for sale, distribute in commerce or import into the U.S. any children’s toy or childcare article that contains concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP) or benzyl butyl phthalate (BBP).”

A “children’s toy” means a product intended for a child 12 years of age or younger for use when playing, and a “childcare article” means a product that a child three and younger would use for sleeping, feeding, sucking or teething.

The law also provides “Three additional phthalates, diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP), have been prohibited pending further study and review by a group of outside experts and the CPSC. Beginning February 10, 2009, and until the CPSC decides otherwise, it will be illegal to manufacture for sale, offer for sale, distribute in commerce, or import into the U.S. any children’s toy that can be placed in a child’s mouth or childcare article that contains concentrations of more than 0.1 percent of DINP, DIDP or DnOP.”

A federal court has ruled that existing inventories prior to February 10, 2009 that contain those phthalates in excess of the limits, may not be sold.

TESTING AND CERTIFICATION

The CPSIA sets forth a framework for accreditation, establishing accreditation requirements for various product categories, what constitutes third-party testing, and various other aspects of testing and certification process.

At this time this is the most confusing part of the law. One has to understand that some products are not subject to a federal consumer product safety standard, rule, regulation or ban, and no testing or certification is required. For some products, there is a federal consumer product safety standard, rule, regulation or ban already in ready in existence and a General Conformity Certificate (GCC) would have to be issued if not for the stay of enforcement. There are some products for which third-party testing is already required (e.g. lead in paint/surface coatings). For some products, third party testing and certification will be required at a later date.

The CPSC has issued a stay of enforcement with regard to General Conformity Certification requirements and third party testing and certification for certain standards established by the CPSIA.

For our industry, the stay affects the General Conformity Certification and the third party testing for lead content (except for jewelry), the elements of mandatory safety standard and phthalates in children's products. This stay provides relief from the general certification requirements for all consumer product safety rules and similar rules which went into effect on November 12, 2008 as well.

The stay does NOT apply to:

- The ban on lead in paint and other surface coatings effective for products made after December 21, 2008;
- The ban on small parts effective for products made after February 15, 2009; and
- The limits on lead content of metal components of children's jewelry effective for products made after March 23, 2009.

It is important to note that the stay does not apply to the standards themselves. Products must meet the lead content, phthalate and mandatory safety standards,

The stay is effective until February 10, 2010.

Between February 10, 2009 and March 23, 2009, the children's jewelry must meet the 600 ppm standard but as a result of the stay, no testing and certification is required. After March 23, 2009, third party testing and certification is required.

There are significant differences between what is required for a GCC and third-party testing and certification.

Basically, a GCC is a “self-certification” and while the presumption is that you have testing to back it up, it does not specifically require a certain testing protocol.

Third-party testing and certification is a different story. The CPSC will be required to establish protocols and standards:

- For ensuring that a children’s product tested for compliance with an applicable children’s product safety rule is subject to testing periodically and when there has been a material change in the product’s design or manufacturing process, including the sourcing of component parts.
- For the testing of random samples to ensure continued compliance.
- For verifying that a children’s product tested by a conformity assessment body complies with applicable children’s product safety rules.’

In general, what is required for a GCC or third party certification?

A manufacturer or private labeler must issue either a separate certificate for each children's product safety rule applicable to a product or a combined certificate that verifies compliance with all applicable children's product safety rules, in which case each rule must be specified.

Every certificate required by law must identify the manufacturer or private labeler issuing the certificate and any third-party conformity assessment body on whose testing the certificate depends. The certificate shall include, at a minimum, the date and place of manufacture, the date and place where the product was tested, each party's name, full mailing address, telephone number and contact information for the individual responsible for maintaining records of the test results.

Every certificate required by the law shall be legible and all content required must be in the English language. A certificate may also contain the same content in any other language. Every certificate shall accompany the applicable product or shipment of products covered by the same certificate and each distributor or retailer of the product must be provided with a copy of the certificate.

Testing Laboratories

How do you find a testing laboratory? Only CPSC-approved laboratories can be used to fulfill a third-party testing and certification requirement. The CPSC has begun to publish lists of approved laboratories for specific third-party testing and certification requirements. Click [HERE](#) for a full list.

The CPSIA sets forth a timetable for establishing accreditation requirements for these laboratories based on various product categories. For example, by December 12, 2008, the CPSC was required to publish a notice of the requirements for accreditation of third-party conformity assessment bodies to assess conformity with the requirements of the CPSIA with respect to children's metal jewelry. This has been done and laboratories can now apply for CPSC approval for testing of children's metal jewelry. The toy testing accreditation comes later in the queue.

For the GCC, one does not have to use a CPSC approved laboratory, if a laboratory is used..

GENERAL CONFORMITY CERTIFICATE

The following material explains the General Conformity Certificate (GCC) process. *We have retained it even though the CPSC stay for certain standards will result in making it a moot point for those standards.* When third party testing certification is required, it supersedes the GCC requirement so by the time the stay is lifted, the third party testing and certification should be in place.

The General Conformity Certificate (GCC) is a self-certification required by the Consumer Product Safety Improvement Act (CPSIA). The new law requires a manufacturer or importer of a product, which is subject to a federal consumer product safety rule, ban, standard or regulation under any Act enforced by the CPSC, to certify that the product meets or is conformance with the federal consumer product safety rule, ban, standard or regulation. A GCC is required as of November 12, 2008 for any *existing* rule, ban, standard or regulation and as of the effective date of any new rule, ban, standard or regulation. *However, the stay of enforcement includes those GCCs as well.*

Prior the issuance of the stay, the process was to be as new standards become effective (e.g., February 10, 2009, for lead content, phthalates and overall toy safety for children's products) a general conformity certificate (GCC) must be issued if a promotional product is subject to those standards. If and when third party certification is required, it supersedes the GCC requirement.

This self-certification means a domestic manufacturer or importer must certify, based on a test of each product or upon a reasonable testing program that the product complies with all applicable standards. It does not have to be tested by a third party, but for all practicable purposes it would seem that is the most logical way to demonstrate a reasonable testing program. If you use a testing lab to support your GCC, it does not have to be approved by the CPSC.

Under the law, the GCC has to be furnished to the distributor. CPSC staff believes that an electronic certificate is "accompanying" a shipment if the certificate has a unique identifier and can be accessed via a World Wide Web URL or other electronic means, provided the URL or other electronic means and the unique identifier are created in advance and available with the shipment.

Unfortunately, the CPSC is unwilling and unable to provide a list. Said the CPSC in its [Federal Register Notice on Certificates \(FRNC\)](#). "Staff has been deluged with hundreds and hundreds of requests to evaluate specific individual products and specify what bans, standards, regulations, etc., might apply to them. First, the CPSC does not have, or expect to have, sufficient resources to evaluate every one of the products within the scope of the *thousands of types* of products within its jurisdiction in this manner. The CPSC has never preapproved products for compliance with its standards, bans, regulations or rules in this manner in any event."

The structure of the regulatory system for federal consumer product safety is a combination of regulation by hazards and some regulation by specific product. Given the

breadth of promotional products, any attempt to summarize is likely to omit some promotional product and/or hazard.

Hazard rules, bans and regulations for which a GCC is currently required include:

- Federal Hazardous Substance Act (FHSA) bans and requirements adopted by the Commission as well as bans defined by statute (banned hazardous substance by definition)
- FHSA labeling rules adopted by the Commission
- Flammable Fabric Act
- Poison Prevention Packaging Act “special packaging” standards
- Refrigerator Safety Act standard for refrigerators

The CPSC has a list of hazards and products that includes links to statutory and regulation citations as well as some of their regulatory summaries. It is the best place to start: Click [HERE](#) to see a complete list.

Testing To Support A GCC

According to CPSC’S [certification summary](#) it must be based on a test of the product or a “reasonable testing program” According to CPSC’s [conformity certificate presentation slide No. 12](#): “Type and frequency of tests are up to the issuer of the certificate; not necessary to use the exact test procedure prescribed by the regulations; may be advantageous to use stricter test; and should be stringent enough to detect variations that would cause a product to fail.”

According to the CPSC, general conformity certifications do not need to be based on testing done by a third-party laboratory.

Sample General Conformity Certificate

General Conformity Certificates must include:

1. Product identification
2. Citation to each CPSC product safety regulation for which the product is certified
3. Identification of the importer or domestic manufacturer that is certifying compliance of the product: identification includes name, full mailing address and telephone number
4. Contact information of the individual who maintains records of the test results: name, full mailing address, e-mail address and telephone number
5. Date and location of compliance testing: city, country and/or administrative region included
6. Identification of the third-party laboratory involved in the testing that resulted in certification: name, full mailing address and telephone number.

Click [HERE](#) to see a sample certificate provided by the CPSC.

GCCs For Imports

The CPSC has stated that a GCC must be made available to the CPSC as soon as the product or shipment itself is available for inspection in the U.S. The name of the foreign manufacturer does not need to be noted on the GCC. Only the domestic manufacturer or the importer's information must be listed.

According to the CPSC, a GCC must accompany each product or product shipment and be furnished to each distributor and retailer of the product in question.

Electronic Certifications

A physical GCC does not need to physically accompany each shipment. An electronic certificate will satisfy the "accompany" requirement if the certificate is identified by a unique identifier and can be accessed via the World Wide Web URL or other electronic means, provided that the URL or other electronic means and the unique identifier are created in advance and are available, along with access to the electronic certificate itself, to the CPSC or to the Customs authorities as soon as the product or shipment itself is available for inspection.

An electronic certificate satisfies the "furnish" requirement if the distributors and retailers of the product are provided a reasonable means to access the certificate.

Retention Of GCCs

The CPSC recommends that each issuer maintain test records supporting the certification for at least three years as is currently required by certain consumer product specific CPSC standards. The responsibility is on the manufacturer/importer to provide the GCC to the promotional products distributor. However, if a distributor knowingly receives GCCs that are false, that distributor may be subject to penalties.

General Conformity Certificates Versus Third-Party Certification

For children's products, the CPSIA specified that third-party testing and certification will be required.

There are timetables for the third-party testing and certification. For lead in paint/surface coatings, it is already in effect as of December 21, 2008. For children's metal jewelry, it will take effect for products after March 23, 2009. For lead content in children's products other than metal jewelry, phthalates content and toy safety, the third-party testing and certification will take effect at some point when the stay is lifted

ADDITIONAL GUIDANCE ON CHILDREN'S PRODUCTS

Advertising For Certain Toys And Games

Any advertisement by a retailer, manufacturer, importer, distributor or private labeler (including advertisements on internet websites, catalogs or other printed materials) that provides direct means for the purchase or order of a product for which a cautionary statement is required under the CPSIA must include the appropriate cautionary statement displayed on or immediately adjacent to that advertisement.

The law established new responsibilities for a limited range of children's products and ranges regarding the cautionary warnings required in section 24 of the Federal Hazardous Substances Act—specifically, cautionary statements regarding choking hazards presented by small parts, small balls, marbles and balloons.

It applies to catalogs and other printed material advertisements which provide a direct means of purchase or order of products. (See Catalog Advertising Rule.) Since most promotional products catalogs do not permit a direct means of purchase, it would seem the rule does not apply.

In addition, the CPSC's catalog advertising rule provides for an exception for catalogs that are used for business-to-business transactions.

However, the final rule provides that catalogs that are distributed solely between businesses are exempted from the requirements unless the recipient business is one that could be expected to be purchasing the product for the use of children instead of for resale. According to the CPSC, "Examples of businesses that could be expected to purchase products for the use of children include schools, daycare centers, churches and recreational facilities."

We are unable to give definitive guidance to members who have those types of customers at this time. The basic scope of the coverage is the "provide a direct means of purchase or order of products." Typically, a supplier catalog does not provide for that option. At a minimum, distributors and suppliers should be aware of the potential responsibility for cautionary warnings in catalogs given to those types of businesses for those types of products.

Tracking Labels

Effective August 14, 2009, the manufacturer of a children's product shall place permanent, distinguishing marks on the product and its packaging, to the extent practicable, that will enable:

- 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
- The ultimate purchaser to ascertain the manufacturer or private labeler, location and date of production of the product and cohort information (including the batch, run number or other identifying characteristic)

Database

The CPSC will establish and maintain a database on the safety of consumer products, and other products or substances regulated by the CPSC, which is publicly available, searchable and accessible through the internet website of the CPSC.

The database shall track reports of harm relating to the use of consumer products, and other products or substances regulated by the CPSC, that are received by the CPSC from consumers, local, state, or federal government agencies, healthcare professionals, child service providers and public safety entities.

RESPONSIBILITY FOR COMPLIANCE

The CPSIA added a new section to the basic consumer product safety law. SECTION 19 of the Consumer Product Safety Act (15 United States Code Section 2068) states:

“(a) It shall be unlawful for any person to—(1) sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is regulated under this Act or any other Act enforced by the Commission, that is not in conformity with an applicable consumer product safety rule under this Act, or any similar rule, regulation, standard, or ban under any other Act enforced by the Commission.”

This means that everyone in the sales channel is responsible for a product that does not meet a standard (e.g. the lead content standard) not just the manufacturer or importer that tested and certified it if testing and certification is required.

What no one knows at this point, is exactly how the liability would sort itself out when the distributor has obtained a certificate from a manufacturer or importer. We do know what the potential penalties are for violations of the law.

The current maximum penalty amounts of \$8,000 for each violation and \$1,825,000 for any related series of violations continue in effect until the new amounts take effect later this year. The maximum civil penalties that the CPSC can assess will become a maximum of \$100,000 for a violation and a maximum of \$15 million for a series of related violations.

CONSUMER PRODUCTS IN GENERAL

Supply Chain Identification

Under the CPSIA, if the CPSC asks for it, every importer, retailer or distributor of a consumer product (or other product or substance over which the CPSC has jurisdiction under the CPSIA or any other act) must identify the manufacturer of that product by name, address or other identifying information to the extent that the information is known or can be readily determined by the importer, retailer or distributor.

Every manufacturer must identify by name, address or other identifying information each retailer or distributor to which the manufacturer directly supplied a given consumer product (or other product or substance over which the CPSC has jurisdiction under the CPSIA or any other Act), as well as each subcontractor involved in the production or fabrication of the product or substance and each subcontractor from which the manufacturer obtained a component thereof.

Penalties

The maximum civil penalties that the CPSC can assess are going up to a maximum of \$100,000 for a violation and a maximum of \$15 million for a series of related violations.

Recall And Corrective Actions

The CPSC has been given enhanced authority regarding recalls and corrective actions. Congress has specified what it wants included in recall notices.

State Attorneys General

State Attorneys General have been given new rights to initiate actions in federal courts.

Whistleblower Protections

No manufacturer, private labeler, distributor or retailer may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee):

- Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the federal government, or the attorney general of a state information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of the CPSIA or any other Act enforced by the CPSC, or any order, rule, regulation, standard, or ban under any such Acts;
- Testified or is about to testify in a proceeding concerning such violation;
- Assisted or participated or is about to assist or participate in such a proceeding;

- Or objected to, or refused to participate in any activity, policy, practice or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of the CPSIA or any other Act enforced by the CPSC, or any order, rule, regulation, standard or ban under any such Acts.

There is administrative process and a court appeals process.

Relief could include all relief necessary to make the employee whole, including:

- Injunctive relief and compensatory damages
- Reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination
- The amount of back pay, with interest
- Compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

Pre-emption

The pre-emption issue is a complicated one and there remain various schools of thought regarding exactly what state laws might or might not be pre-empted based on what aspect of this new federal law is being discussed.

Lead content provisions are amendments to the FHSA. They should pre-empt state lead-in-children's product laws but pre-emption is a complex issue and we would not be surprised if the courts will be asked to provide the definitive answer.

The CPSIA does provide that the law known as Proposition 65 in California is specifically *not* pre-empted: "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 laws that was in effect on August 31, 2003."

PPAI WORKING FOR ITS MEMBERS

On its members' behalf, PPAI has had an active campaign of education and advocacy on this issue since its beginning.

- Even before the law passed, PPAI took the steps of hiring a testing and conformity assessment expert, and with her help, PPAI produced the *Guide to Managing Responsibility For Product Safety, Social and Environmental Standards In The Promotional Products Industry*. The guide anticipated much of what is now required by law.
- As soon as this issue emerged in Congress, PPAI began to actively express the industry's concerns and sought industry involvement through direct efforts as well as its L.A.W. page at www.ppai.org.
- In addition, PPAI has joined the all-industries coalition, headed up by the National Association of Manufacturers, and PPAI's Washington counsel, John Satagaj, is participating in its efforts. Most recently, PPAI, with other trade associations, filed a petition with the CPSC asking the CPSC to provide comprehensive guidance to the business community and testing laboratories on testing and exemptions. Without a well-defined regulatory regime predicated on sound test standards and science-based exclusions that protect children, the threat to small business and their employees is significant.
- PPAI President Steve Slagle, CAE, is serving as chair of the board of the Small Business Legislative Council, a coalition of more than 60 associations and that coalition was also active presenting the small business perspective in the legislation.
- PPAI has held numerous webinars on the general topic and the law.
- PPAI has participated in CPSC meetings and has submitted numerous comments to the CPSC both unsolicited and in response to requests for comments on specific topics.
- PPAI has covered this subject extensively in *Promotional Products Business* (www.ppbmag.com).

RESOURCES

The PPAI [Product Safety Page](#):

PPAI Webinar Addressing The CPSIA And The Industry
Consumer Product Safety Improvement Act Q&A
CPSC Catalogue Advertising Rule
CPSC Certification Summary
CPSC Conformity Certificate Presentation
CPSC General Conformity Presentation
CPSC Lead in Paint and Lead Content Questions
Federal Register Notice Certification (FRNC)
Lead Content Inventory Opinion
Phthalate Inventory Opinion
Sample General Conformity Certificate
Children's Products Lead/Lead Paint Timeline
CPSC Advisory Opinion Regarding Phthalates
CPSIA and the Promotional Products Industry
NAM CPSC Coalition Letter To U.S. Senate
Product Safety Group Seeks Input On Lead Limits
CPSC Request for Comments Regarding Phthalates

Consumer Product Safety Commission www.cpsc.gov

SCHEDULE OF IMPLEMENTATION

September 22, 2008

- CPSC published notice of laboratory accreditation procedures for lead paint ban

November 12, 2008

- GCCs required for any consumer product that is covered by an *existing* federal consumer product safety law, rule standard, regulation or ban. **STAY OF ENFORCEMENT**

December 12, 2008

- CPSC published notice of requirements of accreditation of third-party conformity assessment with respect to children's metal jewelry

December 21, 2008

- Third-party testing and compliance for lead paint/surface coating children's toys takes effect,

February 10, 2009

- Lead in children's products may not exceed 600 ppm. Products that exceed that level are banned in the U.S. after that date.
- ASTM F963-07 becomes a mandatory standard.
- Unlawful to manufacture children's toys or childcare articles containing more than 0.1 percent of three types of phthalates: DEHP, DBP and BBP. Pending further study, the following types of phthalates are also banned: DINP, DIDP and DnOP. Products that exceed that level are banned in the U.S. after that date.

March 23, 2009

- Third-party testing and certification for children's jewelry takes effect

May 2009

- CPSC will publish notice of laboratory accreditation procedures for lead in children's products other than metal jewelry subject to 300 ppm
- CPSC will publish notice of laboratory accreditation procedures for lead paint/surface coating in children's products subject to 90 ppm

June 2009

- CPSC will publish notice of laboratory accreditation procedures for ASTM F963-07 (surface coating materials not including lead)

August 14, 2009

- Lead content limit in children's products 300 ppm
- Limit for lead in paint/surface coating 90 ppm
- CPSC shall promulgate a rule regarding lead in children's products providing guidance with respect to what product components, or classes of components, are considered inaccessible
- Manufacturers of children's products must place permanent tracking labels on the product and packaging
- CPSC will issue study on x-ray technology effectiveness and alternative methods

September 2009

- CPSC will announce accreditation of laboratories for testing toy safety standards
- Third-party testing and compliance with F963-07 takes effect **STAY OF ENFORCEMENT**
- Third-party testing and compliance for phthalates in children's toys and childcare items takes effect. **STAY OF ENFORCEMENT**
-

February 10, 2010

- CPSC Stay of enforcement on testing and certification is set to be reconsidered.

May 2011

- CPSC will publish notice of laboratory accreditation procedures for lead limits of 100 ppm in children's products other than metal jewelry (if technologically feasible)
-

August 14, 2011

- Lead limit in children's products 100 ppm (if technologically feasible)

No Specific Date But ASAP

- CPSC will issue rule and compliance schedule addressing requirements to eliminate/minimize accessibility of lead in electronic devices.



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