

# Complying With Tougher Lead Bans for Children's Products

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In recent years, toys and other children's products have been found to contain paint with excessive levels of lead, leading to public outcry to protect public health and safety and ultimately to significant legislative reform. This summer, Congress took action, imposing new federal restrictions regulating both the use of lead in paint and substrate in certain consumer products.<sup>1</sup> The breadth and gravity of the recent lead paint issue is evident from the sheer number of products recalled in the United States for excessive levels of lead on surface coatings and paint, including several high profile recalls of popular toys.<sup>2</sup> For instance, in June 2007, 1.5 million "Thomas & Friends" wooden train toys were recalled due to paint containing excessive levels of lead.<sup>3</sup> A few months later in August 2007, well known toy maker Mattel announced the recall of 967,000 Fisher-Price toys also found to be coated with paint containing excessive levels of lead.<sup>4</sup>

Not surprisingly, when the House of Representatives and the Senate proposed bills to amend the Consumer Product Safety Act (CPSA) in 2008, both versions of the bill included stricter bans on lead paint and a new provision limiting the lead content in certain children's products.<sup>5</sup> On August 14, 2008, the Consumer Product Safety Improvement Act of 2008 (CPSIA or Act) was signed into law by President Bush, containing the new lead restrictions which begin taking effect on February 10, 2009. Recognizing that many of the products recalled for violating the Consumer Product Safety Commission's (CPSC or Commission) existing lead paint ban were manufactured outside the United States, Congress extended standard certification and testing requirements to products prior to importation into the United States. In an effort to raise the stakes of noncompliance, the CPSIA also includes much stiffer penalties for selling banned products and for failing to certify and test when mandatory standards require, including the lead paint and lead content standards.

## *Are Your Company's Products Subject to the New Lead Bans?*

The first step in complying with the new lead bans is to ascertain which products are subject to the bans. The products covered by the lead paint ban and the lead content ban are defined by each somewhat differently. The existing **lead paint** ban (and the more stringent lead paint ban enacted by the CPSIA) apply to "toys and other articles intended for use by children."<sup>6</sup> The lead paint ban further defines the "toys and other articles intended for use by children" to which it applies as those "intended to be entrusted to or for use by children" but not necessarily "all articles to which children might have access simply because they are present in the household."<sup>7</sup> By comparison, the new general **lead content** ban in the CPSIA applies to any "children's product," defined as a "consumer product designed or intended primarily for children 12 years of age or younger."<sup>8</sup> Although this CPSIA definition is more specific than the similar category of products in the lead paint rule, at this point all indications are that the Commission will apply the lead paint and lead content bans consistently, using the CPSIA definition of "children's product."<sup>9</sup>

The CPSIA amends the existing lead paint ban in several respects. First, it requires third party testing and certification for all covered products with paint or similar surface coating.<sup>10</sup> Second, it extends the testing and certification rules to imports at the point of importation.<sup>11</sup> And third, it reduces the allowable lead in paint to 0.009 percent lead by August 2009.<sup>12</sup> However, the CPSIA does not change the scope of products subject to the lead paint ban. Items subject to the lead paint ban continue to be: (1) paint and other similar surface coating; (2) toys and other articles intended for use by children; and (3) furniture articles for consumer use (excluding household items such as large and small appliances, bathroom fixtures, windows, doors, and window shades).<sup>13</sup> Past recalls for violation of the lead paint ban have included items such as Barbie® accessories,<sup>14</sup> "Big Red" wagons,<sup>15</sup> and children's toy gardening tools.<sup>16</sup> These items rather clearly fall under the definition of a "toy" like the Barbie® accessories, or as "intended for use by children" like the wagon, or even under both, like the toy garden tools. Because the scope of the lead paint ban does not change, products subject to the more stringent lead paint ban should

have been tested and compliant with the existing 0.06 percent lead paint ban. The law simply requires that these products be tested by an accredited third party testing facility and be certified to the new lead paint limit. In addition, these products (and potentially others) will now require third party testing and certification to the lead content limit (and potentially other children's product safety rules in accordance with the CPSIA).<sup>17</sup>

The CPSIA's new lead content ban applies to any "children's product" defined as "a consumer product designed or intended primarily for children 12 years of age or younger."<sup>18</sup> In applying this new definition, the CPSIA requires that the Commission consider four factors in determining whether a product is a "children's product" and thus subject to various provisions in the Act such as the general lead ban. The four factors are:

(A) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable. (B) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger. (C) Whether the product is commonly recognized by consumers as being intended for use by a child under 12 years of age or younger. (D) The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.<sup>19</sup>

In addition, it is worth noting that the "children's product" definition incorporates the definition of "consumer product,"<sup>20</sup> thus items which are not "consumer products" are also not children's products.

Given the new CPSIA definition and factors for determining whether a product is a "children's product" and therefore subject to the general lead content ban, companies should reevaluate their product portfolio and analyze whether any products they manufacture, import, distribute or sell meet the definition of a children's product. Products intended for 10-12 year olds might not have previously been interpreted as a product covered by the existing lead paint ban, but now squarely fall within the definition of "children's products" for the general lead content ban. Other products, especially those aimed at "tweens" or those right on the cusp between ages 12 and 13 now require more careful analysis of the other factors.

The focus on both the *intended* use and the *common recognition* of products creates both burdens and opportunities for product makers and sellers. Perhaps even more so than before, counsel may need to work with marketing departments to ensure that those products being treated from a regulatory compliance standpoint as adult items are not being marketed to those 12 and under. Intended use may be measured not just by age statements on packaging, but also by more subtle cues like product appearance, price point and whether the product is depicted as a children's product. An item that is adult in color, style and price could potentially be viewed as a children's product if marketed by an advertising campaign constantly depicting the product being used by a group of unsupervised 10 year olds. Along the same lines, while the marketing campaign of one company would not speak to the intention of its competitor, if one company advertises a common product so broadly that it generically comes to be recognized publicly as a children's product, other companies might be forced to consider whether their own similar products should also be treated as children's products, despite their contrary intentions, and test for lead accordingly.

It is important to note that the law requires – and Commission officials have confirmed – that *all* children's products must be tested for lead content (and those with paint or similar surface coating tested for lead in paint as well), not just products made of metal or other materials where lead is not uncommon. Therefore, a fabric baby blanket, for example, would require third party testing and certification to the new lead content limit.

In addition to testing a sufficient range of products – those which fall into the "children's product" category – manufacturers should be aware that the CPSC considers the new lead bans to apply

retroactively to inventory on the shelves and in warehouses. As such, the effective date for compliance is not just the date upon which newly made products must meet the heightened lead requirements, but the date upon which all products sold or distributed – whether from inventory or store shelves – must be in compliance.<sup>21</sup> Thus, companies should not forget to test samples of children's products in inventory or on store shelves if those products differ in manufacturing, design, parts or paint from samples of new products being tested.

### *Is Your Company Testing Enough Parts?*

Once you determine that your product meets the definition of a “children's product” under the CPSIA, the next step is to ensure it is properly tested to meet the applicable lead paint and lead content restrictions. This is particularly important as noted above because the new CPSIA requires that manufacturers have children's products tested by an accredited third party testing body and certify that the products meet applicable children's product safety standards enforced by the Commission.<sup>22</sup>

The CPSC's lead restrictions can be divided into two main categories: coatings and substrates (or components). Coatings and lead paint are banned if they contain over 0.06 percent lead, and as of February 10, 2009, if they contain over 0.009 percent lead.<sup>23</sup> Substrates, however, were not previously subject to any specific lead quantity restriction enforced by the CPSC except for a 600 parts per million (ppm) lead limit for children's metal jewelry components.<sup>24</sup> Under the old regime, unless a product intended for children consisted of metal jewelry, only the coating or paint of a toy or other article intended for use by children was subject to a specific lead limit. (The old regime, pursuant to the Federal Hazardous Substances Act, did ban toys or other articles intended for use by children bearing or containing accessible hazardous substances that could cause substantial personal injury or illness as a result of reasonably foreseeable use, including ingestion by children. However, it did not specify any numerical threshold of lead content as “hazardous.”)<sup>25</sup> The new CPSIA has essentially expanded the children's metal jewelry component rule into a component rule for all children's products. Now, not only does the paint or surface-coating on a children's product need to be tested for compliance, but so do the accessible parts of the product itself.<sup>26</sup>

Only substrates that are inaccessible or made of material specifically excluded by the CPSC are exempt from the new lead content requirement. The CPSIA defines inaccessible component parts as those which are “not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product. Reasonably foreseeable use shall include swallowing, mouthing, breaking, or other children's activities, and the aging of the product.”<sup>27</sup> To be inaccessible, the part must therefore be unexposed and it must remain so over the reasonably expected use and lifespan of the product. Electroplating and paint are not considered sufficient barriers for lead content, thus covering a component with a coating does not make it inaccessible under the regulations.<sup>28</sup>

As a rough illustration of the enhanced testing requirements, consider the example of a painted toy train. Each of the paint colors on the train surface requires lead paint testing. Under prior CPSC lead regulation, if these various different coatings did not contain lead in excess of 0.06 percent, and the other parts of the train did not pose a risk of lead-related substantial injury or illness from reasonably foreseeable use, the train would be in compliance. Under the new CPSIA, not only will the various paints require third party testing and certification to the lead paint standard, but each distinct, accessible component of the train itself – wheels, body, smoke stack – regardless if those parts appear ingestible or foreseeably usable in a way that might result in a child sustaining substantial injury, will require third party testing and certification to the general lead content standard. The fact that components might be totally covered in paint would not exempt them from testing and certification. However, if the body of the train has a small weight inside, totally contained in the train body and unreachable, that internal weight would be exempt from testing and the lead requirements as it would likely be considered inaccessible.

### *Is Your Company Testing to a Rigorous Enough Standard?*

In addition to extending lead restrictions to a wider array of products and product parts, the new CPSIA has toughened lead restrictions by reducing the permissible amount of lead. Both coating and substrate values will change over time pursuant to the new CPSIA. Previously, lead paint was banned if it contained more than 0.06 percent of the weight of the total nonvolatile content of the paint or the weight of the dried paint film.<sup>29</sup> Under the new CPSIA, as of August 14, 2009, paint is banned in consumer products intended for use by children if it is above 0.009 percent of the weight – a significant reduction.<sup>30</sup> The Commission will thereafter review the regulation every five years with the goal of revising it downward “to require the lowest amount of lead that the Commission determines is technologically feasible to achieve.”<sup>31</sup>

In addition, on February 10, 2009, ASTM F963-07 Standard Consumer Safety Specification for Toy Safety, including its limits on lead and other specified heavy metals in paint and surface coatings on toys, becomes a mandatory toy safety standard.<sup>32</sup> Thus, toys (as defined by ASTM F963-07) manufactured after February 10, 2009 must *additionally* comply with and be certified to the 90 ppm limit on the *soluble* portion of lead in paint and surface coatings using a specified extraction methodology in the standard. However, the more stringent 90 ppm total lead content ban in paint and similar surface coating in 16 C.F.R. § 1301 replaces the soluble lead limit in ASTM F963-07 on August 14, 2009.<sup>33</sup>

Previously, the CPSC required children’s metal jewelry components to contain no more than 600 ppm.<sup>34</sup> As discussed, under the new CPSIA, the 600 ppm standard applies not just to metal jewelry, but to all accessible component parts or “substrates” found in children’s products. A year after enactment, that amount is to drop to 300 ppm,<sup>35</sup> and then again three years after enactment to 100 ppm, if technologically feasible.<sup>36</sup> Given these substantial reductions in allowable limits over time, companies should consider not just whether they are making goods which are currently in compliance, but whether they are on track to meet the next reduction a year or few years later. If alternative materials or designs will be needed to meet future limits, the costs and benefits of beginning such a transition now should be examined, especially as the increasing lead limits will apply retroactively to existing inventory when the limit becomes effective.<sup>37</sup>

#### *Tougher Lead Bans Present Opportunities for Reviewing Compliance Programs*

Given the recent high publicity surrounding lead-related children’s product recalls as a public health and safety issue, and the special focus lead issues have received in the new CPSIA, manufacturers should be on high alert for potential lead issues with any of their children’s products. Simply conducting a methodical review of your product portfolio to determine which items are clearly children’s products, which are clearly not, and which fall into a “gray area” can reduce compliance problems. If not done already, now is the time to discuss more perplexing questions with counsel, such as whether a particular product is considered a children’s product or whether a component part is likely to be deemed accessible. A review of inventory, sales, product development and laboratory testing processes for lead issues can help your company avoid painful costs, publicity and even criminal penalties.<sup>38</sup> While complying with the new lead restrictions presents burdens, it is also an opportunity to evaluate your company’s regulatory compliance program and consider necessary improvements and efficiencies.

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<sup>1</sup> Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016 (Aug. 14, 2008).

<sup>2</sup> A search of the Consumer Product Safety Commission website ([www.cpsc.gov](http://www.cpsc.gov)) yields over 200 lead paint related recall notices in 2007 alone.

<sup>3</sup> Eric S. Lipton and David Barboza, As More Trains Are Recalled, Trail Ends in China, June 19, 2007 <http://www.nytimes.com/2007/06/19/business/worldbusiness/19toys.html> (last visited Dec. 8, 2008); see also CPSC Office of Information and Public Affairs, RC2 Corp. Recalls Various Thomas & Friends™ Wooden Railway Toys Dye to Lead Poisoning Hazard (June 13, 2007), <http://www.cpsc.gov/cpscpub/prerel/prhtml07/07212.html> (last visited Dec. 8, 2008).

<sup>4</sup> Louise Story, Lead Paint Prompts Mattel to Recall 967,000 Toys, August 2, 2007 <http://www.nytimes.com/2007/08/02/business/02toy.html> (last visited Dec. 8, 2008); see also CPSC Office of Information and Public Affairs, Fisher-Price Recalls Licensed Character Toys Due to Lead Poisoning Hazard (Aug. 2, 2007), <http://www.cpsc.gov/cpscpub/prerel/prhtml07/07257.html> (last visited Dec. 8, 2008).

<sup>5</sup> See H.R. 4040 and S.2663.

<sup>6</sup> 16 C.F.R. § 1303.1(a)(1) and CPSIA, § 101(f). In addition, the lead paint ban applies to paint and other similar surface coatings and furniture. See *id.* at § 1303.1(a).

<sup>7</sup> *Id.* at § 1303.2(b)(3).

<sup>8</sup> 15 U.S.C. § 2052(a)(2).

<sup>9</sup> For instance, at a CPSC public meeting held on November 6, 2008 to address the topic of lead, senior CPSC officials indicated that "children's products" containing paint or similar surface coating will require testing and certification to both the lead paint and lead content limits as of August 14, 2009.

<sup>10</sup> 15 U.S.C. § 2063.

<sup>11</sup> *Id.*

<sup>12</sup> CPSIA, § 101(f)(1).

<sup>13</sup> 16 C.F.R. § 1303.1(a).

<sup>14</sup> CPSC Office of Information and Public Affairs, Mattel Recalls Various Barbie® Accessory Toys Due to Violation of Lead Paint Standard (Sept. 4, 2007), <http://www.cpsc.gov/cpscpub/prerel/prhtml07/07301.html> (last visited Dec. 8, 2008).

<sup>15</sup> CPSC Office of Information and Public Affairs, Northern Tool & Equipment Recalls "Big Red" Wagons Due to Violation of Lead Paint Standard (Nov. 7, 2007), <http://www.cpsc.gov/cpscpub/prerel/prhtml08/08066.html> (last visited Dec. 8, 2008).

<sup>16</sup> CPSC Office of Information and Public Affairs, Target Recalls Children's Toy Gardening Tools and Chairs Due to Violation of Lead Paint Standard (Sept. 26, 2007), <http://www.cpsc.gov/cpscpub/prerel/prhtml07/07309.html> (last visited Dec. 8, 2008).

<sup>17</sup> For example, the CPSIA incorporates the toy safety standards in ASTM F963-07 as mandatory toy safety standards, which include among other things paint and other surface coatings on toys containing antimony, arsenic, barium, cadmium, chromium, lead, mercury, or selenium, of which the metal content of the *soluble* material of is in excess of certain levels by weight of the contained solids. ASTM F963-07, 4.3.5.2. CPSIA, § 106(a). In addition, certain children's toys and other child care articles will be subject to limits on certain phthalates as of February 10, 2009 and will require testing by an accredited third party testing facility and certification. CPSIA, § 108.

<sup>18</sup> 15 U.S.C. § 2052(a)(2).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at § 2052(a)(5) (The term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . . .").

- <sup>21</sup> CPSC Office of the General Counsel, *Retroactive Application of the CPSIA to Inventory* (Sept. 12, 2008); see also CPSC Office of the General Counsel, letter response to Arent Fox regarding Retroactive Application of the Consumer Product Safety Act to Inventory (Nov. 17, 2008).
- <sup>22</sup> 15 U.S.C. § 2063(a)(2).
- <sup>23</sup> CPSIA § 101(f)(1).
- <sup>24</sup> CPSC Interim Enforcement Policy for Children's Metal Jewelry Containing Lead (Feb. 3, 2005).
- <sup>25</sup> 16 C.F.R. § 1500.
- <sup>26</sup> CPSIA § 101(a) (any children's product . . . that contains more lead than the limit . . . shall be treated as a banned hazardous substance.")
- <sup>27</sup> *Id.* § 101(b)(2)(A).
- <sup>28</sup> *Id.* § 101(b)(3) ([P]aint, 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 lead into the human body . . .").
- <sup>29</sup> 16 C.F.R. § 1303.1(a).
- <sup>30</sup> CPSIA § 101(f)(1).
- <sup>31</sup> *Id.*
- <sup>32</sup> *Id.* § 106.
- <sup>33</sup> Note that solubility testing for the other heavy metals specified in ASTM F963-07 will remain in effect after August 14, 2009 because they are not replaced by the more stringent lead paint limits in 16 C.F.R. § 1303.
- <sup>34</sup> CPSC Interim Enforcement Policy for Children's Metal Jewelry Containing Lead (Feb. 3, 2005).
- <sup>35</sup> CPSIA § 101 (a)(2)(B).
- <sup>36</sup> *Id.* at § 101 (a)(2)(C).
- <sup>37</sup> CPSC Office of the General Counsel, *Retroactive Application of the CPSIA to Inventory* (Sept. 12, 2008); see also CPSC Office of the General Counsel, letter response to Arent Fox regarding Retroactive Application of the Consumer Product Safety Act to Inventory (Nov. 17, 2008).
- <sup>38</sup> CPSIA § 217.