

## CLIENT ALERT

### CPSC General Counsel States that Phthalates Bans Do *Not* Apply Retroactively

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On November 17, 2008, the Consumer Product Safety Commission ("CPSC") General Counsel Cheryl Falvey issued an advisory opinion letter stating that Section 108 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), prohibiting certain phthalates in concentrations above 0.1 percent in children's toys and child care articles, will not apply retroactively to products manufactured prior to the date on which the provision goes into effect, February 10, 2009. Ms. Falvey made the following points in reaching this conclusion:

- The CPSIA specifies that the phthalates provision is "a consumer product safety standard under the Consumer Product Safety Act" ("CPSA"). Section 9(g)(1) of the CPSA expressly states that consumer product safety standards are only applicable to products manufactured after the effective date, and therefore those standards are not retroactive. 15 U.S.C. § 2058(g)(1).
- Based on rules of statutory interpretation, the designation of the phthalates provision as a consumer product safety standard reflects a desire to keep the regulatory process consistent with past practice under the existing CPSA. Given the CPSA provision that consumer product safety standards do not apply retroactively, Ms. Falvey opined that the phthalates provision will not be applied retroactively.
- Ms. Falvey noted that many of the products affected by the phthalates provision were manufactured prior to any indication from Congress or the CPSC that the level of phthalates in those products would be restricted, reinforcing the reasoning in the case law requiring clear congressional intent before applying new rules retroactively.

This interpretation of the phthalates provision differs from Ms. Falvey's September 12, 2008 interpretation of the CPSIA lead content restrictions in which she opined that CPSIA Section 101's lead limits will apply retroactively to products manufactured prior to the effective dates of the limits. The following are notable distinctions between Ms. Falvey's lead and phthalates analyses:

- While the phthalates provision is a consumer product safety standard under the CPSA, the CPSIA specifies that children's products containing lead in substrate above the legal limit are to be treated as banned hazardous substances under the Federal Hazardous Substances Act ("FHSA").
- Unlike the CPSA, the FHSA does not contain a provision restricting retroactive application of hazardous substances bans.
- The CPSIA prohibits the "manufacture for sale, offer for sale, distribute in commerce or import into the United States" of any banned hazardous substance under the FHSA.
- The CPSIA, read as a whole, suggests that the lead limit provision applies retroactively to inventory and products sold when the provision goes into effect.
- This same reasoning is applicable to the CPSIA's more stringent lead paint ban, and thus the increased limit of 90 ppm for lead paint will apply retroactively when it goes into effect on August 14, 2009.

[Click here for the November 17, 2008 letter regarding phthalates and the September 12, 2008 memorandum regarding lead \[PDF\].](#)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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