

Environmental and Land Development ADVISORY

January 13, 2009

Under a California Proposition 65 Settlement and A.B. 1108, Toy Manufacturers Are Now Subject to New Federal Product Safety Laws for Lead and Phthalates

Proposition 65 and Lead

A recent settlement in a Proposition 65 lawsuit by the California Attorney General and City of Los Angeles District Attorney against some familiar names in toy manufacturing will subject those defendants to stricter lead standards in a new federal law months ahead of schedule. The government entities filed *People v. Mattel, et al.* in Alameda Superior Court, against 17 toy manufacturers and retailers in 2007 amidst a flurry of product safety recalls and notices of intent to sue from private plaintiff groups. Alston & Bird represented toy manufacturer Kids II, Inc. in the lawsuit.

Lead is listed as a carcinogen and reproductive toxin under California's Proposition 65. As such, the California law requires that manufacturers provide warnings to the purchasers of products that can expose persons using the products to lead, unless the exposure is below a very low risk threshold. The settlement acknowledges that compliance with the new federal lead limitations also complies with Proposition 65, although the companies involved in the settlement agreed to lower lead limitations earlier than required by federal law.

The settlement by defendant toy manufacturers, including Mattel, Inc., Marvel, Kids II and RC2 Corp., contained their agreement to accelerate new federal standards for lead content in surface paint and various toy parts pursuant to Congress' new Consumer Product Safety Improvement Act (CPSIA). The law is due to become effective in February 2009 for some of the standards, and August 2009 for others. By way of two consent judgments, the settling defendants became subject to most of the standards as of November 1, 2008—i.e., in time for the holiday shopping season. Judge Steven A. Brick approved the settlements during a court hearing on December 31, 2008.

The CPSIA Reflects Recent Public Concern About the Composition of Children's Products

The CPSIA, signed into law in August of 2008 while the Proposition 65 lawsuit was pending, reflects the public's recent attention on lead in children's toys—in particular, toys from China and the Far East. To that end, Title I of the CPSIA relates solely to children's products, which are defined as

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consumer products designed or intended primarily for children 12 years of age or younger. CPSIA's requirements include lowering the levels of lead in children's products and lowering the lead levels permitted in the products' paint.

Specifically, the lead paint limit is currently 600 ppm for children's products. Pursuant to the CPSIA, it will be lowered to 90 ppm on August 14, 2009. Lead content limits for all children's products go into effect February 10, 2009, to 600 ppm, and it will be lowered again on August 14, 2009, to 300 ppm. In order to settle the Proposition 65 lawsuit, the manufacturers agreed to phase in new requirements as early as November 2008. Because of this low lead level agreement, a Proposition 65 warning on toys was deemed unwarranted by the government plaintiffs and the court. As for claims of past violations of Proposition 65, while the manufacturers steadfastly maintained that their products were in compliance with all laws at all relevant times, they nevertheless agreed to pay fines to settle disputed claims with the government. The manufacturers also agreed to enhanced quality control measures.

Enforcement of the New Standards

Another requirement of the CPSIA is that retailers, including importers, will have to provide proof that individual products have been tested at an accredited, independent lab to ensure compliance with the stricter standards. Otherwise, those products cannot be sold. Moreover, each product must have a permanent label affixed to it that states the

- production location;
- date of production;
- name of manufacturer; and
- lot or batch number.

The CPSIA also broadens the jurisdiction of state attorneys general, allowing them to bring suits in federal court to enforce the act. Previously, enforcement of federal consumer product regulations was under the aegis of the Consumer Product Safety Commission (CPSC). State attorneys general have long been interested in consumer product safety, and several states including California and Vermont, have enacted strict state-law lead limitation standards. The CPSIA provides a direct route for the state AGs to enter federal court to prevent, among other things, the sale of products violating CPSC standards, the sale of products that have been recalled, the sale of banned hazardous substances and the sale of products that lack certification of compliance with CPSC standards. State attorneys general may also bring a civil suit on the grounds that the product in question poses a "substantial product hazard."

With the exception of suits alleging a "substantial product hazard," state attorneys general must provide the CPSC with notice of the intended suit, to allow it the opportunity to bring suit itself or intervene in the state's suit. Suits alleging substantial product hazard have no notice requirement. Before the CPSIA, the CPSC was the only entity vested with the authority to find that a product

was a hazard to the public such that it should be recalled; this determination was the principal way by which the CPSC exerted its enforcement authority. CPSIA's extension of this authority to state attorneys general represents a significant sharing of power to monitor the manufacturing and resale consumer product markets, and it will undoubtedly result in more aggressive policing of consumer goods.

In addition to the enhanced enforcement under CPSIA, the Proposition 65 consent decrees in *People v. Mattel, et al.* also provide for an expedited enforcement process that may be initiated by the California Attorney General's office.

A.B. 1108 and Phthalates

In addition to accelerated lead standards, manufacturers of toys and child care articles are, as of January 1, 2009, already subject to stricter phthalate standards in California than are required under the CPSIA. (Phthalates refers to a type of colorless chemical used in thousands of consumer products—including toys and child care articles—to impart flexibility and durability.) The CPSIA regulates phthalates in the section governing phthalates (section 108), but it applies only to products manufactured after its effective date of February 10, 2009. In contrast, under Assembly Bill 1108, California's prohibition on the sale of children's toys and child care articles with excessive levels of phthalates applies as of January 1, 2009, regardless of when or where the goods were manufactured.

Final Thoughts

Compliance with the CPSIA's higher standards and increased enforcement power will most likely increase industry's bottom line in the manufacturing and retailing of children's products. This may result in a net increase in the consumer cost of such products, but will also substantially diminish the possibility of exceeding applicable lead and phthalate content standards.

For further information regarding Proposition 65, the CPSIA or the toy industry settlement, please contact the authors of this advisory, Kurt Weissmuller or Megan Hey, or your Alston & Bird attorney.

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