



cpsc and lead limits

MSK Client Alert

July 31, 2013

With enactment of the Consumer Product Safety Improvement Act in 2008 (CPSIA), makers of children's products (generally designed for those aged 12 and younger; in some cases a lower age limit applies) have long struggled with how best to comply with the reduced lead and phthalates levels now mandated by law, especially when the hazardous substance came from minor inputs, such as buckles in apparel or other minor components or inputs. The new law mandated the following levels for lead: 600 ppm by February 10, 2009; 300 ppm by August 14, 2009; and finally 100 ppm by August 14, 2011. The CPSIA totally banned phthalates DEHP, DBP, or BBP at levels higher than 0.1 percent. Failure to comply led to the imported article being banned as a hazardous substance under the Federal Hazardous Substances Act.

In the July 10, 2013 Federal Register, the Consumer Product Safety Commission (CPSC) issued revised rules addressing the industry's point that a process for exclusion needed to be formalized. With this new publication, there is now an exception process established, at least as to lead levels. Specifically, with this publication, CPSC is changing the language in 16 U.S.C. § 1500.90(b). It will now allow the exclusion of "certain materials or products and inaccessible component parts" and recognizes a "functional purpose exception from the lead limits" found in the CPSIA. The exception is for lead only and is formalized as follows.

Either CPSC or a petitioning interested party may seek an exception for "a specific product, class of product, material, or component part." For the exception to be granted, CPSC must provide notice and hold a hearing. It must then determine:

1. The product, class of product, material, or component part (for ease of reference we will refer to these collectively as "products") must include the lead because it is not "practicable or not technologically feasible" to make the product by removing the excess lead or by making the lead "inaccessible";

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1. The product is "not likely to be placed in the mouth or ingested, taking into account normal and reasonably foreseeable use and abuse" of the product by a child; and
1. An exception for the product has "no measurable adverse effect on public health or safety, taking into account normal and reasonably foreseeable use and abuse" by a child.

The Federal Register notice then goes on to define "measurable adverse effect" as if the excepted article will not result in a "measurable increase" in the blood lead levels of a child. CPSC also left itself wiggle room to adopt a different method of measurement, but only after notice and hearing, and if based on a "better scientific method for measuring adverse effect on public health and safety."

To obtain the exception, a party must petition the CPSC and, not surprisingly, bears the burden of proof. CPSC is permitted to consider only the petitioner's evidence (which may have been previously filed in another exception petition) or it may elect to consider any evidence received by way of a hearing. Petitioner's evidence may be proprietary, or it may rely on nonproprietary information submitted by any other party seeking an exception. Perhaps of equal interest is the exception sought may be for the entire product, but, in that case, petitioner must show the exception is met for "every accessible component or accessible material of the product."

If an exception is granted, CPSC may also opt to set a specific lead limit for the product, set a manufacturing expiry date on the exception, or set a schedule for full compliance with the existing lead limit or any new one adopted for the product. Once the exception is granted, it applies regardless of date of manufacture, unless the exception states otherwise.

Whether this exception goes far enough to ease practical and commercial industry concerns remains to be seen and will be greatly influenced by how CPSC decides the first petitions that are filed.