

Summary of Consumer Product Safety Improvement Act of 2008 H.R. 4040 As Approved by the House and Senate, July 2008

The following is a summary of portions of the Consumer Product Safety Act of 2008 relevant to toys and other children's products, as well as provisions related to CPSC Reform. Significantly, this legislation establishes uniform national preemptive standards for toys containing lead and phthalates, toy advertising with sales opportunities, and upon adoption of ASTM F-963 as a mandatory federal standard. Enactment of the legislation occurs when the President signs the legislation into law. Effective dates are prospective and apply to goods introduced into U.S. Commerce after dates referenced in legislation or regulations implementing the law. Requirements are not retroactive and goods previously sold in the ordinary course of business can continue to be sold.

This summary is provided as an overview of the legislation for the convenience of TIA members, and should not be considered an authoritative account or interpretation of the Act. Significant work is left to be done by the CPSC to propose and adopt implementing regulations, and there is substantial room for interpretation of various provisions of the Act. TIA members should read this Summary with caution and consult with their legal counsel and quality assurance counsel regarding the application of the provisions of the Act to their products and operations.

Lead in Children's products (total lead) (Sec. 101)

Scope: Materials and substrate of any children's products.

Requirement: The limits on lead in children's products will be established as follows and according to this timetable:

1. 600 parts per million (ppm) – effective 180 days after enactment of the Act
2. 300 ppm – effective 1 year after enactment of the Act
3. 100 ppm, if determined technologically feasible by CPSC, – effective 3 years after enactment of the Act (if determined not feasible, CPSC must establish the lowest limit that is feasible and lower than 300 ppm in this same timeframe.)

These limits must also be periodically reviewed by CPSC and revised downward to require the lowest amount of lead that they determine technologically feasible.

Exceptions include/may include:

- Parts or components that are inaccessible to a child and not exposed due to a sealed covering or casing even under reasonably foreseeable use and abuse. Paint, coatings or electroplating do not qualify as a barrier for inaccessibility. Within one year of enactment, the CPSC must provide guidance on what will be considered inaccessible. (Until then, rely on description provided in the legislation.)
- Product or material that CPSC determines will neither result in absorption of lead in the body under reasonably foreseeable use and abuse or have any other adverse impact on public health or safety.
- Certain electronic devices – if compliance with the limits is determined not technologically feasible by CPSC, the Commission will issue regulations to eliminate or minimize the potential for exposure to accessibility of lead in such electronic devices and establish a timetable by which such products shall be in full compliance if feasible.

Lead in paint and surface coatings (Sec. 101, part (f))

Scope: Children's products

Requirement: The limit will be reduced from the current 0.06 percent (600 ppm) requirement to 0.009 percent (90 ppm).

Testing: The Act allows for consideration of alternative methods of testing for lead in paint including x-ray fluorescence technology (XRF) when the total weight of the paint or surface coating to be tested is no greater than 10 mg or no more than 1 cm² of surface area. Additionally, the Act calls on CPSC to study the effectiveness, precision and reliability of XRF and other alternate methods for measuring lead in paint and surface coatings – and if determined to be at least as effective, precise and reliable as other methods the agency may promulgate regulations governing the use of such methods. The Act would permit such alternate methods to be used as a screening tool to determine whether further testing or action is needed.

Mandatory Testing and Certification (Sec. 102)

Scope: Any product subject to a children's product safety rule under this Act, or any other similar standard, regulation, ban or rule under any other Act enforced by the Commission.

Requirement: Effective 90 days after enactment of the Act, manufacturer of a product must certify, based on testing, that product complies with all applicable standards and rules enforced by the CPSC, and specify each such rule.

CPSC will establish and publish notice of the requirements for accreditation of conformity assessment bodies (see timeline below). For any product manufactured more than 90 days after the Commission publishes such notice, testing must be done by an accredited independent conformity assessment body and before importing for consumption or warehousing, or before distributing in commerce. The Act allows testing by a governmental entity or a conformity assessment body owned managed or controlled by the producer as long as there are safeguards against undue influence and bias and the conformity assessment body provides equal or greater consumer safety protection as a third party independent body.

Timeline for Accreditation: The Commission shall publish notice of requirements for accreditation of conformity assessment bodies according to the following product-specific timelines:

Lead paint – Not later than 30 days after enactment of the Act;
Full and non-full size cribs; pacifiers – Not later than 60 days after enactment;
Small parts – Not later than 90 days after enactment;
Children's metal jewelry – not later than 120 days after enactment;
Baby bouncers, walkers and jumpers – Not later than 210 days after enactment;
Products subject to all other children's product rules – at the earliest practicable date but no later than 10 months after enactment.

The Commission may accredit third party conformity assessment bodies, or designate an independent organization to do so, and shall periodically review and revise the accreditation requirements, maintaining a list of accredited entities on its website. **Note: TIA's Toy Safety Certification Program is intended to provide an appropriate certification system under the Act and will seek CPSC recognition for toy safety certification.**

Certificates must be legible, in English, and include: the date and place of manufacture and where the product was tested, including the name, address, phone and contact info for the person responsible for maintaining records of test results. Certificates must accompany the applicable product or shipment and a copy must be provided to each distributor and retailer of the product. The manufacturer (or private labeler) must be able to furnish a copy upon request by the

Commission. The Commission may rule to provide for electronic filing of certificates, up to 24 hours before arrival at US Customs of imported product.

Tracking Labels for Children's Products (Sec. 103)

Scope: Children's products

Requirement: Effective one year after enactment of the Act, manufacturers must place permanent, distinguishing marks on a product and its packaging, to the extent practicable, that will enable the manufacturer and ultimate purchaser to ascertain: the name of the manufacturer, date and location of production and identifying production information (cohort, batch, run number or other identifying information). This provision recognizes that flexibility is needed for different types of products and allows the manufacturer to use its own tracking systems.

This section also stipulates that advertising, labeling or packaging of a product, if it references a consumer product safety rule or standard, must be in compliance with that rule or standard.

Product Registration for Durable Nursery Products (Sec. 104)

Scope: Durable infant and toddler products defined as the following products: full- and non-full size cribs; toddler beds; high chairs booster chairs and hook-on chairs; bath seats; gates and other enclosures; play yards; stationary activity centers; infant carriers; strollers; walkers; swings and bassinets and cradles.

Requirement:

1. Calls for CPSC, in consultation with industry and others, to assess effectiveness of voluntary standards related to durable infant or toddler products and promulgate federal standards that are equally or more stringent.
2. Also requires product registration cards (and an electronic equivalent option) be provided with the products and information collected to be maintained by the manufacturer and used only in the event of a recall or safety alert. Calls on CPSC to study the effectiveness of consumer registration forms and potential alternate recall notification technology.
3. This section also makes it a violation of federal law to manufacture, sell, contract to sell or resell, lease, sublet, offer, provide for use or otherwise place in the stream of commerce a crib that does not comply with a federal standard for those products. Application to resellers, child care facilities, hotels and other such entities is significant.

Labeling Requirement for Advertising of Toys and Games (Sec. 105)

Scope: Retailers, manufacturers, importers, distributors, private labelers of toys and games

Requirement: Any advertisement that contains a direct means for the purchase or ordering of product, must also contain any and all applicable cautionary statements that are already required under the FHSA on or near the product. (e.g. If a game has a small parts warning, this cautionary statement must be repeated in any point-of-purchase advertising such as a catalog or online retailer.). The legislation stipulates the language, type style and layout that must be used in the cautionary statement in advertising. It is incumbent on the manufacturer, importer or private labeler to inform the retailer of such a requirement for the product in advertising and the retailer to inquire of the supplier. CPSC, within 90 days of enactment, must promulgate regulations related to this requirement. Effective 120 days after enactment for internet websites; 180 days for catalogs and other printed materials.

Mandatory Toy Safety Standards (Sec. 106)

Scope: ASTM F963-07 Consumer Safety Specification on Toy Safety

Requirement: Beginning 180 days after enactment, ASTM F963-07 shall be considered a

consumer product safety standard issued by the Commission. Exceptions to this are Section 4.2 and Annex 4 regarding flammability, as well as any provision that restates or incorporates an existing mandatory standards.

Further, within one year of enactment, the Commission, in consultation with industry and other experts, shall examine the effectiveness of ASTM F963-07 or its successor standard specifically related to magnets; toxic substances; toys with spherical ends; hemispheric-shaped objects; cords; straps and elastics on toys; and battery-operated toys. Within one year of such assessment, CPSC shall promulgate rules that take into account other children's product safety rules that are more stringent than such standards, if determined this would further reduce risk of injury from such products.

After promulgating these rules, the Commission shall use the same process to undertake an assessment and promulgate rules on the remaining sections of ASTM F963 (or its successor) until standards for all "product categories" have been addressed, with the CPSC determining the priority order. CPSC will also periodically review and assess the standards to determine if and where additional, more stringent rules may be called for.

With future revisions to ASTM F963 standard, CPSC has 90 days after notice from ASTM of a revised version to notify ASTM if it has determined that the revised standard does not improve the safety of the consumer product covered. Without such notice from CPSC, the revised ASTM standard would become a federal rule 180 days after notification by ASTM of the revision to CPSC.

The legislation allows for states to apply for an exemption for an ASTM adopted standard or regulation in accordance with existing pre-emption provisions. CPSC shall consider the following factors, among others, when assessing whether states can meet a heavy burden required to justify an exception: technological and economic feasibility; cost of compliance; geographic distribution of the product; and the need for a national, uniform standard for such a product.

Study of Preventable Injuries and Deaths in Minority Children Related to Consumer Products (Sec. 107)

Requirement: Calls on the federal government to initiate a study, beginning no later than 90 days after enactment, to assess disparities in the risks and incidents of preventable injuries and deaths among children of minority populations.

Prohibition on Sale of Certain Products Containing Phthalates (Sec. 108)

Scope: Six phthalates; Children's toys and childcare articles.

Definitions:

1. Toy: consumer product designed and intended for a child 12 years or younger for use by the child when he/she plays.
2. Childcare article: consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger or help children with sucking or teething.
3. Also stipulates factors and resources upon which intended age of the product should be determined.
4. Toy that "can be placed in the mouth" – if any part of the toy can actually be brought to the mouth and kept in the mouth by the child so that the toy can be sucked or chewed (if product can only be licked it is not regarded as able to be "placed" in the mouth.) Toy or part must be smaller than 5 cm in one dimension to be "placed in the mouth".

Requirement:

1. Permanent ban – 180 days after enactment, prohibits toys or child care articles that contain concentrations of more than 0.1 percent of the phthalates DEHP, DBP, or BBP.
2. Interim Ban – 180 days after enactment and until a final rule is promulgated, an interim ban on any children’s toy or child care article that contains more than 0.1 percent of DINP, DIDP, or DnOP.
3. Study – calls for CPSC to appoint a Chronic Hazard Advisory Panel (CHAP) to study and assess the potential health effects on children of all phthalates (alone and in combination) and phthalate alternatives.
4. Final Rule – Calls on CPSC to promulgate a final rule, as warranted, based on the results of the assessment, report and recommendations of the CHAP.

Additional, Miscellaneous Provisions

Increased CPSC authority, staffing and funding (Sec. 201-202) – Reauthorizes of the Commission; designates additional funding for the agency beginning in 2010 and increasing annually to arrive at a \$136 million annual budget in 2014; requires CPSC to report on how funding will be allocated; allows Commission to operate with a temporary quorum of two members; calls for increased CPSC staffing to at least 500 full-time equivalents, including assigning personnel to US ports of entry or to inspect overseas manufacturing facilities.

Sec. 203-209 – Provides for expedited rulemaking and changes to the existing rulemaking process and procedures; additional CPSC rules; internal audits and reporting; and sharing of information with federal, state, local and foreign government agencies.

Consumer Product Safety Information Database (Sec. 212) – calls on CPSC to establish and maintain a publicly available, searchable database online that includes information from Section 15(c) reporting or any public notice of corrective action; reports of harm related to the use of consumer products submitted by consumers; local, state or federal government agencies; health care professionals; child service providers; and public safety entities. No later than 6 months after enactment the agency must provide a detailed implementation plan, including reporting requirements, access; protection against release of confidential or other protected information; review and verification; process by which manufacturer or private labeler can respond or comment on comments submitted on their product, etc.

Enhanced Recall Authority and Corrective Action Plans (Sec. 214) – Calls for CPSC to approve Corrective Action Plans in writing. If Commission finds a corrective action plan not effective or appropriate or not effectively executed, the Commission may order, amend or require amendment of the action plan. Calls on CPSC to establish guidelines for recall notices, no later than 180 days after enactment, and lists the minimum requirements for content of the recall notice.

Inspection of Firewalled Conformity Assessment Bodies and Identification of Supply Chain (Sec. 215)

1. Provides for CPSC to determine that conformity assessment bodies are appropriately firewalled from the manufacturer, importer or private labeler for whom they are performing the assessment.
2. Requires manufacturers, importers, retailers and distributors of consumer products to identify, upon request of CPSC:
 - o the product manufacturer by name, address (or other requested information),
 - o each retailer or distributor to whom the product was supplied, and
 - o each subcontractor.

Penalties (Sec. 217) – Increases the maximum civil penalties the Commission can assess for violations to from \$1.85 to \$15 million with a \$100,000 minimum per violation and established factors for the Commission to consider in assessing penalties for violations. It also amends the criminal penalties permissible for violations to include asset forfeiture for knowing and willful violations.