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VIA E-MAIL & FIRST CLASS MAIL
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General Counsel
Office of the General Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

RE: Implementation of California State Law Restricting Phthalates

Dear Ms. Falvey:

In light of the recent public debate concerning the applicability of the federal phthalate restrictions in the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), we are writing to explain our position on the applicability of California's phthalate limits on toys and child care articles. In short, California's phthalate restrictions become effective January 1, 2009, and prohibit the manufacture, sale, or distribution of toys and child care articles with excessive levels of certain phthalates, regardless of when or where those items were manufactured.

Your letter of November 17, 2008, stated that the federal phthalate restrictions in section 108 of the new CPSIA apply only to products manufactured after that provision's effective date of February 10, 2009. Under this interpretation of the federal law, manufacturers can continue making toys with significant amounts of phthalates, and sell them in this country for years to come, so long as they were made by February 9, 2009. In response to your letter, members of Congress have sent letters to CPSC objecting to this interpretation and explaining that Congress intended that children's toys and child care articles with excessive level of phthalates cannot be sold after February 10, 2009, even if they were manufactured earlier.

Regardless of which of these interpretations of the federal CPSIA prevails, toys and child care articles containing excessive levels of phthalates cannot be sold or distributed in California after January 1, 2009, no matter when or where they were manufactured. This California requirement is not preempted or otherwise affected by the federal CPSIA phthalate restrictions. While it is not CPSC's obligation to advise companies on the applicability of state law, we are concerned that since your November 17, 2008, letter does not mention the existence of state phthalate requirements, readers could mistakenly conclude that there will be no phthalate

limitations in effect anywhere in the United States on January 1, 2009. We hope that this letter will provide guidance to the public as to how the federal and state phthalate laws interact.

California's phthalate restrictions

In October of 2007, Governor Schwarzenegger signed Assembly Bill 1108 ("A.B. 1108"), which limits the phthalate content of toys and child care articles[1] manufactured, distributed, or sold in California. (Cal. Health & Saf. Code, §§ 108935-108939, Stats. 2007, c. 672, A.B. 1108.) This California law restricts six particular phthalates, which are the same as those restricted by the federal CPSIA: di-(2-ethylhexyl) phthalate ("DEHP"), dibutyl phthalate ("DBP"), benzyl butyl phthalate ("BBP"), diisononyl phthalate ("DINP"), diisodecyl phthalate ("DIDP"), and di-n-octyl phthalate ("DnOP"). Three of the phthalates, DEHP, DBP and BBP ("Group 1"), may not be present in concentrations exceeding 0.1 percent in any toy or child care article. The remaining three phthalates, DINP, DIDP, and DnOP ("Group 2"), are restricted to 0.1 percent only in those toys and child care articles "intended for use by a child under three years of age if that product can be placed in the child's mouth." (Cal. Health & Saf. Code, § 108937, subd. (b).)

A.B. 1108's restrictions take effect January 1, 2009. On that date, "no person or entity shall manufacture, sell, or distribute in commerce" any of the toys or child care articles violating its provisions. (Cal. Health & Saf. Code, § 108937, subd. (a), (b).) Thus, even if a product was manufactured before January 1, 2009, it cannot be sold in California by a retailer after that date unless it meets the A.B. 1108 phthalate standards.

A violation of A.B. 1108's phthalate standards is an unlawful act in violation of California's Unfair Competition Law.[2] (Cal. Bus. & Prof. Code, § 17200, et seq.) Violations of the Unfair Competition Law may be enforced through a civil action brought by the Attorney General or a district attorney in the name of the People, by certain city attorneys, and by individual persons who have "suffered injury in fact and lost money or property" as a result of the violation. (Cal. Bus. & Prof. Code, § 17204.)

In addition, while manufacturers and distributors have no express duty under A.B. 1108 to stop distributing and manufacturing products that do not comply with A.B. 1108 before January 1, 2009, sale of a non-compliant product at a time and place that makes it likely that the product will be offered for sale after January 1, 2009, could violate other legal duties. It may violate warranties or other contractual agreements among the parties in the chain of distribution,

[1] A "toy" is defined as a "products designed or intended by the manufacturer to be used by children when they play." (Cal. Health & Saf. Code, § 108935, subd. (a).) A "child care article" is defined as "all products designed or intended by the manufacturer to facilitate sleep, relaxation, or the feeding of children, or to help children with sucking or teething." (Cal. Health & Saf. Code, § 108935, subd. (b).)

[2] A.B. 1108 does not contain any provision authorizing any agency to adopt implementing regulations or guidelines, nor does it contain any enforcement provisions itself.

or it may create a threatened violation of A.B. 1108, which the Attorney General can seek to enjoin under the Unfair Competition Law. Thus, distributors and manufacturers should assess their chain of distribution and take action to assure that these issues do not arise.

Finally, even before January 1, 2009, it is illegal in California to expose persons to certain phthalates without providing a clear and reasonable warning. (Cal. Health & Saf. Code, §§ 25249.5-25249.13 [commonly known as "Proposition 65"].) As discussed further below, this requirement has been in effect and will continue to be in effect after January 1, 2009.

No federal preemption of California's phthalate restrictions

California's A.B. 1108 phthalate restrictions are not preempted by the new federal CPSIA. To the extent that federal and California phthalate restrictions overlap, they are identical. To the extent that there are any products that are subject to A.B. 1108's phthalate standards for which there are no federal phthalate requirements at all, there is no federal requirement that could preempt state law. CPSIA, therefore, does not preempt California's phthalate restrictions.

Section 108 (d) of CPSIA provides that the standards for phthalates are "consumer product safety standards," which apparently means that they have the preemptive effect given by section 26(a) of the Consumer Product Safety Act. (15 U.S.C. § 2075(a).) That section states that a federal consumer product safety standard preempts a state law that — as to a risk of injury associated with a given consumer product — "prescribes any requirements as to the performance, composition, contents design, finish, construction, packaging or labeling of such product," "unless such requirements are identical to the requirements of the Federal standard." (*Id.*)

Even if A.B. 1108's phthalate restrictions are considered to be requirements on "composition" or "contents" of a product, A.B. 1108 is not preempted because its restrictions on the phthalate content of a given consumer product are identical to any applicable federal restriction. Indeed, CPSIA adopted the same phthalate restrictions that had previously been enacted in A.B. 1108. CPSIA sets the same concentration limit (0.1 percent) on the same six phthalates as does A.B. 1108, and both statutes use the same Group 1/Group 2 approach to the types of products covered by their standards. A product that is subject to and complies with CPSIA's phthalate limits would also comply with A.B. 1108's phthalate limits, and vice versa. As to all products that fall under the scope of both statutes, A.B. 1108 and CPSIA apply the same percentage content restrictions to the same phthalates. Because state and federal law are identical in this respect, the state law is not preempted. (15 U.S.C. § 2075(a).)

To the extent that A.B. 1108 may apply its standards to a broader category of products than does CPSIA, those additional products are not subject to a federal standard at all, and therefore there is no preemption. For instance, A.B. 1108 defines child care articles to include things that facilitate "sleep, relaxation, or the feeding of children," while CPSIA omits the term "relaxation." CPSIA limits child care articles to those intended for children age three or

younger, while A.B. 1108 contains no age limitation. CPSIA defines toys as products intended for play by children "12 years of age or younger," while A.B. 1108 contains no age limitation on "children." CPSIA has a specific definition of what "can be placed in a child's mouth," while A.B. 1108 does not. Importantly, A.B. 1108 does not apply different requirements to the products covered by CPSIA, it simply applies the identical standard to a somewhat broader class of products. In other words, there may be some products to which CPSIA provides no phthalate limits at all that would be subject to regulation under A.B. 1108.

Furthermore, during the time in which there is no federal phthalate consumer product safety standard in effect as to a product, there is no preemption. Section 26(a) of the Consumer Product Safety Act preempts a non-identical state requirement on a product only during the time when "a consumer product safety standard . . . is in effect and applies to a risk of injury associated with a product." (15 U.S.C. § 2075(a).) Prior to February 10, 2009, there is no federal consumer product safety standard in effect at all with respect to phthalates in toys and child care articles, so there can be no preemption prior to that date under any circumstance.

In addition, if the position in your November 17, 2008, letter is correct that the federal CPSIA phthalate limits do not apply to products manufactured prior to February 10, 2009 (an issue we do not address), then as to those products there can be no preemption of state law either, because there is no federal consumer product safety standard in effect and applicable to them.

Thus, A.B. 1108's phthalate standards are not preempted under section 26(a) of the Consumer Product Safety Act because, as to any given product, A.B. 1108 requirements are identical to federal requirements, and, as to some products regulated by A.B. 1108, there is no applicable federal standard.

Finally, CPSIA explicitly provides that neither it nor the Consumer Product Safety Act "shall be construed to preempt or otherwise affect any State requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard under the Consumer Product Safety Act." (CPSIA § 108(d).) A.B. 1108 requires manufacturers to use "the least toxic alternative" when replacing phthalates, and replacement chemicals cannot include certain known or suspected carcinogens. (Cal. Health & Saf. Code, § 108939, subd. (a).) Congress expressly protected from preemption A.B. 1108's prohibitions on substitute chemicals.

Role of Proposition 65

Proposition 65 applies to products regulated by both A.B. 1108 and CPSIA and will continue to do so after those two statutes take effect, but we expect that it will have little practical significance because products that comply with A.B. 1108 and CPSIA would not, with a few possible exceptions, require a Proposition 65 warning. Thus, Proposition 65 actions should become largely unnecessary for products that comply with the other laws.

California's Proposition 65 requires that businesses provide a warning before knowingly and intentionally exposing persons to chemicals identified by the state as known to cause cancer

or reproductive toxicity, unless the business can show that the level of exposure is below the level of significant health risk, as established under the statute and regulation. (Cal. Health & Saf. Code, §§ 25249.5-25249.13; Cal. Code of Regs., title 27, chapter 1 (§§ 25102-27001).) All of the Group 1 phthalates (DEHP, DBP and BBP) are listed reproductive toxicants under Proposition 65. Of the Group 2 phthalates, DIDP is a listed reproductive toxicant, while DINP and DnOP are not. One additional phthalate not covered by either A.B. 1108 or CPSIA, however, is a listed reproductive toxicant under Proposition 65: DnHP. Proposition 65 may be enforced by the Attorney General and district attorneys in the name of the People, by certain city attorneys, and by "any person in the public interest" who meets specific requirements, including issuance of a notice of violation and execution of a Certificate of Merit. (Cal. Health & Saf. Code, § 25249.7(c).)

Proposition 65 is not directly affected by A.B. 1108 or CPSIA. First, A.B. 1108 does not purport to repeal or limit Proposition 65, so compliance with both laws is required. Second, the warning requirement of Proposition 65 is not preempted by CPSIA, the Federal Hazardous Substance Act, or the Consumer Product Safety Act. CPSIA includes an express savings provision that protects Proposition 65 from preemption, stating that "Nothing in this Act [CPSIA] or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003." (CPSIA § 231(b).) Furthermore, because Proposition 65 does not impose requirements on the "content" or "composition" of a product, and because it is not a "labeling" requirement,[3] it is not expressly preempted by section 26(a) of the Consumer Product Safety Act.

Thus, the requirements of Proposition 65, A.B.1108, and CPSIA on products containing phthalates will all coexist simultaneously. For example, a violation of A.B. 1108 or CPSIA that is also an independent violation of Proposition 65 can be enforced through Proposition 65. It is also conceivable that a toy or child care article containing phthalates below the A.B.1108 and CPSIA limits could still require a Proposition 65 warning. Based on our analysis of the products in question, however, we expect that the phthalate exposure from a toy or child care article that complies with the A.B. 1108 and CPSIA standards would be so low that no Proposition 65 warning would be required, with a few possible exceptions.

Conclusion

As of January 1, 2009, it will be illegal to sell, distribute, or manufacture toys and child care articles in California with greater than 0.1 percent of six specified phthalates, regardless of when or where the products were manufactured. The effective date of the federal CPSIA does not affect implementation of California's phthalate restrictions. Because A.B. 1108 will have

[3] Proposition 65 allows warnings to be provided through point-of-sale materials that are not "labeling." (*Chemical Specialty Manufacturers Assn. v. Allenby* (9th Cir. 1992) 958 F.2d 941; *People ex rel. Lungren v. Cotter & Co.* (1997) 53 Cal App. 4th 1373.)

been on the books for over 14 months before its phthalate limits take effect, we believe that industry has had sufficient time to prepare to comply with the requirements that take effect on January 1, 2009. The Attorney General, and other public enforcers, can and will enforce California's phthalate ban after that date.

If you would like to discuss this letter further, please contact Tim Sullivan at (510) 622-4038.

Sincerely,

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