

**MEMORANDUM**

**TO:** All NBVA Members

**FROM:** Morrie Much

**RE:** Frequently Asked Questions About the Consumer Product Safety Improvement Act of 2008 (“CPSIA”)

**DATE:** Revised as of November 21, 2008

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**What’s the story with Phthalates?**

*Suppliers are well aware of the phthalates issue and are making sure that phthalates are not found in any further bulk vending products in excess of the tiny amount currently permitted under the law.*

*Phthalates is a chemical additive (actually at least 6 different types of them) that make hard plastics into flexible toys and many other children’s products. Any plastic product that bends or twists is likely to have a phthalate additive.*

*The reason that at least 3 types of this chemical additive are banned starting February 10, 2009 is that scientific evidence suggests the possibility, based on dozens of studies, that show reproductive toxicity in rats and there is at least some evidence in humans as well. For example, one of the researchers suggests that there is a relationship between phthalates in infant males and smaller genitalia. When the Consumer Product Safety Commission released its study in 1998, it concluded that few, if any, children were at risk because the amounts ingested don’t reach harmful levels.*

*The European Union made a permanent ban of phthalates in 2005 and major retailers like Toys ‘R Us and Wal-Mart adopted the same ban as a matter of Policy for all toy retailers supplying them. Similarly, California, Washington and Vermont have also passed laws to restrict the chemical’s use.*

*As a result of these concerns, the new law bans three types of phthalates outright (DEHP, DBP and BBP), while three other types of phthalates are banned on an interim basis, but the CPSC is charged with the responsibility, in conjunction with the Chronic Hazard Advisory Panel, to determine whether to continue or lift the ban on those three other types of phthalates (DINP, DIDP and DnOP).*

**Can imported products be brought into this country without certificates showing compliance? Does the foreign manufacturer issue the certificate?**

*According to a November 12, 2008 Press Release from the CPSC, only the importer of a foreign made product is required to provide the certificate. Pursuant to a Final Rule issued by the CPSC dated November 10, 2008, a certificate issued by the importer (not the manufacturer) must "accompany" imported products throughout the chain of distribution. The certificate may either be paper or may be furnished by electronic means. The "accompanying" requirement is satisfied if it is "available" to the CPSC upon arrival of the shipment for inspection. If available by electronic means, there must be a unique identifier that can be accessed via a World Wide Web URL or other electronic means provided the unique identifier is available to the CPSC when the product arrives for inspection. Any imported products that lack the required importer's certificate can be stopped by Customs and potentially destroyed. The CPSC has created an "Import Surveillance Unit" initially staffed by twelve former Customs agents that will randomly test to verify compliance.*

**Are certificates required ONLY on imported products?**

*No, EVERY shipment – foreign or domestically manufactured – must be "accompanied" by a supplier's certificate. For domestic products, the domestic manufacturer must issue the certificate.*

**What information must be shown on each supplier's certificate?**

*Each certificate must identify the date and place of manufacture (but not the name of the manufacturer). The certificate must also state the name and address of the testing lab, the date and place where the product was tested, and the importer's name, full mailing address, telephone number and contact information for the individual responsible for maintaining records of test results.*

**Do I need to keep copies of all certificates?**

*Yes, if you are an importer you cannot bring the products into the country without issuing the certificate and when you sell foreign or domestic products to a distributor, retailer or operator, you are required to FURNISH A COPY OF THE CERTIFICATE to the route operator or other buyer. Since the CPSC has now determined that "furnish" means to "make available", we expect those supplier's certificates will either "accompany" each invoice with each shipment—either as paper or by electronic means – or the buyer will be told the certificate is "available" upon request or at a web site with a "unique identifier."*

**Should the operator retain the certificate?**

*If you get a hard copy – then yes. If a CPSC inspector questions a product, the operator will have a copy of the invoice from your supplier—with the attached certificate—to identify the manufacturer and the testing lab. But to reduce the paperwork burden on suppliers and operators, we expect that most suppliers "make available" the certificates rather than furnish paper copies with each invoice. Then you can get them as needed. Consider also the public relations of showing your compliance certificates or test results to some of the store location owners or managers to establish that you are a responsible operator who buys from reputable suppliers.*

### **What should I do with my inventory of non-compliant children's products?**

*If you are aware of non-compliant products due to excess levels of lead, you need to pull them from your machines by February 1, 2009 and destroy them. Any further sale or distribution after that date is against the law. Products with phthalates may be different. If a product contains phthalates but the product was manufactured prior to February 10, 2009, then that product may continue to be sold, according to a recent CPSC staff advisory opinion dated November 17, 2008. As a word of caution, however, an aggressive State Attorney General may still try to have the products removed and get newspaper coverage in the process to educate and alert the public — even if they subsequently lose the effort to have the products removed. The defense may be costly so consider the likelihood of challenge by the State Attorney General in your state.*

### **Will products that were compliant when sold but become non-compliant on February 10, 2009 be recalled by the suppliers?**

*This is not addressed in the CPSIA and is a matter of the contract laws in each state, to be answered by your respective counsel.*

### **Who issues test certificates establishing compliance with the laws?**

*Only testing laboratories that are accredited by the CPSC or by an independent accreditation organization designated by the CPSC. There are several international testing laboratories regularly used by our importers. The CPSC will issue accreditation standards.*

### **How long will it take the CPSC to recall a product?**

*A lot quicker than before. Based on the new powers granted to the CPSC, they can:*

- *issue an immediate stop sale order, without a prior hearing;*
- *force an involuntary recall and require cash refunds (and/or other remedies) to consumers; and*
- *dictate the content of all public notices to be issued.*

*Since it is now illegal to sell or export for sale a previously recalled or otherwise non-compliant product, the CPSC has the power to confiscate and destroy all of these products and substances.*

### **If a supplier sells capsuled merchandise or a mix of products, does the supplier need to furnish a certificate for each item?**

*Yes – a certificate must “accompany” each product (or be made available) and the operator needs to verify that EVERY item in the mix is safe.*

### **When a customer re-orders a few weeks later, does the supplier still need to furnish a certificate?**

*Yes – suppliers also may re-order or obtain later shipments. Every sale to an operator must be “accompanied” by the applicable certificate or the certificate must be “made available.”*

**The NBVA has a mailing list of a few hundred operators, but there are many more operators – how will they know about compliance?**

*If the other operators are buying from reputable and responsible suppliers, hopefully they will get copies of this memo or others like it. The suppliers need to educate all of their customers—for the good of the industry.*

**Are operators required to keep track of products on location?**

*There is no specific provision in the CPSIA because the law requires that every product package must contain information that details the date and place of manufacture, as well as batch information. But our products don't come in boxes or cartons that can be stamped with that information. We filed a request with the CPSC for a temporary exemption from the labeling requirement and they acquiesced at least for now. The problem will arise after the one year anniversary when we will request a permanent exemption. At that time, we may be questioned whether operators track the products and the CPSC might condition a permanent exemption on maintaining tracking information. At a minimum, the consequence of not tracking likely will be a recall of ALL the particular items that are found to have excessive levels of lead or phthalates—not just the particular batch that may be bad. For the operator – considering the cost and pain of tracking against the likelihood and expense of recall – a total recall may or may not be the cheaper alternative.*

**Do the CPSIA standards preempt state laws that have different standards?**

*Generally yes—especially as they may relate to the limits on lead and phthalates. But the CPSIA contains a limited provision to enable states to continue laws that existed as of August 13, 2008 provided the states provide certain notices to the CPSC on or before November 12, 2008. We have not yet heard from the CPSC but expect an announcement to be made of which laws may remain in effect. We expect the California warning label laws to remain in effect – and possibly others.*