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MARYLAND LEGISLATION ADOPTS STRINGENT LEAD RESTRICTIONS

In this time of extensive press coverage and legislative activity surrounding product safety, the Maryland General Assembly adopted stringent legislation restricting the use of lead in certain products. This news brief will summarize this important legislation.

EXECUTIVE SUMMARY

The safety of consumer products—and toys and products for children in particular—has been the subject of extensive publicity and Congressional scrutiny over the last year.

During this legislative session, the Maryland General Assembly took up the banner and passed House Bill 62 containing stringent restrictions on lead content in certain products.

Specifically, the legislation restricts the use of lead in excess of 0.06% (600 ppm) in toys, clothing, furniture, jewelry and other products marketed for use by a child, or “the use of which by a child is foreseeable.” These requirements extend beyond existing federal regulations.

Moreover, the legislation requires manufacturers of products falling under the provisions of the bill to test all products for lead by an independent third party laboratory and issue a certificate to any retailers and distributors of the product. Retailers and distributors are required to maintain the certificates issued by manufacturers.

The bill provides for various enforcement mechanisms and both civil and criminal penalties for selling products that violate the law’s provisions.

This bill is expected to be signed by Governor O’Malley, and will take effect on July 1, 2008.

HOUSE BILL 62

BACKGROUND

During the 2008 session, the Maryland General Assembly passed House Bill 62, described as “An Act Concerning Lead-Containing Children’s Products—Prohibition.” The bill establishes a comprehensive limitation on lead in certain products, along with certification and testing requirements, an enforcement mechanism, and civil and criminal penalties.

The bill creates uncertainty in a number of areas, as well as several hurdles for manufacturers, distributors and retailers.

The new Maryland requirements extend beyond existing federal regulations. There is concurrent activity in Congress in the same area, and it remains to be seen how conflicts between the Maryland requirements and ultimate federal legislation will be resolved.

LEAD RESTRICTION

The bill’s prohibition of lead or lead-compounds greater than 0.06% by weight (600 ppm) in any part, component or coating of affected products. If federal law establishes a lesser standard, then the lesser standard governs.

PRODUCTS AFFECTED

The bill applies to accessories and jewelry, clothing, decorative objects, furniture, lunch boxes and eating utensils and toys that are either marketed for use by a child, or “the use of which by a child is foreseeable.” Thus, many products in the categories will be affected, even if not specifically marketed for use by a child, because it will arguably be foreseeable that a child will use them.

Significantly, the bill permits the expansion of affected products to any other item specified by the Department of the Environment by regulation.

DEFINITION OF CHILD

The law defines “child” as any individual under the age of 6 years.

At this time, both the House and the Senate versions of the proposed federal provisions have more expansive definitions of a child. If federal law is enacted

establishing the permissible level for lead in children's products, then the federal definition will presumably apply.

PRODUCTS EXCLUDED

The bill specifically excludes from its provisions vehicles and their parts. It also excludes electronic devices containing lead, unless there is a finding that there is a significant risk of exposure to the lead by a child.

TESTING AND CERTIFICATION REQUIREMENTS

In addition to the ban on lead-containing products, the bill also mandates a testing and certification program for affected products. Manufacturers are required to test for lead levels in products through a third party qualified testing laboratory that is accredited and is not owned, managed, controlled or directed by the manufacturer.

The manufacturer must issue a certificate, which must be transmitted with the product to any distributor or retailer that receives the product. Manufacturers must maintain records regarding the testing and issuance of certificates, and provide a copy "to any person" on request. Retailers and distributors must maintain copies of the certificates, and also provide a copy to any person on request.

The certificate must be based on a test of each product, or a testing protocol established or recognized by the Department of the Environment.

No product without a certificate may be sold or offered for sale in any fashion in the State of Maryland.

PENALTIES

The bill establishes a number of penalty provisions:

- Civil penalties of \$1,000 per day for each violation.
- Criminal penalties setting willful violations as a misdemeanor, with fines up to \$10,000 per violation and imprisonment not exceeding 1 year or both on conviction.
- A violation of the act is also an unfair or deceptive trade practice, subject to the enforcement provisions of the Commercial Law Article.

EFFECTIVE DATE

The law takes effect on July 1, 2008.

IMPLEMENTING REGULATIONS

The Department of the Environment is authorized to adopt regulations implementing the law.

Indeed, without implementing regulations, it is difficult to see how the law will be implemented at all. The following are among the regulations necessary to implement the bill:

- Regulations establishing the accreditation process for testing entities.
- Regulations establishing acceptable testing protocols.
- Regulations establishing an acceptable certificate form.

EFFECT OF FEDERAL REQUIREMENTS

Presently, there are no consistent federal regulations regarding lead in toys, other than a ban on paint containing more than 600 ppm lead. Lead in toys is otherwise evaluated on a case by case basis by the U.S. Consumer Product Safety Commission, with an emphasis on children's jewelry.

Bills passed by both the U.S. Senate and House of Representatives, but not yet reconciled in conference committee or sent to the President for signature, contain provisions regulating lead in toys. The ultimate bill passed by Congress may very well conflict with the Maryland law, setting up a potential court fight on what regulations take precedence.

CONCLUSION

Passage of this Maryland legislation sets up a complex ban on lead and an overlying complex regulatory scheme. The law takes effect in a little more than two months, and important implementing regulations have not even been proposed.

Moreover, with pending federal legislation, the uncertainty grows about which regulations and effective dates will apply.

Manufacturers, distributors and retailers need to pay particular attention to this legislation to avoid potential penalties. Amendments to the bill seeking to make it more

favorable to industry were beaten back by the legislature, so it is not likely that there will be relief in the scope or the timing of implementation.

The **PRODUCT LIABILITY PRACTICE GROUP** of Miles & Stockbridge represents clients before the U.S. Consumer Product Safety Commission and in a wide variety of trial and appellate cases involving product liability issues.

This article is not intended to be and should not be taken as legal advice, and is not intended and does not create any attorney-client relationship. If you have any questions or would like additional information on the material covered in this article, please feel free to contact Timothy L. Mullin, Jr., Esq.

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