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November 26, 2008

TO CLIENTS AND FRIENDS:

RE: Update on Phthalates under CPSIA

The General Counsel of the Consumer Product Safety Commission has responded to inquiries from the American Apparel and Footwear Association concerning the coverage of Section 108 of the Consumer Product Safety Improvement Act ("CPSIA"), under which various phthalates will become banned hazardous substances beginning as of February 10, 2009. The General Counsel has also advised that inaccessible phthalates in products are still subject to the ban, contrary to the situation for lead.

In a response dated October 17, 2008, to an inquiry as to the applicability of the ban to footwear, the General Counsel reiterated her statements made at the October 2, 2008, public meeting to the effect that shoes are not toys subject to the phthalates ban because they are not intended to be played with by a child. The opinion letter can be found at <http://www.cpsc.gov/library/foia/advisory/318.pdf>

In her response dated November 25, 2008, to a similar inquiry on apparel, the General Counsel stated that children's wearing apparel is generally not considered a toy because it is not intended to be played with by a child, giving as an example vinyl rainwear, but that sleepwear and bibs were examples of apparel that would constitute "child care articles" subject to the age specific ban, while costumes (presumably including footwear, headwear, and accessories components of the costume) may be subject to the phthalates ban, requiring individual product evaluation. The response letter can be found at <http://www.cpsc.gov/library/foia/advisory/321.pdf>.

Although not covered in either response, loungewear similar to sleepwear in appearance, and sporting goods, including specialized apparel and footwear, are other articles that potentially remain subject to the ban. The staff previously issued the following response concerning sporting goods:

".... any determination as to whether a particular sporting goods product would be a toy as defined under section 108, and therefore, subject to the ban on phthalates, would be made on a case by case basis after consideration of the following factors:

- A statement by the manufacturer about the intended use of the product, including a label on the product if such statement is reasonable.
- Whether the product is represented in its packaging, display, promotion or advertising as appropriate for use by of the ages specified.
- Whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified.
- The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.

As there will be continuing uncertainty concerning the overall coverage of the phthalates ban, should you require additional information on the coverage of the various applicable safety standards, the CPSC age guidelines, testing and/or certification protocols, please do not hesitate to contact our office.

Note: The above comments are intended for general information only, and not as legal advice. Legal advice can only be offered after a review of a client's specific facts and circumstances, which may affect the applicability of any general comments contained herein.

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