

CPSC Issues Final Rule on Phthalates in Toys and Child Care Products

Article By:

Product Liability and Mass Torts

The [Consumer Product Safety Commission \(CPSC\) issued a final rule](#) in October prohibiting the manufacture for sale, offer for sale, distribution in commerce, or importation of toys and child care products containing more than 0.1 percent of five phthalate chemicals. Phthalates make plastics soft and pliable, and are contained in many toys and other products intended for young children. The rule will take effect on April 25, 2018.

The rule put an end to litigation against the CPSC over phthalate chemicals. In December 2016, the Natural Resources Defense Council, the Environmental Justice Health Alliance for Chemical Policy Reform, and the Breast Cancer Fund sued the CPSC because it had not passed a final rule before the January 14, 2015 deadline. An August 2017 consent decree required the litigation to be dismissed with prejudice after the CPSC issued a final rule barring children's products containing phthalates. So the court dismissed the suit on October 31.

The phthalates regulation is nearly a decade in the making. Congress originally prohibited toys and child care items containing three phthalates (DEHP, DBP, and BBP) in the Consumer Product Safety Improvement Act of 2008 (CPSIA). The CPSIA also imposed an interim ban on three additional phthalates (DINP, DNOP, and DIDP) until an expert panel known as the Chronic Hazard Advisory Panel (CHAP) completed an investigation into these phthalates. The CHAP considered the health effects of phthalates in combination or alone, and made a recommendation to the CPSC whether to ban additional phthalates from children's toys and products. In July 2014, the CHAP published a report recommending that the CPSC ban five phthalates, including making permanent the interim ban on DINP (the report also recommended banning DIBP, DPENP, DHEXP, and DCHP).

The CPSC put forward a [proposed rule banning the five additional phthalates](#) in December 2014, but the CPSC did not vote on the final rule until last month. The final rule passed three to two, which reflects the ongoing controversy surrounding the phthalates rule.

In his statement defending the passage of the final rule, CPSC Commissioner Elliot F. Kaye noted that future litigation and judicial review are "very likely," and even made an appeal to "the judges and law clerks who may look over the record and make a final determination" if the final rule becomes the subject of future litigation. Commissioner Kaye noted that the CPSIA had a specific charge to the CPSC, argued that the CHAP followed the directives of Congress in its thorough

review, and stated that the rulemaking process “included the latest and most credible and relevant scientific information available.”

On the other side of the debate, CPSC Commissioner Joseph P. Mohorovic [characterized the October 18 vote](#) as “a missed opportunity to pass a reasoned, evidence-based rule prohibiting the phthalates that pose actual risk to consumers.” Mohorovic first argues that the “Commission cannot say with confidence that *any* of the general population is exposed to an unacceptable risk.” He then states that he opposes the final rule “because it is in no way a logical outgrowth of the proposed rule.” Acting CPSC Chairman Anne Marie Buerkle also published a statement in which she, like Mohorovic, asserted the view that the data do not support the Commission’s decision to make permanent the ban on DINP or to extend the scope of the prohibition on phthalates to include a broader scope of toys than the CPSIA required. These criticisms of the final rule echo phthalate manufacturers’ earlier criticism of the CHAP report, arguing that it was flawed because it relied on data from 2005.

The impact of the final phthalates rule on the toy and child care product industry remains to be seen. The Toy Association, the trade association representing the toy industry, said in a [statement re-affirmed last month](#) that it does not believe the rule is fully supported by scientific evidence. Even so, in a statement emailed to CNN, the Toy Association confirmed that “safety is the toy industry’s top priority” and noted that the rule’s passage will have minimal impact on manufacturers in the toy industry because “[t]he industry largely moved away from using phthalates in the late 1990s.”

The CPSC’s recently passed final rule on phthalates resolves questions about the use of phthalates in toys, but it appears that other industries may be subject to scrutiny for phthalate use in the future. Both supporters and opponents of the recently passed final rule point to the potential negative health effects of phthalates in other consumer products. For instance, Dr. De-Kun Li of Kaiser Permanente Division of Research called the rule the first step in the right direction, but noted that “phthalates are still plentiful out there in consumer products” and indicated his hope that cosmetic products are the next to be regulated. Likewise, Commissioner Mohorovic’s statement indicated that dietary sources are the biggest contributor to phthalate exposure. As the phthalate debate carries on, manufacturers outside of the toy and child product industries should monitor the controversy and seek counsel as to whether their products may be at issue.

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