

February 2009

Saner Heads Have Prevailed

There are three major regulatory programs scheduled to roll out in 2009 and all of them are giving international traders heartburn. Last week, there was a collective sigh of relief when APHIS and CPSC both announced delays with their programs. Last week Customs also announced that 10 + 2 would go forward as originally scheduled on January 26, but that was not really a surprise to anyone. What may have come as a surprise to some was the directive from the President dated January 30, 2009 instructing the heads of the agencies to consult with OMB in what sounds like it might be a wholesale review of how regulations are written. See below for more details.

Regarding the Lacey Act, APHIS announced it has revised the phase-in schedule for this Act which deals with the importation of plant and plant products and puts additional declaration and other requirements on importers. Whether in response to the Emanuel and OMB memos mentioned in the last edition of our newsletter, or whether the raft of public comments (120+) caused reconsideration, either way the trading in products made of plants and plant materials now have more time to become compliant. The phase-in period is December 15, 2008, to September 30, 2010. Each phase is extended from three (3) to six (6) months and a list of products falling into each phase is being provided. The degree of processing and complexity of composition of a product is the key to when it will be phased-in. Phase II contains products that are minimally processed or of less complicated composition, such as wood in rough or sheets for veneering. Phase III consists of products that are more processed and of more complex composition, such as wood pulp or particle board. Phase IV includes the more highly processed products such as paper and furniture. APHIS also announced it is considering requiring declarations for other products not included in the current phase-in schedule.

Taking effect between April 1, 2009, and September 30, 2009, Phase II involves products in Chapter 44 of the HTS under headings 4401, 4403, 4404, 4406 - 4409, 4417 and 4418. Effective October 1, 2009, to March 31, 2010, Phase III adds products also in Chapter 44 - 4402, 4405, 4410 - 4416, 4419 and 4420, and in Chapter 47 - 4701 - 4705. Phase IV takes effect between April 1, 2010, and September 30, 2010, and adds products classified under Chapters 44 (4421), 448 (4801 through 4811) and 94 (9401.69, 9403.30, 9403.40, 9403.50, 9403.6 to 9403.70).

If there are any further additions to the product listings, APHIS has committed to provide six (6) months notice. APHIS also reiterated the declaration requirement applies only to formal entries and only becomes mandatory once electronic filing is available through Customs, which is still on track for April 1, 2009. However, anyone voluntarily filing declarations must make sure the data is complete and accurate or face enforcement action. On a positive note, APHIS has also concluded that sundries which ordinarily accompany a product, such as tags, labels, manuals and warranty cards, will not require a declaration. With CPSC, a press release was issued making clear the Commission voted to issue a one year stay of enforcement for certain testing and certification requirements for manufacturers and importers of children's products. This is particularly welcome news to those dealing in children's products who were facing costly testing requirements. While testing is not currently required, parties are reminded they must still meet the lead and phthalates limits, mandatory toy standards and other requirements. As a reminder, children's products are defined as those "designed or intended primarily for children 12 years of age or younger."

The stay will remain in effect until February 10, 2010, but does not apply to the ban on lead in paint and other surface coatings effective for products made after December 21, 2008; the standards for

cribs and pacifiers made after January 20, 2009; the ban on small parts effective for products made after February 15, 2009; and the limits on lead content of metal components of children's jewelry made after March 23, 2009. The certification requirements for ATVs manufactured after April 13, 2009, also remain in effect, as do the pre-CPSIA testing and certification requirements for such products as automatic residential garage door openers, bike helmets, candles with metal core wicks, lawn mowers, lighters, mattresses and swimming pool slides, along with pool drain cover requirements under the Virginia Graeme Baker Pool & Spa Safety Act and any voluntary guarantees provided in the Flammable Fabrics Act.

Everyone, especially handmade toy and apparel makers, crafters, and home-based small businesses, is reminded that although the CPSC testing and certification requirements have been stayed, compliance with the related standards must be met. Selling goods which fail to meet the lead and phthalates standards could lead to lawsuits by consumers and environmentalists. This means garment makers need to be satisfied that their zippers, buttons and other fasteners do not contain excessive lead levels. Similarly, toy makers need to keep in mind whether their products, if using plastic or soft flexible vinyl, contain banned or excessive phthalates levels.

How much time, effort and money did you spend getting ready for the original February 10, 2009 deadline? CPSC seems to realize that until it announces its testing standards, everyone, especially manufacturers and importers, are facing serious and costly hurdles with compliance, so look for more clarifying regulations from CPSC in the near future, but at least for now, there is a bit of a breather from CPSC and APHIS. The open question is just will come out of the Obama Administration's review of regulation writing. Here is the mandate:

"I therefore direct the Director of OMB, in consultation with representatives of regulatory agencies, as appropriate, to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review. Among other things, the recommendations should offer suggestions for the relationship between (the Office of Information and Regulatory Affairs, a part of OMB) and the agencies; provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost-benefit analysis; address the role of distributional considerations, fairness, and concern for the interests of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of the behavioral sciences in formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process."

It certainly sounds like business might be conducted differently in the future, but we'll have to wait and see what really happens.

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