State Authority to Regulate Toxins in Children's Consumer Products

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State lawmakers have been the first to react to the spike in children's consumer product safety recalls. An array of legislation aimed at shoring up consumer product safety standards and enforcement were approved in state legislatures across the nation since 2006. These bills generally focused on lowering the permissible lead content in children's products, banning the sale of recalled products, and regulating potentially harmful substances found in some children's products.

In the summer of 2008, Congress followed suit by passing the Consumer Product Safety Improvement Act of 2008. Signed into law by President Bush on August 14, 2008, this bill amended the major federal consumer products safety statutes by setting lead levels in products and paint and restricting the use of several chemical compounds known as phthalates, all areas where the states had previously acted.

This article explores the extent to which the Consumer Product Safety Improvement Act of 2008 preempts existing state children's consumer product safety laws. First, this article will review the major federal consumer protection laws and their administration by the Consumer Product Safety Commission (CPSC). Next, it will review the changes made by the Consumer Product Safety Improvement Act of 2008. This article then will analyze the effect of these changes on state consumer protection laws using federal preemption doctrine.

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VI. Introduction

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VII. History of Children's Consumer Products Regulation

A. Federal Regulation


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   • "to protect the public against unreasonable risks of injury associated with consumer products,"
   • "to assist consumers in evaluating the comparative safety of consumer products,"
   • "to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations," and
   • "to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U.S.C. 2051 (b) (2008).

   (1) to conduct research and tests on consumer products, 15 U.S.C. 2054 (b) (1), and
   (2) to promulgate safety standards, 15 U.S.C. 2056, and
   (3) to ban hazardous products, 15 U.S.C. 2057. [447 U.S. 102, 105 (2008)]

The agency also has authority to regulate most consumer products, establish guidelines and standards to protect the public from harm, and pursue recalls for products that present a substantial hazard.

Under the broad regulatory authority over consumer products given to it by the Act, the Consumer Product Safety Commission has issued set specific safety standards with regards to certain products or hazards.

Regarding children's health, the Commission has addressed lead in paint, toys and children's products. The Commission limited the lead content in paint for consumer use. Under 16 C.F.R. 1303, any paint or similar surface-coating materials with a lead content more than 600 parts per million (ppm) or 0.06 percent by weight is considered a banned hazardous products under sections 8 and 9 of the Consumer Product Safety Act. In addition, the Commission specifically declares "toys and other articles intended for use by children than bear 'lead-containing paint'" to be banned hazardous products. The limit was established because of the "unreasonable risk of lead poisoning in children associated with lead content of over 0.06 percent in paints and coatings to which children have access."  

2. The Federal Hazardous Substances Act (FHSA)

Adopted in 1960, the Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1261 et seq., gives the commission authority to ban any toy or article intended for use by children that contains a hazardous substance if a child can gain access to the substance. The FHSA defines "hazardous substance" to include any substance which is toxic and may cause substantial personal injury or substantial illness during or as a result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children. 15 U.S.C. 1261(f)(1)(A) (2008). A

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7 16 C.F.R. § 1303.1(c) (2009).
"banned hazardous substance" is any toy or other article intended for use by children which is a hazardous substance or contains a hazardous substance in such a manner as to be susceptible of access by a child. 15 U.S.C. 1261(q)(1)(B) (2008).

3. The Consumer Product Safety Commission

The U.S. Consumer Product Safety Commission has jurisdiction over some 15,000 products, a staff of approximately 420 and an annual budget of approximately $70 million.8 Under the authority of the Consumer Product Safety Act and the Federal Hazardous Substances Act, the Consumer Product Safety Commission assumes three key responsibilities to ensure children's consumer product safety with respect to potentially toxic substances: setting and enforcing toy safety standards, identifying and removing potentially hazardous substances from the marketplace, and ensuring the safety of imported children's products.

a. Setting and enforcing toy safety standards

The commission is responsible for setting and enforcing toy safety standards. 15 U.S.C. 2056 (2008). In addition to those toy safety standards set by statute (e.g., prohibition against manufacture, sale or distribution of "banned hazardous substances"), mandatory safety standards established by the commission under existing regulatory authority also exist. The regulatory process for establishing a mandatory standard can be started by vote of the commission or by a petition from an interested party.

Regarding lead-based paint, the commission has set a mandatory standard. The commission bans toys and other children's products that use paint with a lead content of more than 0.06% by weight (or 600 parts per million). Prior to adoption of the Consumer Product Safety Improvement Act of 2008, the commission was considering whether to ban children's jewelry with more than 0.06% (or 600 parts per million) lead in metal components. The commission has not issued mandatory safety standards for other children's product hazards such as bisphenol-A, phthalates or cadmium.

When a company manufactures, imports, distributes or sells a product in violation of the commission's mandatory standards or bans on products, then they are potentially subject to legal action. The commission has the authority to require the manufacturer, distributor or retailer of a hazardous consumer product to repair, replace or refund the purchase price of the hazardous product. 15 U.S.C. 2064(d) (2008). In addition, the commission can pursue civil and criminal penalties against those violating mandatory standards. 15 U.S.C. 2069, 2070 (2008).

The largest fine CPSC issued came in March 2008 against Reebok International Ltd. Reebok agreed to pay a $1,000,000 civil penalty under the FHSA for distributing 300,000 charms for children's shoes that had a lead content between 78 percent to 93 percent. Because they were distributed with children's shoes and intended for use by children, the charms were deemed "banned hazardous substances" under the FHSA.

While the commission has the authority to issue and enforce mandatory product safety standards, there is a preference in the law for relying on voluntary private sector standards. 15 U.S.C. 2056(b) (2008). The CPSA states that the commission "shall rely on voluntary consumer product safety standards...whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." 15 U.S.C. 2056(b) (2008). The commission provides guidance and technical support to assist industry in adopting voluntary toy safety standards, and works closely with voluntary standards development coordinators, such as ASTM International (formerly American Society for Testing and Materials) or the American National Standards Institute (ANSI). For example, the commission staff requested that ASTM International coordinate development of a voluntary standard that would eliminate or significantly reduce children's exposure to lead from children's vinyl products. An ASTM subcommittee was formed in August 2007 to develop such a standard.

b. Identifying and recalling hazardous products

The commission also is responsible for identifying potentially hazardous children's products and working with industry to remove those items from the marketplace. The commission fields reports on unsafe products and injuries or deaths from consumers, police and fire personnel, insurance investigators, physicians, coroners and medical examiners. Manufacturers, importers, distributors and retailers must notify the commission if one of their products does not comply with a mandatory commission rule or voluntary standard, or creates an unreasonable risk of serious injury or death. 15 U.S.C. 2064 (2008). The commission's field inspectors look for potentially unsafe products throughout the country. When a potentially hazardous product is brought to its attention, the commission will perform laboratory tests on that product to determine if it violates any standards or is otherwise unsafe. The commission employs over 80 toxicologists, chemists, engineers and other professionals whose primary duty is toy inspection.

When the commission, either through it own tests or from reports from others, determines that an unsafe children's product is on the market, it will assist the product's manufacturer, importer, distributor or retailer in issuing a recall of that product. While the commission does not issue recalls, it does serve as a clearinghouse of information on recalls, publishing the recalled product's name (and picture when available), the hazard leading to the recall, the number of units involved, any injuries associated with the hazard, distributor and retailer listings, what consumers with that product should do, and who to contact for further information. In 2007, 81 toys and an additional 64 infant or child products were recalled in 2007, mostly due to concerns about lead-hazards.9

c. Imported children's product safety

In 2006, $614 billion dollars worth of imported products under the commission's jurisdiction entered into the country.10 Imports account for about 44 percent of all consumer products sold in

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the U.S. and comprise over three-fourths of all product recalls administered by the consumer
products safety commission. The agency employs approximately 15 full-time inspectors to
oversee imported products arriving at the nation's 300 ports of entry.

The agency has adopted an Import Safety Strategy to ensure foreign products meet U.S. safety
standards. Activities initiated under this strategy include:

- Entering into Memoranda of Understanding (MOU) with foreign countries to exchange
  information on safety standards and practices and to coordinate regulatory activities.
  Canada, Chile, China, Costa Rica, Egypt, European Commission, India, Israel, Japan,
  Mexico, Peru, South Korea, Taiwan (Taipei Economic and Cultural Representative
  Office), and Vietnam all have MOUs with the commission.
- Working with importers to extend best practices, including third party testing and
certification, to design and production of products by foreign suppliers.
- Conducting outreach and training events on U.S. regulations to firms that make and
  import products and foreign officials who regulate these firms overseas.
- Encouraging foreign agency inspections at manufacturing locations to confirm U.S.-
bound products meet U.S. safety standards.
- Improving partnership with U.S. Customs and Border Protection (CBP), including by
  utilizing CBP databases and technology which identify and track hazardous substances.
- Promoting retailer compliance reviews of foreign inventory and products and expecting
  retailers to know all firms in the supply and distribution chains to increase speed and
effectiveness of recalls.
- Exchanging recall information with foreign regulators.

In March 2008, the commission created the Import Surveillance Division, which, along with the
CBP, is responsible for inspecting, detecting and stopping hazardous products entering the U.S. Under the initiative, commission inspectors have the ability to identify, stop, examine and either hold or release foreign shipments.

VIII. The Consumer Product Safety Improvement Act of 2008

This Act reauthorizes the Consumer Product Safety Commission. It also tightens existing
consumer product safety standards and establishes new areas of federal regulatory authority.
Several of these modifications change the preemptive effect of federal law on many state
consumer product safety statutes, particularly those dealing with potentially hazardous materials.
This section highlights those changes to federal law made by the Consumer Product Safety
Improvement Act of 2008 that have an effect on existing state consumer product safety laws or
legislation.

A. Lead Paint Standard

Section 101(f) of the Consumer Product Safety Improvement Act amends the Consumer Product Safety Commission's lead paint regulation (16 C.F.R. § 1303) by lowering the acceptable lead content level to 0.009 percent by weight (or 90 ppm) from 0.06 percent by weight (or 600 ppm). The new limit went into effect in August 2009. The Act also requires the Commission to reevaluate the lead paint limit at least every five years and reduce it to the lowest technologically feasible limit where possible.

B. Lead Content Standard

The Consumer Product Safety Improvement Act of 2008 also establishes a ban on toys and other children's consumer products with high lead content. Under Section 101(a), any consumer product with a lead content in excess of the prescribed amounts would be considered a banned hazardous substance under the FHSA. The acceptable lead limits begin at 600 ppm 180 days after enactment, then drop to 300 ppm one year after enactment and 100 ppm three years after enactment. If the Commission determines that a limit of 100 ppm is not technologically feasible, then it is authorized to determine the lowest alternative feasible limit less than 300 ppm. The Act also requires the Commission to reevaluate the lead content limit at least every five years and reduce it to the lowest technologically feasible limit where possible.

C. Phthalates Ban

The Act creates a new ban on the sale, distribution, or importation of any children's toy or child care article that contains concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP). Also established is an interim ban on the sale, distribution or importation of any children's toy that can be placed in a child's mouth or child care article that contain concentrations of more than 0.1 percent of three other phthalates — diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP). A Commission appointed Chronic Hazard Advisory Panel will study the risks of all phthalates and phthalate alternatives used in children's toys and child care articles and recommend policy options. Based on these recommendations, the Commission then can make the interim rule with regard to toys that can be mouthed permanent or declare any children's product containing any phthalates to be a banned hazardous product under the CPSA. Any

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17 Consumer Product Safety Improvement Act of 2008, Sec. 101(f)(1). The Act states the reduced limit should go into effect one year after the date of enactment, which was August 14, 2008.
state requirement with respect to any phthalate alternatives not specifically regulated by the Consumer Product Safety Commission would not be preempted by this ban.27

In this bill, "children's toy" means "a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays."28 "Child care article" means "a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething."29

D. Mandatory Third Party Testing30

Every manufacturer of an imported consumer product under the Consumer Product Safety Commission's jurisdiction must list each rule, ban, standard or regulation applicable to the product, and certify that the product is in compliance with these requirements.31 Furthermore, each manufacturer of imported children's consumer products shall have those products tested by an accredited third party testing body and certify, based on the test results, that the product complies with all applicable children's product safety rules.32 The testing body cannot be owned, managed or controlled by the manufacturer or private labeler.33

E. Mandatory ASTM Toy Safety Standards

The toy safety standards included in ASTM International Standard F963-07, with the exception of section 4.2 and Annex 4, are adopted as mandatory rules of the Consumer Product Safety Commission.34 The Commission will also have to assess the effectiveness of ASTM F963 standards for safety requirements, safety labeling, and test methods within one year of enactment, and adopt more stringent methods if the risk of injury from toys would be reduced.35 Following this appraisal, the Commission will assess the adequacy of the remaining ASTM F963 standards and adopt more stringent standards where necessary to reduce injuries from toys.36 Future revisions to the ASTM F963 standards will be codified as CPSC rules unless the Commission determines that revision does not improve the safety of the consumer product covered.37 State children product safety standards addressing the same risk of injury as the ASTM F963 standards codified as Commission rules will not be preempted so long as states filed their standards with the Commission by November 12, 2008.38
IX. Preemption

When Congress acts in accordance with the Constitution, it preempts state laws in conflict with its actions.\textsuperscript{39} The theory of preemption arises from Article IV, cl. 2 of the Constitution, which states that it, and all laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."\textsuperscript{40}

Preemption is either express or implied.\textsuperscript{41} In either case, courts look to congressional intent in determining whether federal action preempts a state law, using the purpose of Congress as "the ultimate touchstone."\textsuperscript{42} When determining the whether preemption exists, and its scope, the courts start "with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."\textsuperscript{43} In fields that states traditionally regulate, courts will presume that federal laws do not preempt local regulations.\textsuperscript{44}

Express preemption occurs when Congress explicitly states, in the statute's language, the limits of state laws in the regulated field.\textsuperscript{45} Although explicit in the law, courts must still interpret the scope of the language and its limits on states.\textsuperscript{46}

In addition to express preemption, the Supreme Court has also recognized two types of implied preemption: field preemption and conflict preemption.\textsuperscript{47} Field preemption occurs when federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for States to supplement it" or "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."\textsuperscript{48}

A federal law will also preempt a state law if the state law is in conflict with, or impedes that federal law.\textsuperscript{49} "The test of whether both federal and state regulations may operate, or the state

\textsuperscript{40} U.S. CONST. art. VI, § 2.
\textsuperscript{43} Mortier, 501 U.S. at 604.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} See, e.g. Bates v. Dow Agrosciences, LLC., 544 U.S. 431 (2005), in which, in order to resolve a split in the Circuit Courts of Appeal, the Supreme Court held that the FIFRA provision that prohibited states from requiring labeling different from or in addition to the EPA approved labels preempted common law claims premised on defective labeling. The Court ruled that common law tort liability was a requirement beyond the EPA label, but that common law claims that used the EPA labels as the standard of care were permitted, as this did not require anything in addition to, or different from federal requirements.
\textsuperscript{47} Gade, 505 U.S. at 98.
\textsuperscript{48} Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted) (examining the federal Warehouse Act’s language and legislative history to determine that Congress intended to be the sole regulator in the field when it eliminated a provision from the Act that allowed states to license warehousemen). See also Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that Congress preempted the field of immigration and alien registration with the Federal Alien Registration Act, as immigration is a field traditionally reserved to the federal government).
\textsuperscript{49} Hines, 312 U.S. at 67.
regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field.\textsuperscript{50} The Court need not even examine Congressional intent where "compliance with both federal and state regulations is a physical impossibility," as the federal law automatically preempts the state law in that circumstance.\textsuperscript{51}

Additionally, conflict preemption may take the form of obstacle preemption, when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{52} A clear example of obstacle preemption occurred in \textit{Nash v. Florida Industrial Commission}, in which the court found that federal unfair labor practices laws preempted a state law denying unemployment benefits to employees that filed an unfair labor practice charge with the National Labor Relations Board, as the state law stood as an obstacle to federal laws discouraging unfair labor practices.\textsuperscript{53}


Section 231 of the Act states:

\begin{quote}
(a) RULE WITH REGARD TO PREEMPTION.—The provisions of sections 25 and 26 of the Consumer Product Safety Act (15 U.S.C. 2074 and 2075, respectively), section 18 of the Federal Hazardous Substances Act (15 U.S.C. 1261 note), section 16 of the Flammable Fabrics Act (15 U.S.C. 1203), and section 7 of the Poison Packaging Prevention Act of 1970 (15 U.S.C. 1476) establishing the extent to which those Acts preempt, limit, or otherwise affect any other Federal, State, or local law, any rule, procedure, or regulation, or any cause of action under State or local law may not be expanded or contracted in scope, or limited, modified or extended in application, by any rule or regulation thereunder, or by reference in any preamble, statement of policy, executive branch statements, or other matter associated with the publication of any such rule or regulation. In accordance with the provisions of those Acts, the Commission may not construe any such Act as preempting any cause of action under State or local common law or State statutory law regarding damage claims.
\end{quote}


\textsuperscript{51} \textit{Id.} at 142–43

\textsuperscript{52} \textit{Hines}, 312 U.S. at 67.

\textsuperscript{53} \textit{Nash v. Florida Industrial Commission}, 389 U.S. 235 (1967). However, obstacle preemption is not always this clear. See, Erwin Chemerinsky, \textit{Constitutional Law: Principles and Policies}, 415 (Aspen Publishers 3rd ed. 2006), for a discussion of \textit{Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission}, 461 U.S. 190 (1983), in which the court found that California’s moratorium on new nuclear power plants was not an obstacle to the federal goal of promoted nuclear power, as California’s moratorium was based on economic concerns, rather than safety concerns, and the Court characterized the federal objective as encouraging nuclear power only to the extent it was economically feasible. Chemerinsky argues that in characterizing the federal and state objectives as it did, the Court avoided finding preemption, however, had the Court viewed either objective broader, it would have likely found obstacle preemption.
(b) PRESERVATION OF CERTAIN STATE LAW.—Nothing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003.\(^{54}\)

By leaving intact the preemption provision of the major consumer product safety laws and extending the scope of federal law to prohibit consumer products containing lead and certain phthalates, the Consumer Product Safety Improvement Act of 2008 will preempt some existing state laws making similar prohibitions.

Therefore, reference to the preemption provisions of the major federal consumer product safety laws is necessary in order to determine if a state law is preempted by the Consumer Product Safety Improvement Act of 2008. The preemption provisions of the Consumer Product Safety Act and the Federal Hazardous Substances Act are particularly important, as these serve as primary authority for federal regulation of hazardous substances in children's consumer products.

Section 26(a) of the Consumer Product Safety Act states:

"Whenever a consumer product safety standard under this Act is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard."

Section 18(b)(1)(A) of the Federal Hazardous Substances Act states:

"[I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b)."

Section 18(b)(1)(B) of the Federal Hazardous Substances Act states:

"[I]f under regulations of the Commission promulgated under or for the enforcement of section 2(q) a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations."

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\(^{54}\) Consumer Product Safety Improvement Act, Sec. 231.
In essence, the Consumer Product Safety Act and the Federal Hazardous Substances Act preempt state safety standards, regulations or labeling requirements if they apply to a risk of injury targeted by current federal standards. State standards that are identical to federal standards are not preempted.\textsuperscript{55}

B. State Children’s Product Safety Laws and Legislation\textsuperscript{56}

Below are major categories of state children’s product safety laws and legislation. This section will apply the federal preemption doctrine to each category of existing state consumer protection laws to determine which state laws are preempted by the Consumer Product Safety Improvement Act of 2008. While some of these state laws will be preempted, many remain unaffected by the recent federal action.

1. State Standards Preempted by the Consumer Product Safety Improvement Act of 2008

The Consumer Product Safety Improvement Act of 2008 established consumer product safety standards in a number of different areas where states had previously acted. In many cases, these new federal standards are significantly different than these state laws.

Where they are not identical to federal mandates, these state standards likely are preempted by the Consumer Product Safety Improvement Act of 2008. The major areas where new federal law will preempt existing state standards are with respect to the lead content of children's products, the lead-content of paint and surface coatings applied to children's products, the content of several heavy metals in paint and surface coatings applied to children’s products, and restrictions on the use of certain phthalates.

a. Lead content restrictions

The Consumer Product Safety Improvement Act of 2008 set a graduated schedule for regulating the lead content of children's products, restricting products with more than 600 ppm initially and dropping that level to 100 ppm (or the lowest technologically feasible amount) after three years. Any consumer product with a lead content in excess of the prescribed amounts would be considered a banned hazardous substance under the Federal Hazardous Substances Act.\textsuperscript{57} These new federal standards will directly preempt many existing state standards regulating the lead content of children's products.

Both state and federal law restricting the lead content of children's products is targeted at the same risk of injury – namely lead poisoning in children.\textsuperscript{58} And because they prescribe requirements as to the composition and contents of such a product, state lead content restrictions clearly fall under the scope of the Federal Hazardous Substances Act's preemption provisions.

\textsuperscript{55} In addition, the Consumer Product Safety Improvement Act of 2008 will not preempt any cause of action under state or local common law or state statutory law regarding damage claims.

\textsuperscript{56} The following list is limited to state laws and legislation that target children's product safety. State laws and legislation that address general consumer product safety but not specifically children’s consumer products are not included.

\textsuperscript{57} Consumer Product Safety Improvement Act of 2008, Sec. 101(a).

\textsuperscript{58} See Vermont S.B. 152 (2008 Sess.) finding that "lead is highly toxic to humans, particularly to young children."
Therefore, in order to avoid preemption, state lead content restrictions must be identical to the federal standard established by the Consumer Product Safety Improvement Act of 2008.

Sixteen states have restrictions on the lead content of toys or other children's consumer products. The form of these state laws, and the specific standards they set, vary considerably.

Many of these standards are not identical to the federal laws, and therefore are likely preempted under the Consumer Product Safety Act of 2008. For example, in 2007, Michigan limited the lead content of certain children's products. The state's law bans the application of a "toxic substance" in or on any toy or child care article, and prohibits the sale, offer for sale, or transfer to any person any toy or child care article that contains a "toxic substance." "Toxic substance" is defined as "a substance that contains lead, or a coating on an item that contains lead, so that the lead content is more than 0.06 percent of the total weight." This standard is likely preempted because it addresses the same risk of injury as the federal standards and it is not identical to the graduated lead reduction levels mandated by the Consumer Product Safety Act of 2008.

Other state lead-content standards may or may not be preempted, depending on future federal regulations. For example, a Connecticut law passed in June 2008 will result in a lower lead content standard following a graduated reduction schedule. From July 1, 2009 to June 30, 2011, any children's product with greater than 300 ppm total lead content by weight for any part of the product is considered a "banned hazardous substance." After July 1, 2011, the threshold level is lowered to 100 ppm lead content by weight. Connecticut's State Child Protection Act prohibits "the manufacturing, distributing, selling at wholesale or retail, contracting to sell or resell, lease sublet or otherwise place in the stream of commerce...any children's product that has been designated a banned hazardous substance under [state law] or the Federal Hazardous Substances Act." If the federal government lowers the lead content threshold to 100 ppm as mandated by the Consumer Product Safety Improvement Act of 2008, then Connecticut's lead standard will be identical to the federal limit and will not be preempted. However, if the federal government determines that 100 ppm is not technologically feasible and instead adopts a higher lead content threshold, then Connecticut's 100 ppm standard will be preempted.

Many state laws that enacted different standards than those adopted under the Consumer Product Safety Improvement Act of 2008 will nonetheless not be preempted because of language that

incorporates federal standards. For example, Maryland enacted a lead-containing children's products prohibition in May 2008. The law prohibits the manufacture, sale, import or distribution of a lead-containing children's product. "Lead containing product" means "a product in which any part, component, or coating of the product contains lead or lead compounds...greater than the lesser of...0.06 percent by weight of the total weight of the part, component or coating [or] the standard established under federal law regarding the permissible level of lead in children's products." In other words, a product is banned under the state law if it violates either the state standard of 0.06 percent by weight, or any federal standard, whichever is lower. So although the state lead-content limit of 0.06 percent by weight is not identical to the federal graduated standards, Maryland's law nevertheless is not preempted because it incorporates existing federal standards. Vermont also has passed a graduated reduction schedule that, like Connecticut, will lower the lead content standard to 100 ppm by weight. Enacted in June 2008, Act 193 mandates "no person shall manufacture, regardless of location, for sale in, offer for sale, sell in or into the stream of commerce, or otherwise introduce into the stream of commerce in Vermont any children's product any component part of which contains lead." Any product containing or having a surface coating of 0.06 percent as of October 1, 2008; 0.03 percent as of July 1, 2009; and 0.01 percent as of January 1, 2010 is deemed to "contain lead" under the statute. The Vermont law states that if these standards are preempted by a federal standard as to any class of products, then the lowest such federal standards and federal effective dates for such products apply.

Some state laws target children's jewelry, regulating the lead content and type of materials that can be used in the manufacturing of the product. However, federal law does not specifically target these products. Thus, state restrictions on the lead content of children's jewelry will be preempted unless it is identical to the federal lead content standards. Because the Consumer Product Safety Improvement Act of 2008 does not regulate the type of materials that can be used in making children's jewelry, those state standards will not be preempted.

For example, a California statute restricts the manufacture, shipment, sale, or offer for sale children's jewelry for retail sale unless the children's jewelry is nonmetallic or made with other material that conforms to prescribed lead limits. Acceptable materials include: certain approved nonmetallic materials; metallic material that is less than 0.06 percent (600 ppm) lead

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77 Cal. Health & Safety Code §§25214.2(b)(1), (2) (2008). The approved nonmetallic materials are listed as "Class 1" and "Class 2" materials in Cal. Health & Safety Code §§25214.1(e), (f) (2008). Approved Class 1 nonmetallic materials include natural or cultured pearls; glass, ceramic, or crystal decorative components, including cat's eye, cubic zirconia, including cubic zirconium or CZ, rhinestones, and cloisonne; a gemstone that is cut and polished for ornamental
by weight; certain approved metallic elements; glass or crystal decorative components that contain less than 0.06 percent (600 ppm) lead by weight; printing ink or ceramic glaze that contains less than 0.06 percent (600 ppm) lead by weight; any other material that contains less than 0.02 percent (200 ppm) lead by weight. Children's jewelry is defined as jewelry that is made for, marketed for use by, or marketed to, children aged six and younger.

Children's jewelry as defined under California's state law falls under the scope of federal law regulating the lead content of children's products. Therefore, because California's lead content restrictions in children's jewelry target the same risk of injury – child lead poisoning – as the federal standards, and prescribe requirements as to the content of these products, California's standards are preempted unless identical to the federal regulations.

California's statute sets a number of different lead content restrictions for children's jewelry based on the type of material used. In each case, these are different than the federal graduated standard. Therefore, California's law regulating the lead content of children's jewelry will likely be preempted by the standards in the Consumer Product Safety Improvement Act of 2008.

States with similar laws targeting the lead-content of children's jewelry include Minnesota and New York.

Michigan takes more general approach in regulating the lead content of children's jewelry. Under a bill passed in December 2007, Michigan prohibits the use or application of a "lead-bearing substance" in or on any children's jewelry in the state, and bans the sale, offer for sale, or transfer to any person any children's jewelry that contains a "lead-bearing substance." "Lead-bearing substance" is defined as "an item or substance that contains lead, or a coating on an item that contains lead, so that the lead content is more than 0.06 percent of the total weight." As this state standard is higher than the new federal lead content threshold, it too is likely preempted.

purposes (with some exceptions); elastic, fabric, ribbon, rope, or string, unless it contains intentionally added lead; all natural decorative material, including amber, bone, coral, feathers, fur, horn, leather, shell, wood, that is in its natural state and is not treated in a way that adds lead. Approved Class 2 nonmetallic materials include plastic or rubber, including acrylic, polystyrene, plastic beads and stones, and polyvinyl chloride (PVC) that less than 0.06 percent (600 ppm) lead by weight on or before August 30, 2009 and less than 0.02 percent (200 ppm) lead by weight on or after August 31, 2009; or a dye or surface coating containing less than 0.06 percent (600 ppm) lead by weight.

Cal. Health & Safety Code §25214.1(c) and (d) (2008).
b. State restrictions on lead paint and surface coatings

Until August 2009, federal law limits the amount of lead in paint and surface coatings applied to children's products to 0.06 percent by weight (or 600 ppm). After August 2009, that standard will be lowered to 0.009 percent by weight (or 90 ppm) pursuant to the Consumer Product Safety Improvement Act of 2008. Any consumer product with lead paint or surface coatings in excess of the federal standard is a banned hazardous substance under the Federal Hazardous Substances Act.  

Like lead content restrictions, state and federal laws limiting lead in paint and surface coatings applied to children's products are intended to prevent child lead poisoning. And because they prescribe requirements as to the composition and contents of such a product, state lead paint restrictions clearly fall under the scope of the Federal Hazardous Substances Act's preemption provisions. Therefore, in order to avoid preemption, state lead content restrictions must be identical to the federal standard established by the Consumer Product Safety Improvement Act of 2008.

Sixteen states regulate lead in paints and other surface coatings applied to toys or other children's consumer products. By lowering the lead limits for paints and surface coatings, the Consumer Product Safety Improvement Act of 2008 will directly preempt many of these state standards. Other state standards that match the lower federal limit will not be preempted.

Limits in Kentucky and New Jersey are currently set at 0.5 percent lead by weight. Because they are different than the new federal standard, these and similar state standards will be preempted.

Other state standards are identical to the existing federal limit of 0.06 percent lead by weight, but will be preempted after the federal standard is lowered in August 2009. For example, Massachusetts statute prohibits the application on toys of any paint or glaze with a content of 0.06 percent lead by weight. New York also has a standard set at 0.06 percent lead by weight. When the federal standard is lowered to 0.09 lead by weight in 2009, these state standards will no longer be identical to the federal limit. Therefore, they will be preempted by the lower federal standard.

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On the other hand, some states have lead standards for paint and surface coatings that are currently set at 0.009 percent by weight. These state standards will not be preempted by the new federal limit. For example, Connecticut House Bill 5650 enacted in June 2008 lowers the state's limit for lead-containing paint to 90 ppm (or 0.009 percent by weight). After August 2009, the Connecticut law will not be preempted because it will be identical to the new federal standard of 0.009 percent by weight.

c. State restrictions on heavy metals in paint and surface coatings

The Consumer Product Safety Improvement Act of 2008 adopts standards codified in ASTM F963-07 as mandatory federal standards after February 2009. ASTM F963-07 regulates the soluble content of several heavy metals in paint and surface coatings applied to children’s toys. In particular, soluble arsenic is set at 25 mg/kg, soluble barium at 1000 mg/kg, soluble cadmium at 75 mg/kg, soluble chromium at 60 mg/kg, soluble mercury at 60 mg/kg, soluble lead at 90 kg/mg, soluble antimony at 60 kg/mg, and soluble selenium at 500 kg/mg.

Some state laws address the application of these substances to children’s products. For example, California law prohibits the manufacture, sale or distribution of any toy that is “coated with paints or lacquers containing…soluble compounds of antimony, arsenic, cadmium, mercury, selenium, barium.” Under California’s standard, compounds are soluble if quantities in excess of 0.1 percent are dissolved by 5 percent hydrochloric acid after stirring for 10 minutes at room temperature. Because its limits and methods for determining solubility are different, California’s standard with respect to these heavy-metals in painting and surface coatings will be preempted by the mandatory federal standards of ASTM F963-07.

Recently enacted Washington law also regulates cadmium in children’s products. Specifically, the state limits the cadmium content in children’s products to 0.004 percent by weight (40 ppm). Unlike California’s standard which specifically addresses the heavy metal content in paint and surface coatings, Washington’s standard regulates the overall content of the children’s product or product component. To the extent that paint or surface coatings are considered a product component, then Washington’s standard of 0.004 percent would be different than the federal limit for soluble cadmium and would therefore be preempted. However, if Washington’s cadmium limit applies to the overall content of the children’s product, and not specifically to paint, then the cadmium limits in the Consumer Product Safety Improvement Act of 2008 codified in ASTM F963-07 would not directly preempt the state standard.

d. State phthalate restrictions

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98 Note that the Connecticut state standard of 0.009 percent by weight will not be enforceable until after August 2009, when the federal limit matches the state standard.
99 ASTM F963-07, Sec. 4.3.5. Note that after August 2009, the soluble limit for lead paint under ASTM F963-07 will not be necessary because the maximum total lead content in paint has been reduced to 90 ppm, which would be a more stringent requirement in all cases. See U.S. Consumer Product Safety Commission Web site at http://www.cpsc.gov/ABOUT/Cpsia/faq/faqs.html.
New federal phthalate standards under the Consumer Product Safety Improvement Act of 2008 would ban the use in children's consumer products of DEHP, DBP and BBP in concentrations more than 0.1 percent (or 1000 ppm) and place an interim prohibition on the use of DINP, DIDP and DnOP in concentrations more than 0.1 percent (or 1000 ppm) in a children's toy that can be placed in a child's mouth or any child care article.

Three states have enacted restrictions on the amount of phthalates in children's consumer products: California, Vermont and Washington.

California was the first state in the nation to pass such restrictions. Under Assembly Bill 1108, enacted on October 14, 2007, the manufacture, sale or distribution in commerce of "any toy or child care article that contains di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP), in concentrations exceeding 0.1 percent" is prohibited. In addition, the manufacture, sale or distribution in commerce of "any toy or child care article intended for use by a child under three years of age...that can be placed in the child's mouth and contains diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP), in concentrations exceeding 0.1 percent" is prohibited. California's phthalate restrictions are set to commence January 1, 2009.

In this bill, "toy" means "all products designed or intended by the manufacturer to be used by children when they play." "Child care article" means "all products designed or intended by the manufacturer to facilitate sleep, relaxation, or the feeding of children, or to help children with sucking or teething."

Assembly Bill 1108 also requires manufacturers use the "least toxic alternative" when replacing phthalates, and prohibits the use of carcinogens rated by the U.S. Environmental Protection Agency as A, B, or C carcinogens or known to the state to cause cancer as listed in the California Safe Drinking Water Act. Manufacturers are prohibited from replacing phthalates with "reproductive toxicants that cause birth defects, reproductive harm, or developmental harm" as identified by the U.S. EPA or listed in the California Safe Drinking Water Act.

On May 24, 2008, the Vermont legislature passed restrictions on the use of phthalates identical to California's law. Vermont Senate Bill 261 prohibits the manufacture, sale or distribution in commerce of "any toy or child care article intended for use by a child under three years of age if that product contains di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP), in concentrations exceeding 0.1 percent." In addition, the bill prohibits the manufacture, sale or distribution in commerce of "any toy or child care article intended for

use by a child under three years of age if that product can be placed in the child's mouth and contains diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP), in concentrations exceeding 0.1 percent. Vermont's phthalates restrictions took effect July 1, 2009.

Like California, Vermont defines "toy" as "any product designed or intended by the manufacturer to be used by children when they play." "Child care article" means "any product designed or intended by the manufacturer to facilitate sleep, relaxation, or the feeding of children, or to help children with sucking or teething." Vermont also will require manufacturers to use the "least toxic alternative" when replacing phthalates, and prohibits the use of carcinogens rated by the U.S. Environmental Protection Agency as A, B, or C carcinogens. Manufacturers are prohibited from replacing phthalates with "reproductive toxicants that the EPA has identified as causing birth defects, reproductive harm, or developmental harm."

California and Vermont's phthalate standards restricting the use of DEHP, DBP and BBP to no more than 0.1 percent match the federal standards and therefore are not preempted. The two states' restrictions on DINP, DIDP and DnOP in children's products that can be mouthed also mirror the federal "interim prohibition" and will not likely be preempted unless the interim prohibition on these products is lifted by the Consumer Product Safety Commission, or the Commission determines that another standard is appropriate for these substances.

Only Washington will likely have an aspect of its phthalates ban preempted by the newly enacted federal ban. Under Washington's law, manufacturers, wholesalers and retailers are prohibited from the manufacture, sale offer for sale, distribution for sale, or distribution for use any "children's product or product component containing...phthalates, individually or in combination, at more than 0.10 percent by weight."

"Phthalates" means "di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), benzyl butyl phthalate (BBP), diisononyl [sic] phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP). "Children's product" includes "toys," "children's cosmetics," " Children’s cosmetics" is defined in Wash. Rev. Code Ann. §70.240.010(1)(c) (2009) as "cosmetics that are made for, marketed for use by, or marketed to children under the age of twelve.” Included in this definition are cosmetics that are packaged, displayed or advertised as appropriate for use by children; are sold in conjunction with, attached to, or packaged together with other products that are packaged, displayed or advertised as appropriate for use by children; or sold in retail stores, catalogues or online web sites in which a person exclusively offers for sale products that are packaged, displayed, or advertised as appropriate for use by children, or a discrete portion of a retail store, catalogue, or online web..."
"children's jewelry," a product designed or intended by the manufacturer to help a child with sucking or teething, to facilitate sleep, relaxation, or the feeding of a child, or to be worn as clothing by children," and "child car seats." Washington's law does not require phthalates be replaced with the least toxic alternative.

A portion of Washington's phthalates law banning DEHP, DBP and BBP in concentrations over 0.10 percent by weight matches the new federal ban and would not be preempted.

However, Washington will restrict the use DINP, DIDP and DnOP in all children's products, not just those that can be mouthed. The federal standard, however, applies only to children's toys that can be placed in a child's mouth or any child article. Thus, children's products containing DINP, DIDP, and DnOP that cannot be placed in a child's mouth would not be regulated by the federal law, but would be regulated under Washington's standards. Therefore, Washington's law is not identical to the federal regulation and is preempted.

2. State Standards That Are Not Preempted by the Consumer Product Safety Improvement Act of 2008

Many state laws to ensure child product safety are not affected by the Consumer Product Safety Improvement Act of 2008. As discussed above, some state standards are identical to existing federal law, or will be when new federal standards mandated by the Consumer Product Safety Improvement Act of 2008 go into force. Also, many states have adopted innovative approaches to children's product safety which were not addressed by the Consumer Product Safety Improvement Act of 2008.

a. Comprehensive Chemical Identification and Prioritization

Rather than prescribing specific limits or standards for toxins in legislation, some states have authorized executive departments to compile lists of priority chemicals of concern based on potential for exposure and harm to children. Once a list is compiled, manufacturers in some states will be required to disclose which children's products contain priority chemicals. In some instances, manufacturers would be required to replace the priority chemical with safer alternatives when available.

i. Maine L.D. 2048/H.B. 1432

[122] "Children’s jewelry" is defined in Wash. Rev. Code Ann. § 70.240.010(2) (2009) as "jewelry that is made for, marketed for use by, or marketed to children under the age of twelve. Included in this definition is jewelry that is packaged, displayed, or advertised as appropriate for use by children under the age of twelve; is sold in conjunction with, attached to, or packaged together with other products that are packaged, displayed or advertised as appropriate for use by children; sized for children and not intended for use by adults; or sold in vending machines, or in retail stores, catalogues, or online web sites in which a person exclusively offers for sale products that are packaged, displayed, or advertised as appropriate for use by children.

Maine became the first state to adopt a comprehensive regulatory approach to chemicals by enacting L.D. 2048/H.B. 1432 (Sess. 2008) in April 2008. It allows state regulators to collect information about chemical use and prohibit the sale of children's products that contain priority chemicals when safer alternatives are available.

The categorization and regulation of chemicals under Maine's law are subject to several steps. The law requires the state Department of Environmental Protection to work with the Maine Department of Health and Human Services and the Maine Center for Disease Control and Prevention to publish a list of chemicals of high concern. A chemical is eligible to be included on this list "...only if it has been identified by an authoritative governmental entity on the basis of credible scientific evidence" as being known as "[a] carcinogen, a reproductive or developmental toxicant or an endocrine disruptor;" "[p]ersistent, bioaccumulative and toxic;" or "[v]ery persistent and very bioaccumulative."

Once a substance is listed as a chemical of high concern, it must be identified as a priority chemical so its use in consumer products can be regulated. The commissioner of Environmental Protection can list a chemical of high concern as a priority chemical if the commissioner finds, in concurrence with the Department of Health and Human Services and the Maine Centers for Disease Control and Prevention, any of the following conditions are satisfied:

- "The chemical has been found through biomonitoring to be present in human blood, including umbilical cord blood, breast milk, urine or other bodily tissues or fluids;
- "The chemical has been found through sampling and analysis to be present in household dust, indoor air, drinking water or elsewhere in the home environment;
- "The chemical has been found through monitoring to be present in fish, wildlife or the natural environment;
- "The chemical is present in a consumer product used or present in the home;
- "The chemical has been identified as a high production volume chemical by the federal Environmental Protection Agency; or
- "The sale or use of the chemical or a product containing the chemical has been banned in another state within the United States."

At least two priority chemicals must be designated by 2011. The Department of Environmental Protection must review the list of chemicals of high concern at least every three years and can add or remove substances from the list of high-priority chemicals or designate additional priority chemicals.

Once a chemical has been listed as a priority chemical, substantial requirements exist for manufacturers and distributors of children's products sold in the state that contain the priority chemical. First, they must provide written notice to the Department of Environmental Protection that identifies "...the children's product, the number of units sold or distributed for sale in the State or nationally, the priority chemical or chemicals contained in the children's product, the

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amount of such chemicals in each unit of children's product and the intended purpose of the chemicals in the children's product.”129

The state also can require additional information, such as:

- "Information on the likelihood that the chemical will be released from the children's product to the environment during the children's product's life cycle and the extent to which users of the children's product are likely to be exposed to the chemicals;
- "Information on the extent to which the chemical is present in the environment or human body; and
- "An assessment of the availability, cost, feasibility and performance, including potential for harm to human health and the environment, of alternatives to the priority chemical and the reason the priority chemical is used in the manufacture of the children's product in lieu of identified alternatives.”130

The information on priority chemicals in children's products will be reviewed by the Board of Environmental Protection, a 10-member body charged with issuing department rules. The board then has the option to prohibit the manufacture, sale or distribution in the state of a children's product that contains a priority chemical if it finds that “…[d]istribution of the children's product directly or indirectly exposes children and vulnerable populations to the priority chemical; and [o]ne or more safer alternatives to the priority chemical are available at a comparable cost.”131 If a number of safer alternatives exist, the board can require use of the least toxic or environmentally harmful alternative.132

Safer alternatives are chemicals “…that, when compared to the priority chemical, would reduce the potential for harm to human health or the environment or that has not been shown to pose the same or greater potential for harm to human health or the environment as that priority chemical.”133 In determining whether a safer alternative is available, the board can presume one is if the children's product containing the priority chemical has been banned by another state or is an item of apparel or novelty; or if the alternative is sold in the United States.134 The board also can presume a safer alternative is available if the alternative is not a chemical of high concern.135

Once a children's product is prohibited, manufacturers and distributors must file a compliance plan with the state or seek a waiver within 180 days from the commissioner of Environmental Protection.136 The compliance plan must identify the prohibited children's product and specify whether compliance will be achieved by discontinuing sale of the product or substituting a safer alternative in the product.137 If an alternative will be used, the manufacturer or distributor must identify the safer substance and submit a timetable for substitution.138

Waivers for prohibited products can be granted only if the commissioner of Environmental Protection finds that "...there is a need for the children's product in which the priority chemical is used and there are no technically or economically feasible alternatives for the use of the priority chemical in the children's product." Waivers can be granted for up to five years and can be renewed if technologically or economically feasible alternatives remain unavailable.

If the state suspects a children's product is being sold in violation of this chapter, the Department of Environmental Protection can require the product's manufacturer or distributor to certify its compliance with the law and either attest that the children's product does not contain a priority chemical, or notify retailers that the sale of the product is prohibited. Manufacturers and distributors then must provide the state with the list of names and addresses of the retailers who were notified.

Maine's law does not apply to retailers unless the retailer knowingly sells a prohibited item that contains a priority chemical. Priority chemicals used in or for industry or manufacturing are not covered under the new law. In addition, the requirements do not apply to motor vehicles, items already regulated under Maine's Mercury-Added Products and Services Statute, telecommunications devices, or food and beverage packaging (unless intentionally marketed for use by children age three).

The Maine Legislature also authorized the state to cooperate with other states and governmental entities in an interstate clearinghouse to promote safer chemicals in consumer products. The state would classify existing chemicals in commerce into four categories:

1. Chemicals of high concern;
2. Chemicals of moderate concern, defined as "a chemical identified by an authoritative governmental entity on the basis of credible scientific evidence" as being suspected of causing specific adverse health or environmental effects;";
3. Chemicals of low concern, defined as "a chemical for which adequate toxicity and environmental data are available to determine that it is not a chemical of high, moderate or unknown concern;" or
4. Chemicals of unknown concern, defined as "a chemical for which insufficient data are available to classify it as a chemical of high, moderate or low concern."

The state also can use the interstate clearinghouse to organize and manage data on chemicals; to produce and inventory information on safer alternatives; to provide technical assistance to businesses and consumers; and to support other state programs to promote safe chemicals.
Finally, the law requires the Department of Environmental Protection to develop a program to educate and help consumers and retailers identify children’s products that may contain priority chemicals.\footnote{2008 Me. Laws, Chap. 643 (Laws of Maine); Me. Rev. Stat. Ann tit. 38, §1699 (2008).}

The Maine Legislature did not authorize specific appropriations to carry out these provisions. The Department of Environmental Protection, through the governor, however, is allowed to accept donations, grants and other funds to carry out the new law's requirements.

ii. California A.B. 1879/S.B. 509

On September 29, 2008, California Governor Arnold Schwarzenegger signed into law A.B. 1879 and S.B. 509 to establish a Green Chemistry Initiative and Toxics Information Clearinghouse.\footnote{2008 Cal. Stats., Chap. 559; 2008 Cal Stats., Chap. 560.} A result of a compromise between chemical and environmental interests, the new California law establishes a process to identify and rank chemicals of concern and determine how best to limit their affects. California also would establish a clearinghouse to collect, maintain and distribute information about hazardous chemicals.

The Green Chemistry Initiative requires the Department of Toxic Substances Control to adopt two sets of regulations before Jan. 1, 2011. The first set will establish a process to identify and rank chemicals of concern.\footnote{2008 Cal. Stats., Chap. 559; Cal. Health & Safety Code §25252(a).} This process must include consideration of the volume of chemical in commerce in the state; the potential for exposure to the chemical in a consumer product; and the potential effects on sensitive subpopulations, including infants and children.\footnote{2008 Cal. Stats., Chap. 559; Cal. Health & Safety Code §25252(b)(1).} The process must set criteria to evaluate chemicals and their alternatives, including the chemical's traits, characteristics and endpoints.\footnote{2008 Cal. Stats., Chap. 559; Cal. Health & Safety Code §25252(B)(2).} The Department also must reference and use, to the maximum extent feasible, available information from other nations, governments and authoritative bodies that have undertaken similar chemical prioritization processes.

The second set of regulations will establish a process to evaluate chemicals of concern in consumer products, and their potential alternatives, to determine how best to limit exposure or reduce their level of hazard.\footnote{2008 Cal. Stats., Chap. 559; Cal. Health & Safety Code §25253(a)(1).} The availability of potential alternatives, the potential hazards posed by alternatives, and critical exposure pathways also must be evaluated.\footnote{2008 Cal. Stats., Chap. 559; Cal. Health & Safety Code §25253(b) (2008).} Consideration must be given to product function or performance; useful life; materials and resource consumption; water conservation; effects on water quality and air emissions; production, in-use, and transportation energy inputs; energy efficiency; greenhouse gas emissions; waste and end-of-life disposal; public health effects, including potential impacts on sensitive subpopulations such as infants and children; and environmental and economic effects.\footnote{2008 Cal. Stats., Chap. 559; Cal. Health & Safety Code §25253(a)(2).} The regulations also should include the range of regulatory responses.\footnote{2008 Cal. Stats., Chap. 559; Cal. Health & Safety Code §25253(b) (2008).} The bill lists some options, including:
• requiring no action;
• requiring industry to provide additional information about the chemical or its alternatives;
• imposing labeling requirements;
• imposing restrictions or outright prohibitions on the use of the chemical in consumer products;
• imposing requirements that control access to or limit exposure to the chemical of concern;
• requiring the manufacturer to manage the product at the end of its useful life, including recycling or responsible disposal;
• requiring industry to fund green chemistry challenge grants when no feasible safer alternative exists;
• or any other outcomes the department deems necessary.\textsuperscript{158}

The bill does not define chemicals that should qualify as chemicals of concern, nor does it specify which chemicals of concern in consumer products should be evaluated first or how to prioritize those evaluations.

Before each set of regulations can be formally adopted, the department must submit the proposed processes for review by the council.\textsuperscript{159} To assist the council, the department must subject the proposed sets of regulations to a "multimedia life-cycle evaluation." This is defined as "...the identification and evaluation of a significant adverse impact on public health or the environment, including air, water, or soil, that may result from the production, use, or disposal of a consumer product or consumer product ingredient."\textsuperscript{160} The multimedia evaluation must be based on the best available scientific data, written comments from the public, and information collected by the department.\textsuperscript{161} It is to address effects associated with emissions of air pollutants, including ozone-forming compounds, particulate matter, toxic air contaminants and greenhouse gases; contamination of surface water, groundwater and soil; disposal or use of the byproducts and waste materials; worker safety and impacts to public health; and other environmental effects.\textsuperscript{162} The department must consult with a variety of state departments and agencies including the Department of Public Health, the State and Consumer Services Agency, the Department of Homeland Security and the Department of Industrial Relations when creating the multimedia life-cycle.\textsuperscript{163}

The council must complete its review within 90 days after it receives a proposed set of regulations.\textsuperscript{164} If it determines that the regulations will have "a significant adverse impact on the public health or the environment," or "alternatives exist that would be less adverse," the council

\textsuperscript{160}2008 Cal. Stats., Chap. 559; Cal. Health & Safety Code §25252.5(g) (2008). The department does not have to subject the regulations to a multimedia life-cycle evaluation if the council conclusively determines, after an initial evaluation, that the proposed regulations will not have "any significant adverse impact on public health or the environment."
must recommend alternative measures. Upon receiving these recommendations, the department has 60 days in which to revise the regulations to avoid or reduce the adverse impact. Otherwise, the affected agencies must take appropriate action that will mitigate the adverse impact.

The bill also establishes a Green Ribbon Science Panel, consisting of members with science, research and public health backgrounds. The panel was launched in 2009 and will meet at least twice a year. It will advise the department about scientific and technical matters associated with chemicals of concern; developing green chemistry and chemical policy recommendations; prioritizing chemicals based on hazard traits and toxicological end-point data; and adopting regulations. Panel proceedings must be open to the public.

A major industry concern with this bill was how the state would handle trade secrets. The final law includes language that allows industry, when giving information about products or chemicals to the state, to identify specific information as a trade secret. The state would not be able to release the information to the public unless it determines otherwise. The disclosure requirements do not apply to "hazardous trait submissions for chemicals and chemical ingredients" required by the bill.

In addition to the Green Chemistry Initiative, California also passed S.B. 509, which requires the department to establish a publicly accessible Toxics Information Clearinghouse for "...the collection, maintenance, and distribution of specific chemical hazard traits and environmental and toxicological end-point data." The department is to determine design requirement standards and the data quality and test methods that govern the information included in the clearinghouse.

By Jan. 1, 2011, the California Office of Environmental Health Hazard Assessment is to gather and evaluate the information to be included in this web-based clearinghouse. The evaluation is to be conducted with "all appropriate state agencies, after one or more public workshops, and an opportunity for all interested parties to comment." The department also is to consult with other states, the federal government and other nations to identify available data, and regional, national and international data sharing arrangements is encouraged.

Neither A.B. 1879 nor S.B. 509 authorized specific appropriations to carry out their mandates.

iii. Washington and Connecticut Laws

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In April 2008, Washington passed a law similar to but less comprehensive than Maine’s bill.\textsuperscript{174} Washington’s bill requires the state to compile a list of priority chemicals of high concern based on the potential exposure to children or developing fetuses and to submit a report and policy recommendations to the Legislature.\textsuperscript{175} Due to a line item veto by the Governor, however, the state is not required to adopt rules to formally identify these chemicals or to impose reporting or testing requirements when the chemicals are found in consumer products.\textsuperscript{176}

In June 2008, Connecticut passed H.B. 5650, directing the Connecticut commissioner of Consumer Protection, in consultation with the commissioners of Public Health and the Environment, to "...compile, and from time to time amend, a list of...toxic substances and the recommended maximum amount of such toxic substances that may exist in children's products."\textsuperscript{177} The Connecticut law also calls for a list of safer alternatives to the toxic substances.\textsuperscript{178} In addition, the legislature authorized the commissioner of Environmental Protection to:

- participate in an interstate clearinghouse to classify chemicals found in commercial goods as of high, moderate, low or unknown concern;
- organize and manage available data on chemicals, including information on uses, hazards and environmental concerns associated with chemicals;
- produce and inventory policies and programs related to such alternatives; and
- provide technical assistance to business and consumers relating to safer chemicals.\textsuperscript{179}

A Washington bill passed in 2008 also would require the state to identify "high priority chemicals that are of high concern for children after considering a child's or developing fetus's potential for exposure to each chemical."\textsuperscript{180} The law requires consideration of the same criteria as Maine’s law, including whether the chemical "has been added to or is present in a consumer product used or present in the home."\textsuperscript{181} Once the list of chemicals of high concern is compiled, the state Department of Ecology is required to identify children's products or product categories that may contain these chemicals and report back to the legislature on policy options for addressing the chemicals in children's products, including recommendations for additional ways to inform consumers about toxic chemicals in products, such as labeling.\textsuperscript{182}

Other states have considered enacting similar comprehensive chemical regulation legislation. In 2008, such bills were introduced in Alabama,\textsuperscript{183} Illinois,\textsuperscript{184} Massachusetts,\textsuperscript{185} Pennsylvania,\textsuperscript{186} Rhode Island,\textsuperscript{187} South Carolina,\textsuperscript{188} Vermont,\textsuperscript{189} and Wisconsin.\textsuperscript{190}

\textsuperscript{174} 2008 Wash. Laws, Chap. 288.
\textsuperscript{175} 2008 Wash. Laws, Chap. 288.
\textsuperscript{181} 2008 Wash. Laws, Chap. 288; Wash. Rev. Code Ann. §70.240.030(1) (2009). Unlike Maine’s law, Washington does not consider whether the chemical has been identified as a high production volume chemical by the federal Environmental Protection Agency.
\textsuperscript{183} H.B. 848, S.B. 620, S.B. 83a (Sess. 2008).
\textsuperscript{184} H.B. 5705, S.B. 2868 (Sess. 2008).
Because these comprehensive chemical identification and prioritization bills do not set standards in relation to specific hazardous substances, these laws are not preempted by the Consumer Product Safety Improvement Act of 2008. However, if a state were to institute regulations that required labeling of products that contained a priority chemical or chemical of concern, then those regulations may be preempted by Federal Hazardous Substances Act labeling requirements. Similarly, if a state used a comprehensive chemical identification and prioritization law as authority to ban a substance already regulated by the federal government (e.g., a complete ban on the use of lead in paint), those regulations would likely be deemed preempted by the federal regulations.

3. Unsafe Children's Products

Ten states have laws that would prohibit the sale of "unsafe" children's products: Arkansas, Connecticut, Delaware, Illinois, Louisiana, Michigan, New Jersey, Oregon, Rhode Island and Vermont. Generally, these states define an unsafe product to include any product that "does not conform to federal law and regulatory standards for children's products"; "has been recalled for any reason by an agency of the federal government or by the products manufacturer, distributor, or importer, and the recall has not been rescinded"; or "an agency of the federal government has issued a warning that a specific product's intended use constitutes a safety hazard, and the warning has not been rescinded."

These laws do not set specific state standards for children's products; rather they prohibit products that do not conform to existing federal standards or are subject to voluntary industry

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192 H.B. 2122, S.B. 1489 (Sess. 2008).
195 S.B. 292 (Sess. 2008).
196 A.B. 968 (Sess. 2008).
197 16 C.F.R. §1303.1(a); 15 U.S.C. 2057, 2058
198 Ark. Stat. Ann. §20-27-1603(a) (2008) ("No commercial user shall remanufacture, retrofit, sell, contract to sell or resell, lease, sublet, or otherwise place in the stream of commerce a children’s products that is unsafe.").
199 Vol. 76 Del. Laws, Chap. 358; Del. Code Ann. tit. 6, §2502C(1) (2008) ("A person shall not knowingly sell, offer for sale, or transfer a toy in the State of Delaware that contains a toxic substance or that is otherwise unsafe to a child.").
200 430 Ill. Comp. Stat. §125/15(a) (2008) ("...no commercial dealer, manufacturer, importer, distributor, wholesaler, or retailer may manufacture, remanufacture, retrofit, distribute, sell at wholesale or retail, contract to sell or resell, lease, or sublet, or otherwise place in the stream of commerce a children’s product that is unsafe.").
recall efforts. Therefore, they are not preempted by the Consumer Product Safety Improvement Act of 2008.

a. Bisphenol-A Restrictions

Recently, state legislation has been introduced to regulated bisphenol-A (commonly known as BPA) in consumer products. BPA, an industrial chemical used to make hard, clear polycarbonate plastics and epoxy resins, is suspected of causing development problems in humans.\(^{203}\)

No state has enacted restrictions on bisphenol-A. However, in the 2008 state legislative sessions, 41 bills in 13 states legislatures addressed bisphenol-A in consumer products.\(^{204}\) Most (33 bills) sought to ban or restrict the use of BPA.\(^{205}\) Some (7 bills) called for studies of the risks associated with the use of bisphenol-A or investigations into safer alternatives.\(^{206}\) One bill (New Jersey Assembly Bill 2958) would require labeling of products (plastic wrap for food) containing bisphenol-A.

Because the federal government has yet to act to restrict the use of bisphenol-A in consumer products, states are free to regulate this substance. Therefore, any state laws enacted in the future addressing this chemical plasticizer would not be preempted by the Consumer Product Safety Improvement Act of 2008.

b. Bans or Restrictions on Asbestos

Connecticut also targeted children's products containing asbestos.\(^{207}\) Under a new law enacted in 2008, all children's products containing asbestos are banned from sale, along with any other hazardous substance banned under the Federal Hazardous Substances Act. This act, designed to prohibit hazardous products for sale to children in commerce, specifically mentions "any toy or other article…marketed for use of children under the age of sixteen containing asbestos" to be

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\(^{204}\) The 13 states that considered legislation addressing bisphenol-A in 2008 are California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island and Vermont.

\(^{205}\) California S.B. 1713 (Sess. 2008); Connecticut S.B. 527 (Sess. 2008); Connecticut H.B. 5601 (Sess. 2008); Hawaii H.B. 2187 (Sess. 2008); Hawaii H.B. 2449 (Sess. 2008); Hawaii S.B. 2239 (Sess. 2008); Illinois H.B. 4744 (Sess. 2008); Illinois H.B. 5705 (Sess. 2008); Illinois S.B. 2868 (Sess. 2008); Illinois S.B. 944 (Sess. 2008); Maine H.B. 636 (Sess. 2008); Maryland H.B. 56 (Sess. 2008); Massachusetts H.B. 259 (Sess. 2008); Massachusetts S.B. 545 (Sess. 2008); Massachusetts S.B. 2340 (Sess. 2008); Minnesota S.B. 1858 (Sess. 2008); Minnesota H.B. 2100 (Sess. 2008); New Jersey A.B. 2112 (Sess. 2008); New Jersey A.B. 2332 (Sess. 2008); New Jersey A.B. 2940 (Sess. 2008); New Jersey A.C.R. 158 (Sess. 2008); New Jersey S.B. 1428 (Sess. 2008); New Jersey S.R. 46 (Sess. 2008); New Jersey S.B. 1804 (Sess. 2008); New Jersey S.B. 1859 (Sess. 2008); New York A.B. 6829 (Sess. 2008); New York S.B. 6058 (Sess. 2008); New York A.B. 11277 (Sess. 2008); Pennsylvania H.R. 797 (Sess. 2008); Rhode Island H.B. 7812 (Sess. 2008); Rhode Island H.B. 7813 (Sess. 2008); Rhode Island S.B. 2685 (Sess. 2008); Vermont H.B. 858 (Sess. 2008).


banned from commerce.\textsuperscript{208} This law also requires the state to compile a list of toys and other children's products which are classified as a banned hazardous substance.

Other states addressed asbestos in commerce,\textsuperscript{209} but none of the other bills specifically mentioned asbestos in children's products.

\section*{C. Mandatory third-party testing}

The Consumer Product Safety Improvement Act of 2008 instituted mandatory third party certification and testing requirements for imported children's products. The U.S. Consumer Product Safety Commission has decided not to enforce these requirements until after February 10, 2010.\textsuperscript{210}

Several states have considered instituting similar certification or testing requirements on children's product manufacturers. Only Maryland has instituted third-party testing requirements for children's consumer products. Enacted in May 2008, Maryland House Bill 62 requires the manufacturer of a children's product "test whether the children's product is a lead-containing product by using an independent third party qualified testing entity."\textsuperscript{211} A lead-containing product is defined as a product that contains more than 0.06 percent lead by weight, or the standard established under federal law, whichever is lowest.\textsuperscript{212}

The testing agency cannot be "owned, managed, controlled, or directed by the manufacturer" and must be "accredited in accordance with an accreditation process established or recognized" by the state.\textsuperscript{213}

If the product does not contain levels of lead above statutory limits, the qualified testing agency will issue a certification, which must be maintained by the products manufacturer and retailer.\textsuperscript{214} Maryland's law makes it illegal to sell a children's product without the third-party certification.\textsuperscript{215}

Until the U.S. Consumer Product Safety Commission institutes and enforces a federal third-party testing and certification program, it is unclear to what extent state requirements such as Maryland's will be preempted.

\section*{X. Conclusion}

The extent to which states are free to regulate hazardous substances in children's products has changed significantly since the adoption of the Consumer Product Safety Act of 2008. Prior to the recent Congressional action, states acted in a number of different ways to ensure the safety of children's products. States were first to enacted strict limits on lead and other heavy metals in

\begin{footnotesize}
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\item \textsuperscript{208} Conn. Acts, P.A. 08-122 (a)(9) (Reg. Session); Connecticut H.B. 5025 (a)(9) (Sess. 2008).
\item \textsuperscript{209} N.J. A.B. 1849 (Sess. 2008).
\item \textsuperscript{210} \textit{Notice of Stay of Enforcement of Testing and Certification Requirements}, 74 Fed. Reg. 6396 (February 9, 2009).
\item \textsuperscript{211} 2008 Md. Laws, Chap. 483; Md. Environment Code Ann. § 6-1304(A) (2009).
\item \textsuperscript{212} 2008 Md. Laws, Chap. 483; Md. Environment Code Ann. §6-1301(D) (2009).
\item \textsuperscript{214} 2008 Md. Laws, Chap. 483; Md. Environment Code Ann. §§6-1304(A) to (D) (2009).
\end{itemize}
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paints, on the overall content of lead and certain phthalates in children’s products. Now that Congress has adopted federal standards in each of these areas, many state laws are affected. Some state standards match the new federal standards and will not be preempted as the new federal regulations come into force. However, many state restrictions on lead, heavy metals and phthalates not identical with federal requirements will be preempted. Nonetheless, states continue to set innovative consumer protection laws in areas where the federal government has not acted and will be at the forefront of protecting children from potentially hazardous substances in their toys and other consumer products.