Billing Code 6355-01-P

CONSUMER PRODUCT SAFETY COMMISSION

Notice of Stay of Enforcement of Testing and Certification Requirements

AGENCY: Consumer Product Safety Commission.

ACTION: Stay of Enforcement.

SUMMARY: This notice announces the decision of the Consumer Product Safety Commission ("CPSC" or "Commission") to stay enforcement of certain provisions of subsection 14(a) of the Consumer Product Safety Act ("CPSA") as amended by section 102(a) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), Public Law 110-314. Specifically, the Commission is staying certain of the requirements of paragraphs 14(a)(1), (2), and (3) that otherwise require testing and issuance of certificates of compliance by manufacturers, including importers, of products subject to an applicable consumer product safety rule as defined in the CPSA or similar rule, ban, standard, or regulation under any other Act enforced by the Commission. This stay covers all such requirements with the exception of:

(1) those where testing and certification was required by subsection 14(a) of the CPSA prior to enactment of the CPSIA; and

(2) those requirements, when they become effective, applicable to children's product certifications required to be supported by third party testing for which the Commission has issued requirements for acceptance of accreditation of third party testing laboratories to test for:

- lead paint (effective for products manufactured after December 21, 2008),
- full-size and non-full size cribs and pacifiers (effective for products manufactured after January 20, 2009),
- small parts (effective for products manufactured after February 15, 2009), and
- metal components of children's metal jewelry (effective for products manufactured after March 23, 2009);

and

(3) any and all certifications expressly required by CPSC regulations; and

(4) the certifications required due to certain requirements of

the Virginia Graeme Baker Pool & Spa Safety Act being defined as consumer product safety "rules;" and

(5) the certifications of compliance required for ATVs in section 42(a)(2) of the CPSA which were added by CPSIA; and

(6) any voluntary guarantees provided for in the Flammable Fabrics Act ("FFA") or otherwise (to the extent a guarantor wishes to issue one).

This stay will remain in effect until February 10, 2010, at which time the Commission will vote to terminate the stay. This stay does not alter or postpone the requirement that all products meet applicable consumer product safety rules as defined in the CPSA or similar rules, bans, standards, or regulations under any other Act enforced by the Commission.

EFFECTIVE DATE: This stay is effective February 10, 2009.[1]

FOR FURTHER INFORMATION CONTACT: John "Gib" Mullan, Assistant Executive Director for Compliance and Field Operations, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; e-mail *jmullan@cpsc.gov*.

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[1] The Commission voted 2-0 to implement the stay. The Commissioners' statements concerning the stay are available on the Commission web site at www.cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND:

The Commission is aware that there is substantial confusion as to which testing and certification requirements of subsection 14(a) of the CPSA apply to which products under the Commission's jurisdiction, what sort of testing is required where the provisions do apply, whether testing is necessary for children's products that may not by their nature contain lead, whether testing to demonstrate compliance must be conducted on the final product rather than on its parts prior to assembly or manufacture, whether manufacturers and importers must issue certificates of compliance to address the labeling requirements under the Federal Hazardous Substance Act ("FHSA"), and what sort of certificate must be issued and by whom. The Commission has received literally thousands of e-mail, telephone, and written inquiries as to how to comply, when to comply, what is required in support of the various certifications, what form the required certificates must take, and who must issue them. Likewise, the Commission has received innumerable inquiries seeking relief from the expense of testing children's products

that either may not contain lead or may be subject to exemptions that the Commission may announce in the near future as a result of ongoing rulemakings either required or permitted by the CPSIA.[2] Commission staff has been unable to respond to many of these inquiries due to the press of its usual regulatory and compliance activities and the additional burden of the very early, multiple statutory deadlines imposed on the agency by the CPSIA, including those necessitating issuance of fourteen proposed and final rules in the six months since CPSIA was signed into law on August 14, 2008. Furthermore, the Commission is operating in fiscal year 2009 with the same level of funding appropriated to it for fiscal year 2008, before the CPSIA as well as two other acts also requiring significant additional Commission efforts - the Virginia Graeme Baker Pool and Spa Safety Act and the Children's Gasoline Burn Prevention Act - were enacted. This funding constraint is a severe handicap on the Commission's ability to staff up to address the numerous new requirements imposed by the CPSIA.

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[2] "Children's products" are defined in section 3(a)(2) of Consumer Product Safety Act, as amended, as consumer products "designed or intended primarily for children 12 years of age or

The Commission has embarked on four rulemakings to address many of these issues[3] as they relate to the lead content of children's products:

- Determinations that certain materials inherently will not exceed the statutory CPSIA limits on the lead content of children's products. 74 FR 2433 (January 15, 2009).
- Exemption of certain electronic devices from otherwise applicable limits on lead in children's products. 74 FR 2435 (January 15, 2009).
- Guidance on determining inaccessibility of components of children's products containing lead. 74 FR 2439 (January 15, 2009).
- Procedures for seeking determinations as to lead content of materials or products and exclusions from otherwise applicable limits on lead content of children's products. 74 FR 2428 (January 15, 2009).

These proposed rules present complex scientific, technical, and

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younger."

[3] The Commission has also requested comments on section 102 of the CPSIA , entitled "Mandatory Third-Party Testing for Certain Children's Products," specifically seeking input on the possibility of testing of component parts rather than the final children's products.

procedural issues that will not be resolved by February 10, 2009, the effective date of CPSIA's initial 600 parts per million ("ppm") limit on the lead content of children's products. Moreover, on that same date - February 10, 2009 - additional sweeping requirements of the CPSIA come into effect, including those related to the phthalates content of children's toys and child care articles, the myriad requirements of the ASTM F963 voluntary toy standard becoming mandatory CPSC consumer product safety standards,[4] and the recently issued CPSIA regulations related to print and catalog advertising of certain children's products.

These extensive changes to the regulatory landscape cut a broad swath through the business community from books to children's apparel to toys and sporting goods to children's electronic products. Many firms making consumer products, especially children's products, are small businesses. Bureau of

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http://www.cpsc.gov/about/cpsia/ComponentPartsComments.pdf.

[4] To add even further complexity with respect to the F963 toy standard, while the CPSIA explicitly states that the version of F963 as it existed on the date of enactment of CPSIA (August 14, 2008) presumably F963-07, is what becomes mandatory on February 10, 2009, the Commission understands that ASTM either has issued or intends to issue a new version of F963 - F963-08 - in the very near future.

Census data indicates that approximately ninety-eight percent of the domestic manufacturers of toys, dolls and games fall into the Small Business Administration's traditional definition of small business (less than 500 employees), approximately eighty one percent of manufacturers of such products have fewer than twenty employees, and over fifty percent have fewer than five employees. According to the same source, over 99 percent of firms making apparel (including clothing for children and infants) are small businesses. Moreover, the testing and certification requirements affect companies that have not previously been regulated (or did not realize that they could be regulated) by the Commission, such as book publishers and craft makers. These entities too are dominated by small businesses. According to a 2000 survey conducted by the Craft Organization Directors Association, 64 percent of craftspeople worked alone, and nearly all of them employed fewer than 5 people.

The new requirements pose many significant technical challenges. Since the passage of the CPSIA, the Commission's technical staff has had to verify testing methods for total lead in metallic substrates. The staff has also been working

diligently to validate testing methodologies for lead in plastics and other organic substrates to meet the lead content requirements of section 101 of the CPSIA. As soon as those methodologies are confirmed, they will be announced publicly. A method for testing for phthalates was identified by staff, but the extremely tight timeframe precluded meaningful public comment and input from the laboratories that will ultimately have to perform the testing. While the x-ray fluorescence screening method for lead has proven a useful tool, there is presently no similar screening method for preliminary testing for phthalates, although several promising ideas are under development. Finding appropriate screening tests for phthalates is essential given the costly and burdensome destructive testing currently required for the chemical analysis measuring phthalate concentrations. Commission staff needs time to work with laboratories to assure uniform understanding of the testing requirements adequate to support certification of compliance. We also need time to educate the numerous businesses, both big and small, for which this expansion of mandatory regulatory requirements is all new.

Smaller businesses that make up a significant portion of companies manufacturing products under the Commission's jurisdiction do not have laboratory test facilities and must turn to outside labs. The testing required to confirm compliance with requirements of the F963 toy standard ranges from chemical tests for antimony, arsenic, barium, cadmium, and chromium in surface coatings to various acoustic measurements for sound producing toys, tests for surface temperatures in battery operated toys, and tests for breakaway features on cords, straps, and elastic, among other things. To enforce certification on February 10, 2009, without the Commission having identified the labs accredited to do such testing disadvantages these small businesses and could result in these businesses paying for testing twice if the accreditation of the laboratory they choose for testing is not later accepted by the Commission. Also, the Commission has not had enough time or resources to educate the craft and handmade toy businesses on these new standards and testing requirements. While many of the larger manufacturers may already be conducting testing and certification, many smaller companies are only just learning

which CPSIA requirements apply to them. Companies cannot test and certify products when it is still unclear to them what standards apply.

Furthermore, the CPSIA tasks the Commission with issuing a number of additional rules within the first 15 months of enactment addressing testing and certification of compliance of children's products that will help to clarify the responsibilities of importers, manufacturers, distributors, retailers, and testing labs. These include requirements addressing mandatory third party testing to all applicable children's product safety rules[5] due by statute in June 2009, rules addressing auditing of accredited children's product testing laboratories also due in June 2009, and comprehensive rules addressing compliance labeling of consumer products and production testing of children's products subject to third party testing and certification for continued compliance with applicable requirements, including random sampling protocols,

[5] Children's product safety rule means "a consumer product safety rule under this Act [the CPSA] or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance." CPSA at § 14(f)(1), as amended by CPSIA §102(b).

required by CPSIA to be issued in November of 2009. These rules will define, among other things, which tests on what products will be required and how frequently those tests will need to be conducted. These answers are needed to ensure that the right tests are run on the right products without unnecessary and expensive testing on products likely to be exempted in some manner by the Commission in the coming months.[6]

The Commission anticipates that when these rules are finalized and our ongoing stakeholder information and education efforts have been in place for sufficient time for the new requirements to become known and understood within the regulated community, implementation of the stayed testing and certification requirements could move forward by Commission action in orderly fashion supported by sound scientific and technical analysis and determinations. Accordingly, the stay

[6] Because of the tremendous burden all of this has placed on the agency, the Commission staff has been unable to respond to questions from businesses small and large on the general certification requirements for all consumer product safety rules and similar rules which went into effect on November 12, 2008. Indeed, several requests for relief from those provisions have not yet been acted upon by the Commission. This stay provides relief from those certification requirements as well but does not provide any defense or excuse for non-compliance with the underlying standards or bans.

will remain in effect until February 10, 2010, at which time the Commission will vote to terminate the stay. We believe at this time that the stay will give us the time needed to develop sound rules and requirements as well as implement outreach efforts to explain these requirements of the CPSIA and their applicability.

The stay will provide the Commission with the ability to focus in the immediate future on high priority enforcement matters such as those related to cribs, where the Commission has recognized the need for a thorough investigation of what appear to be potentially widespread safety issues (see 73 FR 71570), small parts, and lead in children's metal jewelry. Also, the Commission's technical and scientific staff will be able to focus on areas such as children's wearing apparel and children's books where certain of the pending rulemakings noted above may be able to provide appropriate relief, well in advance of the lifting of this stay, assuming that those industries provide the additional information requested by our staff in a timely manner. Among the children's products issues staff will need to address are bicycles intended or designed primarily for children 12 and under, where spokes and tire inflation valves raise

complex issues related to the lead provisions of CPSIA.

Leaving in place the manufacturer, including importer, certification and testing requirements for lead paint, full-size and non full-size cribs, pacifiers, small parts, and lead in metal components of children's metal jewelry, where laboratory accreditation requirements have been issued by the Commission will provide a high degree of assurance of safety in children's products manufactured during the pendency of the stay and reflects the priorities attached to those products by Congress in the CPSIA. Also, the Commission emphasizes that the stay only applies to testing and certification, not to the sale of products that do not comply with applicable mandatory safety requirements. All children's products must comply with all applicable children's product safety rules, including, but not limited to, the upcoming limits on lead and phthalates in the CPSIA.[7] Failure to comply with all applicable product safety rules as defined in the CPSA or similar rules, bans, standards,

[7] Children's product safety rule means "a consumer product safety rule under this Act [the CPSA] or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance." CPSA at § 14(f)(1), as amended by CPSIA §102(b).

or regulations under any other Act enforced by the Commission will remain prohibited in accordance with section 19 of the CPSA as amended by CPSIA.

II. THE STAY

The United States Consumer Product Safety Commission hereby stays applicability to manufacturers, including importers, of the requirements for testing and certification[8] of products set forth in paragraphs 14(a)(1), (2) and (3) of the CPSA, as amended by subsection 102(a) of CPSIA, with the exception of:

(1) the requirements of any CPSC regulation, or of subsection 14(a) of the CPSA as it existed prior to amendment by the CPSIA, for product testing and certification, including existing requirements for certification of automatic residential garage door openers, bike helmets, candles with metal core wicks, lawnmowers, lighters, mattresses, and swimming pool slides;[9] and

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[8] By immediate final rule published November 18, 2008 (73 Fed. Reg. 68,328-32), the Commission limited the testing and certification requirement to importers and U.S. domestic manufacturers.

[9] Prior to amendment by the CPSIA, § 14(a) of the CPSA required testing and issuance of a certification for each product subject to a CPSA consumer product safety standard, namely a product subject any requirement of 16 CFR parts 1201 through 1213, e.g., part 1205 for walk-

(2) the certifications required due to certain requirements of the Virginia Graeme Baker Pool & Spa Safety Act being defined as consumer product safety "rules;" and

(3) the certifications of compliance required for ATVs in section 42(a)(2) of the CPSA which were added by CPSIA; and

(4) any voluntary guarantees provided for in the Flammable Fabrics Act ("FFA") or otherwise (to the extent a guarantor wishes to issue one); and

(5) the requirements on manufacturers, including importers, of children's products to use third party laboratories to test and to certify, on the basis of that testing, compliance of children's products with:

- requirements on the lead content of paint and other surface coatings effective for products manufactured after December 21, 2008;
- requirements applicable to full-size and non full-size

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behind power mowers or part 1211 for automatic residential garage door operators. Certain CPSC regulations themselves require certification of compliance or a statement of conformity. *See, e.g.* 16 CFR part 1633 for flammability (open flame) of mattresses or 16 CFR 1500.17(a)(13(i)(B) for candles made with metal-cored wicks.

cribs and pacifiers effective for products manufactured after January 20, 2009;

- requirements concerning small parts effective for products manufactured after February 15, 2009; and
- requirements on the lead content of metal components of children's metal jewelry effective for products manufactured after March 23, 2009.

This action by the Commission does not stay the requirement that products meet all applicable product safety rules as defined in the CPSA or similar rules, bans, standards, or regulations under any other Act enforced by the Commission.

Dated: February 2, 2009

Todd A. Stevenson, Secretary
Consumer Product Safety Commission