



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER ROBERT S. ADLER

December 17, 2009

**STATEMENT OF COMMISSIONER ROBERT ADLER REGARDING THE
STAY OF ENFORCEMENT OF CERTAIN TESTING AND CERTIFICATION
REQUIREMENTS**

On December 16, 2009, the Commission, by unanimous vote, agreed to modify the stay of enforcement on certain testing and certification requirements mandated by the Consumer Product Safety Improvement Act (CPSIA). I was delighted to see that, as a result of much hard work and careful deliberation, by the CPSC staff and the Commissioners' staff, such broad agreement was reached. As a result of this unanimous vote, a number of products will have the stay extended. A number of products manufactured after February 10, 2010, however, will be required to have certification based on independent third-party testing at CPSC-recognized laboratories. These include bike helmets, dive sticks, bunk beds, and rattles.

One issue is not so easily resolved. That pertains to the requirement in section 101(a) of the CPSIA that any "children's product" that contains more than 300 parts per million total lead content be treated as a banned hazardous substance. In order to demonstrate that any children's product meets the lead limits in section 101(a), firms must undertake third party testing by CPSC-recognized laboratories and must then issue a certificate indicating that the product meets the requirements of section 101(a).

On February 9, 2009, the Commission issued a stay of enforcement of the testing and certification requirements of section 102 of the CPSIA. (This section, among other things, requires third-party testing by CPSC-recognized laboratories of children's products.) The stated reason was the need to avoid chaos in the marketplace because the Commission had not had time to provide guidance to the business community regarding a number of issues, including whether testing to demonstrate compliance had to be conducted on the final product or whether suppliers could test and certify components used in children's products. With its December 16 vote, I believe the Commission has addressed this point and most of the other factors used to justify the stay.

Today I voted to direct the CPSC staff to prepare a *Federal Register* notice with regard to lead content testing and certification indicating that the stay will be lifted on August 10,

2010. While I had originally hoped the Commission and the marketplace would both be prepared for the lifting of this stay of enforcement, after thorough consultation with CPSC staff and stakeholders in both industry and the public health community, I believe an extension of another six months is necessary to permit market adjustments, especially with respect to the testing and certification by the suppliers of components.

I respectfully disagree, however, with my colleagues who have chosen to extend the stay beyond August 10, 2010. While there will be some disruption in the marketplace no matter which date is chosen, no hard evidence has been brought to my attention that would require an even longer extension of this stay than two years from the passage of this landmark legislation. I recognize that others feel differently.

One of the primary rationales advanced for extending the stay is to await the effective date of the so-called 15-month rule. (This is the rule with respect to continuing testing under section 14(d)(2) of the Consumer Product Safety Act.) At the Commission meeting yesterday, I opined that it would be helpful for the expiration of the stay to be linked to the 15-month rule. Upon further consultation with CPSC staff and a full consideration of the matter, I no longer believe that these two should be linked.

To await the effective date of the 15-month rule before lifting the stay risks the stay being repeatedly and endlessly extended because of unforeseen delays in drafting the 15-month rule. This is problematic for a number of reasons, including an ongoing lack of confirmation that products are in compliance with section 101(a). Congress added testing and certification requirements for a reason, and the sooner they are in place, the sooner the public will have confirmation of the safety of the products they buy.

Moreover, the 15-month rule and the lifting of the stay have less in common than may appear upon first impression. I believe this for a number of reasons:

- Congress never linked the 15-month rule to when the lead limits in the CPSIA were to become effective. In fact, Congress mandated that lead limits be lowered beginning 180 days after enactment of the CPSIA, well before the 15-month rule was likely to become effective. The only linkage that Congress imposed in the CPSIA was with respect to the accreditation of third party laboratories. This has been done. As of today, there are a number of fully-accredited laboratories capable of testing children's products for lead content and there are likely to be more as of August 10, 2010.
- When the Commission issued the stay on February 9, 2009, it refused to extend the stay to lead in paint, full-size and non-full size cribs, small parts, metal components of children's metal jewelry (which expressly included limits on lead), certifications expressly required by CPSC regulations, certifications of compliance required for ATV's in section 42(a)(2) of the CPSA (added by CPSIA) and flammable fabrics voluntary guarantees. Needless to say, the 15-month rule was not in effect at that time nor did the Commission indicate that the stay should be extended to these products because of the 15-month rule.

- One of the items approved unanimously by the Commission on December 16, 2009, was to lift the stay with respect to bike helmets, dive sticks, bunk beds, and rattles. If finalizing the 15-month rule were critical to extending the stay for lead content in children's products, one would think that it would be equally important for lifting the stay for these products. Yet, there were no objections to lifting the stay because of the absence of the 15-month rule.
- Most manufacturers already test and certify their products for quality assurance reasons and would do so irrespective of the requirements of the 15-month rule. In fact, most large retailers have required their suppliers to test and certify to the lead content requirements for many months irrespective of the Commission's stay. This rule will provide some guidance for companies, but will likely not require major modification of the programs they already have in place to assure compliance with the CPSC. Moreover, extending the stay based on the 15-month rule could be seen as creating a competitive disadvantage for firms that test and certify before the Commission has directed them to do so (perhaps based, in part, on those firms' anticipation that the stay would be lifted in February 2010), and a disincentive for other firms to test and certify before being directed to do so.
- Section 14(d) of the CPSA, which is the heart of the 15-month rule, pertains to *continuing* testing rather than *initial* testing for certification purposes. The two types of testing are only marginally related and need not be linked. The stay relates only to the initial testing required under the CPSIA.
- Developing and implementing the 15-month rule will require extensive time, resources and analysis. Although it is possible that the rule will become effective before the stay expires, it is equally likely that the 15-month rule may still be under consideration upon the expiration of the stay. There is no need to have one be the trigger for the other. I know of no company that has indicated that it will withhold production until the 15-month rule becomes effective.
- The Interim Enforcement Policy on Component Testing and Certification (of Lead and Content) that we issued yesterday will address the largest set of concerns raised by the manufacturing community regarding testing and certification. Now that companies know they can rely on component suppliers for compliance with the law, they should be able to plan production and control costs in a reasonable manner.

Commissioner Robert S. Adler

December 17, 2009

Date