



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814**

COMMISSIONER NANCY A. NORD

**Statement on the Commission's vote
to approve a final rule establishing requirements
pertaining to third party conformity assessment bodies**

February 21, 2013

Today, the Consumer Product Safety Commission voted to issue regulations for laboratory accreditation under our children's product testing and certification program. Although I generally support the regulation, some of its elements deserve comment.

First, one element—the test for whether a laboratory is “controlled” by a manufacturer—is excessively stringent in view of the extent (or absence) of the problem it addresses. This requirement continues a reflexively proscriptive, hyper-regulatory approach to addressing problems without fully considering more thoughtful options or even verifying that there is a problem at all. Second, we should provide some further clarity on testing that occurred before relevant rules were approved. While that issue is not addressed in the final rule, I am pleased that the staff plans to further address it in the near future. Finally, some of the provisions in this rule could be misinterpreted to require duplicative record-keeping. I explain below why I do not believe this is necessary.

Controlling “Control”

This rule presents a key example of the compulsion to over-police: overreacting to a hypothetical problem that, if it exists, is already adequately addressed by statute and other regulatory provisions. The Consumer Product Safety Improvement Act requires us to “establish protocols and standards . . . for safeguarding against the exercise of undue influence” over labs by manufacturers.¹ The CPSIA permits us to approve a company's in-house lab, but only if we go through an extensive added review to ensure its work is as sound as an independent lab's would be.² By statute, that review is triggered whenever a lab “is owned, managed, or controlled by a manufacturer.”³

¹ 122 Stat. 3016 § 102(b) (codified at 15 U.S.C. § 2063(d)(2)(B)(iv)).

² 122 Stat. 3016 § 102(b) (codified at 15 U.S.C. § 2063(d)(2)(D)).

³ *Id.*

In drafting the rule, our staff proposed language that captured the plain meaning of the law. It viewed a manufacturer as controlling a lab if it could appoint a majority of the lab's board of directors (or other governing body), appoint the presiding official of that body, or hire, fire, or set salaries for lab personnel. This approach made sense, and tracks other areas of law that address controlling interests: If a manufacturer controls the people who do the testing or the people above them, then it controls the lab. That (along with the other protections found in ISO 17025) should have been sufficient to make sure that any lab that should be subject to the firewall requirements would be.

Unfortunately, my colleagues did not accept staff's recommendation. Instead, the final rule applies firewalled-lab status if a manufacturer can appoint *any* member of a lab's governing body. The argument is that even a single board member with manufacturer ties can be so persuasive as to steer the lab in directions that benefit the manufacturer. This solution in search of a problem ignores the realities of the marketplace.

While the CPSIA requires us to address the issue of manufacturer control over labs, this heavy-handed restriction seems unwarranted. There has been no demonstration that manufacturers commonly have board-appointment powers⁴ at labs, that they are using any such powers, or such use can give them a voodoo-like hold over the labs through the boards. Both common sense and statute demand that we have some line for control, but there was no reason we could not adopt staff's proposal, which mirrors the approach of other legal fields.

What is more, the provision does not require any connection between manufacturer appointment powers and the products that the lab tests, nor does it require actual exercise of those powers. If *any* manufacturer *can* (not "does") appoint *any* board member, the lab can only be accredited as a firewalled lab, even if it does no work for the manufacturer with the appointment power. It borders on the absurd to suggest a board member would act contrary to her fiduciary duties to the lab to benefit a manufacturer for whom she does not even work.

If a manufacturer is actually using a lab's board member to steer decisions unfairly or improperly to its favor, then we can require a firewall. Until then, so long as a lab's board has a majority with no perceived manufacturer loyalties, it is not "controlled" by manufacturers in the common sense meaning of that term. I offered language to this effect; that my colleagues rejected it is dismaying.

⁴ I also feel this rule is too vague on the concept of appointment powers, providing no definition or guidance as to what that term means. That uncertainty would have been present under the staff's majority appointment approach, as well, but if *any* appointment power can trigger firewall requirements, it becomes crucial to know what an appointment power is.

Retrospective Testing

The final rule directly raises the issue of how we treat retrospective testing. When the effective date for the testing rule looms, manufacturers do not sit idle, waiting for the regulatory starter's pistol. They make products and send them to labs to be tested. In the rule we issued today, we recognize that reality with respect to a number of individual safety standards.

I believe that it would be helpful to have some plain-language clarity on that point in the form of a Frequently Asked Question (FAQ) document or some other type of staff guidance. Given that CPSC's rules take up their fair share of the near-quarter million pages in the Code of Federal Regulations, it is not reasonable to expect that all our labs and manufacturers will read each line. Giving them the opportunity to learn about the regulations in a manageable form will only enhance compliance, and I am glad that the staff intends to provide this clarity.

Record-keeping Redundancy?

This rule requires labs to retain testing records for five years. On its face, this is not a particularly odious provision. There need to be adequate records of tests so that, if something goes wrong, we can work with the labs and manufacturers to find out what and prevent it from happening again.

However, this requirement should be read in concert with our other rules. The periodic testing rule already requires manufacturers to keep test records for five years. In my view, our rules should be read so that, so long as the agency has reliable, ready access to these documents on demand, it does not matter whose file drawer they are in. If a manufacturer wishes to keep all the information in-house and provide it when we request, that should be fine. If a company prefers to effectively outsource that function to the lab, then, as long as it can deliver us the records quickly and completely, our ability to function is unchanged.

Contrariwise, one might read the record-keeping requirements as a new mandate to require another entity to keep the same records. I do not believe this is the best reading of the requirement. Such a reading would not benefit consumers, but add yet more costs to the supply chain that brings them the products they buy. The more sensible reading should govern here.

Conclusion

While I am generally supportive of the rule adopted today, as described above, I believe that certain elements should be different. My larger concern is that those elements reflect an instinct that adopts hyper-regulation as the answer, even where there is no question. We have no evidence that a manufacturer is using a single laboratory appointee to manipulate a laboratory's board into improper decisions, but we are acting

on unfounded suspicions nonetheless. For a science-driven agency tasked with problem-solving, this is a troubling overreaction.