

December 23, 2009

Consumer Product Safety Commission Issues Enforcement Policy on Component Testing and Certification of Children's Products; Acts on Testing and Certification Stays

Last week, the Consumer Product Safety Commission (CPSC) voted on several matters related to its ongoing development of administrating the Consumer Product Safety Improvement Act (CPSIA). On December 17, the Commissioners voted to modify the terms of its stay of enforcement of the testing and certification requirements under Section 102(a) of the CPSIA. They also voted to adopt an interim enforcement policy allowing compliance testing to be performed on a product's component materials, rather than on the completed product.

Stay of Enforcement of Certification and Testing Requirements

The CPSC had previously delayed enforcement of the CPSIA's testing and certification requirements for most consumer products until February 9, 2010. Last week's vote lifted the stay for some products, and extended it for others:

- For manufacturers or importers of children's bicycle helmets, bunk beds, rattles and dive sticks, the stay of enforcement will be lifted on February 10, 2010. Children's products manufactured after this date will require testing by a recognized third-party laboratory and certification based on such testing.
- The CPSC will also lift the stay of testing and certification of the CPSIA lead-in-paint requirement for *non-children's* consumer products manufactured after February 10, 2010. (Children's products have been subject to lead-in-paint limitations since before the enactment of the CPSIA.) These products will not require testing by a recognized third-party laboratory; instead, they will require testing based on a reasonable testing program, and manufacturers will need to provide a general conformity certificate to the applicable product safety requirement.
- For manufacturers or importers of bicycles (including adult and children's bicycles), the stay of testing and certification will be lifted on May 17, 2010. Products manufactured after this date will require testing by a recognized third-party laboratory and certification based on such testing.
- For manufacturers or importers of other children's products, the stay of testing and certification for the lead in substrate limitation will be lifted on February 10, 2011. Products manufactured after this date will require testing by a recognized third-party laboratory and certification based on such testing.

If you have any questions, please contact one of the Katten Muchin Rosenman LLP Customs and International Trade attorneys or professionals listed below:

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- The CPSC will continue the stay of enforcement of the testing and certification requirements for products subject to a number of other regulations—including the CPSIA’s ban on phthalates and rules governing durable infant products and the ASTM F963 toy standard—until further notice is given.
- Products that were subject to testing, certification, labeling or other requirements in place prior to the enactment of the CPSIA were not affected by the February 9, 2009, stay of enforcement. However, such products manufactured after February 10, 2010, will **also** be subject to the CPSIA’s testing and certification requirements. Note that the CPSIA’s requirements may call for information that was not previously required by the previous rule.

Interim Enforcement Policy on Component Testing of Children’s Products for Lead

As of August 14, the CPSIA required that children’s products and other consumer products not exceed 90 parts per million (ppm) lead in paint, and that children’s products not exceed 300 ppm lead in substrate. Some of these products are currently subject to the CPSIA’s testing and certification requirements, while the requirements have been stayed for others.

Originally, certification of a children’s product’s compliance under these requirements must be based on a test of samples of the finished product, in the same condition they would be in when sold to a consumer. However, effective December 17, the CPSC generally allows manufacturers and importers to provide certifications (both general conformity certifications and certifications based on third-party testing) based on testing performed on accessible components or representative samples of the product. This policy is issued on an interim basis.

For the lead-in-paint limitation, the CPSC will allow certification of a children’s product with the lead paint requirements based on a test report showing passing test results for a sample of the paints used on the product. Alternatively, a manufacturer or importer may provide a “paint certificate” provided by a third party. That third party must certify that the paint on an applicable product is in compliance with the lead paint limits based on testing a representative sample by a recognized third-party laboratory.

The paint to be tested need not be provided in the same quantity as would be used on the finished product, nor would it need to be painted on the same substrate material. Instead, the testing may be performed on any quantity of paint that is sufficient for testing purposes. However, the paint sample must have the same composition in all other respects to the paint actually used on the finished products.

For the lead in substrate limitation, manufacturers or importers may certify compliance through testing individual accessible components for lead. The CPSC will permit certification of a children’s product if, for each accessible component, the manufacturer or importer has obtained a test report or holds a component certificate issued by a third party. The “master” certificate accompanying the finished children’s product should list each component required to be tested and identify the test report or component certificate.

The testing may be performed on a “representative sample” of the component. The representative sample need not be of the same shape, size or finish condition, but it must be in the same form and in a quantity sufficient for testing purposes. The manufacturer must also ensure that the manufacturing process does not add lead to the component from an untested source, such as a material hopper, regrind equipment, or other equipment used in the assembly of the finished product.

A manufacturer or importer who certifies compliance with the CPSIA’s lead limitations in this manner will not be penalized for failing to have the finished product tested. Of course, manufacturers or importers who present false or misleading certificates will be subject to penalties.

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