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This is a Test; This is Only a Test

Nearly 21 months following passage of the Consumer Product Safety Improvement Act of 2008 (CPSIA),¹ the Consumer Product Safety Commission (CPSC) issued its “15 month rule,”² proposing new requirements for testing (including component testing) and labeling of consumer products.³ Given the enormity of the tasks CPSC was required to address under the CPSIA, and the impact of many of those efforts on devising a testing and certification scheme, even a mere 6 month delay may be viewed as a significant achievement. CPSC has given members of the public 75 days following publication of these proposals in the *Federal Register* to absorb and understand these significant proposals and to provide comments to CPSC for consideration before it issues final rules. Given that CPSC’s rules and the accompanying discussion near 250 pages, this summary is necessarily incomplete. However, it touches on some of the basic provisions and briefly considers their impact on regulated firms.

Testing and Labeling Proposal

As amended by the CPSIA, Section 14(a)(1) of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064(a)(1), provides that every manufacturer and private labeler of a consumer product must issue a general conformity certification that the product meets each relevant CPSC rule, standard, or ban, based on a test of each product or upon a **reasonable testing plan**. The CPSIA created a somewhat different obligation for manufacturers and private labelers of “children’s products.”⁴ Section 14(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), requires every private labeler or manufacturer of such a children’s product that is subject to a “children’s product safety rule,”⁵ to have their product tested by a third party conformity assessment body. Such a body must be accredited by the CPSC and test for compliance with such children’s product safety rule. Based on that testing, the manufacturer or private labeler must certify that the children’s product complies.

¹ Pub. L. No. 110-314, 122 Stat. 3016 (2008).

² Section 102(b)(2)(A)&(B) of the CPSIA required CPSC within 15 months to initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification rules. CPSC must also establish protocols and standards for testing of production, retesting when material changes have occurred, for testing of random samples, and for procedures to verify that a children’s product tested by a conformity assessment body complies with the relevant rules. Finally, CPSC had to devise rules for procedures safeguarding against the exercise of undue influence on third party conformity assessment bodies.

³ *Testing and Labeling Pertaining to Product Certification*, proposed 16 C.F.R. Part 1107, 75 Fed. Reg. 28336 (May 20, 2010), and *Conditions and Requirements for Testing Component Parts of Consumer Products*, proposed 16 C.F.R. Part 1109, 75 Fed. Reg. 28208 (May 20, 2010).

⁴ A “children’s product” is any consumer product designed or intended primarily for children 12 years of age or younger. 15 U.S.C. § 2052(a)(2).

⁵ Congress defined a “children’s product safety rule” as a standard or ban under 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.” Section 14(f)(1) of the CPSA, 15 U.S.C. § 2064(f)(1). While this definition is arguably overly broad, the “children’s product” language of Section 14(a)(2) has caused the CPSC to focus on rules, or portions of rules, affecting children’s products.

Non-Children's Products - Reasonable Testing Program

Proposed 16 C.F.R. § 1107.10 identifies elements of a reasonable testing plan for products not already covered by a detailed testing and certification scheme under an existing rule. Those elements include: (1) product specifications that describe the product and the elements necessary to assure compliance, (2) certification tests to prove that the design can comply with the relevant requirement(s), (3) a production testing plan that may include testing and/or process controls to maintain ongoing compliance, (4) a remedial action plan to address deviations or changes in the product that cause non-compliance, and (5) recordkeeping. The CPSC provides a great deal of detail on what must be part of a records system and requires that the records for this system be kept in the United States, in English, for at least 5 years after the product production or importation ceases, and that they be made available to CPSC upon request.

A manufacturer may use third party conformity bodies to conduct its tests, but does not have to do so. Manufacturers of children's products may maintain a reasonable testing program in addition to the third party testing program discussed below.

Children's Product Certification

Schemes for "children's product testing" share many of the same elements CPSC defined for a "reasonable testing program." The essential difference is that the testing that forms the basis for certification is conducted by accredited third party conformity assessment bodies. Firms that maintain a reasonable testing scheme of their own may require less frequent third party testing. However, the same essential stages for testing apply to children's products. The CPSC does not detail the number of samples needed for testing, but essentially requires testing of the initial product design followed by retesting as "material changes" that could affect conformity occur, and "periodic testing." Periodic testing schemes should be established based upon the manufacturer's knowledge of its products, the production methods used, the risk of injury, and other factors that a reasonably diligent firm undertaking such a program would consider. Proposed 16 C.F.R. § 1107.21(c). The rule also sets forth requirements for selecting "random samples" for periodic testing. (16 C.F.R. §

1107.22) In an effort to address the needs of small businesses, CPSC says that periodic testing is not required unless a firm makes or imports at least 10,000 of the particular product. 16 C.F.R. § 1107.21(d) (Testing of the initial design, and after any material changes, is still required.)

Children's product manufacturers must have procedures to deal with material changes in products (16 C.F.R. § 1107.23), remedial action procedures (16 C.F.R. § 1107.25) and procedures to guard against undue influence on third party conformity assessment bodies. (16 C.F.R. § 1107.24) In addition, they must maintain a comprehensive set of records detailing these efforts in English in the United States and make them available to CPSC. The same 5 year record retention requirement applies (16 C.F.R. § 1107.26).

Labeling

Manufacturers and private labelers of a consumer product that is properly certified may label the product as follows: "Meets CPSC Safety Requirements."

Component Part Testing and Certification

Apparently in another attempt to alleviate the burden on small businesses, CPSC set forth in 16 C.F.R. Part 1109 a proposal regarding testing of component parts to complement the testing and recordkeeping requirements in proposed Part 1107. Relying on testing of components of a product is allowed where those results are sufficient to assess compliance of the finished product (16 C.F.R. § 1109.5(a)). This means that the components must be very carefully tracked, there must be a strong paper trail demonstrating the provenance and compliance of all components, and the production process must not alter or affect the compliance of the product assembled from the tested components. As a practical matter, component testing cannot be used in place of use and abuse testing or where testing of the finished product is required by the underlying regulation (16 C.F.R. § 1109(b)).

The CPSC has a number of requirements designed to make the components traceable, and to provide a paper trail of compliance that can be followed to the final product. Not surprisingly, this scheme places a

considerable burden on component part manufacturers to become certifiers of their components, to provide certification and underlying evidence of compliance to their customers that can be tied to every component, and to maintain appropriate records for CPSC scrutiny (16 C.F.R. § 1109.5(e) & (f)).

As drafted, the proposed rule also sets forth particularized guidance regarding testing of lead, lead paint, and phthalates. In a nutshell, dried paint samples either scraped from a product or from the paint source must be tested for lead paint. (Third party testing is necessary for children's products but is not necessary for paint used in adult furniture which is not considered a children's product (16 C.F.R. § 1109.11)). Any certification for a finished product to the *lead content requirements* must list every single component tested, identifying the corresponding test report or component part certificate upon which the certification is based. The same requirement exists for identifying every component, and the underlying certification and testing data relied upon for the finished product certification.

While this component testing scheme may have been intended to ease the testing burden on small manufacturers, and may work for some firms who have a significant working relationship with their component suppliers, the component tracking and recordkeeping burden created by these requirements may cancel out any testing cost savings for many firms. The most obvious problem with this scheme is that it is impractical for many small manufacturers, particularly for the small hobbyist/manufacturer who buys small numbers of components either from a distributor or a hobby store. Under this scheme, the small manufacturer/hobbyist would have to receive detailed evidence of compliance for all of its components, track every component with military precision, and maintain that evidence for years. Using a small manufacturer of children's jewelry for example, that manufacturer may go to a beading supply store for its supplies. Now, it must somehow be able to identify the lot of every bead purchased (likely from a bin that commingles many identical beads from different lots) and tie it to detailed information about the underlying testing and

certification from the supplier that shows compliance with all relevant requirements. The beader must then certify each necklace, bracelet or other finished product referencing all of the underlying components and the detailed certification and test data for each component. It must then maintain records of those bracelets and other products for five years after production. These paperwork burdens provide such small manufacturers with no viable option but to stop producing their products.

While the intent of this provision may be to push suppliers to be accountable for their components, it may not have that effect. Many suppliers of components and craft items, particularly in foreign countries, do not have the kinds of controlled processes or resources to participate in this scheme. The time, effort, and costs involved in providing a paper trail for all components could discourage many component manufacturers from even attempting to supply evidence of compliance.

Conclusion

These proposed testing rules provide useful detailed guidance for manufacturers of consumer products and children's products. However, while the CPSC provided firms with some flexibility on the details of their testing programs, it created extensive new burdens and recordkeeping requirements. Similarly, the attempt to provide some leeway for testing of component parts comes with the burden of extensive new recordkeeping and paperwork burdens for both component manufacturers and finished product manufacturers. Firms should consider whether they should comment during the 75 day comment period that ends August 3, 2010 so the CPSC can better understand the practical problems with the proposals. Manufacturers and importers should also look at whether significant changes to their systems will be necessary to comply with final rules that may not deviate greatly from these drafts and to insure that the necessary systems of records will be in place.

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