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Consumer Product Safety Commission

16 CFR Chapter II

Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens; Proposed Rule

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II

Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens

AGENCY: Consumer Product Safety Commission.

ACTION: Request for comments.

SUMMARY: The Consumer Product Safety Commission staff (“CPSC,” “Commission,” or “we”) invites public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Third party testing requirements apply to most children’s products that are subject to a children’s product safety rule. We are taking this action pursuant to section 14(i)(3)(A) of the Consumer Product Safety Act (“CPSA”), as amended by H.R. 2715, Public Law 112–28.¹

DATES: Written comments must be submitted by January 23, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2011–0081, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (email), except through www.regulations.gov.

Written Submissions

Submit written submissions in the following way:

Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received may be posted without change, including any personal

identifiers, contact information, or other personal information provided, to <http://www.regulations.gov>. Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Randy Butturini, Project Manager, Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504–7562; email RButturini@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. What is third party testing? Why is it required?

Section 14(a)(2) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2063(a)(2)) establishes testing requirements for children’s products that are subject to a children’s product safety rule. Section 3(a)(2) of the CPSA (15 U.S.C. 2052(a)(2)) defines a “children’s product,” in relevant part, as a consumer product designed or intended primarily for children 12 and younger. Section 14(a)(2)(A) of the CPSA also states that, before a children’s product that is subject to a children’s product safety rule is imported for consumption or warehousing or distributed in commerce, the manufacturer or private labeler of such children’s product must submit sufficient samples of the children’s product “or samples that are identical in all material respects to the product” to an accredited “third party conformity assessment body” to be tested for compliance with the children’s product safety rule. Based on such testing, the manufacturer or private labeler, in accordance with section 14(a)(2)(B) of the CPSA, must issue a certificate that certifies that such children’s product complies with the children’s product safety rule based on the assessment of a third party conformity assessment body accredited to perform such tests.

Section 14(i)(2)(A) of the CPSA requires that we initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements. This provision applies to all consumer products that are subject to a product safety rule administered by the Commission.

Section 14(i)(2)(B) of the CPSA requires that we establish protocols and standards for: (1) Ensuring that a children’s product tested for compliance with a children’s product safety rule is subject to testing periodically and when there has been a material change in the product’s design or manufacturing process, including the sourcing of component parts; (2) testing of representative samples; (3) verifying that a children’s product tested by a conformity assessment body complies with applicable children’s product safety rules; and (4) safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler.

In the **Federal Register** of May 20, 2010 (75 FR 28336), we published a proposed rule titled, “Testing and Labeling Pertaining to Product Certification,” which would establish, among other things, requirements for compliance and continuing testing for children’s products and the labeling of consumer products to indicate that they meet the certification requirements in section 14(a) of the CPSA. In the same issue of the **Federal Register**, we also published a proposed rule on “Conditions and Requirements for Testing Component Parts of Consumer Products” (75 FR 28208); the proposed rule would establish requirements regarding the testing of component parts of consumer products to demonstrate, in whole or in part, their compliance with applicable rules, bans, standards, and regulations to support a certificate for a children’s product.

On August 12, 2011, the President signed H.R. 2715 into law (Pub. L. 112–28). Section 2 of H.R. 2715 amended what was then section 14(d) of the CPSA in several ways, including:

- Renumbering section 14(d) of the CPSA, as it pertained to “Additional Regulations for Third Party Testing,” as section 14(i) of the CPSA. Congress took this action because the CPSA, as amended by the Consumer Product Safety Improvement Act of 2008 (Pub. L. 110–314), inadvertently created a second paragraph (d) in section 14 of the CPSA;

- Requiring us to seek public comment, not later than 60 days after H.R. 2715’s enactment, on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. H.R. 2715 also specifies seven issues for public comment.

Thus, this notice complies with the requirement that we seek public

¹ The Commission voted 5–0 to publish this notice, with changes, in the **Federal Register**. Chairman Inez M. Tenenbaum, Commissioner Robert S. Adler, and Commissioner Thomas H. Moore issued a joint statement. Commissioner Nancy A. Nord issued a statement. The statements can be found at <http://www.cpsc.gov/pr/statements.html>.

comment on the issues specified in H.R. 2715.

II. What are the issues for which we invite comment?

As directed by H.R. 2715, we invite public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. (Elsewhere in this issue of the **Federal Register**, we have published the final rule on "Testing and Labeling Pertaining to Product Certification," the final rule on "Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements," and a proposed rule on "Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products." Interested parties may wish to familiarize themselves with the two final rules and the one proposed rule before responding to this notice.) We identify each issue, using the language set forth in H.R. 2715, and, after each issue, provide additional questions to refine the issue further or to focus comments on particular concerns or questions.

1. Issue 1—The extent to which the use of materials subject to regulations of another government agency that requires third party testing of those materials may provide sufficient assurance of conformity with an applicable consumer product safety rule, ban, standard, or regulation without further third party testing.

- What materials are subject to regulations of another government agency that require third party testing? Please specify the materials and the government agency's regulation. Please summarize the purpose, test methods, and testing frequency required by the government agency, and describe how compliance with the government agency's regulation is relevant to demonstrating compliance with the specific consumer product safety rule(s), ban(s), standard(s), or regulation(s). Please state whether the government agency requires third party testing to be conducted by a third party conformity assessment body meeting the requirements of section 14(f)(2) of the CPSA. If the government agency permits testing by third party conformity assessment bodies that do not meet the requirements of section 14(f)(2) of the CPSA, what is the basis for assuring the testing laboratories' technical

competence and protection against undue influence? Also, please address whether the number of laboratories used by a single testing party, or the number of products tested, could be reduced, while still assuring compliance with all applicable consumer product safety rules, bans, standards, or regulations, by aligning the CPSC's rules governing the frequency of third-party testing and the sampling of products for testing with the rules governing product testing under the regulations of the other government agency that requires third party testing.

- Currently, third party testing of materials subject to a rule, ban, standard, or regulation that we administer requires a third party conformity assessment body (testing laboratory) to apply to the CPSC for acceptance of the third party conformity assessment body's accreditation using CPSC-specified testing methods. The application includes specific requirements for the testing laboratory's accreditation body and has extra requirements for firewalled or governmental testing laboratories. Should the other governmental agencies' third party conformity assessment bodies also comply with these requirements in order for their testing results to provide sufficient assurance of conformity with an applicable consumer product safety rule? Why or why not?

- Should the same testing methods as required by the CPSC-accepted testing laboratories be required for any third party conformity assessment bodies to provide sufficient assurance of conformity to an applicable product safety rule? Why or why not?

2. Issue 2—The extent to which modification of the certification requirements may have the effect of reducing redundant third party testing by or on behalf of 2 or more importers of a product that is substantially similar or identical in all material respects.

- What situations might result in redundant third party testing by or on behalf of two or more importers of a product that is substantially similar or identical in all material respects? Please provide a definition and examples of products that are considered "substantially similar" or "identical in all material respects."

- How might the certification requirements of section 14 of the CPSA be modified to reduce redundant third party testing by or on behalf of two or more importers of a product that is substantially similar or identical in all material respects?

- How should we determine that a product is substantially similar to

another product or "identical in all material respects," in order to allow reduced third party testing?

- If an exporter third party tests and/or certifies a product and provides importers copies of test results, certificates, and other information needed by the importer to issue its own finished product certificate, what additional steps might the importer take to ensure the compliance of the product to the applicable product safety rules?

3. The extent to which products with a substantial number of different components subject to third party testing may be evaluated to show compliance with an applicable rule, ban, standard, or regulation by third party testing of a subset of such components selected by a third party conformity assessment body.

- How might we interpret "substantial number of different components?"

- In general, the final rule on "Conditions and Requirements for Relying on Component Part Testing or Certification, or another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements" establishes conditions and requirements for relying on testing or certification of component parts of consumer products, or another party's finished product testing or certification, to demonstrate, in whole or in part, compliance of a consumer product with all applicable rules, bans, standards, and regulations: (1) To support a children's product certificate ("CPC"); (2) as part of the standards and protocols for continued testing of children's products; and/or (3) to meet the requirements of any other rule, ban, standard, guidance, policy, or protocol regarding consumer product testing that does not already directly address component part testing. The final rule is intended to give all parties involved in testing and certifying consumer products pursuant to sections 14(a) and 14(i) of the CPSA the flexibility to conduct or rely on required certification testing where such testing is the easiest and least expensive. However, the final rule does not require third party conformity assessment bodies to select component part samples for testing, nor does it specify how many samples are to be tested; sample selection is left to the manufacturer or importer. Thus, how should a third party conformity assessment body select or determine the subset of components to test? Should the subset of components be a statistically valid sampling of the population of component parts? How might one assure that the subset of component parts is representative of the

population of component parts? Please explain.

- How would the test results on a subset of components infer compliance of the untested components?

- Should some form of batch/lot control be used on these components to identify and ensure that only approved component materials are used in producing the finished product? If so, what forms might provide the desired level of control with the least burden? Please explain.

- What similarities should be required among the different components in order to be evaluated in this manner?

4. Issue 4—The extent to which manufacturers with a substantial number of substantially similar products subject to third party testing may reasonably make use of sampling procedures that reduce the overall test burden without compromising the benefits of third party testing.

- How might we interpret:
 - “Substantial number”?
 - “Substantially similar products”?
 - “Reasonably make use”?

For example, if a manufacturer makes toy cars and toy boats, are they “substantially similar” products in the sense that they are all toy “vehicles”? Does “substantially similar” refer to the type of products and/or their composition? Can first party testing (meaning testing by the manufacturer rather than testing by a third party) be designed to show the similarity between the products?

- Also, sampling procedures that may seem “reasonable” to one manufacturer, such as a large firm that makes many products, may not seem “reasonable” to another, such as an individual who makes a similar product by hand. How might a manufacturer combine knowledge from first party testing to develop a sampling plan for third party testing that reduces the overall test burden while still allowing the compliance of untested products to be inferred from the products tested by the third party conformity assessment body? What knowledge from first party testing would be used to develop the sampling plan and how would the plan be structured?

- What sampling procedures could be used with a set of substantially similar products to reduce the overall test burden without compromising the benefits of third party testing?

5. Issue 5—The extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety

rules, bans, standards, or regulations applicable under [the CPSA].

- Please identify national or international governmental standards that provide assurance of conformity to consumer product safety rules, bans, standards, or regulations under the CPSA. How should the CPSC evaluate the equivalency of such national or international standards?

- What constitutes “evidence of conformity”? If a product bears a mark indicating conformance to the standard of another government or an international body, what factors should be considered in determining whether conformance to the standard of another government or an international body provides assurance of conformity to U.S. standards? In the event the Commission were to have a sufficient level of assurance of conformity to U.S. standards, how much should the concern regarding the likely existence of counterfeit marks inform the Commission’s consideration of accepting those marks as evidence of conformity?

- If the test methods used by other national or international governmental standards are not those required by CPSC-accepted third party conformity assessment bodies for determining compliance with a consumer product safety rule, ban, standard, or regulation, what additional information should be required to provide assurance of conformity?

- If a CPSC-accepted third party conformity assessment body is not used, what assurance should be provided of the testing laboratory’s technical competence and protections against undue influence?

6. Issue 6—The extent to which technology, other than the technology already approved by the Commission, exists for third party conformity assessment bodies to test or to screen for testing consumer products subject to a third party testing requirement.

- Please identify specific technologies, except for those that have already been approved by the CPSC, that may be used to test or screen a consumer product subject to a third party testing requirement.

- What are the objective requirements that we should use to evaluate testing or screening technologies for consumer products (e.g., accuracy, precision, repeatability, sensitivity, linearity)? What objective requirements, if any, should exist for those who would use the testing or screening technology? For example, assume that a machine exists that can detect the presence of a particular substance. If the machine must be calibrated before each use, then

an individual using the machine should be aware of the need to calibrate the machine and also should be trained to do such calibrations; otherwise, using an improperly calibrated machine could lead to incorrect or misleading test results.

- In what ways (and by how much) should screening technologies be allowed to be less technically capable than testing technologies?

- Should screening technologies be allowed only for third party conformity assessment bodies to use, or should certifiers be allowed to use screening technologies as a means of reducing third party testing? What controls or limits should be placed on first party use of screening technologies?

7. Issue 7—Other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

- Are there techniques, consistent with assuring compliance with applicable consumer product safety rules, bans, standards, and regulations, that can use a risk-based analysis to reduce the cost of third party testing? If yes, please describe what they are. What other techniques might exist for lowering the cost of third party testing but still assure compliance with applicable consumer product safety rules, bans, standards, and regulations? Please describe how the other technique(s) lower(s) testing costs and still assure compliance.

- Under what circumstances could component part testing (as described in the final rule on component part testing, which appears elsewhere in this issue of the **Federal Register**) be expanded beyond what is already permitted in the rule to reduce the overall test burden without compromising the benefits of third party testing?

III. How should comments be submitted?

We invite public comment on the issues identified in part II of this document, as well as any comments on other opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Written comments should be submitted by January 23, 2012, as described in the **ADDRESSES** portion of this document.

Dated: October 21, 2011.

Todd A. Stevenson,

*Secretary, Consumer Product Safety
Commission.*

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