

Client Alert.

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Looking Forward to the New Year and New Third-Party Testing and Certification Requirements for Children's Products

By **Linda Lane and Jessica Roberts**

After February 8, 2013, all importers and domestic manufacturers of children's products will be required to maintain comprehensive technical files proving their products' continuing compliance with applicable Consumer Product Safety Commission ("CPSC") testing and certification rules. This development represents the next step in implementing the Consumer Product Safety Improvement Act ("CPSIA") passed in August 2008.

In an effort to assist importers and manufacturers, the CPSC voted in October to move forward with exploring changes to these anticipated new rules that would incorporate more cost-saving measures. However, this development has only introduced further uncertainty and confusion into an already convoluted regulatory development.

OVERVIEW OF NEW RULES

Currently, firms are required to conduct *initial* testing on some categories of children's products, including those with lead paint, those with small parts, full-size and non-full-size cribs, pacifiers, and children's metal jewelry. The new rules will require firms to go beyond initial testing to ensure that each product, throughout its lifespan, continues to meet applicable safety standards.

Children's Product Certificates

For nearly all children's products, manufacturers (or importers) must issue a Children's Product Certificate ("CPC") for that product and furnish it to retailers and distributors. Currently, a firm's CPC is based on initial third-party testing by a CPSC-accredited laboratory showing that their children's product complies with the applicable children's product safety rules. Beginning in February 2013, in addition to initial testing, testing of samples of continuing production must also take place periodically to ensure ongoing compliance. The testing must be done on enough samples to provide a "high degree of assurance" that the tests conducted demonstrate the products' ability to meet applicable standards.

Periodic Test Plan

Even after a product is initially certified as compliant, effective February 2013, periodic testing will be required when there is continuing production of that product. A periodic testing plan must outline the tests that will be conducted, appropriate testing intervals, and the number of samples tested. Like initial testing, periodic testing must be conducted by an accredited third-party lab. The maximum testing interval is once a year (or once every two years if the firm has a production testing plan, or once every three years if the firm conducts tests using a lab accredited by ISO/IEC 17025:2005). The interval selected must be short enough to ensure that products manufactured after the issuance of the initial certificate continue to comply with all product safety rules.

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Material Changes

Under the new rules, a manufacturer needs to retest its production batch any time a “material change” has been made that a manufacturer, exercising due care, knows or should know could impact the product’s compliance with applicable children’s product safety rules. Such a “material change” would include changes in the production design, the manufacturing process, or the sourcing of component parts.

Undue Influence

By February, firms having their products tested must put safeguards in place to ensure that there is no undue influence by the firm upon third-party testing laboratories. Safeguards include a written policy statement from a company official directing its staff to receive training, and attesting to staff participation in the training. In addition, employees must be told that they can confidentially notify the CPSC of a problem with the product or manufacturing process at any time. Employees are required to notify the CPSC immediately if a manufacturer makes any attempt to hide results or exercise undue influence over test results.

Recordkeeping

With regard to recordkeeping, the new rules require that specified records be maintained for five years from the date of production. Required records include a copy of the CPC; third-party certification tests; records of all material changes in design, manufacturing, and/or sourcing; undue-influence procedures; and periodic testing plans and test results.

Component-Part Rule

In certain circumstances, a manufacturer can meet its testing and certification requirements by relying upon testing or certification by a component-part manufacturer, or another party’s finished product testing or certification. Reliance upon a test procured by another is not acceptable unless the component part or finished products are traceable, and both the testing parties and the party conducting the test are identifiable.

IMPLICATIONS AND GUIDANCE

It is anticipated that many U.S. importers of children’s products will require their international suppliers to comply with the new testing and certification rules. Thus, for imported products, the burden likely will shift to overseas factories to conform to the new rules, thereby reducing the increased burdens of compliance for U.S. importers, but possibly increasing the costs of imported goods. Domestic manufacturers do not have a corresponding way to shift their associated burdens, and the costs of domestically manufactured goods may also rise due to the increased regulatory burdens.

It is recommended that importers and domestic manufacturers alike categorize their products to determine the standards and requirements applicable to each product category. Then, it is important to develop periodic, continuing testing protocols and supplier requirements that are committed to writing and followed. If any change is made to the manufacturing process during the life of the product, firms will need to factor in the additional time and costs associated with retesting of those products to ensure compliance.

Manufacturers should also maximize all available means to reduce testing costs. For example, a manufacturer should consider (1) whether it qualifies for exemptions as a small-batch manufacturer; (2) whether its products really are

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“children’s products,” and if they are, whether they are exempt from certain testing requirements (i.e., certain natural materials are exempt from lead and phthalate testing); and (3) whether it is maximizing “component” testing/certification.

LOOKING FORWARD

On October 10, 2012, the CPSC voted to direct agency staff to further investigate nine recommendations that would reduce the burden of third-party testing under the anticipated rules. These recommendations include investigating various issues, such as the feasibility of developing a list of materials determined not to contain prohibited elements.

Although the results of the Commission’s efforts to reduce costs may ultimately benefit those firms affected by these proposed changes, the introduction of these efforts at this late stage adds additional uncertainty and difficulty to the anticipation of changes that must be made in the near future. Even if some of these recommendations are implemented, 2013 will bring significant new burdens to the manufacturers and importers of children’s products. While the CPSC has stated that it hopes the new rules will “clarify the options upon which firms can base their certifications,” civil fines—and potentially even criminal penalties or asset forfeiture—may result for those who fail to comply.

Morrison & Foerster has closely followed the CPSIA as it evolved in Congress and was ultimately signed into law in 2008. We have since advised a variety of clients on its implementation and helped them keep abreast of developments emanating from the CPSC. In addition, we regularly represent children’s and consumer product companies, as well as trade associations, and assist them with a variety of legislative, regulatory, administrative-enforcement, and litigation matters.

Contact:

Linda Lane

(858) 720-7989

llane@mofocom

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