

*Client Advisory<sup>i</sup>*  
*December 28, 2009*

**CPSC Releases Two Significant Notices:**

**Expiration of Stay of Enforcement of Testing and Certification Requirements**

**and**

**Interim Enforcement Policy of Component Testing and Certification of Children's Products and Other Consumer Products to Lead Limits**

**Commission Action on the Stay of Enforcement of Testing and Certification Requirements**

The CPSC announced on December 28, 2009, that the current stay of enforcement of testing and certification provisions of Section 14 of the Consumer Product Safety Act ("CPSA") pertaining to most, but not all, products, will expire on February 10, 2010. On that date, manufacturers, including importers, and private labelers of children's products must comply with the testing and certification requirements set forth in paragraphs 14(a)(1), (a)(2), (a)(3) and (g) of the CPSA, as amended by section [102\(a\) of the CPSIA](#) with certain product exceptions. This makes the mandatory third party testing requirements effective for most children's products manufactured after February 10, 2010.

However, this does not represent a change in compliance requirements for the involved children's products. The original stay was announced on February 9, 2009, and only stayed the third party testing and certification requirements, not compliance to the applicable mandatory product safety requirements. For instance, the stay of enforcement meant that a manufacturer did not have to have a recognized third party laboratory test its children's toys with respect to the CPSIA's limit for phthalates, but the children's toy still had to comply with the phthalate limit that would be separately enforced by the CPSC. The impact of this Notice is that the toy will now have to be compliant; be tested by a third party lab; and be certified. This full certification scheme will be effective for children's and other specified products manufactured beginning on February 11, 2010.

Additionally, the CPSC will be lifting its stay of enforcement on February 10, 2010 with regard to other rules and regulations (i.e., non-CPSA) applicable to products subject to bans and/or regulations, such as:

- Lead-In-Paint in paint and on furniture;
- Child-resistance on portable gas containers;
- Special packaging required under the Poison Prevention Packaging Act;
- Extremely flammable contact adhesives;
- Unstable refuse bins; and,
- Refrigerator door latches.

(Products subject to these other statutes and regulations will also require testing based upon a reasonable testing program, and the manufacturers will need to issue a certificate of general conformity to these statutes or regulations [“general conformity certificate”] beginning on February 10, 2010 for all products manufactured after that date. The Commission has concluded that general conformity certificates are not required for labeling requirements under the Federal Hazardous Substances Act because those requirements are not sufficiently similar to consumer product safety standards or bans to warrant certification.)

The stay will remain in effect for several product categories, including, bicycles (but not bicycle helmets, stay through May 17, 2010) and total lead content in metal children’s products and in non-metal children’s products tested to CPSC-CH-E1002-08, Standard Operating Procedure for Determining Total Lead (Pb) in Non-Metal Children’s Products (stay through February 10, 2011).

Further, the Commission has decided to continue the stay for enforcement for the following consumer and/or children’s products and/or testing requirements:

- Carpets and rugs
- Vinyl plastic film
- Wearing apparel
- Caps and toy guns
- Phthalates
- ASTM F963 (Consumer Safety Specifications for Toy Safety)
- Clacker balls
- Baby walkers
- Bath
- Children’s sleepwear
- Electronic toys
- Durable infant products

Again, these products must be compliant with the CPSIA and all other relevant regulations in every way. The effect of the stay is simply that the CPSC will not take enforcement action against the manufacturers (including importers) and private labelers with regard to these products for not having certificates based on third party testing.

### **Interim Enforcement Policy on Component Testing and Certification of Children’s Products and Other Consumer Products to the August 14, 2009 Lead Limits**

The CPSC announced an interim enforcement policy today regarding component testing and certification of children’s products and other consumer products to the 90 parts per million (ppm) lead in paint limit and to the 300 ppm lead limit for children’s products established in section 101 of the CPSIA. (Certain higher lead content limits are established for certain electronics components of children’s products and other electronic components).

By way of background, effective August 14, 2009, it became unlawful to sell, offer for sale, manufacture for sale, distribute in commerce or import into the US any product that is subject to the new lead limits, but fails to comply, regardless of when the product was made. Products that do not comply with the applicable lead limits are classified as banned hazardous substance and are subject to export restrictions.

- Any children's product that bears paint and is manufactured after August 14, 2009 must be certified as in compliance with the 90 ppm lead limits.
- Children's metal jewelry that is manufactured after August 14, 2009 must be certified as in compliance with the 300 ppm limit on lead in any accessible metal part (but if it bears paint, too, it will be subject to the 90 ppm restriction).
- HOWEVER, other children's products (not listed described in the first two bullet points) must be certified in compliance with the 300 ppm lead content limit only if they are manufactured
  - After February 10, 2011 and
  - Only as to accessible parts; but
  - Products constituted wholly of certain materials that never exceed the lead content limits as determined by the CPSC, or have such materials and no other component material is accessible, need not be tested or certified.

In this Notice, the CPSC provides further guidance on component testing.

### **Certification to Lead Paint Limits Based on Testing of Paint Samples Not Obtained from the Final Product.**

In general, certification of children's products must be based on testing of sample of the final product. The CPSC intends to issue rules addressing when certification can be based on testing of paints before are applied to such a product. These rules anticipate certification if, for each paint used on the product, the domestic manufacturer or importer who certifies the product either has obtained a test report or holds a paint certificate.

The certificate should list each paint used by color, location or other means, and should identify the corresponding test report or paint certificate on which the product certification is based.

- A domestic manufacturer or importer may rely on a test report showing passing test results based on testing either of them has commissioned from a recognized third-party test lab.
- Any person who certifies a children's product as complying with the 90 ppm lead paint limit should be able to trace each batch of paint to the paint manufacturer.
- The manufacturer should ensure that paints are not later contaminated with lead from other sources.

For consumer products that are not children's products but are subject to lead paint limits, the manufacturer may base its certification on its own test or on 3<sup>rd</sup> party testing.

**Certification to Lead Content Limits for Children’s Metal Jewelry and Other Children’s Products Based on Component Testing.**

The CPSC intends to issue new rules addressing the acceptability of certain component testing.

- A domestic manufacturer or importer may rely on a test report showing passing test results for one or more components used on the product, based on testing either of the has commissioned from a recognized 3<sup>rd</sup> party lab.
  - This anticipates that for each type of component to be tested the manufacturer of children’s product will draw a random sample form the batch or lot of such components to be used in making the final product.
  - Test reports should identify each component tested, by part number or other specification, as well as the manufacturer of the component and the supplier (if different)
  - Any person who certifies a children’s product as comply with the lad content limits should be able to trace each component of the product to the component’s manufacturer.

**Composite Testing**

- Third party labels may test a combination of different paint samples so long as they follow certain CPSC specified procedures.
- Third party labs may test a combination of plastic components or a combination of metal components so long as they follow procedures ensuring that no failure to comply with the lead limits will go undetected.

**Requirement that Reliance be Reasonable**

- The certifier (a “person”) may not certify a product or rely on a test report, or a component certificate, if he or she has not exercised due care and has reason to know that the test report or certificate is false or misleading in any material respect.
- With appropriate reliance, a domestic manufacturer or importer who certifies a children’s product shall not be subject to civil or criminal penalties for failure to certify or for false certification.
  - A retailer or other seller of a product who holds a certificate based on component testing in accordance with the policy the CPSC is developing will be able to rely upon it to the same extent as if it had been based on testing of the final product.
  - Any person who issues a false or misleading certificate for any paint or component is subject to penalties (presumably civil and criminal, though not specified in the Notice).

**Other Manufacturer and Importer Duties**

- Duty to ensure that each product unit manufactured or imported complies with all applicable lead limits
- Duty to report to the CPSC immediately should you obtain information with reasonable supports the conclusion that such product fails to comply with applicable lead limits.

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