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# ◆SPC&B Safety News◆

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A Newsletter for Clients of Sharretts, Paley, Carter & Blauvelt, P.C.

November 8, 2011

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***I. Reminder — Third Party Testing/Certification Will be Required for Children's Products Subject to Lead, Phthalates and Toy Standards, Starting December 31, 2011***

***II. CPSC Publishes Notices on Testing Program Requirements for Children's Products; Non-Children's Product Reasonable Testing Program Rules Put on the Shelf***

***III. California Issues Draft "Green Chemistry" Regulation***



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**I.** Although accredited third party testing and certification is already required for children's products subject to the standards for lead in paint/surface coating, lead in metal components of metal jewelry, pacifiers, small parts, rattles, dive sticks, and wearing apparel and sleepwear (flammability), among others, the requirement was stayed for the lead in substrates, phthalates, and toy standards, until December 31, 2011. **The stay has now been lifted and children's products manufactured on and after December 31, 2011 will be subject to third party testing for lead in substrates, phthalates, and most portions of the mandatory toy standard, as applicable.** Certification also will be required.

**II.** In this section, we have attempted to provide you with a comprehensible summary of various rules published in today's *Federal Register* by the CPSC, which children's product manufacturers and importers will be expected to comply with at various upcoming stages.

## **Children's Product Testing Program Requirements — Final Rule, Effective February 8, 2013**

This final rule sets forth most of the requirements for children's product testing programs to be implemented by domestic manufacturers and importers. Although it does not go into effect until February 8, 2013, the rule provides useful guidelines that children's product manufacturers and importers should start implementing as soon as possible, since the enforcement phase of the CPSIA is well underway and having testing programs and protocols in place is a strong defense in any penalty action taken by the CPSC. One other change is that for children's products, the General Certificate of Conformity (GCC) will be referred to as the Children's Product Certificate (CPC), but other than the name change, the documents are identical.

The following are the children's product testing program requirements.

- ◆ A sufficient number of samples, identical in all material respects to the final product, must be tested to provide a "high degree of assurance" that the product covered by a CPC meets all applicable children's product safety rules. Note that the CPSC leaves it up to the children's product manufacturer/importer to determine how many samples will provide this level of assurance, based on experience in the industry. The laboratories can be helpful in determining the appropriate number of samples for testing compliance with the various standards.

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- ◆ Component part testing may be used unless the safety rule requires the product in its finished state to be tested (see below for more information on the final rule for component testing, also published today).
- ◆ Third party periodic testing to ensure ongoing compliance must be conducted at least once a year (absent material changes or high variability in test results requiring shorter intervals) pursuant to a Periodic Testing Plan, unless the manufacturer/importer has a Production Testing Plan, in which case the periodic testing can be conducted at least once every two years. If the manufacturer/importer has an in-house fire-walled laboratory, periodic testing must be done at least every three years.
- ◆ “Representative Sampling” must be used for purposes of periodic testing. Originally, the CPSC was going to require “random sampling,” but Congress intervened and changed it to representative sampling. Accordingly, the CPSC also published a proposed rule on representative testing, which we discuss at the end of this section.
- ◆ Production Testing Plans may include recurring testing or the use of “process management techniques” to control potential variations in product manufacturing that could affect compliance. Each production facility must have its own Production Testing Plan.
- ◆ Each manufacturer/importer must establish written procedures to safeguard against the exercise of undue influence on a third party accredited testing facility.
- ◆ Specified documents must be maintained for a period of five years. They do not have to be kept in the United States, but must be made available to the CPSC upon request, in English, within 48 hours. Documents required to be maintained are: the Children’s Product Certificate (CPC); test reports, Periodic Testing Plan or Production Testing Plan; remedial action taken after a failed test report; undue influence policy and procedures; and .

We note that the original proposed rule also included the elements of a “Reasonable Testing Program” for non-children’s product compliance. In the final rule, this section was reserved. Accordingly, until such time as the CPSC takes up the issue again, manufacturers and importers will have to determine for themselves whether their testing programs are “reasonable.”

### **Component Testing — Final Rule, Effective December 8, 2011**

This rule allows manufacturer/importers to rely on component part testing for certain standards applicable to children’s products, generally in the areas of lead and phthalates content standards. Component testing is allowed both for the third party certification testing and third party periodic testing procedures discussed above. Manufacturers that assemble finished products can test and certify component parts , or can rely on certification from component suppliers based on testing, and use them in multiple product lines. The component parts tested must be identical in all material respects to the component parts used in the finished product.

A finished product certifier must exercise “due care” in relying, in whole or in part, on component testing in order to issue a finished product certificate, based on one or more of the following:

- ◆ Finished product certificate(s) issued by another party
- ◆ Finished product test report(s) provided by another party
- ◆ Component part certificate(s)
- ◆ Component part test report(s)

The component parts or finished products must be traceable and the following documentation must be obtained from each certifier and testing party:

- ◆ Identification of the component part or the finished product tested

- ◆ Identification of a lot or batch number, or other information sufficient to identify the component parts or finished products to which the testing applies
- ◆ Identification of the applicable rules, bans, standards, and regulations for which each component part or finished product was tested
- ◆ Identification of the testing method(s) and sampling protocol(s) used
- ◆ The date or date range when the testing was conducted
- ◆ Test reports

### **Representative Sampling for Periodic Testing of Children’s Products — Proposed Rule, Intended to be Effective February 8, 2013**

Under the original proposed rule for children’s product testing programs, the CPSC had included a requirement that periodic testing for ongoing production be done on the basis of “random,” or statistical, sampling. In recent legislation, Congress mandated that periodic testing be accomplished by “representative” sampling, rather than random sampling. The proposed rule requires that the manufacturer/importer have a reasonable basis for the sampling procedure adopted and that the process cannot be “haphazard.” There must be some basis for determining that the samples selected are representative of the product produced and that a “golden sample” is not used.

Determining that selected samples are representative may be achieved in many ways. For chemical tests, a sample selected from a homogenous material, such as a well-mixed container of paint, could be considered representative of the entire container. For discretely produced products, information indicating uniform materials and dimensional control could be used for ensuring that a sample is representative of the product for mechanical tests. Other methods that may be used include: incoming inspection of raw materials or component parts; process control data generated during product manufacture; and use of manufacturing techniques with intrinsic manufacturing uniformity, such as die casting. Of course, random sampling is also a means of selecting representative samples.

Children’s product manufacturer/importers will be required to have a written justification for the method used for representative sampling for periodic testing. The written justification will be part of the general recordkeeping requirements for children’s product testing programs.

**III.** The California Department of Toxic Substances Control (DTSC) has issued a new draft of the Safer Consumer Products regulation for public comment. Similar to the EU’s REACH regime, California’s proposed “green chemistry” regulation, as it is otherwise known, would immediately establish a list of chemicals of concern and thereafter determine what consumer products containing such chemicals to “prioritize” in the future. A public workshop is being held on December 5, 2011, to discuss the proposed regulation. Written comments must be submitted by December 30, 2011.

If you have any questions on the effect of the CPSC’s rules on children’s products, or if you are interested in further updates on California’s regulations, please contact Gail Cumins at [gcumins@spcblaw.com](mailto:gcumins@spcblaw.com), Donna Shira at [dshira@spcblaw.com](mailto:dshira@spcblaw.com), or Alli Baron at [abaron@spcblaw.com](mailto:abaron@spcblaw.com), or call us at 212-425-0055, for further information.