



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**Statement of Commissioner Robert S. Adler
Regarding the Extension of CPSC Stay of Enforcement of Testing and Certification
Requirements on Lead Content in Children's Products**

February 1, 2011

Today my colleagues voted to extend the stay of enforcement on testing and certification for lead content under section 102 of the Consumer Product Safety Improvement Act (CPSIA) for ten months, from February 10, 2011 until December 30, 2011. This is the third time the Commission has voted to extend the stay of these requirements, which otherwise would have gone into effect in February 2009, some two years ago. While I respect the thoughtfulness and care that went into the majority's decision, I disagree with it.

Of the three stay extension votes, I have supported only one, partially. In December 2009, I voted to extend the stay of enforcement on lead content from February 2010 until August 2010. I reluctantly supported a six month extension, among other reasons, in order to clarify that testing and certification by component part suppliers could be relied on by manufacturers and importers in meeting their own testing and certification obligations. To my disappointment, the Commission chose to extend the stay six months more, until February 2011, a decision I did not support.¹ As we approach the expiration of the second stay, my colleagues once again have voted to extend it. Once again, I dissent for almost exactly the same reasons I did originally. In addition, I note a few broader policy concerns below.

Economic Realities and Consumer Concerns

To be clear, I fully recognize that we live in perilous economic times that are now commonly referred to as the "Great Recession." In fact, I am old enough to have had parents who lived through the Great Depression. Accordingly, I do not take lightly what this downturn means to many Americans, particularly those with small businesses that struggle to survive even in steady economic times. I am hopeful that an extension of the stay of enforcement will reassure the many small businesses who have pleaded with the Commission to extend the stay that their voices have been heard. I am equally hopeful that the Commission will publish the regulations and guidelines that these businesses believe they need to understand how best to comply with the CPSIA's various requirements. I commit here to doing everything in my power to ensure the Commission meets its rulemaking and advisory obligations as fully as possible.

¹ My dissent is available at <http://www.cpsc.gov/pr/adler12172009.pdf>.

Further, I sympathize with all manufacturers, private labelers, and importers regardless of size when they tell us that complying with CPSIA is a difficult lift and they need as much guidance as we can provide them on how to comply with this complicated law. I am confident that the Commission will do its best to provide such guidance and I point to a helpful document created by our Acting Small Business Ombudsman along these lines.²

All of this said, I do not find it to be sufficient justification for extending the stay for another ten months.³ As a starting point, I remain concerned about the burden on the unknowing consumer. I realize that my colleagues care about consumers as much as I do. But as we approach the third year of the passage of this landmark consumer safety law, I note that consumers still do not have the assurance that the children's products they buy have been reasonably tested, or tested at all, to determine if they meet the federal lead standards required in the CPSIA. I fear that a number of companies will mistake our extending the stay on enforcement and certification as a de facto extended stay of the lead standard itself.

Whether the Commission Needed to Promulgate its Testing or Component Parts Rules Prior to Lifting the Stay

Moreover, I continue to object to linking the stay to when our testing and certification rule, called for in section 14(d)(2) of the CPSIA, or our proposed rule on testing component parts of consumer products⁴ become effective. Although I recognize that many companies feel having these rules in place is necessary in order for them to proceed effectively, I see little basis for this belief. Were this the case, one wonders how those businesses currently required to meet the testing and certification requirements for lead in paint, full-size and non-full-size cribs, small parts, metal components of children's metal jewelry and the various children's products subject to the Flammable Fabrics Act manage to operate. In fact, as noted in the staff briefing package on the stay, "it is not necessary for the testing rule to be complete to lift the stay as to the initial test for lead compliance. As a practical matter, the only way to ensure compliance with the lead limit is, at the bare minimum, an initial test of the product for lead content."⁵

I strongly suspect that once we have the testing rule and the component parts rule in place, most reputable companies that have raised concerns about having to adjust their manufacturing practices in light of these rules will find that they have to make only the mildest of changes, if any. In fact, I would not be surprised if they conclude that their pushing for the stay to be extended resulted in no significant manufacturing benefit.

² See: "How does this affect my Small Business? Lifting of the Stay of Enforcement of Certification Requirements for Non-Children's Clothing Textiles, Carpets and Rugs, and Vinyl Plastic Film," at: <http://www.cpsc.gov/about/cpsia/smbus/SBOLiftStayCert16CFR1610.pdf>.

³ I note in passing that the extension of the stay is not just with respect to third party testing. The Commission has also issued a stay with respect to General Conformity Certificates (GCCs) which require only "reasonable testing." Reasonable testing can be done first party by manufacturers by themselves. See *infra* note 6 and accompanying text.

⁴ Published at 75 Fed. Reg. 28208 (May 20, 2010).

⁵ Memorandum on Stay of Enforcement of Testing and Certification Requirements for Lead Content, pg 7, available at <http://www.cpsc.gov/library/foia/foia11/brief/staylead.pdf>.

The Clamor Will Continue

What particularly concerns me about the Commission's decision is that it will do little, in my judgment, to reduce the calls to continue extending the stay. I fear that we will face a similar clamor for extending the stay as we approach the new December deadline. I say this because I believe that the primary reason for the objections to our lifting the stay has more to do with industry's reluctance to undertake the third party testing required under section 102 of the CPSIA and to comply with the toy standard, ASTM F-963, mandated in section 106 of the CPSIA. As many members of the regulated community, especially many small manufacturers and importers, see it, the costs and complexity of complying with these CPSIA requirements greatly threaten their financial well-being. Needless to say, they have vigorously objected to any action that the Commission might take to implement these requirements. That fear, and not the lack of a testing rule or a component parts rule, is, I believe, the real reason for the protests to lifting the stay.

I understand this fear. And I sympathize with those small businesses that face heavy third party testing costs once the stay is lifted. I have heard numerous anguished accounts from these companies about the extreme challenge of meeting these costs. Regrettably, that is not a matter over which the Commission or I have any significant control – and should not be a basis for the Commission's extending the stay. If change is to come, Congress is the proper party to approach.

Additional Concerns: ASTM F-963 Stay and GCCs

Finally, although not directly at issue in our vote on the stay, the so-called toy standard in the CPSIA, ASTM F-963, cannot be ignored as a critical part of the story. Unfortunately, unless the Commission takes decisive action, the testing and certification requirements for this standard – which, to me, lies at the very core of why Congress enacted the CPSIA – continue to be stayed. While it is true that the Commission has never stayed the need for toys to meet ASTM F-963 requirements, the reality is that only way to demonstrate compliance with certain parts of the standard is to perform laboratory tests. However, because the Commission has not issued a Notice of Requirements for this standard, (a statutorily necessary precursor for laboratories to know exactly how to test) there is currently no legal requirement for a toy manufacturer that claims to meet ASTM F-963 to have its claim verified. In fact, the Commission has not even required manufacturers, regardless of size, to issue a General Conformity Certificate (GCC)⁶ for toys subject to ASTM F-963 – a matter of extreme regret to me.

⁶ A General Conformity Certificate (GCC) is a certificate based on a test of each product or upon a reasonable testing program that certifies that each product complies with all statutes, rules, bans, standards, or regulations applicable to the product. A GCC is required for those products for which a statute, regulation, rule, ban, or standard is currently in place. (15 U.S.C. § 2063(a)(1)(A)) A GCC does not require third party testing, so it can hardly be considered burdensome for anyone claiming to sell complying products.

What is regrettable about this omission is that since toys must meet the standard, issuing a piece of paper attesting to the fact that the product actually complies would not be difficult – at least for those companies that purport to produce and distribute complying products. And issuing GCCs would demonstrate to consumers and the CPSC that companies know about the toy standard and attempt to comply with it. Moreover, I understand that many retailers currently demand similar certificates from their suppliers, so issuing GCCs would not be unfamiliar to most manufacturers. Accordingly, I encourage the Commission to be more open to issuing GCCs for products subject to its regulations, especially those not yet subject to third party testing requirements.

In sum, I hope that, in the years to come, the controversy surrounding the CPSIA will have disappeared and that the American consumer is presented with safer and more affordable children's products as they make their purchasing decisions. I believe that this will be the case and that the regulated community will continue to be the Commission's partner in achieving this goal, no matter the bumps in the road that face all sides in this difficult, but achievable, task. I am hopeful that my colleagues and I will continue to work towards this goal in the coming weeks and months.