



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

This document has been electronically
approved and signed.

BALLOT VOTE SHEET

DATE: April 6, 2011

TO: The Commission
Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel
Kenneth R. Hinson, Executive Director

FROM: Philip L. Chao, Assistant General Counsel
Jan S. Carlson, General Attorney

SUBJECT: Third Party Testing for Certain Children's Products; Clothing Textiles: Revisions to Terms of Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to Commission's Acceptance of Accreditation

Ballot Vote Due: April 12, 2011

The Office of the General Counsel is providing a draft *Federal Register* document that would revise the terms of acceptance of children's product certifications based on third party conformity assessment body testing of clothing textiles pursuant to 16 C.F.R. part 1610, "Standard for the Flammability of Clothing Textiles," before the Commission's acceptance of accreditation.

Please indicate your vote on the following options.

- I. Approve publication of the draft document in the *Federal Register*.

(Signature)

(Date)

II. Approve publication of the draft document in the *Federal Register* with changes. (Please specify.)

(Signature)

(Date)

III. Do not approve publication of the draft document in the *Federal Register*.

(Signature)

(Date)

IV. Take other action. (Please specify.)

(Signature)

(Date)

Attachment: Draft *Federal Register* document titled, “Third Party Testing for Certain Children’s Products; Clothing Textiles: Revisions to Terms of Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to Commission’s Acceptance of Accreditation”

CONSUMER PRODUCT SAFETY COMMISSION

CPSC Docket No. CPSC-2011 –[INSERT]

16 CFR Part 1610

Third Party Testing for Certain Children’s Products; Clothing Textiles: Revisions to Terms of Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to Commission’s Acceptance of Accreditation

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of requirements; revision of retrospective testing terms.

SUMMARY: The U.S. Consumer Product Safety Commission (“CPSC,” “Commission,” or “we”) issues this notice amending the terms under which it will accept certifications for children’s products based on third party conformity assessment body (laboratory) testing to the flammability regulations at 16 CFR part 1610 that occurred before the Commission’s acceptance of the accreditation of the third party conformity assessment body. We are taking this action in response to a request from certain members of the clothing textile industry to reduce unnecessary retesting of clothing textiles that have been tested already and found to be in compliance with CPSC regulations.

DATES: Effective Date: The revision announced in this notice is effective upon publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Robert “Jay” Howell, Assistant Executive Director for the Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; e-mail: rhowell@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 14(a)(3)(B)(vi) of the CPSA, as added by section 102(a)(2) of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110-314, directs the CPSC to publish a notice of requirements for accreditation of third party conformity assessment bodies to assess children’s products for conformity with “other children’s product safety rules.” Section 14(f)(1) of the CPSA defines “children’s product safety rule” as “a consumer product safety rule under [the CPSA] or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance.” Under section 14(a)(3)(A) of the CPSA, each manufacturer (including the importer) or private labeler of products subject to a children’s product safety rule must have products that are manufactured more than 90 days after the Commission has established and published notice of the requirements for accreditation tested by a third party conformity assessment body accredited to do so, and must issue a certificate of compliance with the applicable regulations based on that testing. Section 14(a)(2) of the CPSA requires that certification be based on testing of sufficient samples of the product, or samples that are identical

in all material respects to the product. The Commission also emphasizes that, irrespective of certification, the product in question must comply with applicable CPSC requirements (see, e.g., section 14(h) of the CPSA).

In the Federal Register of August 18, 2010 (75 FR 51016), we published a notice of requirements providing the criteria and process for Commission acceptance of accreditation of third party conformity assessment bodies for testing pursuant to 16 CFR part 1610, “Standard for the Flammability of Clothing Textiles,” which sets minimum standards for flammability of clothing textiles under the Flammable Fabrics Act (15 U.S.C. 1191 et seq.) (FFA). The notice of requirements stated that its publication had the effect of lifting the stay of enforcement with regard to testing and certification of children’s products under 16 CFR part 1610. This meant that each manufacturer of clothing textiles that are children’s products must have any such product manufactured after November 16, 2010, tested by a third party conformity assessment body accredited to do so, and must issue a certificate of compliance based on that testing (75 FR at 51018).

We addressed testing performed by a third party conformity assessment body prior to the Commission’s acceptance of its accreditation, or “retrospective” testing, in section IV of the notice of requirements. We stated that we would accept a certificate of compliance with the standard included in 16 CFR part 1610 based on testing performed by an accredited third party conformity assessment body (including a government-owned or -controlled conformity assessment body, and a firewalled conformity assessment body), prior to the Commission’s acceptance of its accreditation if:

- The product was tested by a third party conformity assessment body that was ISO/IEC 17025 accredited by an ILAC-MRA member at the time of the test. For firewalled

conformity assessment bodies, the firewalled conformity assessment body must be one that the Commission accredited by order at or before the time the product was tested, even though the order will not have included the test methods in the regulations specified in this notice. If the third party conformity assessment body has not been accredited by a Commission order as a firewalled conformity assessment body, the Commission will not accept a certificate of compliance based on testing performed by the third party conformity assessment body before it is accredited, by Commission order, as a firewalled conformity assessment body;

- The third party conformity assessment body's application for testing using the test methods in 16 CFR part 1610 is accepted by the CPSC on or before October 18, 2010;
- The product was tested under 16 CFR part 1610 on or after August 18, 2010;
- The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to 16 CFR part 1610;
- The test results show compliance with the applicable current standards and/or regulations; and
- The third party conformity assessment body's accreditation, including inclusion in its scope of 16 CFR part 1610, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with 16 CFR part 1610.

75 FR at 51019 through 51020.

II. Requests for Revision

On December 2, 2010, the American Apparel and Footwear Association (AAFA) submitted a letter to the Commission requesting that we “extend the testing and certification date

by an additional 60 days,” and that we amend section IV of the notice of requirements “to accept third party tests done on or after August 18, 2009 by testing facilities accredited on or before November 16, 2010.” (The AAFA letter may be viewed at www.regulations.gov in the docket folder for docket number CPSC-2011-[INSERT].)

The AAFA based its request for an extension of the testing and certification date on our authority in section 102(a)(3)(F) of the CPSIA, which states:

If the Commission determines that an insufficient number of third party conformity assessment bodies have been accredited to permit certification for a children’s product safety rule under the accelerated schedule required by this paragraph, the Commission may extend the deadline for certification to such rule by not more than 60 days.

15 USC 2063(a)(3)(F). The AAFA contended that there is an insufficient number of CPSC-accepted third party laboratories accredited to 16 CFR part 1610. It presented three arguments in support of this contention. First, it argued that although there were 67 CPSC-accepted laboratories accredited to test to 16 CFR part 1610 as of November 16, 2010, those laboratories were not geographically distributed in such a way as to meet industry needs. Second, it stated a concern that many apparel manufacturers are not aware of their obligation to use CPSC-accepted laboratories. Third, the AAFA also asserted that many companies were unaware that the stay of enforcement on the testing and certification requirements for children’s apparel had been lifted.

The AAFA stated that limiting acceptable retrospective tests to those conducted since August 18, 2010, would “further back up testing facilities and be an unnecessary burden on business... [and would] put at a disadvantage those companies who had taken the proactive step to engage in third party testing” prior to August 18, 2010. It noted that many textiles are tested before they are manufactured into garments and explained that in some cases, the time that elapses between when a textile has been tested and when the garment is produced can be “several

months or even years.” In addition, the AAFA stated that limiting retrospective tests to those conducted since August 18, 2010, “unnecessarily adversely affects the continuing guaranteses ... issued ... pursuant to Section 8 of the FFA.” Section 8 of the FFA provides that a manufacturer or supplier of clothing textiles may issue a guaranty, based on reasonable and representative testing, that the clothing textile complies with FFA standards. The holder of a valid guaranty is not subject to criminal prosecution under section 7 of the FFA (penalties) for a violation of section 3 of the FFA (prohibited transactions). A continuing guaranty is a notarized declaration filed with the Commission in which the manufacturer avers that it has conducted the requisite reasonable and representative product testing and that the testing shows that the product conforms to 16 CFR part 1610. A continuing guaranty remains valid for three years (and at such other times as any change occurs in the legal business status of the person filing the guaranty).

III. The Response to the Requests

A. Request to Extend the Testing and Certification Date by an Additional 60 Days

We decline to extend the date by which a manufacturer of a children’s product subject to 16 CFR part 1610 must have such product tested by a third party conformity assessment body accredited to do so and must issue a certificate of compliance based on that testing. We have the authority to grant such a request only if there is insufficient laboratory capacity. The existence of 67 CPSC-accepted labs accredited to test to 16 CFR part 1610 as of November 16, 2010, belies the claim of insufficient laboratory capacity, even if the laboratories are not distributed geographically as the AAFA would prefer.

We also disagree with the AAFA’s assertion, as another basis for an extension, that some manufacturers are not fully aware that children’s product certifications must be based on testing

conducted by CPSC-accepted third party laboratories, and that many companies are unaware that the stay of enforcement on the testing and certification requirements had been lifted for children's apparel. The CPSIA became law in August 2008, and we published the notice of requirements pertaining to 16 CFR part 1610 in the Federal Register on August 18, 2010. The statute's existence, as well as the publication of the notice of requirements for 16 CFR part 1610, provided notice of these manufacturers' legal obligations. Additionally, the Commission encourages the apparel and textile trade associations to educate the industry on their obligations under the CPSIA and FFA.

Finally, we note that section 14(a)(3)(E) of the CPSA authorizes the Commission to extend the deadline for certification "by not more than 60 days." Such a time period is measured from the date on which such certification would have been required. In this case, the certification requirement became effective for products manufactured after November 16, 2010; therefore, a 60-day extension, had it been granted, would have expired in mid-January 2011. Thus, the AAFA's request for an extension is moot.

B. Request to Accept, for Children's Product Certification Purposes, Tests Pursuant to 16 CFR Part 1610 Conducted by Accredited Third Party Laboratories Since August 18, 2009

We have considered AAFA's request and, through this notice, are revising our position regarding "Limited Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission's Acceptance of Accreditation." Due to the nature of the wearing apparel industry, there is a possible significant time lapse between fabric testing and the finished garment. This could mean that some products that were tested previously by laboratories that have since become CPSC-accepted, would need to be

retested. Therefore, we agree that revising our position on “retrospective” testing is appropriate because it will reduce further the potential need for redundant testing. We will accept children’s product certifications based on third party conformity assessment body testing, prior to our acceptance of accreditation, under the following conditions:

- At the time of product testing, the product was tested by a third party conformity assessment body that was ISO/IEC 17025 accredited by an accreditation body that is a signatory to the ILAC-MRA;
- The third party conformity assessment body’s application for testing using the test methods in 16 CFR part 1610 is accepted by the CPSC on or before November 16, 2010;
- The product was tested under 16 CFR part 1610 on or after August 18, 2009;
- The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to 16 CFR part 1610;
- The test results show compliance with the applicable current standards and/or regulations; and
- The third party conformity assessment body’s accreditation, including inclusion in its scope of 16 CFR part 1610, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with 16 CFR part 1610.

Dated: _____.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

DRAFT



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Memorandum

This document has been electronically
approved and signed.

Date: April 6, 2011

TO : The Commission
Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel
Kenneth R. Hinson, Executive Director

FROM : Patricia K. Adair
Director, Division of Combustion and Fire Sciences
Directorate for Engineering Sciences

Mary F. Toro
Director of Regulatory Enforcement
Office of Compliance and Field Operations

Robert J. Howell
Assistant Executive Director
Office of Hazard Identification and Reduction

SUBJECT : Accreditation Requirements for Third Party Conformity Assessment Bodies to Test the Flammability of Clothing Textiles and Textile Fabrics Intended for Children's Wearing Apparel as Established by the Consumer Product Safety Improvement Act of 2008; *Staff's Proposed Revision of Retrospective Testing Terms*

I. Introduction

On August 14, 2008, the Consumer Product Safety Improvement Act (hereinafter referred to as the "Act" or the "CPSIA") was signed into law [Public Law 110-314]. Section 102 of the Act mandates that third party testing be conducted for certain children's products. Before importing for consumption or warehousing or distributing in commerce any children's product that is subject to a children's product safety rule, every manufacturer of such children's product (and the private labeler of such children's product if such product bears a private label) shall: (A) submit sufficient samples of the children's product, or samples that are identical in all material respects, to a third party testing laboratory accredited under requirements to be established by the Commission to be tested for compliance with such children's product safety rule; and (B) based on the assessment by the third party testing laboratory, issue a certificate that certifies that such

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children's product complies with the children's product safety rule.¹ Section 235 of the Act defines "children's product" to mean a consumer product designed or intended primarily for children 12 years of age or younger.

The CPSIA defines a third party testing laboratory as one that is not owned by the manufacturer or private labeler of a product assessed by such testing laboratory. A laboratory that is so owned nevertheless, in certain specified circumstances, may be accredited as a third party testing laboratory. The Act specifies that a third party testing laboratory also may include, under certain conditions, a government-owned or -controlled laboratory.

Special provisions are established in the Act for laboratories that are owned by a manufacturer or private labeler. Such laboratories commonly are referred to as "proprietary laboratories" or "first party" laboratories, although the Act does not use such terms. The Act stipulates that the Commission may accredit a proprietary laboratory as a third party testing laboratory if the Commission, by order, makes certain findings that the laboratory is protected from undue influence by the manufacturer, private labeler, or other interested party, and that procedures are in place for immediate and confidential reporting to the Commission of any attempts by the manufacturer, private labeler, or other interested party to hide or exert undue influence over test results. The Commission also must find that accrediting the proprietary laboratory would provide equal or greater consumer safety protection than the manufacturer's or private labeler's use of an independent third party conformity assessment body. A laboratory that satisfies these requirements is defined in the Act as a "firewalled" testing laboratory.

The Act provides that accreditation of third party testing laboratories may be conducted by either the Commission or an independent accreditation organization designated by the Commission and requires that the Commission maintain on its website an up-to-date list of laboratories whose accreditation the Commission has accepted to assess conformity with children's product safety rules.

On August 18, 2010, the Commission published a notice of requirements in the *Federal Register* providing the criteria and process for Commission acceptance of accreditation of third party conformity assessment bodies for testing pursuant to 16 CFR part 1610, "*Standard for the Flammability of Clothing Textiles*."² Publication of the notice of requirements in the *Federal Register* had the effect of lifting the stay of enforcement for testing and certification of children's products under 16 CFR part 1610, such that each manufacturer of clothing textiles and textile fabrics intended for children's wearing apparel must have any such product manufactured after November 16, 2010, tested by a third party conformity assessment body accredited to do so and must issue a certificate of compliance based on that testing. The Commission maintains on its

¹ On November 18, 2008, the Commission published a final rule in the *Federal Register* (FR) that limits the parties who must certify to the U.S. importer and, in the case of domestically produced products, the U.S. manufacturer. The rule also specifies the requirements that an electronic certificate must meet. The regulation is now codified at 16 CFR part 1110.

² 75 *Federal Register* 51016; August 18, 2010. Third Party Testing for Certain Children's Products; Clothing Textiles: Requirements for Accreditation of Third Party Conformity Assessment Bodies. <http://www.cpsc.gov/businfo/frnotices/fr10/clothing.html>.

website an up-to-date listing of third party conformity assessment bodies whose accreditation it has accepted along with the scope of each accreditation.

The notice of requirements addressed testing performed by a third party conformity assessment body prior to the Commission's acceptance of its accreditation, or "retrospective" testing, in section IV. It stated that the CPSC would accept a certificate of compliance with the Standard included in 16 CFR part 1610, based upon testing performed by an accredited third party conformity assessment body (including a government-owned or -controlled conformity assessment body, and a firewalled conformity assessment body) prior to the Commission's acceptance of its accreditation if:

- The product was tested by a third party conformity assessment body that was ISO/IEC 17025 accredited by a signatory to the International Laboratory Accreditation Cooperation-Mutual Recognition Arrangement (ILAC-MRA) at the time of the test. For firewalled conformity assessment bodies, the firewalled conformity assessment body must be one that the Commission accredited by order at or before the time the product was tested, even though the order will not have included the test methods in 16 CFR part 1610. If the third party conformity assessment body has not been accredited by a Commission order as a firewalled conformity assessment body, the Commission will not accept a certificate of compliance based on testing performed by the third party conformity assessment body before it is accredited, by Commission order, as a firewalled conformity assessment body;
- The third party conformity assessment body's application for testing using the test methods in 16 CFR part 1610 is accepted by the CPSC on or before October 18, 2010;
- The product was tested under 16 CFR part 1610 on or after August 18, 2010;
- The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to 16 CFR part 1610;
- The test results show compliance with the applicable current standards and/or regulations; and
- The third party conformity assessment body's accreditation, including inclusion in its scope of 16 CFR part 1610, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with 16 CFR part 1610.

This memorandum presents CPSC staff's recommendation for revising the conditions for "*Limited Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission's Acceptance of Accreditation.*"

Background on the Requirements of 16 CFR part 1610

The purpose of the clothing textiles standard is to eliminate from the marketplace dangerously flammable clothing textiles, such as certain lightweight or brushed fabrics, thereby reducing the danger of injury or death from burning apparel. The standard provides requirements for testing and rating the flammability of textiles for apparel use. It establishes three classes of flammability, sets requirements for clothing textiles, and prohibits the use of textiles deemed unsuitable for clothing. Flammability classes are based on measures of burn time and flame intensity. These measures are made before and after refurbishing (dry cleaning and laundering).

Some clothing textiles are exempt from part 1610 testing [see 16 CFR part 1610.1(d)]. Manufacturers do not need to submit exempt clothing textiles designed or intended primarily for children 12 years of age or younger to a third party conformity assessment body to confirm that the exemption applies.³ For clothing textiles designed or intended primarily for children 12 years of age or younger that are subject to 16 CFR part 1610, manufacturers may submit a product for third party testing at either the pre- or post-garment stage of production.⁴

Issues Presented by the American Apparel and Footwear Association (AAFA)

In a December 2, 2010 letter to the Commission, AAFA requested changes to the third party conformity assessment body testing requirements for 16 CFR part 1610 (letter attached). The requested changes can be summarized as follows:

1. Immediately extend the testing and certification date by an additional 60 days, and
2. Amend section IV of the notice of requirements for 16 CFR part 1610 to accept third party tests done on or after August 18, 2009, by testing facilities accredited on or before November 16, 2010.

Staff's Response to the AAFA Letter

With respect to the AAFA's issues, staff's recommended responses are as follows:

Comment: The CPSC should immediately extend the testing and certification date by an additional 60 days. With regard to the request for an extension of the testing and certification date, the AAFA based its request on our authority in section 102(a)(3)(F) of the CPSIA, which states:

If the Commission determines that an insufficient number of third party conformity assessment bodies have been accredited to permit certification for a children's product safety rule under the accelerated schedule required by this paragraph, the Commission may extend the deadline for certification to such rule by not more than 60 days.

The AAFA argued that, although 67 laboratories had been accredited as of November 15, 2010, these facilities are not distributed geographically in the countries where clothing is designed and sourced and where fabric is procured. The AAFA contended that the global distribution of the laboratories presents a laboratory capacity problem for the industry.

The AAFA also noted that many apparel manufacturers were not aware of their obligation to use CPSC-accepted laboratories. Third, the AAFA advised that many companies were unaware that the stay of enforcement on the testing and certification requirements had been lifted for children's apparel.

³ 75 *Federal Register* 51016; at 51017.

⁴ 75 *Federal Register* 51016; at 51017.

Response: The Commission may grant a request to extend the testing and certification date by an additional 60 days only if there is insufficient laboratory capacity. As of November 16, 2010, there were 67 CPSC-accepted laboratories accredited to test to 16 CFR part 1610. Staff believes this to be sufficient laboratory capacity, even if the laboratories are not distributed geographically as AAFA would prefer.

With regard to AAFA's concern that some apparel manufacturers were not fully aware of their obligation to use CPSC-accepted laboratories, staff notes that the Consumer Product Safety Improvement Act of 2008 became law in August 2008, and the Commission published the notice of requirements pertaining to 16 CFR part 1610 on August 18, 2010 in the *Federal Register*.⁵ Thus, the statute's existence, as well as the publication of the notice of requirements in the *Federal Register*, provided notice of the obligation to use CPSC-accepted laboratories. Additionally, staff encourages the apparel and textile trade associations to educate the industry on their obligations under the CPSIA and FFA.

With regard to the AAFA's contention that many companies were unaware that the stay of enforcement on the testing and certification requirements had been lifted for children's apparel, staff notes that the notice of requirements (75 FR at 51018) stated: "Further, as the publication of this notice of requirements effectively lifts the stay of enforcement with regard to testing and certifications related to 16 CFR part 1610, each manufacturer of a children's product subject to 16 CFR part 1610 must have any such product manufactured after November 16, 2010, tested by a third party conformity assessment body accredited to do so and must issue a certificate of compliance with 16 CFR part 1610 based on that testing."

Finally, staff notes that section 14(a)(3)(E) of the CPSA authorizes the Commission to extend the deadline for certification "by not more than 60 days." The time period would be measured from the date on which such certification would have been required. In the present case, the certification requirement became effective for products manufactured after November 16, 2010. Accordingly, a 60-day extension, had it been granted, would have ended in mid-January 2011. Thus, the request for an extension is moot.

Comment: The Commission should amend section IV of the notice of requirements for 16 CFR part 1610 to accept third party tests conducted on or after August 18, 2009, by testing facilities accredited on or before November 16, 2010. The AAFA notes that the limited acceptance of test results conducted by third party laboratories prior to the issuance of the third party accreditation requirements will create a backlog at the testing facilities and place an unnecessary burden on businesses. Further, the AAFA notes that the lack of a longer "grandfathering" period may affect adversely the continuing guaranties that were issued in the past pursuant to Section 8 of the FFA.

Response: Manufacturers and importers residing in the United States may file a continuing guaranty with the Commission under section 8 of the FFA; the guaranty must be based on reasonable and representative testing and, to remain in effect, must be renewed every three years and at such other times as any change occurs in the legal business status of the person filing the guaranty. Staff agrees that amending section IV of the notice of requirements for 16 CFR part

⁵ 75 *Federal Register* 51016.

1610 to accept third party tests conducted on or after August 18, 2009, by testing facilities accredited on or before November 16, 2010, would allow for certification of products already tested by an accredited third party laboratory, thus allowing existing continuing guaranties to remain in effect, as long as the testing to support the continuing guaranty was conducted at an accredited third party laboratory.

Staff takes no position with respect to the AAFA's claim of a "backlog" of testing. Staff is unaware of any backlog; however, to the extent that such a backlog exists, the change described above would alleviate some of the testing burden.

Staff's Revised Recommendation

After careful consideration of the AAFA's requests, staff recommends revising the recommendation for "*Limited Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission's Acceptance of Accreditation*" to amend the terms under which the Commission will accept clothing textiles and textiles intended for children's wearing apparel product certifications based on third party conformity assessment body testing, prior to our acceptance of accreditation.

Staff proposes that the Commission accept clothing textiles and textiles intended for children's wearing apparel product certifications if the product⁶ was tested on or after one year prior to the date of publication of the laboratory accreditation requirements in the *Federal Register* (on or after August 18, 2009) by a laboratory whose application is accepted by the CPSC within 60 days of such publication of laboratory accreditation requirements (or by November 16, 2010).

IV. Rationale for Proposed Revision

This policy would allow for certification of products on the basis of testing performed by an accredited third party laboratory, thereby providing a substantial degree of assurance of compliance with the standard. Under this approach, firms that already were getting products tested voluntarily by competent laboratories will not have to submit those same products for retesting. This will help textile and apparel manufacturers manage the transition to the requirements imposed by section 102 of the CPSIA. Manufacturers and private labelers that did not utilize third party testing already, or that based their certifications on test dates prior to the test issue dates listed above, would need to conduct third party testing by a CPSC-accepted laboratory to be able to certify products manufactured on or after the effective date.

VI. Environmental Considerations

Generally, CPSC mandatory requirements are considered to "have little or no potential for affecting the human environment," and environmental assessments are not usually prepared for such actions (see 16 CFR § 1021.5(c)(1)). Nothing in this recommended revision of the accreditation requirements alters that expectation. Therefore, staff does not expect such requirements to have any negative environmental impact.

⁶ The CPSIA requires that certification be based on testing of sufficient samples of the product or samples that are identical in all material respects to the product.

VII. Recommended Effective Date

Staff recommends that the requirements for accreditation of third party laboratories to test products for compliance with the regulations for clothing textiles and textile fabrics in children's wearing apparel be revised. The revised requirements would become effective upon publication of notice thereof in the *Federal Register*. Publication in the *Federal Register* is typically the means by which the public is advised formally of new mandatory requirements.

VIII. Staff Recommendation for Accreditation Requirements for Third Party Laboratories to Test the Flammability of Clothing Textiles and Textile Fabrics Intended for Children's Wearing Apparel

Staff recommends that the Commission approve staff's proposed revised approach for accepting accreditation of laboratories to test for compliance with the regulation for the flammability of clothing textiles and textile fabrics intended for children's wearing apparel. Staff recommends that the Commission approve publishing the revision in a *Federal Register* (FR) notice as drafted by the Office of the General Counsel.

Attachment:

December 2, 2010 letter from the American Apparel and Footwear Association (AAFA) to the U.S. Consumer Product Safety Commission.



December 2, 2010

Office of the Secretary,
U.S. Consumer Product Safety Commission
Room 820
4330 East West Highway,
Bethesda, MD 20814

Ref: Petition to Provide Additional 60 Day Period for Third Party Testing and to Provide Additional Grandfathering Period for 16 CFR 1610 (Standard for the Flammability of Clothing Textiles)

To Whom It May Concern:

I am writing on behalf of the American Apparel & Footwear Association (AAFA) – the national trade association representing the footwear and apparel industry and its retailers, suppliers, manufacturers and service providers – to petition the Consumer Product Safety Commission (CPSC) to provide limited relief in connection with the Third Party Testing requirements for 16 CFR Part 1610 (Standard for the Flammability of Clothing Textiles):

- (a) Immediately extend the testing and certification date by an additional 60 days and
- (b) Amend Section IV of the, “Third Party Testing for Certain Children’s Products; Clothing Textiles: Requirements for Accreditation of Third Party Conformity Assessment Bodies” to accept third party tests done on or after August 18, 2009 by testing facilities accredited on or before November 16, 2010.

Background

On August 18, 2010, the Commission published a notice entitled “Third Party Testing for Certain Children's Products; Clothing Textiles: Requirements for Accreditation of Third Party Conformity Assessment Bodies” setting forth the third party testing requirements for general wearing apparel. This notice was published pursuant to the Consumer Product Safety Improvement Act (CPSIA). Among other things, the notice establishes the procedures that testing facilities must follow in order to become accredited by the Commission for the purpose of performing CPSIA mandated third party testing for compliance with 16 CFR Part 1610. Publication of the notice triggered a timetable that involved:

- (a) A date (November 16, 2010 – 90 days after the publication date of the Federal Register notice) after which the CPSIA requires all applicable garments manufactured after that date must meet third party testing requirements. This date is also the effective date of the lifting of a stay of enforcement that had been imposed in 2009.
- (b) A period (August 18, 2010 - the date of publication of the notice) to “grandfather” previous tests that were conducted before accreditation was achieved.
- (c) A deadline (October 18, 2010 – roughly 60 days after publication of the notice) to achieve accreditation if manufacturers want to take advantage of the grandfather period without having to re-test.

In response to that notice, AAFA submitted comments¹ challenging the Commission’s decision to proceed with the application of the third party testing requirement with respect to 16 CFR Part 1610. In that submission, we noted that the 16 CFR Part 1610 applies to all garments, not just children’s products. As a result, 16 CFR Part 1610 should not be considered a “children’s product safety rule,” which triggers the accredited third party testing requirement.

Moreover, we noted that the accredited third party testing requirement suddenly amends the 16 CFR Part 1610, which was developed over many years through an extensive public rule-making process. In fact, the Commission recently made a series of technical updates to this rule in a process that stretched over many years and involved extensive consultation with industry and other stakeholders. Earlier this year, the Commission published an updated testing laboratory manual for this rule. Our concern here is that 16 CFR Part 1610 is a well-established and well-balanced rule that does not lend itself to easy amendment and certainly not one that completely bypasses the regulatory requirements mandated by the Flammable Fabrics Act (FFA). Changes that are quickly implemented to such rules often have unintended consequences or cause confusion among the regulated community. Our comments below, and the subject of this petition, are intended to alleviate two such concerns.

A. Request for Additional 60 Days Following the November 16 Effective Date

We hereby request that the Commission, using the authority in Section 102(a)(3)(F) of the CPSIA, provide an additional 60 days to the 90 day statutory period outlined in the August 18 Federal Register notice.

We are making this request because, based on the global distribution of the textile and clothing manufacturing industry, an insufficient number of third party testing facilities are accredited by the CPSC to test for flammability of textiles in accordance to 16 CFR Part 1610. Although 67 facilities have been accredited (as of November 15, 2010), and

¹ See <https://www.apparelandfootwear.org/userfiles/file/testimony-comments/2010/091710cpscffa.pdf>

we understand more applications are pending, our members report that there are real capacity issues because too few of the accredited testing facilities are located in the countries where clothing is designed and sourced, and where fabric is procured. In fact, in a survey sent out to the apparel and textile industry, 15 percent of respondents already reported a delay in receipt of flammability test results even *before* third party testing and certification was required for children's products. Where in 2009, 81 percent of respondents reported that test results would take anywhere from 3 days to two weeks, as of November 15, 2010, 83 percent of respondents reported that test results take anywhere from one week to three weeks. In another survey, 60% of respondents indicated that once the proposed *Testing and Labeling Pertaining to Product Certification* rulemaking goes into effect, they will need to increase the frequency of testing meaning the testing demand has not yet fully matured. We believe the additional 60 day period combined with clearer and more public statement that the stay with respect to 16 CFR Part 1610 has been lifted, will result in additional capacity and ease the compliance burden on companies as they make the transition from a well-established third party testing environment to an accredited third party testing environment. Moreover, inasmuch as there is already strong compliance with the Part 1610 standard, the provision of an additional 60 day period will have no adverse impact on product safety or public health.

1. Distribution of Facilities Does Not Meet Industry Needs

Many of the apparel manufacturing countries that account for large portions of United States apparel imports have either very few or no accredited third party testing facilities. On November 16, the day the stay of testing lifted for 16 CFR Part 1610, 67 testing facilities were accredited by the CPSC to test for flammability in children's products. 8 of these testing facilities are located within the United States while only 3 percent of apparel sold in the United States is actually manufactured in the United States. Of the remaining 59 accredited testing facilities outside of the United States, 11 testing facilities are located in countries that collectively supply less than 2 percent of the apparel imported into the country. This leaves 48 testing facilities located within the 30 sourcing countries that collectively account for 98 percent of apparel imports. Some countries that supply a large percentage of apparel sold in the United States have no accredited testing facilities to test for compliance with 16 CFR Part 1610. For example, Vietnam is the second largest supplier of apparel imported to the United States but as of November 16, 2010, no third party testing facilities in Vietnam were accredited.² Only one testing facility is accredited within the 6 countries that are parties with the United States of the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA), even though that region accounts for 12 percent of apparel imports. While the CPSC continues to work to accredit more testing facilities, the interim shortage means that many products in production will not be in compliance with the *accredited* third party test requirement.

² Three facilities were accredited in Vietnam between November 16, 2010 and December 2, 2010).

2. Misunderstanding of the nature of accreditation

We agree with the CPSC's assessment that the requirement for accredited testing facilities will push more testing facilities to become accredited. However, we are concerned that many apparel manufacturers are still not fully aware of their obligation to use "accredited" third party testing facilities, and this is a new requirement layered over a long standing testing procedure.

As you know, the apparel industry has been subject to 16 CFR Part 1610 for many years and many companies have used third party testing facilities to ensure compliance. As a result, the industry has perceived the transition from pre-CPSIA 16 CFR Part 1610 testing to post-CPSIA 16 CFR Part 1610 as a relatively painless endeavor. Through the many years of industry compliance with 16 CFR Part 1610, and during the initial implementation period of the CPSIA, most manufacturers have tested for compliance with 16 CFR Part 1610 using third party facilities either as part of standard quality control procedures or, knowing that third party testing will be required eventually, to stay ahead of the regulations and facilitate compliance once the stay of testing lifted. Based on comments we receive from members, many manufacturers are currently operating under the assumption that third party testing facilities are the same as CPSC *accredited* third party testing facilities. Others mistakenly believe that third party facilities approved by their retail customer are the same as third party facilities approved and accredited by the CPSC.³

3. Confusion over whether the stay of enforcement has lifted

Moreover, many companies are still unaware that the stay of the third-party testing and certification requirements has, in fact, lifted for children's apparel. The Commission announced the initial stay of enforcement and the extension of the stay of enforcement with great fanfare. However, the Commission lifted the stay of enforcement of testing and certification for children's apparel subject to 16 CFR Part 1610 with a paragraph buried within the Federal Register notice announcing the requirements for accreditation of third party testing facilities. Many children's apparel manufacturers have thought this Federal Register notice contains requirements that pertain exclusively to testing facilities (as it is entitled, "Third Party Testing for Certain Children's Products; Clothing Textiles: *Requirements for Accreditation of Third Party Conformity Assessment Bodies*" emphasis added) and therefore are not fully aware that the stay has lifted. Furthermore, industry is still unclear as to whether the accreditation requirements also lifted the stay of certification for adult's apparel subject to 16 CFR Part 1610. The lack of clarity and the uneven manner in which the Commission has lifted the stay are both unfair to companies, given promises of transparency by the agency, and the wrong way to go about regulating an industry. Therefore, not only is the 60 day extension necessary due to accredited third party test lab capacity concerns, but the 60 day

³ At a recent conference sponsored by AAFA and other groups in Vietnam in early November, several questions from factory managers touched on this point.

extension is necessary to give the Commission time to properly announce the lifting of the stay.

B. Request for Longer Grandfathering Period

We also hereby request that the Commission modify the Notice of Accreditation to permit manufacturers to rely upon tests that were conducted before August 18, 2010 for children's product certifications. As is the case with the children's sleepwear accreditation procedures, we are asking that the Commission permit test results to be accepted provided they were completed by August 18, 2009 – one year earlier.

Our concern is two-fold. First, we are concerned that the extremely limited acceptance of test results conducted by third party testing facilities prior to the issuance of the third party accreditation requirements will further back up testing facilities and be an unnecessary burden on businesses. During the stay of testing and certification, as the CPSC has been finalizing third party testing requirements, children's apparel manufacturers have continued to rely upon third party testing – even when they were not required to do so. While some may have undertaken new obligations in preparation for the CPSIA – a fact which has drawn commendation from the Commission – others were performing such tests because it was the best way to ensure compliance with 16 CFR 1610, given the complicated nature of the rule. By only recognizing test results that were conducted on or after August 18, 2010, the CPSC puts at a disadvantage those companies who had taken the proactive step to engage in third party testing.

Most textiles are tested before they are manufactured into garments and the time between when a textile has been tested and when the garment is manufactured varies based on the company, the season, the style, the availability of the fabric, and many other factors. Stock fabrics may be in inventory for several months or even years. As a result, many manufacturers are using fabrics that were third party tested well before August 18, 2010. That the fabrics were tested before August 18, 2010 has no impact on the safety of the fabrics. Requiring manufacturers to retest the fabric or the garment made out of the already tested fabric does not make the fabrics or garments any safer. Since this relief would apply to labs that moved quickly to achieve accreditation following publication of the accreditation standards (i.e., those who achieve accreditation during the first 60 days), it would not open the door for companies to “game” the system. Rather it would provide needed relief to companies that had already integrated third party facilities, which were quick to achieve accreditation, into their supply chains.

Our second concern is that a lack of a longer grandfathering period unnecessarily adversely affects the continuing guarantees that were issued in the past pursuant to Section 8 of the FFA. These continuing guarantees recognize that testing done years ago still appropriately demonstrates that the fabric in question complies with the flammability requirements. Strictly accepting test results conducted on or after August 18, 2010 renders many continuing guarantees unusable. Requiring retesting not only creates a logistical nightmare for manufacturers who have to sort through which fabrics

were tested prior to August 18, 2010 simply to ensure compliance with the requirements – a hassle these same manufacturers tried to avoid by being proactive.

Conclusion

Granting a 60 day extension on the third party testing and certification requirements to test for textiles and apparel subject to Flammable Fabrics Act 16 CFR 1610 regulations is necessary to deal with limited third party lab capacity issues and to clarify the status of the stay. Furthermore, extending the acceptance of retroactive testing will alleviate lab capacity issues and alleviate unnecessary testing burdens for an industry that has been testing and complying with the flammability standard for many years. Thank you for your consideration of this petition. If you have any questions, please contact Rebecca Mond with our staff at 703-797-9038 or rmond@apparelandfootwear.org.

Sincerely,

A handwritten signature in cursive script that reads "Kevin M. Burke". The signature is written in black ink and is positioned below the word "Sincerely,".

Kevin M. Burke