



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
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STATEMENT OF COMMISSIONER NANCY NORD  
ON THE VOTE TO APPROVE THE NOTICE OF PROPOSED RULEMAKING FOR THE  
TESTING AND LABELING FOR PRODUCT CERTIFICATION  
May 5, 2010

While I am voting to issue the notice of proposed rulemaking for testing and labeling for product certification, I do so with reluctance. My vote is premised on the fact that the statute requires that we issue regulations establishing protocols and standards for ongoing product testing, among other things; we are behind the statutory schedule for accomplishing this task; and, to avoid unnecessary confusion, a rule should be in place before we lift the stay of enforcement for certain testing requirements now due to go into effect in February 2011. My vote is only to get the process started and does not suggest that I support in its totality the rule before us. In my view, this proposed rule goes well beyond what is required by the statute and what is needed to get the job of safety done. It may well impose unprecedented, burdensome, and costly regulations without the requisite payback in terms of safety.

Component Testing:

Before addressing my concerns with the proposed rule, I must acknowledge the potentially helpful proposed component and composite testing regulations that are being issued as a separate proposed rule, but which are substantively tied to this proposed rule (The Notice of Proposed Rulemaking for Testing Component Parts). It is hoped that these rules will spread out and thereby somewhat ease the very significant testing burdens that the rest of proposed rule imposes. Under the scheme proposed, if a component manufacturer is willing to test for compliance to CPSC rules and those components will be used in children's products, then those components must be tested and certified by a CPSC-approved third party testing laboratory. In addition, that component maker must also agree to take on the additional testing as required by this rule. In this respect, the component maker is standing in for the final product manufacturer with respect to the testing requirements of the rule.

Retailer Liability:

In addition, I draw attention to language in the preamble of the rule dealing with retailers' responsibilities for testing and certification. We have heard that some retailers, because of the significant new liability risks the law imposes not only from the federal government but also from state governments, are requiring suppliers to engage in additional costly testing. The proposed rule emphasizes that retailers may rely on testing and certification done by their suppliers if that reliance is made in good faith, and in that case, retailers will not be subject to penalties for selling products that do not comply. An issue is presented when a retailer also acts as a direct importer. This is because the certification requirements flow to the domestic manufacturer or importer. However the retailer can still rely on the testing done by the foreign manufacturer in preparing its certification. We must look for ways to drive down costs and avoid redundant testing. We do not want perceived liability to result in unnecessary testing and if our regulations contribute to this result then amendments to those regulations may be warranted. Additional comment on this issue is sought.

Reasonable Testing Program:

Section 14 (a) of the Consumer Product Safety Act (CPSA) requires that product manufacturers certify, based on a test of the product or a *reasonable testing program*, that their products meet applicable CPSC regulations. This certification is referred to as a general certification of compliance (GCC). For children's products, certification of compliance must be based on tests done by an independent third party testing laboratory. While the agency has the authority to issue regulations defining what a reasonable testing program is for purposes of Section 14(a), *the statute does not require that we do so*.

What we are required to do is spelled out in Section 14 (d) (2) of the CPSA. In that section we are required (1) to issue regulations for a voluntary program for labeling products as compliant, and (2) to establish standards and protocols for (a) ensuring that children's products are tested periodically; (b) ensuring that children's products are tested when there is a material change; (c) random sample testing; (d) verifying results from testing laboratories; and (e) safeguarding against efforts to unduly influence a testing laboratory. The CPSA imposes a very short timeline for finishing the work required under Section 14 (d) (2). In other words the statute spells out what we must do and when we must do it.

Instead of directing our attention to what is required under the statute (the most significant of those requirements deal with testing and certification of children's products), we have constructed complex testing and certification requirements applicable to all product makers. In almost two hundred pages of rather dense regulatory language, we define a reasonable testing program (which, again, the statute does not require of us), and direct that those making products requiring a GCC and subject to a CPSC rule implement those requirements.

Standing alone the individual requirements of the proposed reasonable testing program may be elements of a quality assurance program that many manufacturers have in place. However, those programs are tailored to the needs of the individual company and manufacturing environment. When the individual elements required in this proposed rule are added up, they may well overwhelm some manufacturers who are making perfectly safe and compliant products. Nevertheless, they are mandatory requirements and presumably can and will be enforced. As we have seen in other situations, the new law and our regulations may work for large companies but exceed the capacity of medium or small companies, at least without hiring additional compliance, administrative staff and outside consultants. This is pointed out in the regulatory flexibility analysis accompanying these documents.

Especially since the passage of the Consumer Product Safety Improvement Act in 2008, industries and individual companies have stepped up efforts to put in place quality assurance mechanisms. If we were to finalize what is being proposed today, those efforts may become irrelevant or require substantial change. In addition, it will lock into place a particular path to compliance that may not be the most efficient or effective for all companies. The preamble of the rule recognizes that this may occur when it states that we are not required to "find industry testing programs to be insufficient before implementing a reasonable testing program." I submit that this is exactly what we should do before implementing something of this magnitude on our own initiative and without a record that shows the need for such a far-reaching rule.

Rather than locking these requirements into place in enforceable regulations, we should reserve for ourselves the flexibility to provide guidance as appropriate under the circumstances. In November 2009, guidance was made public describing Commission staff's views of what should go into a reasonable testing program. That guidance and any changes that might be made as we get further experience in dealing with the challenges that will inevitably arise as we implement the testing and certification requirements of the CPSIA, could have provided a foundation on which companies build as they construct quality assurance programs. Unfortunately and unnecessarily, we have chosen a path that does not allow for such flexibility.

Periodic Testing:

Building on the reasonable testing program requirements, the proposed rule then addresses periodic testing, one of the things the statute does require that we address. However, the proposed rule sets out a scheme that is both complex and may not really work well in practice. It should be stated at the outset that the Commission recognizes the law does not equate periodic testing with third party testing and that, under the statute, all periodic testing does not need to be done by a third party testing laboratory. Nevertheless, in this proposed regulation we go on to require that periodic testing be done by third party laboratories in certain circumstances.

In those instances in which a children's product maker has in place a reasonable testing program, as defined in this regulation, then that manufacturer must have its products tested by a third party testing laboratory for the product's initial certification of compliance and whenever there are material changes to the product. That manufacturer must also have its product tested periodically by a third party laboratory to determine continuing compliance at least once every two years.

However, it should be noted that, unlike those manufacturers issuing a GCC, a children's product manufacturer does *not* need to have a reasonable testing program under this rule. If the children's product manufacturer decides not to put a reasonable testing program in place, then the testing requirements outlined in the preceding paragraph change. In this situation, the product manufacturer must have its products tested by a third party testing laboratory for the product's initial certification and whenever there are material changes to the product, but periodic testing (by a third party laboratory) must be done at least once a year rather than biannually. In addition, the rule goes on to state that manufacturers are free to do periodic testing more frequently than once a year, but if they voluntarily do such testing, that also must be done by a third party testing laboratory. This is in spite of the fact that the statute does not require such a result. Equally troubling is that such a requirement may either incent a manufacturer not to do testing on a regular on-going basis, or describe the testing program as a "quality assurance" or "production testing" program, rather than as a periodic testing program, because of the cost of third party testing. Such a result apparently is perfectly fine under the rule but it seems silly to put in place requirements that can so easily be circumvented. This result hints of unthinking regulation for the sake of regulation.

Finally, the periodic testing rules do not recognize that manufacturer supply and process controls can often provide a more effective and more efficient method for assuring compliance than does a rote reliance on testing. Yet testing and only testing is the focus of this aspect of the rule.

Conclusion:

There are many other aspects of the proposed rule that are of concern and on which I do hope interested parties will comment. However, read as a whole, this is an unprecedented intrusion of federal regulators onto the factory floor. The regulatory flexibility analysis that is included in the proposed rule documents the immense costs this rule will have, especially on small businesses. Given that, I believe we have an obligation to work to minimize the impact to the extent we can without sacrificing safety and we have fallen short of that obligation. We have gone well beyond what the statute requires and missed the opportunity to develop a safety compliance system that works for all.