



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

CHAIRMAN ELLIOT F. KAYE

March 17, 2015

The Honorable Harold Rogers  
Chairman  
Committee on Appropriations  
U.S. House of Representatives  
H-305 Capitol  
Washington, DC 20515

The Honorable Thad Cochran  
Chairman  
Committee on Appropriations  
United States Senate  
S-128 Capitol Building  
Washington, DC 20510

The Honorable Nita M. Lowey  
Ranking Member  
Committee on Appropriations  
U.S. House of Representatives  
1016 Longworth House Office Building  
Washington, DC 20515

The Honorable Barbara A. Mikulski  
Ranking Member  
Committee on Appropriations  
United States Senate  
S-146A Capitol Building  
Washington, DC 20510

The Honorable Ander Crenshaw  
Chairman  
Subcommittee on Financial Services  
and General Government  
Committee on Appropriations  
U.S. House of Representatives  
B-300 Rayburn House Office Building  
Washington, DC 20515

The Honorable John Boozman  
Chairman  
Subcommittee on Financial Services  
and General Government  
Committee on Appropriations  
United States Senate  
133 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable José E. Serrano  
Ranking Member  
Subcommittee on Financial Services  
and General Government  
Committee on Appropriations  
U.S. House of Representatives  
1016 Longworth House Office Building  
Washington, DC 20515

The Honorable Christopher Coons  
Ranking Member  
Subcommittee on Financial Services  
and General Government  
Committee on Appropriations  
United States Senate  
125 Hart Senate Office Building  
Washington, DC 20510

Dear Chairmen Rogers, Cochran, Crenshaw, and Boozman, and Ranking Members Lowey, Mikulski, Serrano, and Coons:

Pursuant to the explanatory statement accompanying the Consolidated and Further Continuing Appropriations Act, 2015, (160 Cong. Rec. H9738 (December 11, 2014)), enclosed please find a copy of the U.S. Consumer Product Safety Commission staff's "Report to the Committees on Appropriations of the House and Senate on the Status of CPSC Efforts to Provide Third Party Testing Cost Relief While Still Assuring Compliance (Staff Report)."

As outlined in the Staff Report, since 2009 the Commission has taken significant steps to attempt to address cost concerns regarding the third party testing of children's products required by the Consumer Product Safety Improvement Act of 2008. With the passage of Public Law 112-28 in August 2011, the Commission increased these efforts to explore opportunities to reduce the cost of third party testing consistent with assuring compliance with any applicable consumer product safety rule, ban, standard or regulation. As part of this effort, I anticipate CPSC staff submitting for Commission consideration a related draft Notice of Proposed Rulemaking during the upcoming months.

Since I arrived at the Commission in 2010, this issue has been a top priority for me. The driving force in assessing where to focus our activities in this area has been our robust efforts to seek input from our stakeholders. A primary example of this was the call by many concerned parties to provide more determinations for materials or product categories where third-party testing would be unnecessary. Accordingly, while I was in the office of our prior Chairman, Inez Tenenbaum, I personally worked with our Small Business Ombudsman to begin the process of assessing which determinations would provide the most relief to the regulated community, especially to small businesses, while at the same time assuring compliance with existing rules, bans, standards, and regulations.

When I became Chairman, I continued these efforts to look not only for opportunities to reduce burdens while assuring compliance, but also to urge our staff to prioritize the activities that were likely to produce the most cost savings for those affected. This is why I detailed one of the leading staffers in the agency on this issue to my personal office to help direct CPSC's ongoing efforts. This is also why my staff and I regularly and repeatedly have solicited input from all four of my Commission colleagues as we have searched for truly viable options that will make a difference in the day-to-day business operations of children's product manufacturers while still being protective of the health of children. Unfortunately, some externally and internally driven suggestions, whether in the form of regulatory changes or guidance documents, would not assure compliance and thus would not be sufficiently protective of children's health. Therefore, as a matter of sound public policy and in the interest of protecting children, these ideas, however alluring they may be, are non-starters at this point for the CPSC scientific and technical staff and me.

As described in the Staff Report, the Commission funded some determinations projects in Fiscal Year (FY) 2014. When we considered our FY 2016 Performance Budget Request (PBR), I knew that this work had to be seen through to its completion and additional funding was needed to undertake the technical research required to produce answers on some of the more difficult but worthwhile projects in this area. This is why I ensured our FY 2016 PBR (as submitted to the Office of Management and Budget (OMB) and concurrently to Congress) included an additional \$1 million

March 17, 2015

Page 3

to our base budget to continue this important work. I was pleased the Commission approved the PBR unanimously for submission to OMB in September 2014.

As you know, on December 11, 2014, our full year FY 2015 appropriation included \$1 million to continue these burden reduction/assuring compliance activities. These funds presented an opportunity for a significant enhancement to the determination efforts (and other related projects) that started in FY 2014. This is why I was pleased the Commission, on December 12, 2014, unanimously voted to approve my amendment to the FY 2015 Operating Plan for ongoing and expanded burden reduction/assuring compliance efforts including four determination projects, further study of equivalency of widely used toy standards, and an update to our component part testing rule related to testing for heavy metals in toys.

Although, the final FY 2016 PBR unfortunately did not include the originally requested \$1 million for these activities, I assure you I maintain my commitment to efforts that will provide testing cost relief while assuring compliance with any applicable consumer product safety rule, ban, standard or regulation. The work the agency has contracted for in FY 2015 will hopefully yield results that will provide the intended burden relief while continuing to assure compliance. While there is no question that an additional \$1 million in appropriated funds in FY 2016 would allow CPSC to further this work, to avoid cutting into our core safety work the funds would need to augment our base budget request.

I plan to continue to closely monitor CPSC's advancement in this area and to stay focused on driving progress directly from my office. I will also maintain my regular engagement with stakeholders in search of new and creative ideas to address an issue for which it has proven difficult to find simple solutions. Nevertheless, consistent with the explanatory statement, I will persist in leading CPSC's efforts to follow all viable leads that do not impact our core safety work on behalf of consumers.

Should you or your staff have any questions, please do not hesitate to contact me, or Jason K. Levine, Director of the Office of Legislative Affairs, by telephone at (301) 504-7853, or by e-mail at JLevine@cpsc.gov.

Sincerely,



Elliot F. Kaye

cc: The Honorable John Thune, Chairman  
The Honorable Bill Nelson, Ranking Member  
The Honorable Jerry Moran, Chairman  
The Honorable Richard Blumenthal, Ranking Member

Transmittal letter for CPSC Report to Committees on Appropriations

March 17, 2015

Page 4

The Honorable Fred Upton, Chairman  
The Honorable Frank Pallone, Jr., Ranking Member  
The Honorable Michael Burgess, M.D., Chairman  
The Honorable Jan Schakowsky, Ranking Member  
The Honorable Robert Adler, Commissioner  
The Honorable Marietta Robinson, Commissioner  
The Honorable Ann Marie Buerkle, Commissioner  
The Honorable Joseph Mohorovic, Commissioner

Enclosure



## **Staff Report**

To the Committees on Appropriations of the House and  
Senate on the Status of CPSC Efforts to Provide Third  
Party Testing Cost Relief While Still Assuring  
Compliance

March 17, 2015

# **Report to the Committees on Appropriations of the House and Senate on the Status of CPSC Efforts to Provide Third Party Testing Cost Relief While Still Assuring Compliance**

## **1 Introduction**

The explanatory statement accompanying the House appropriations bill for Fiscal Year 2015 expressed congressional intent regarding the use of funds appropriated for the U. S. Consumer Product Safety Commission (CPSC, or Commission), as follows:

Within the amount provided, \$1,000,000 is for test burden reduction. Resolution is expected on the question of whether the CPSC, within its authority and without materially impacting its core safety work, can provide meaningful third-party testing cost relief while still assuring compliance. The CPSC is urged to articulate to the regulated community any additional data or information the CPSC needs to provide third-party testing cost relief while still assuring compliance. Upon receipt of such information, the CPSC shall inform the regulated community what, if any, steps it can take, and along what timeline, to reduce third-party testing costs while still assuring compliance. The CPSC shall report to the Committees on Appropriations of the House and Senate (Committees) on the status of this effort within 90 days of enactment.<sup>1</sup>

This document is the report required by the explanatory statement.

## **2 Burden Reduction/Assuring Compliance Activities Before Fiscal Year 2015**

The Commission took significant steps to address third party testing burden reduction while assuring compliance with any applicable consumer product safety rule, ban, standard or regulation, before the August 2011 enactment of Public Law No. 112-28 (P.L. 112-28), which amended the Consumer Product Safety Improvement Act of 2008 (CPSIA). A few of these activities included:

- Determinations Regarding Lead in Children’s Products: The Commission, in 2009, determined the 10 product categories that would never violate our lead content rules, thereby obviating the need for third party testing. (16 C.F.R. § 1500.91).
- Component Part Testing: The Commission published a rule permitting finished product certifiers to rely on component part testing, or voluntary certification of component parts by another party, to meet the requirements of third party testing and certification. (16 C.F.R. part 1109).

---

<sup>1</sup> “Consumer Product Safety Commission Salaries and Expenses.” *Congressional Record* 160:151 (December 11, 2014), p. H9738.

- Retesting Not Required for Minor Changes in ASTM Standards: The Commission determined that manufacturers of children's products would not have to re-test their products, if manufacturers have current test results showing compliance with the previous version of the standard, and the relevant tests in the two versions of the standard are unchanged, or are functionally equivalent.
- Use of ASTM F963 Screening Test to Assess Heavy Metals Content: CPSC staff allowed the ASTM screening test for heavy metal content as an option for testing, in place of the solubility test.
- Expanded Use of XRF Technology: CPSC staff increased significantly the number of materials for which x-ray fluorescence (XRF) technology, a simpler, quicker, and less expensive test than the wet chemistry test, could be used for determining lead content.
- Expanded Education Outreach Regarding Third Party Testing: CPSC staff, in particular the Small Business Ombudsman, conducted a series of seminars and webinars on implementing third party testing requirements, providing significant advice on reduced cost approaches.

In addition, CPSC staff moved to implement specific provisions of P. L. 112-28, some sought by CPSC to provide third party testing relief. For example:

- Random Sample Test Requirement Changed to Representative Sample: Before passage of P.L. 112-28, the CPSIA directed the CPSC to require samples selected for periodic testing to be chosen using random sampling techniques. Some companies found using random sampling techniques to be excessively burdensome. In response, Congress amended section 14(i)(2)(B)(ii) of the Consumer Product Safety Act to permit testing representative samples. Accordingly, the Commission modified its rule on third party testing. (16 C.F.R. § 1107(f)).
- Small Batch Manufacturers Not Required to Conduct Some Third Party Tests: P.L. 112-28 gives the Commission the flexibility to exempt small batch manufacturers from third party tests for certain covered products. Therefore, the Commission established the Small Batch Manufacturers Registry, an online mechanism by which Small Batch Manufacturers can identify themselves to obtain third party testing relief.<sup>2</sup>
- Only Accessible Component Parts Required to Be Tested for Phthalates: P.L. 112-28 limited third party testing for phthalates to plastic parts accessible to a child through normal or reasonably foreseeable use and abuse. Accordingly, the Commission modified its rule to make this change. (16 C.F.R. part 1199).
- Functional Purpose Exemption Established: P.L. 112-28 established a protocol by which petitioners may request a functional purpose exception for a product, class of product, material, or component part because meeting the 100 ppm lead content limit is not practicable or not technologically feasible. Accordingly, the Commission modified its rule to make this change. (16 C.F.R. § 1500.90).

On November 8, 2011, pursuant to P.L. 112-28, the Commission published a Request for Comments (RFC) in the *Federal Register* (76 Fed. Reg. 69596), soliciting input from the public regarding opportunities to reduce the cost of third party testing requirements consistent with assuring compliance. In addition, CPSC staff reviewed the Commission's rules on third party

---

<sup>2</sup> See <http://www.cpsc.gov/en/Business--Manufacturing/Small-Business-Resources/Small-Batch-Manufacturers-and-Third-Party-/>.

testing to see whether any modifications of the rules might provide regulatory relief. Additionally, technical staff met separately with each Commissioner's office and solicited input from Commissioners' staff to make sure that helpful ideas from all sources would be considered. This intensive, months-long inquiry resulted in a 117-page report titled, *Staff Briefing Package on Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products*, which staff submitted for Commission review on August 29, 2012.<sup>3</sup> After exploring numerous approaches, staff noted that most of the proposals considered worthy of further consideration presented substantial technical challenges and could be hampered by resource limitations.

While the staff indicated the resource constraints and challenges associated with implementing some of the recommendations in the 117-page report submitted to the Commission in August 2012, after a careful review the Commission approved in October 2012 nine projects worthy of additional exploration.<sup>4</sup> In addition, on April 4, 2013, the Commission published a Request for Information (78 Fed. Reg. 22518), soliciting input from the public on whether there are materials that can be determined not to contain lead, the prohibited phthalates, or the elements listed in ASTM F963-11 (the Toy Standard) in concentrations above their maximum limit. The Commission approved an additional determinations project in May 2014 to study whether unfinished woods and other specified natural materials can be determined not to require third party testing for the ASTM elements while assuring compliance to the Toy Standard. In addition, the CPSC held an all-day stakeholders meeting on reducing third party testing costs in April 2014.

All of the Commission work before Fiscal Year 2015, in addition to the input received from manufacturers and other stakeholders, has informed the CPSC's direction and focus on addressing third party testing costs while assuring compliance. The following status report reflects the CPSC staff's activities and plans.

### **3 CPSC Fiscal Year 2015 Operating Plan**

The Commission's Fiscal Year 2015 Operating Plan<sup>5</sup> reflects the appropriations and explanatory statement language and includes the following project:

#### **Burden reduction consistent with assuring compliance**

This project provides funding as specified by Congress in Public Law No. 113-508 for ongoing and expanded efforts toward providing meaningful reduction of third party testing costs of children's products consistent with assuring compliance with all applicable rules, regulations, bans, and standards. During the fiscal year, and within the available funding level, staff will prepare for Commission consideration a draft notice of proposed rulemaking (NPR) that addresses reduction of third party testing costs on as many of the following categories as staff determines can be accomplished consistent with assuring compliance:

- Component Part Testing Update – Heavy Metals in Toys;
- Determinations Expansion – Heavy Metals in Toys;

<sup>3</sup> See <https://www.cpsc.gov/PageFiles/129398/reduce3pt.pdf>.

<sup>4</sup> See <https://www.cpsc.gov/PageFiles/130209/3rdparty.pdf>.

<sup>5</sup> Available at: <http://www.cpsc.gov/Global/About-CPSC/Budget-and-Performance/FY2015OperatingPlannew.pdf>.

- Determinations Expansion – Phthalates;
- Fourier Transform Infrared Spectroscopy (FTIR) Study Expansion – Phthalates Testing;
- Determinations Expansion – Lead;
- Determinations Clarification – Textiles dyes/prints; and
- Equivalency – Toy Standards.

The status of these seven items is presented below. As reflected more specifically, work is anticipated to occur in Fiscal Years 2015 and 2016.

## **4 Status of Effort**

### **4.1 Component Part Testing Update – Heavy Metals in Toys**

This effort concerns 16 C.F.R. part 1109, the component part testing rule. This rule allows testing at the component part level for compliance to an applicable product safety rule when the entire product is not needed for that test. Tests for chemicals (*e.g.*, lead, phthalates, the solubility of elements listed in ASTM F963-11 for toys), and certain other mechanical or performance tests can be performed at the component part level. The regulation at 16 C.F.R. part 1109 establishes general requirements for component part testing and certification and specifies additional requirements for component part testing for lead and phthalate content. Input from the regulated community shows some uncertainty about whether component part testing can be used to assess compliance with these ASTM F963-11 requirements.

In Fiscal Year 2015, CPSC staff intends to submit to the Commission, a draft NPR to amend 16 C.F.R. part 1109, to clarify that component part testing is allowed to determine compliance with the ASTM F963-11 solubility requirements and for any other test for which the finished product is not required.

CPSC staff believes that this clarification to 16 C.F.R. part 1109 could provide some third party cost reduction while still assuring compliance.

### **4.2 Determinations Expansion – Heavy Metals in Toys**

Table 1 of the voluntary standard, ASTM F963-11,<sup>6</sup> requires that substrate materials of certain toys pass a solubility test for eight elements.<sup>7</sup> Because these toys are children’s products, third party laboratory testing is required.

A Commission determination that a material does not contain any of the eight elements, would exempt that material from required third party testing consistent with assuring compliance with the Toy Standard.

CPSC staff engaged a contractor to study the concentration of the elements in specified materials.<sup>8</sup> Based on the results of the contractor’s report, staff is finalizing

---

<sup>6</sup> This standard was made mandatory via section 106 of the CPSIA.

<sup>7</sup> The elements are antimony, arsenic, barium, cadmium, chromium, lead, mercury, and selenium.

<sup>8</sup> The materials are unfinished woods, cotton, linen, wool, silk, bamboo, beeswax, and paper. The cost of the contract is \$77,229.

recommendations for determinations, as well as conducting an economic analysis. In Fiscal Year 2015, CPSC staff intends to submit to the Commission a draft NPR and briefing package recommending that the Commission determine that certain materials do not contain any of the elements listed in Table 1 of the Toy Standard at concentrations above their solubility limit, and thus, do not require third party testing to assure compliance.

CPSC staff believes a Commission determination that certain materials do not contain any of the elements listed in Table 1 of the Toy Standard could provide some third party cost reduction while still assuring compliance.

#### **4.3 Determinations Expansion – Phthalates**

Phthalates are synthetic chemicals and are applied intentionally to materials to “plasticize,” or soften them. CPSC solicited input from the regulated community, including trade associations and manufacturers. The regulated community identified four plastics to be the most used plastic materials in children’s toys and child care articles. CPSC staff has engaged a contractor to study the production, use, and disposition of phthalates in consumer products. In addition, the contractor will research four specified plastics<sup>9</sup> to assess whether those specified plastics contain more than the maximum level of phthalates.<sup>10</sup> If the testing requirements for those plastics could be modified or eliminated, significant reductions in third party testing consistent with assuring compliance with the applicable requirements, are possible.

The contractor reports are due late in Fiscal Year 2015. Depending on the results of the studies, staff could recommend to the Commission that some or all of the four plastics be determined not to contain phthalates above the limit specified in section 108 of the CPSIA (0.1 percent, or 1,000 parts per million (ppm)), and thus, do not require third party testing for use in children’s toys and child care articles. The results of these studies may support a rationale for determinations recommendations on one or more of the four plastics in a draft NPR for Commission consideration. If the results of the studies support such rulemaking, the draft NPR could be submitted to the Commission in Fiscal Year 2016.

#### **4.4 FTIR Study Expansion – Phthalates Testing**

Based on information from manufacturers and testing laboratories, the approved test methods for phthalates are the most expensive tests to conduct for required third party testing. However, based on CPSC staff’s research, phthalates are not intentionally added to many materials. If an inexpensive method could be developed to screen out materials with no phthalates at the limit specified in section 108 of the CPSIA, numerous expensive third party tests could be avoided.

CPSC staff has drafted a multiphase solicitation seeking research and development (R&D) services to develop a phthalates analyzer to reduce the cost, overall timeframe, and labor associated with phthalate measurement. This initiative’s goal is to produce a Fourier Transform Infrared Spectroscopy (FTIR), or equivalent technology phthalate analyzer, for inexpensive, nondestructive screening of phthalates. This analyzer should be capable of

---

<sup>9</sup> The plastics are polypropylene, polyethylene, high impact polystyrene, and acrylonitrile butadiene styrene.

<sup>10</sup> This work is being conducted through two contracts at a combined cost of \$194,002.

detecting phthalates at the 0.1 percent concentration level within the subject material. Through the multiphase solicitation CPSC is articulating to the regulated community additional information the CPSC needs to provide third-party testing cost relief while still assuring compliance.

The results of this initiative are due in Fiscal Year 2016. Depending on the outcome of this initiative, CPSC staff believes that third party cost reduction could be achieved while still assuring compliance.

#### **4.5 Determinations Expansion — Lead**

Prior input from the regulated community has identified engineered woods (*e.g.*, plywood, particleboard, and medium-density fiberboard) as materials used in children's products that are unlikely to contain lead in excess of the limit in section 101 of the CPSIA (100 ppm). Based on the appropriation for Fiscal Year 2015, CPSC staff has drafted a Statement of Work and is in the process of awarding a contract task order to study the presence of lead, phthalates, and the additional elements in Table 1 of the Toy Standard in engineered woods. Children's products, toys, and child care articles made with engineered wood require third party testing for compliance to one or more of the materials listed in sections 101 (lead), 106 (the toy standard elements), or 108 (phthalates) of the CPSIA.

Depending on the findings from the contractor's report, CPSC staff plans to submit to the Commission a draft NPR recommending that the Commission determine that specific engineered wood-based materials identified in the report that do not contain one or more of the elements listed in the CPSIA or in the Toy Standard, do not require third party testing to assure compliance with the applicable children's product safety rule. Because the contractor report is due in Fiscal Year 2016, a draft NPR based on the results of the contractor's work would be submitted to the Commission in Fiscal Year 2016.

Depending on the outcome of the contractor report, CPSC staff believes that third party cost reduction while still assuring compliance could be achieved.

#### **4.6 Determinations Clarification — Textiles dyes/prints**

The regulation at 16 C.F.R. § 1500.91 lists materials that have been determined by the Commission not to contain lead at concentrations above 100 ppm. These materials do not require third party testing for use in children's products. Some members of the regulated community have expressed uncertainty about the meaning of the wording of one part of this regulation. The members seek clarification about testing exemptions for printed textiles.

CPSC staff intends to submit to the Commission a draft NPR to amend 16 C.F.R. § 1500.91 to clarify that printing technologies used to apply dyes to fabrics are included in the list of materials that do not require third party testing to determine compliance with the lead content limit. CPSC staff believes that this change would be very responsive to stakeholder input and could provide some third party cost reduction while still assuring compliance.

#### **4.7 Equivalency — Toy Standards**

The Chairman's staff, which includes a child behavioral scientist and a toxicologist, both with extensive experience with the Toy Standard, is reviewing the most widely used toy standards having a global influence (ASTM F963, EN 71, ISO 8124), to identify

commonalities and differences. Staff discussed the standards’ provisions with officials in the European Union and Health Canada, and with U.S. trade association representatives. To date, staff work does not support a finding of equivalence between these standards because of significant differences in test methods.

The Chairman’s staff also is exploring the concept of compiling an alternative standard composed of the most rigorous test methods from each toy standard. Should such an approach be feasible as a legal and political matter in each applicable country, an alternative standard could allow multinational marketing of toys with a single test protocol. Staff recognizes that the utility of a global standard depends on multiple countries accepting the standard in lieu of their own national test requirements. Staff plans to continue discussing this strategy, and innovative variations of this strategy, with interested stakeholders, especially those in the toy community, to identify potential areas for burden reduction consistent with assuring compliance.

## 5 Status of Expenditures

The \$1 million allocation for third party testing burden reduction consistent with assuring compliance has been apportioned as follows:

<b>Item</b>	<b>Description</b>	<b>Fiscal Year 2015 Budgeted Expenditures</b>
4.1	Activities related to <i>Component Part Testing Update- Heavy Metals in Toys</i>	\$32,000
4.2	Activities in support of <i>Determinations Expansion- Heavy Metals in Toys</i>	\$100,000
4.3	Additional work on <i>Determinations Expansion — Phthalates</i> (A report is expected in late fiscal year 2015.)	\$154,000
4.4	Research and Development effort for <i>FTIR Study Expansion- Phthalates Testing</i>	\$532,000
4.5	Work in support of <i>Determinations Expansion- Lead</i>	\$150,000
4.6	Work in support of <i>Determinations Clarification- Textiles dyes/prints</i>	\$32,000
4.7	Supporting work on <i>Equivalency — Toy Standards</i> (Chairman’s office)	N/A
<b>Total</b>		<b>\$1,000,000</b>