



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action Commissioners Voting by Ballot*

Commissioners Voting: Acting Chairman Nancy A. Nord
 Commissioner Thomas H. Moore

ITEM:

Stay of Enforcement of Testing and Certification Requirements
(Briefing Package dated January 30, 2009, OS No. 3583)

DECISION:

The Commission voted unanimously (2-0) to implement the stay and publish the draft *Federal Register (FR)* notice without change. The *FR* will announce a stay of applicability of certain product testing and certification requirements of section 102 of the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, pending completion of a number of ongoing and projected Commission rulemakings and scientific and technical activities necessary to fully implement those requirements and to adequately educate the regulated community on them.

Acting Chairman Nord and Commissioner Moore issued the attached statements with their votes.

For the Commission:

A handwritten signature in black ink that reads "Todd A. Stevenson".

Todd A. Stevenson
Secretary

* Ballot vote due January 30, 2009



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF ACTING CHAIRMAN NANCY NORD
ON THE STAY OF ENFORCEMENT OF CERTAIN TESTING AND CERTIFICATION REQUIREMENTS
OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008
January 30, 2009

Today the Commission voted to stay the enforcement of certain testing and certification provisions of the Consumer Product Safety Improvements Act (CPSIA) scheduled to go into effect on February 10, 2009. The stay is for one year and can be lifted only with an affirmative vote of the Commission. This stay does not extend to testing and certification required by Commission regulations issued before enactment of the CPSIA and certain third party and other testing requirements already adopted by the Commission.

Consumer safety is the foremost consideration of this agency. Nevertheless we must be mindful of the chaos and confusion that this new law has created in the marketplace. The action we are taking today puts in place a limited "time-out" so that the Commission and the Congress can address the issues with the law that have become so painfully apparent. The stay will give the CPSC time to develop and issue rules defining responsibilities of manufacturers, importers, retailers, and testing labs. It will give the Commission time to rule on exemptions and exclusions from the lead provisions and develop and put in place appropriate testing protocols. It will give staff time to develop an approach to component parts testing, given the ambiguity of the statute on this point.

It is important to clearly understand what the stay does and does not do. The stay of enforcement of the testing and certification provisions will give some temporary and limited relief to small manufacturers, home-based businesses and crafters who cannot comply with the law without incurring substantial testing costs. However, the stay does not relieve them of complying with the underlying requirements enacted by Congress and which go into effect on February 10, 2009, dealing with lead, phthalates and a number of other toy standards. Any changes to these requirements will need to be addressed by Congress.

The stay of enforcement does not provide relief for the charities, thrift shops, resellers and small retailers who are impacted especially hard by the retroactive effect of the lead ban to existing inventory. While these groups do not have a legal requirement to test their inventory, they must meet all standards enacted by Congress. Thrift shops, charities and other sellers will have to decide whether they will continue to sell children's clothing and other products that have not been tested, even though no one has suggested that they are unsafe. The retroactive nature of the lead ban has caused much of the concern that has been voiced over this law but Congress will need to address that issue; the CPSC cannot.

The CPSC is committed to implementing the Act as fairly and as efficiently as possible given the constraints of the law. I have given the same commitment to Congress in a letter, attached to this statement, which also addresses concerns raised by the law and its implementation. The action taken today provides breathing space to get in place some of the rules needed for implementation, but it should not be viewed as a full solution to the many problems that have been raised.

Attachment



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

NANCY A. NORD
ACTING CHAIRMAN

TEL: (301) 504-7901
FAX: (301) 504-0057

January 30, 2009

The Honorable Jay Rockefeller
Chairman
Commerce, Science and Transportation Committee
United States Senator
531 Hart Senate Office Building
Washington, DC 20510

The Honorable Henry Waxman
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2204 Rayburn House Office Building
Washington, DC 20515

The Honorable Bobby L. Rush
Chairman
Subcommittee on Commerce, Trade and Consumer Protection
U.S. House of Representatives
2416 Rayburn House Office Building
Washington, DC 20515

The Honorable Mark L. Pryor
Chairman
Subcommittee on Consumer Affairs, Insurance and Automotive Safety
United States Senator
255 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Rockefeller and Pryor, and Representatives Waxman and Rush:

Thank you for your recent letter to me and Commissioner Moore concerning implementation of the Consumer Product Safety Improvement Act (CPSIA). I fully agree that it is important for the U.S. Consumer Product Safety Commission (CPSC) to speak clearly and quickly on issues presented by the law that impact both consumers and businesses. The staff of this agency is working diligently to implement this law in strict accordance with the priorities established by Congress, even though the law's complexity and timetable make this an extraordinarily

difficult challenge. *Nevertheless, to date, we have met every deadline imposed by Congress.* The purpose of this letter is to give you an overview of Commission activities to implement the CPSIA over the past six months and to address the specific points raised in your letter.

CPSC Activities since CPSIA Enactment

In the six months since the new law was enacted, the Commission has proposed or promulgated 14 new rules related to implementation of the law. We have held public briefings for stakeholders to help them understand their obligations under the law. We have held training sessions with thousands of domestic and foreign manufacturers to educate them on the requirements of the Act. We have created a special web site devoted to posting information and answering questions about the Act, and responded to thousands of inquiries from affected manufacturers, retailers, resellers and consumers.

The CPSIA is not the only new law we are implementing. The Pool and Spa Safety Act and the Children's Gasoline Burn Prevention Act went into effect this fall as well and these new laws, especially the Pool and Spa Safety Act which puts the hundreds of thousands of public swimming pools under our jurisdiction, have consumed a great deal of staff time.

All this activity is on top of an already full safety agenda. In the six months since enactment, we have conducted well over 100 safety recalls, issued subpoenas, announced civil penalties, and conducted national educational campaigns on such subjects as smoke alarm maintenance, back-to-school safety, safety in the nursery, holiday decorating hazards and generator safety. Very importantly, we have initiated an investigation into safety issues presented by recreational off-highway vehicles, initiated a rulemaking related to crib durability issues, and are finishing work on the furniture flammability rule.

While these new laws have doubled, at minimum, the workload of this agency, Congress has not provided any additional resources for the agency, which is stretched to capacity. In August we asked for an increase in our budget, but Congress has not acted on this request. The CPSC has been directed to work on an expanding menu of issues without any additional funds from the Congress. Against this background, let me address the specific issues raised in your letter.

Exclusions and Exemptions

While we have met every deadline to date, the timelines in the law are proving to be unrealistic, and we will not be able to continue at this pace without a real risk of promulgating regulations that have not been thoroughly considered. You have stressed that we need to move forward quickly on defining exclusions from the lead content provisions of the law, especially with respect to children's books and apparel. As you know, the law's exclusion process for products that do not present health or safety risks is quite prescriptive and gives us little administrative flexibility. However, within that constrained framework, we have proposed, for public comment, rules for certain exclusions and exemptions as well as a process for determining exclusions in the future. The staff will review the comments received and make recommendations to the Commission for a final rule. As you point out, the staff recommendations must be based on sound science. This is a process that requires critical analysis, informed and improved by input from the public. Although the staff has been directed to move as quickly as possible to complete its work, short-circuiting the rulemaking process gives short shrift to the analytical discipline contemplated by the statute.

You note that it is unlikely that children's books and fabrics contain lead and request that we work with these industries "to ensure efficient and effective enforcement of the law." I believe you are aware that we have been doing just that. You should also be aware that we have received requests from other industries that, on their face, also make good cases for exclusions or exemptions. We are dealing with all these requests in a systematic and comprehensive way so that our final rule does result in "efficient and effective enforcement of the law." This rulemaking, however, cannot be completed by February 10.

Guidance to Thrift Stores

Many, many charities, thrift stores, resellers and small retail establishments have contacted us concerning the retroactive effect of the lead provisions of the law. While we have made clear to them that testing and certification by retailers is not required, they do still need to comply with the law. However, contrary to your suggestion, it is unlikely that an exclusion for dyed and undyed fabrics, assuming the Commission grants it, will address the many concerns that have been voiced by thrift stores since virtually all children's clothing sold at these stores have fasteners, zippers, buttons, or trims, and, hence, would not be covered by the exclusion.

The retroactive nature of the law does pose serious problems for thrift stores and charities who now must decide whether they can continue to sell children's clothing, tricycles, bikes and similar products. This problem is real and will not go away by "education and outreach." The bigger safety issue is the sale of recalled products and toys that violate our small parts regulations. This is where thrift stores should be directing their attention in order to advance safety, and as you know, we clearly have encouraged them to do that.

Component Part Testing

I appreciate your apparent endorsement of component part testing. This is a complex issue that is not clearly answered by the law. It is critical that we develop component part testing requirements in a way that adds clarity, eliminates some unnecessary testing and provides limited relief to product sellers, especially small manufacturers. We are moving forward as quickly as possible but will not be able to complete this work by February 10.

Education and Outreach

The CPSC has made unprecedented efforts to educate stakeholders about the obligations and requirements of the CPSIA. We have held six all-day meetings on implementation issues presented by the law and have met with many groups, including, among others, thrift stores, publishers, and apparel manufacturers, in an effort to give clarity to the law. CPSC staff has worked diligently to respond to the thousands of inquiries from manufacturers, importers and others regarding the requirements of the CPSIA. We have posted a section-by-section summary of the Act and responses to FAQ's related to subjects as varied as age factors; testing protocols and technologies; timetables and effective dates; component parts; accessibility; certification requirements; and particular products such as furniture, playground equipment, pens, craft and art materials, video games, fabrics and wearing apparel, to name just a few.

We have received many comments and compliments from stakeholders about the quality and quantity of information on our web site. In order to make sure that the web site is as useful as possible, I have directed the staff to review it and, as needed, reorganize it so that it provides the best possible resource for stakeholders. You have my commitment that we will continue to reach out to stakeholders as we work through the many issues presented by the Act.

Additional Actions Needed

Even though the CPSC staff continues to work at full throttle to be responsive to the hundreds of questions and concerns that daily pour into the agency, we are struggling, and impacted industries are struggling, with the requirements of the CPSIA as they relate to various products, such as bicycles, car seats, shoes and books, that may or may not have been intended to be so broadly impacted by the legislation. We are also working hard to find common sense solutions to some of the scenarios that have been raised in cases where public health is not endangered. As we work through these many issues, the staff has found that the requirements of the new law are inflexible, are not sequenced to maximize effectiveness, and generally limit our options. Action by both the Commission and the Congress is needed to address these issues.

With respect to action by the CPSC to minimize the chaos in the marketplace, the Commission has voted today to stay enforcement of certain testing and certification requirements of Section 102 of the CPSIA. This stay will remain in effect until February 10, 2010, at which time the Commission will consider whether to terminate the stay. The Commission believes that the stay will give us time to promulgate rules addressing some of the confusion over the meaning of the law, address appropriate exclusions and exemptions, and put appropriate testing protocols in place. We anticipate that the stay of enforcement of the testing and certification requirements will give some temporary relief to small manufacturers and crafters who cannot comply with the law without incurring substantial testing costs. This stay does not change the underlying standards enacted by Congress, including the toy standard, the phthalates standard or the retroactive lead ban. It especially should be emphasized that because we cannot change the retroactive effect of the lead ban to existing inventory, this stay will not provide relief to the charities, thrift stores and other small retailers who must still meet the standards enacted by Congress. To effect this change, Congress will need to amend the statute.

The CPSC, under my leadership, is committed to implementing the Act in a fair and efficient manner. However, we are finding that there are problems and issues that were not discussed, and, presumably, not contemplated, by the Congress. The Act gives the agency neither the flexibility nor the resources it needs to deal with many of the problems referenced in this letter. Consequently, addressing these issues should be a priority of the 111th Congress, and I look forward to discussing this needed action at your earliest convenience.

Sincerely,



Nancy A. Nord
Acting Chairman

cc: Commissioner Thomas Hill Moore



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

STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE STAY OF ENFORCEMENT OF CERTAIN OF THE TESTING AND
CERTIFICATION REQUIREMENTS OF THE CONSUMER PRODUCT SAFETY
IMPROVEMENT ACT OF 2008
January 30, 2009

The Consumer Product Safety Improvement Act (CPSIA) embodies a bold and, for some, painful shift in how product safety is assured in this country. Prior to the high profile recalls of 2007 and 2008, many consumers wrongly assumed that products, particularly ones designed for children, were pre-tested by the government before they entered the marketplace. They were shocked to learn that not only was there no pre-market testing by the government, but many products were not even adequately tested by the manufacturers of the products. Consumer outrage at this state of affairs made Congress decide that, at least for children's products, manufacturers had to have their products tested by third party testing laboratories and certify that their products met all applicable safety standards. This provision applied to all manufacturers, regardless of their size. Now it is the business community's turn to be shocked.

The Consumer Product Safety Commission's (CPSC) safety requirements have always applied to all manufacturers of children's products, even the small crafter who makes products at home. But until the enactment of the CPSIA, the government had not required all manufacturers to affirmatively prove that their products complied with those requirements by having them tested. From the outpouring of letters, emails and phone calls to the agency, it is clear that many smaller manufacturers did not know that there were any federal standards that applied to their products, had no idea how to have their products tested and may never have heard of the CPSC, or if they had, did not think this agency had any relevance to their business. Their reaction made a number of things clear:

- That the new electronic media channels, particularly the blogs, are tremendously useful tools for disseminating important information to small businesses, but that they can also be a channel for spreading confusing misinformation,
- That the Commission has not done enough to make the home crafters and other smaller businesses aware of their pre-existing obligations under the law,
- That the new law (CPSIA) has done what the Commission had not been able to do, get the attention of many, many of these smaller manufacturers with respect to their responsibility to assure the safety of their products, and
- That the vast majority of these smaller businesses, while they may not know the specific rules that apply to their products, are likely making safe products, or they would have come to our attention.

Many of the smaller businesses do have legitimate concerns about how they will comply with the new law and the cost of the new testing and certification requirements. However, their fears are being fueled to some extent by others who, through an aggressive misinformation campaign, are trying to create a groundswell of panic that will lead to the repeal of the testing and certification requirement entirely.

The goal of the testing and certification provision is a sound one: to make sure every manufacturer of a children's product, no matter their size, regardless of where they are located, knows the standards that apply to their products and takes the appropriate steps to ensure compliance with those standards *before* the products are put into the hands of consumers. The closer we get to that goal, the fewer recalls our agency will have to undertake and the fewer injuries we will see to children.

Therefore, it is not an easy thing for me to vote to support a delay in enforcing the testing and certification requirements, but I think there are legitimate reasons for doing so. One important reason is to give the larger manufacturers and retailers an opportunity to create a market for pre-tested components—the kinds of things many large companies use in their products, but that are of particular interest to small crafters. Just one example are sewing components like zippers, buttons and snaps, which are the items in children's apparel most likely not to meet the new lead content limits.

Major retailers appear to be on track to comply with the new law's requirements. They are demanding complying components from their suppliers and it is reasonable to think that their demands will lead to a supply of pre-tested and certified components that will be available for the small home-based manufacturers. These components may first be available in those retailers' crafting or notions departments. However, I foresee a huge market for craft and sewing and other components used by smaller manufacturers in making their products. There will be businesses that will supply that market, but they need time to develop.

The Commission also needs time to determine whether and under what circumstances component testing could be used as a surrogate for whole product testing. Assuming such an avenue is legally and practicably supportable, it could provide businesses (large and small alike) with an alternative to testing the finished product through the use of component parts already pre-tested and certified by the component part maker. While the Commission may not have the authority to require component part makers to test and certify their products, the demands of their customers will force them to bring their products into compliance. Some component manufacturers also need time to adjust their manufacturing processes to eliminate the random failures of their products to certain of the safety standards, which some companies are reporting.

Small businesses also need more guidance from the Commission. We are working on filling that need, but the additional time that this stay will provide will enable us to give common sense information to help the small crafters feel comfortable in making and marketing their products without fear of violating the law.

This stay of enforcement does not stop the testing and certification requirements from going into effect, nor does it suspend the underlying product safety requirements. Thus, if during the stay period a company does not test and certify, our agency will not take enforcement action against the company on that ground. However, if the company puts a violative product into the market and that product causes injury to a child, rest assured that we will take whatever action is necessary to protect the public. This may seem like a Catch 22 to some people, but it really will not be for most of the smaller manufacturers who are so worried about the law's application. If they have a history of making products that have caused no harm, as so many assure us in their communications, then they have no reason to fear this interim period. The Commission is not interested in putting small manufacturers out of business; we just want them to make safety one of their guiding principles. If there is one message a small manufacturer should take from the Commission's action today it is this: If you have been making products without receiving any safety-related complaints, you should go on making and selling your products. You should, however, begin to look for and demand that the components you buy are certified as not containing lead or banned phthalates, as your demands can help to bring the component market into compliance. You also must familiarize yourself with all of your obligations under the various laws this agency administers. It is my hope that during this stay our agency will provide **detailed** guidance, particularly for the home-based manufacturers, on how to comply with requirements of the law.

I would expect the companies that can do testing and certification, and who have positioned themselves to comply with the law, will do so regardless of the stay. They should not use this stay as an excuse to delay what they are already doing or have planned to do. It is their compliance that will help develop the market for pre-tested, certified components. While the agency was not able to craft a workable small business exemption, this stay will help small businesses adjust to the new world of product safety. I do not foresee voting for an extension of this stay, so it behooves all manufacturers to prepare for the February 10, 2010 date when the testing and certification requirements will be enforced.

I am aware that some people will be unhappy with this stay, but I fear that without it, the forces that would like to do away with the testing and certification requirements will use the panic they have helped create to accomplish their goal. It should also be understood by all that although the Commission's staff is extremely capable, they are few in number and they must be given adequate time to research, solicit, analyze, and develop all the information and data pertinent to these issues. It is this work that will provide the underpinning for sound recommendations to the Commission on future courses of actions with respect to implementing, and providing guidance for the implementation of, the requirements of the CPSIA.

It is my hope that Congress will act quickly to give our agency the additional funding we need to enable us to move forward swiftly and aggressively to implement and enforce the CPSIA and to provide businesses with the guidance they have been seeking.