



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

COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE EXTENSION OF THE
STAY OF ENFORCEMENT ON THE TESTING AND CERTIFICATION OF CERTAIN
CHILDREN'S PRODUCTS FOR TOTAL LEAD CONTENT

February 2, 2011

On January 31, 2011, I voted with a majority of Commissioners to extend the stay of enforcement pertaining to total lead content in children's products (except for metal components of children's metal jewelry), and certain related products, until December 31, 2011. Extending the stay for an additional 11 months is an important step toward fulfilling the Commission's commitment to allow component parts testing and certification to become a viable compliance alternative for manufacturers *before* third party testing and certification for lead content in most children's products becomes mandatory. Third party testing imposes a financial burden that many manufacturers, and particularly small ones, may never be able to bear. But if there is any hope for their survival, it is essential that the stay not be lifted before there is at least an opportunity for certified component parts to form the basis for the final product certifications of small manufacturers. I am therefore thankful that four commissions were able to reach a fair compromise extending the stay for an additional 11 months.

While I am pleased the stay has been extended to December 31, 2011, I believe it is important to clarify my position regarding the extension. I continue to maintain my long held view that the stay should be continued until one year after finalization of the Commission's rulemaking on both Testing and Labeling Pertaining to Product Certification (NPR at 75 FR 28366), and Conditions and Requirements for Testing Component Parts of Consumer Products (NPR at 75 FR 28208). These proposed rules – referred to by the CPSC as the "15-month rule" and the "component testing rule" -- address, *inter alia*, the protocols that will govern third-party testing of children's products, including random sampling methods and the availability of component parts testing as a means to encourage compliance further up the supply chain and to provide manufacturers with more options. The Commission is just beginning to consider the final versions of these rules.

The Commission's previous stays on lead content testing were implemented principally based on the recognition that manufacturers would be unable to comply with the third-party testing requirement until both the 15-month rule and the component testing rule had been in effect for a reasonable period of time. This link between finalization of the 15-month and component testing rules and the lifting of the stay was recognized by Commissioners of both parties. As explained in the Commission's February 2009 Federal Register notice, the stay on third-party testing of children's products for lead content was first implemented in response to "confusion as to . . . whether testing to demonstrate compliance must be conducted on the final product rather than on

its parts prior to assembly or manufacture . . . and what sort of certificate must be issued and by whom.” 74 FR 6396 (February 9, 2009). The stay was thus intended to afford the Commission time to promulgate new rules addressing, *inter alia*, “production testing of children’s products subject to third party testing and certification . . . including random sampling protocols”, so that “the right tests are run on the right products without unnecessary and expensive testing.”

During the December 2009 public briefings to consider whether to lift the original stay, CPSC staff reported that the apparel component manufacturing sector was reluctant to initiate component testing while the breadth of the requirement remains unsettled, and that smaller manufacturers were unable to obtain component parts testing because suppliers were reluctant to undertake the tests until the final rules for component testing and certification are in place. In the face of this evidence, Chairman Tenenbaum acknowledged that she “would never agree to lift the stay” until the 15-month and component parts rules are in place. She voted to extend the stay “in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new requirements.” Commissioner Moore also recognized the need to “give the small manufacturers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead compliant materials.” Commissioner Adler has similarly identified the link between a company’s ability to “rely on component suppliers for compliance with the law” and its potential “to plan production and control costs in a reasonable manner.”¹

Consistent with the views of all five Commissioners, the Commission “determined that testing of children’s products for lead content by a recognized third party testing laboratory and certification based upon that testing should begin on the products manufactured after February 10, 2011 *to allow component testing to form the basis for certifications for lead content . . .*” 74 FR 68588 (December 28, 2009) (emphasis supplied).

A year has now passed, during which the Commission published proposed 15-month and component testing rules. But in the absence of *final* 15-month and component testing rules, component testing still cannot form the basis for certifications for lead content. Rather, small manufacturers continue to report to the CPSC that component suppliers are refusing to test altogether or are refusing to supply certifications, and that certifications are unavailable from the retail outlets where many small manufacturers obtain component parts. This has occurred because publication of the proposed rules has not provided the regulated community with any certainty regarding the content of the final rules. Indeed, the CPSC’s record of rulemaking over the past year demonstrates that a final rule can change materially from its proposed version and can impose more onerous requirements. It is therefore not surprising that component parts suppliers remain unwilling to incur the expense of providing certifications under a proposed regime that may change substantially before it is finalized. At a minimum then, the final 15-month and component testing rules must be published before the stay is lifted. Otherwise, manufacturers will be in the untenable position of trying to comply with the proposed rule, while anticipating a potentially much different final rule. This would provide manufacturers with insufficient time within which to modify their compliance management processes once the final rule was issued, and would cause needless disruption to business planning, supply chain

¹ Attached as an appendix to this statement is a more detailed Background on Stays of Enforcement of Third Party Testing and Certification for Lead in Children’s Products.

management, test lab contracting, and other aspects of product manufacturing, due to the rapidly changing requirements.

Under these circumstances, yesterday's vote to continue the stay is consistent with the stated views of all five Commissioners, and I am pleased that a majority has voted to extend the stay for an additional 11 months. I hope and expect that the final 15-month and component testing rules will be published by the end of July 2011, thereby giving industry six months to prepare for compliance before the stay is lifted. But it remains my view that the Commission should continue the stay of enforcement on third-party testing and certification of lead content in most children's products until one year after publication of final 15-month and component testing rules. Considering the lead time necessary for manufacturers between design and production, allowing one year after the two testing rules are finalized is necessary to afford the regulated community time to come into compliance. Otherwise, it may be too late for many small manufacturers to benefit from the component testing rule. Finally, extending the stay for a full year after finalization of the 15 month and component parts rules would comport with the expectation created among regulated industries through the Commissioners' and the Commission's public statements that the stay will not be lifted before component testing becomes a viable compliance alternative for small businesses. Yesterday's vote provides an additional 11 months to work toward achieving that goal.

**Background on Stay of Enforcement of Third Party Testing
and Certification for Lead in Children’s Products**

First implemented by Federal Register notice at 74 FR 6396-01 (February 9, 2009)

- Effective until February 10, 2010 at which time Commission intended to vote whether to terminate or continue the stay
- Stay implemented, among other reasons:
 - In response to “confusion as to . . . whether testing to demonstrate compliance must be conducted on the final product rather than on its parts prior to assembly or manufacture . . . and what sort of certificate must be issued and by whom.”
 - To allow time for new rules addressing, inter alia, “production testing of children’s products subject to third party testing and certification . . . including random sampling protocols”, so that “the right tests are run on the right products without unnecessary and expensive testing”
- Lifting anticipated “when these rules are finalized and our ongoing stakeholder information and education efforts have been in place for sufficient time for the new requirements to become known and understood within the regulated community.”

December 2, 2009, Commission Public Briefing/Meeting to Address Commission Action on Existing Stay of Testing and Certification

- CPSC staff testifies that apparel component manufacturing sector contacts have informed him that they recognize the value but are reluctant to initiate component testing while the breadth of the requirement remains unsettled, and that smaller manufacturers have reported to him that suppliers are reluctant to undertake component testing until they see the final rule for component testing and certification.
- When pressed by Adler to advise whether he believes the stay should not be lifted until the final rule on component testing is adopted, CPSC staff opines that it is a factor that should be considered by the Commission.
- CPSC staff testifies that problem is greatest for small manufacturers because testing costs are fixed and cannot be spread by smaller manufacturers over a sufficiently large number of products to avoid competitive damage from passing on costs to consumer.
- Adler suggests alleviating burden on “low volume, small revenue” companies, rather than focusing on particular products made in small batches, as high revenue companies also produce niche products.

December 16, 2009, Commission Public Briefing/Meeting to Address Pending Decision on Existing Stay of Testing and Certification

- Northup proposes the Commission lift the stay on enforcement of third-party testing and certification of lead in children’s products, without requiring another vote, on the date that is six months after the 15-month rule is effective.

- Tenenbaum concedes that “none of us are going to lift the stay if . . . the 15-month rule is not completed . . . so that industry and everyone else knows how to comply with this.” But she prefers a date certain “when we anticipate all the rules being finished.”
- Nord counters that we cannot predict when rulemaking will end and that component testing has to be working in the marketplace before the stay can be lifted.
- Adler agrees 15 month rule should be in effect before stay is lifted.
- Tenenbaum opines that the Commission cannot lift the stay without the 15-month rule because component parts are essential to manufacturers in terms of testing responsibility, but believes a date certain is preferable. “If at that time the 15 month rule is not in place then we would extend the stay again.” She later reiterates that she “would never agree to lift the stay until the 15-month rule were [sic] in place.”
- Nord asks what will happen if a new fixed date for lifting the stay arrives and the 15 month rule is not in place. Tenenbaum responds: “Well, then we would vote to extend the stay.” Inez continues that she “realize[s] the 15 month rule is crucial for everyone to have before certification and testing.” But she prefers to keep the two issues separate for voting purposes.

Continued until February 10, 2011, by Federal Register notice at 74 FR 68588 (December 28, 2009)

- “With regard to lead content, the Commission has determined that testing of children’s products for lead content by a recognized third party testing laboratory and certification based upon that testing should begin on the products manufactured after February 10, 2011 to allow component testing to form the basis for certifications for lead content . . .”

Tenenbaum’s Statement on the Stay Extension (December 17, 2009)

- “The extension of the stay was needed in order to give the agency more time to promulgate rules important to the continued implementation of the CPSIA and for the agency to educate our stakeholders on the requirements of those new rules.
- “I voted to extend the stay . . . in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new requirements.”

Moore’s Statement on the Stay Extension (December 17, 2009)

- “[W]e cannot be certain how long it will take for a secondary market in lead-compliant components to develop and I do want to give the small manufacturers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead compliant materials.”
- “For smaller manufacturers, the enforcement policy on component testing will relieve them of much of the testing burden once the stay is lifted . . .”

Adler’s Statement on the Stay Extension (December 17, 2009)

- “I believe an extension of another six months is necessary to permit market adjustments, especially with respect to the testing and certification by the suppliers of components.”

- Adler no longer believes extension of the stay should be linked to the effective date of the 15-month rule. This is because, inter alia, it is likely the 15-month rule may still be under consideration upon the expiration of the stay, and The Interim Enforcement Policy on Component Testing and Certification (of Lead and Content) that was issued December 16, 2009, “will address the largest set of concerns raised by the manufacturing community regarding testing and certification. Now that companies know they can rely on component suppliers for compliance with the law, they should be able to plan production and control costs in a reasonable manner.”

Northup’s Statement on the Stay Extension (December 17, 2009)

- Believes stay should be kept in place until well after the 15-month rule goes into effect, among other reasons, because otherwise:
 - Companies would have to change their compliance management processes twice in quick succession and thereby incur additional retraining expenses;
 - It would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing; and
 - The Commission could unnecessarily put small companies out of business before Congress’ impending consideration of possible statutory changes, a number of which could provide relief to domestic small businesses that make safe products but would not be able to afford to comply with CPSIA’s testing and certification requirements.
- Agreed to fixed calendar date because:
 - She believes the 15-month rule can be completed in time to give the regulated community approximately six months to prepare for it;
 - The new deadline gives Congress one more year to fix the CPSIA; and
 - February 2011 is better than the August 2010 alternative that would otherwise have received majority support.
- Anticipates that the extension to February 10, 2011 “should” result in the 15-month rule having “been issued well before the time the stay lifts.”

Nord’s Statement on the Stay Extension (December 17, 2009)

- Believes rule addressing what products must be tested, when testing is required and how it is to be conducted must be finalized and given a chance to be absorbed by the impacted industries before the stay is lifted.
- Component testing offers the potential to reduce the cost and burden of third party testing requirements, but the rules should be in place and the Commission should assess whether component testing actually works to relieve the significant cost burdens on small manufacturers and crafters before the stay is lifted.
- The 15-month rule must be adopted and industry must have adequate time to implement it before the stay is lifted.