



January 11, 2010

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland, 20814

RE: NOVEMBER 13, 2009 FEDERAL REGISTER NOTICE OF WORKSHOP ON PRODUCT TESTING REQUEST FOR COMMENTS (74 FR 58611)

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association representing the apparel and footwear industry and its suppliers – I am writing in response to the request for comments by the Consumer Product Safety Commission (CPSC or “the Commission”) regarding Section 14(d)(2)(B) of the Consumer Product Safety Act (CPSA) (15 U.S.C. § 2063(a)(2)) (the “Testing Rulemaking”), as amended by the Consumer Product Safety Improvement Act of 2008 (CPSIA), requiring the CPSC to establish protocols and standards for:

- Ensuring that a children’s product tested for compliance with a children’s product safety rule is subject to testing periodically and when there has been a material change in the product’s design or manufacturing process, including the sourcing of component parts;
- Testing of random samples;
- Verifying that a children’s product tested by a conformity assessment body complies with applicable children’s product safety rules; and
- Safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler.

AAFA and its members are very supportive of numerous provisions set forth in the Commission’s recent rulemakings, guidance documents and decisions pertaining to consumer product testing including key elements of:

- the November 3, 2009 “Guidance Document: Testing & Certification Requirements under the CPSIA,”
- the October 29, 2009 “Statement of Policy: Testing & Certification of Lead Content in Children’s Products,”
- the December 28, 2009 “Interim Enforcement Policy on Component Testing & Certifications of Children’s Products & Other Consumer Products to the August 14, 2009 Lead Limits,” and
- the CPSC decision finalized on December 28, 2009 to continue the stay of testing and certification.

Combined, these Commission’s actions have continued to improve product safety assurance while significantly alleviating much of the extraneous costs and burdens incurred by companies. Specifically, AAFA strongly supports the move towards component testing – a crucial element to a sustainable, practical and reasonable product testing regime. Furthermore, the CPSC’s decision to extend the stay of testing and certification for certain standards was important for industry as many of the testing standards have yet to be fully defined and worked through by both the Commission as well as industry.

Ultimately, the Testing Rulemaking should reflect and expand on the recent testing rulemakings and guidance documents. Any significant changes that result in a more restrictive testing policy will result in significant business disruption and should not be considered. Continued flexibility is crucial to ensure improved product safety while accommodating the different size businesses, supply chains and products that are covered in such a broad rulemaking. Furthermore, as with any new rule, transparency, clarity and continued education and guidance from the CPSC are all extremely important elements to successful implementation.

Our comments below are geared to answer some of the specific questions raised in the subject Federal Register notice.

On a per-product basis, how does a manufacturer / importer determine what is “reasonable?”

A “reasonable” testing program provides some level of certainty that the product or material complies with the underlying product safety standard. However, that level of certainty and what is “reasonable” will vary significantly from manufacturer to manufacturer based on the products, the applicable standards, the manufacturer’s supply chain, the size of the manufacturer, geographic location of the supply chain, the manufacturer’s resources, etc. It is impossible to establish a “one sized fits all” approach in this area. For an individual who sews children’s clothes at home to sell at a local crafts fair, “reasonable” may be going to an arts & crafts store and seeing a certificate on a zipper stating that the zipper complies with applicable product safety regulations. Similarly for a manufacturer which has not separately imposed chemical content requirements on its suppliers (e.g. y way of a Restricted Substances List like the one AAFA provides for the apparel and footwear industry) “reasonable” may entail a more involved quality control process than for a manufacturer which has imposed such requirements. Therefore, the CPSC should be flexible in defining “reasonable” and educate manufacturers about the regulations and on various options available to them that would put them in compliance with the CPSIA requirements. Manufacturers know their products best and are in the best position to determine what is reasonable.

A “reasonable testing program” must also give the manufacturer discretion to determine what is a “representative” test. “Representative” does not need to be the same as the final product sold on the shelves. In the case of chemical limits, testing raw materials will give a manufacturer reasonable assurance that the product complies with the applicable product safety standard. Furthermore, enabling raw material testing will result in the lowest cost of testing for the supply chain. To help stakeholders, the CPSC should continue to provide examples of what does and does not constitute “representative.” Furthermore, the CPSC should work with all accredited third party testing facilities to make sure that the tests across industry are standardized and all testing facilities interpret “representative” and “reasonable” similarly.

Should the potential hazard (either the severity or the probability of occurrence) be considered in determining a reasonable testing program?

Absolutely. Risk should be the central factor in determining a reasonable testing program. Products whose hazards may result in death may need to be tested more often than products whose hazards do not pose a serious risk of injury. Furthermore, in the case of products subject to chemical limits, components that may not be inaccessible but are not likely to be touched or mouthed often by a child (the sole of a shoe for example – particularly for older children) are much less potential concern and should not be subject to as frequent testing as products or components that are more likely or even intended to be touched or mouthed (like a pacifier). The CPSC should require an initial test of the material or product and a test whenever there is a material change and should leave frequency of testing to the discretion of the manufacturers. In addition the CPSC should provide suggested guidance for manufacturers on risk factors to take into account when determining the frequency of testing as is the case in the Flammable Fabrics Act (FFA) (16 C.F.R. 1610.37(c)(2)) .

Another consideration that the CPSC should incorporate into the reasonable testing program is the “risk” that the product could fail the applicable safety standard. As with risk of injury, risk of failure may be

difficult and time consuming to regulate on a product-by-product or material-by-material basis. Again, the FFA provides a helpful example. The CPSC should reference the FFA for language to help incorporate risk while maintaining flexibility. While ultimately the FFA leaves frequency of testing and sample size to the discretion of the manufacturer, 16 C.F.R. 1610.62(b)(1) lists different types of products and fabrics that have shown variability in test results and have also been involved in recalls. As a result, a single test for these fabrics is insufficient. In 16 C.F.R. 1610.62(b)(2), the CPSC states:

A person seeking to evaluate garments made of such materials should assure that the program tests a sufficient number of samples to provide adequate assurance that such textile products comply with the general wearing apparel standard. The number of samples to be tested, and the corresponding degree of confidence that products tested will comply, are to be specified by the individual designing the test program. However, in assessing the reasonableness of a test program, the Commission staff will specifically consider the degree of confidence that the program provides.

To illustrate this, an example of a “reasonable testing program” for a manufacturer which makes hundreds of thousands of children’s plain cotton tee-shirts may simply be a supplier’s Continuing Guaranty (based on a third party test) stating that the material used in the tee-shirt complies with the FFA. Assuming the material never changes, the manufacturer does not need to retest for flammability until the Continuing Guaranty expires. To ensure compliance, a manufacturer which uses fabrics that are listed in 16 C.F.R. 1610.62(b)(1), that may be inherently more flammable or that require finishes to pass flammability standards may want to test the fabric periodically before the Continuing Guaranty expires to ensure compliance. Regardless, the CPSC should allow flexibility and recognize that manufacturers will need to use a case-by-case approach for determining where risk of failure plays into a reasonable testing program.

Please discuss whether the five elements are appropriate for all manufacturers and whether additional requirements or modifications should be made.

1. *Product specifications that describe the consumer product and list the safety rules, standards, etc., with which the product must comply. The product specification should include a complete description of the product and any other information, including, but not limited to, a bill of materials, parts listing, raw material selection and sourcing, and/or model names or numbers of items necessary to describe the product and differentiate it from other products.*

This element is excessive for the purposes of the General Conformity Certification (GCC) as required by Section 102 of the CPSIA. The manufacturer should include information that enables the manufacturer to link the GCC and test reports to the corresponding product. Any additional information such as a bill of materials, parts listing, raw material section and sourcing information could be maintained by the manufacturer **as necessary** to enable the manufacturer trace test reports or other documents to various components included in the product. However, this record keeping information should be distinguished from information that will be required on the GCC. The CPSC has similarly distinguished certification and record keeping requirements in other statutes like the FFA.

2. *Certification tests which are performed on samples of the manufacturer’s consumer product to demonstrate that the product is capable of passing the tests prescribed by the standard.*

For products and materials subject to the Flammable Fabrics Act, the reasonable testing requirements and the Continuing Guaranty system should not be changed by the pending testing rulemaking. The CPSC must make this clear in the rulemaking.

3. *A production testing plan which describes the tests that must be performed and the testing intervals to provide reasonable assurance that the products as produced meet all applicable safety rules.*

The CPSC should recognize that tests are not the only answer for supply chain assurance. Instead, the language should be changed to, “A production testing plan **or quality assurance program** which describes the tests **and process controls** that must be performed...”

We also encourage the CPSC to keep production process assurance programs flexible to accommodate different types of standards, supply chains and business resources. For instance, some standards may require more testing and process controls while other standards may not require as much. Products subject to the phthalate standard may not require as much (or any) testing or production process control if the supplier knows all the chemicals that go into the products and does not use phthalates or if the materials used in the product are known to never or even rarely use phthalates. Phthalates are chemicals that are intentionally added and so a manufacturer should be able to rely on an initial test, a test whenever there is a material change and supplier guarantee that phthalates will not be added to the material. No periodic testing should be required in this situation. Lead, an element that can be unintentionally added into a material, may require more testing or process controls to ensure the element is not accidentally introduced into the manufacturing process. The same may be said for fabrics that are not at risk of violating the FFA like those that have consistently shown to be class 1 under the FFA and do not have any additional finishes vs. fabrics that are class 2 or have more complex finishing process (which could change the flammability of the fabric).

That said, the CPSC should still educate manufacturers and offer suggestions on situations where a more or less stringent testing program with regards to the number of samples and frequency of testing should be used because of risk of injury or risk of failure. A reasonable testing program for a child’s shoe may be more complex simply because there are more components involved (sometimes up to 30). The manufacturer may receive compliant components from suppliers that may or may not need testing for lead. After the initial third party tests, a manufacturer may consider the following examples as part of a reasonable testing program:

- In the case of lead, periodically using an XRF gun to screen materials,
- Auditing its factories to ensure good process controls are in place,
- Sending in random samples periodically for third party testing,
- Checking databases to see if other companies have had problems with the same components,
- Educating the supply chain,
- Using a Restricted Substances List like the one AAFA maintains to monitor chemical regulations and keep track of chemicals used in the products,
- Joining a trade association and becoming an active member in product safety discussions, seminars, CPSC meetings, etc.

We also highly recommend and support approving XRF testing as a method for manufacturers to conduct periodic testing for lead and lead paint. While not dispositive, in our experience, when used appropriately, certain XRF technology has proven to be very effective at testing surface coatings - even more so than wet testing in some circumstances. XRF is also effective at testing substances such as inks which essentially replace the dye in fibers. These are tested as substrate materials since the substance cannot be scraped off. XRF is a better method of testing these types of materials as it can isolate the material for testing. It is also preferable because XRF is relatively inexpensive, and it is non-destructive; both of these are important considerations for small manufacturers. We believe XRF technology should be recognized as a viable testing methodology, particularly in the cases where the CPSC has not established official test methods for particular products.

4. A remedial action plan which must be employed whenever samples of the consumer product or results from any other tests used to assess compliance yield unacceptable or failing test results.

How a manufacturer handles failing components or products will be based on a number of variable factors like their supply chains, the failing component, the level that the component has already been integrated in the product, the design of the product, etc. Therefore, while a manufacturer can to some extent set up a remedial action plan, when they encounter a failure of any sort, the plan will likely ultimately be

determined on a case-by-case basis. The bottom line is ensuring that only safe and compliant products reach the market.

However, as industry and testing labs are still adjusting to the new testing requirements and standards, the CPSC should address many of the testing discrepancies many AAFA members have been encountering. For example, some members report that testing labs are requesting different sample sizes for the same tests. Others report receiving different results when testing samples of the same component from the same batch – particularly when testing for the lead standard. First and foremost, during the stay of testing and certification, while the testing community, the CPSC and industry works out the testing requirements, the CPSC should explicitly permit flexibility when receiving conflicting test results – particularly with components or products that do not present a serious risk of hazard (like if it is not intended to be mouthed). For example if a manufacturer tests a component by two different accredited testing labs and comes back with one failing report and one passing report, the CPSC should state that if the manufacturer receives a third passing report then the manufacturer can use the component. Secondly, the CPSC should engage accredited testing facilities in dialog to reach standardization among test methods and test results.

5. *Documentation of the reasonable testing program and how it was implemented.*

Any documentation (short of the required general conformity certification and third party test results) of the reasonable testing program should be left to the manufacturer's discretion.

What factors should be considered to determine a reasonable frequency for production testing?

Aside from requiring an initial test and a test whenever there is a material change, determining a reasonable frequency for production testing should be left to the manufacturer's discretion. Manufacturers are in the best situation to determine based on resources, products, manufacturing processes, quality control processes in place, etc. how often additional testing is needed. Risk assessment will also be an integral consideration in determining frequency for production testing. That said, the CPSC should help educate manufacturers by issuing information on various factors that could contribute to a manufacturer's decision on how often to test a product or material, but the frequency of testing should be left up to the manufacturer. Prescribing a one-size-fits-all program will result in disproportionate, unnecessary and wasteful testing. Furthermore, prescribing frequency of testing will inherently disadvantage small businesses with limited resources – regardless of whether the CPSC were to prescribe periodic testing based on volume or based on time. A \$100 test over 10,000 products vs. a \$100 test over 100 products disproportionately disadvantages small manufacturers. The CPSC will need to trust the common sense of manufacturers and allow them the flexibility to make their own determination in determining how often to test.

How might component or batch testing be incorporated into a "reasonable testing program?"

As we elaborated in our February 3, 2009 comments (Attachment A), component testing and certification is a crucial element to a successful and **sustainable** reasonable testing program and should be permitted under **all** circumstances. Allowing component testing and certification is ultimately more cost effective than product based testing and encourages manufacturers to design product safety into the product at the beginning of production. Moreover, AAFA strongly supports a component testing program and certification that starts at the supplier and raw material level. The CPSC should also recognize other types of component testing that a manufacturer chooses to employ provided the components are "representative" of the final product available for sale like those submitted in the AAFA-Intertek Petition Requesting Component Part Testing for Spray Sampling, Multiple Stamping and Finished Component Part Testing. In addition, to help industry understand how to adequately comply with the testing requirements, the CPSC should continue to provide clear examples of acceptable and unacceptable forms of component testing.

By allowing supplier-based testing and certification to satisfy the CPSIA's Section 102 testing and certification requirements, companies will be encouraged to develop a matrix of certified and trusted suppliers who can provide safe components and materials for use in their products. While some have expressed concern over whether manufacturers have the supply chain controls in place to implement such a program, we believe that spreading responsibility across the entire supply chain will ultimately lead to a much stronger product safety system employed at all levels of production and not just at the last stage. Furthermore, the market demand for compliance will weed out any bad actors.

The CPSC began to lay the framework for a successful component testing and certification program in the December 28, 2009 *Interim Enforcement Policy on Component Testing and Certification of Children's Products and Other Consumer Products to the August 14, 2009 (Interim Enforcement Policy)*. AAFA and its members strongly support the Interim Enforcement Policy. However, because retailers and manufacturers are concerned about any potential changes to testing policies within the Interim Enforcement Policy, many have not backed off from the strictest application of the CPSIA's testing and certification requirements. As a result, companies continue to employ redundant testing programs and test final products thereby adding unnecessary costs without providing additional product safety assurance.

Finally, to successfully implement any rulemaking, the definitions of the terms used must be made clear. AAFA submitted comments on June 17, 2009 (Attachment B) requesting the CPSC clarify the definition of a "component." Additionally, stakeholders need clarity on the definitions of a "children's product" and "batch" in order to limit confusion and aid in compliance.

Conclusion

Thank you for your consideration of and the opportunity to submit these comments. If you have any additional questions, please contact Rebecca Mond at rmond@apparelandfootwear.org.

Sincerely,



Kevin M. Burke
President and CEO