



December 2, 2010

Office of the Secretary,
U.S. Consumer Product Safety Commission
Room 820
4330 East West Highway,
Bethesda, MD 20814

Ref: Petition to Provide Additional 60 Day Period for Third Party Testing and to Provide Additional Grandfathering Period for 16 CFR 1610 (Standard for the Flammability of Clothing Textiles)

To Whom It May Concern:

I am writing on behalf of the American Apparel & Footwear Association (AAFA) – the national trade association representing the footwear and apparel industry and its retailers, suppliers, manufacturers and service providers – to petition the Consumer Product Safety Commission (CPSC) to provide limited relief in connection with the Third Party Testing requirements for 16 CFR Part 1610 (Standard for the Flammability of Clothing Textiles):

- (a) Immediately extend the testing and certification date by an additional 60 days and
- (b) Amend Section IV of the, “Third Party Testing for Certain Children’s Products; Clothing Textiles: Requirements for Accreditation of Third Party Conformity Assessment Bodies” to accept third party tests done on or after August 18, 2009 by testing facilities accredited on or before November 16, 2010.

Background

On August 18, 2010, the Commission published a notice entitled “Third Party Testing for Certain Children's Products; Clothing Textiles: Requirements for Accreditation of Third Party Conformity Assessment Bodies” setting forth the third party testing requirements for general wearing apparel. This notice was published pursuant to the Consumer Product Safety Improvement Act (CPSIA). Among other things, the notice establishes the procedures that testing facilities must follow in order to become accredited by the Commission for the purpose of performing CPSIA mandated third party testing for compliance with 16 CFR Part 1610. Publication of the notice triggered a timetable that involved:

- (a) A date (November 16, 2010 – 90 days after the publication date of the Federal Register notice) after which the CPSIA requires all applicable garments manufactured after that date must meet third party testing requirements. This date is also the effective date of the lifting of a stay of enforcement that had been imposed in 2009.
- (b) A period (August 18, 2010 - the date of publication of the notice) to “grandfather” previous tests that were conducted before accreditation was achieved.
- (c) A deadline (October 18, 2010 – roughly 60 days after publication of the notice) to achieve accreditation if manufacturers want to take advantage of the grandfather period without having to re-test.

In response to that notice, AAFA submitted comments¹ challenging the Commission’s decision to proceed with the application of the third party testing requirement with respect to 16 CFR Part 1610. In that submission, we noted that the 16 CFR Part 1610 applies to all garments, not just children’s products. As a result, 16 CFR Part 1610 should not be considered a “children’s product safety rule,” which triggers the accredited third party testing requirement.

Moreover, we noted that the accredited third party testing requirement suddenly amends the 16 CFR Part 1610, which was developed over many years through an extensive public rule-making process. In fact, the Commission recently made a series of technical updates to this rule in a process that stretched over many years and involved extensive consultation with industry and other stakeholders. Earlier this year, the Commission published an updated testing laboratory manual for this rule. Our concern here is that 16 CFR Part 1610 is a well-established and well-balanced rule that does not lend itself to easy amendment and certainly not one that completely bypasses the regulatory requirements mandated by the Flammable Fabrics Act (FFA). Changes that are quickly implemented to such rules often have unintended consequences or cause confusion among the regulated community. Our comments below, and the subject of this petition, are intended to alleviate two such concerns.

A. Request for Additional 60 Days Following the November 16 Effective Date

We hereby request that the Commission, using the authority in Section 102(a)(3)(F) of the CPSIA, provide an additional 60 days to the 90 day statutory period outlined in the August 18 Federal Register notice.

We are making this request because, based on the global distribution of the textile and clothing manufacturing industry, an insufficient number of third party testing facilities are accredited by the CPSC to test for flammability of textiles in accordance to 16 CFR Part 1610. Although 67 facilities have been accredited (as of November 15, 2010), and

¹ See <https://www.apparelandfootwear.org/userfiles/file/testimony-comments/2010/091710cpscffa.pdf>

we understand more applications are pending, our members report that there are real capacity issues because too few of the accredited testing facilities are located in the countries where clothing is designed and sourced, and where fabric is procured. In fact, in a survey sent out to the apparel and textile industry, 15 percent of respondents already reported a delay in receipt of flammability test results even *before* third party testing and certification was required for children's products. Where in 2009, 81 percent of respondents reported that test results would take anywhere from 3 days to two weeks, as of November 15, 2010, 83 percent of respondents reported that test results take anywhere from one week to three weeks. In another survey, 60% of respondents indicated that once the proposed *Testing and Labeling Pertaining to Product Certification* rulemaking goes into effect, they will need to increase the frequency of testing meaning the testing demand has not yet fully matured. We believe the additional 60 day period combined with clearer and more public statement that the stay with respect to 16 CFR Part 1610 has been lifted, will result in additional capacity and ease the compliance burden on companies as they make the transition from a well-established third party testing environment to an accredited third party testing environment. Moreover, inasmuch as there is already strong compliance with the Part 1610 standard, the provision of an additional 60 day period will have no adverse impact on product safety or public health.

1. Distribution of Facilities Does Not Meet Industry Needs

Many of the apparel manufacturing countries that account for large portions of United States apparel imports have either very few or no accredited third party testing facilities. On November 16, the day the stay of testing lifted for 16 CFR Part 1610, 67 testing facilities were accredited by the CPSC to test for flammability in children's products. 8 of these testing facilities are located within the United States while only 3 percent of apparel sold in the United States is actually manufactured in the United States. Of the remaining 59 accredited testing facilities outside of the United States, 11 testing facilities are located in countries that collectively supply less than 2 percent of the apparel imported into the country. This leaves 48 testing facilities located within the 30 sourcing countries that collectively account for 98 percent of apparel imports. Some countries that supply a large percentage of apparel sold in the United States have no accredited testing facilities to test for compliance with 16 CFR Part 1610. For example, Vietnam is the second largest supplier of apparel imported to the United States but as of November 16, 2010, no third party testing facilities in Vietnam were accredited.² Only one testing facility is accredited within the 6 countries that are parties with the United States of the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA), even though that region accounts for 12 percent of apparel imports. While the CPSC continues to work to accredit more testing facilities, the interim shortage means that many products in production will not be in compliance with the *accredited* third party test requirement.

² Three facilities were accredited in Vietnam between November 16, 2010 and December 2, 2010).

2. Misunderstanding of the nature of accreditation

We agree with the CPSC's assessment that the requirement for accredited testing facilities will push more testing facilities to become accredited. However, we are concerned that many apparel manufacturers are still not fully aware of their obligation to use "accredited" third party testing facilities, and this is a new requirement layered over a long standing testing procedure.

As you know, the apparel industry has been subject to 16 CFR Part 1610 for many years and many companies have used third party testing facilities to ensure compliance. As a result, the industry has perceived the transition from pre-CPSIA 16 CFR Part 1610 testing to post-CPSIA 16 CFR Part 1610 as a relatively painless endeavor. Through the many years of industry compliance with 16 CFR Part 1610, and during the initial implementation period of the CPSIA, most manufacturers have tested for compliance with 16 CFR Part 1610 using third party facilities either as part of standard quality control procedures or, knowing that third party testing will be required eventually, to stay ahead of the regulations and facilitate compliance once the stay of testing lifted. Based on comments we receive from members, many manufacturers are currently operating under the assumption that third party testing facilities are the same as CPSC *accredited* third party testing facilities. Others mistakenly believe that third party facilities approved by their retail customer are the same as third party facilities approved and accredited by the CPSC.³

3. Confusion over whether the stay of enforcement has lifted

Moreover, many companies are still unaware that the stay of the third-party testing and certification requirements has, in fact, lifted for children's apparel. The Commission announced the initial stay of enforcement and the extension of the stay of enforcement with great fanfare. However, the Commission lifted the stay of enforcement of testing and certification for children's apparel subject to 16 CFR Part 1610 with a paragraph buried within the Federal Register notice announcing the requirements for accreditation of third party testing facilities. Many children's apparel manufacturers have thought this Federal Register notice contains requirements that pertain exclusively to testing facilities (as it is entitled, "Third Party Testing for Certain Children's Products; Clothing Textiles: *Requirements for Accreditation of Third Party Conformity Assessment Bodies*" emphasis added) and therefore are not fully aware that the stay has lifted. Furthermore, industry is still unclear as to whether the accreditation requirements also lifted the stay of certification for adult's apparel subject to 16 CFR Part 1610. The lack of clarity and the uneven manner in which the Commission has lifted the stay are both unfair to companies, given promises of transparency by the agency, and the wrong way to go about regulating an industry. Therefore, not only is the 60 day extension necessary due to accredited third party test lab capacity concerns, but the 60 day

³ At a recent conference sponsored by AAFA and other groups in Vietnam in early November, several questions from factory managers touched on this point.

extension is necessary to give the Commission time to properly announce the lifting of the stay.

B. Request for Longer Grandfathering Period

We also hereby request that the Commission modify the Notice of Accreditation to permit manufacturers to rely upon tests that were conducted before August 18, 2010 for children's product certifications. As is the case with the children's sleepwear accreditation procedures, we are asking that the Commission permit test results to be accepted provided they were completed by August 18, 2009 – one year earlier.

Our concern is two-fold. First, we are concerned that the extremely limited acceptance of test results conducted by third party testing facilities prior to the issuance of the third party accreditation requirements will further back up testing facilities and be an unnecessary burden on businesses. During the stay of testing and certification, as the CPSC has been finalizing third party testing requirements, children's apparel manufacturers have continued to rely upon third party testing – even when they were not required to do so. While some may have undertaken new obligations in preparation for the CPSIA – a fact which has drawn commendation from the Commission – others were performing such tests because it was the best way to ensure compliance with 16 CFR 1610, given the complicated nature of the rule. By only recognizing test results that were conducted on or after August 18, 2010, the CPSC puts at a disadvantage those companies who had taken the proactive step to engage in third party testing.

Most textiles are tested before they are manufactured into garments and the time between when a textile has been tested and when the garment is manufactured varies based on the company, the season, the style, the availability of the fabric, and many other factors. Stock fabrics may be in inventory for several months or even years. As a result, many manufacturers are using fabrics that were third party tested well before August 18, 2010. That the fabrics were tested before August 18, 2010 has no impact on the safety of the fabrics. Requiring manufacturers to retest the fabric or the garment made out of the already tested fabric does not make the fabrics or garments any safer. Since this relief would apply to labs that moved quickly to achieve accreditation following publication of the accreditation standards (i.e., those who achieve accreditation during the first 60 days), it would not open the door for companies to “game” the system. Rather it would provide needed relief to companies that had already integrated third party facilities, which were quick to achieve accreditation, into their supply chains.

Our second concern is that a lack of a longer grandfathering period unnecessarily adversely affects the continuing guarantees that were issued in the past pursuant to Section 8 of the FFA. These continuing guarantees recognize that testing done years ago still appropriately demonstrates that the fabric in question complies with the flammability requirements. Strictly accepting test results conducted on or after August 18, 2010 renders many continuing guarantees unusable. Requiring retesting not only creates a logistical nightmare for manufacturers who have to sort through which fabrics

were tested prior to August 18, 2010 simply to ensure compliance with the requirements – a hassle these same manufacturers tried to avoid by being proactive.

Conclusion

Granting a 60 day extension on the third party testing and certification requirements to test for textiles and apparel subject to Flammable Fabrics Act 16 CFR 1610 regulations is necessary to deal with limited third party lab capacity issues and to clarify the status of the stay. Furthermore, extending the acceptance of retroactive testing will alleviate lab capacity issues and alleviate unnecessary testing burdens for an industry that has been testing and complying with the flammability standard for many years. Thank you for your consideration of this petition. If you have any questions, please contact Rebecca Mond with our staff at 703-797-9038 or rmond@apparelandfootwear.org.

Sincerely,

A handwritten signature in cursive script that reads "Kevin M. Burke".

Kevin M. Burke