



Here We Go Again – Yet Another Round of Testing Requirements For Children’s Products from the CPSC

By: Jenifer N. Keenan

The Consumer Product Safety Improvement Act of 2008 (CPSIA) has brought a world of changes for children’s products, including strict limits on lead, a ban on phthalates, permanent tracking labels, initial product testing and certificates of conformity based on that testing. These changes have been both onerous and costly. And yet, the requirements on children’s products that have been imposed to date pale in comparison to the burden that will be imposed by the periodic testing requirements that are set to go into effect on February 8, 2013. See 16 CFR § 1107.21 *et seq.*

There is no way around it—the CPSIA’s periodic testing requirements for children’s products are burdensome. The regulations require manufacturers to conduct “periodic testing” of a “sufficient number of samples” to provide a “high degree of assurance” that the tests conducted demonstrate the ability of the product to meet all applicable standards. There are a lot of unanswered questions as to what this all really means, but this article will help shed some light on some of the most significant requirements of the new regulations.

Who must perform the periodic testing?

Periodic testing must be conducted by third-party laboratories that are certified by the Consumer Product Safety Commission (CPSC) to conduct the specific test (e.g., lead, small parts, etc.) in question. Thus, it will not be enough for companies to have their products periodically tested by accredited laboratories—the third-party laboratory that conducts the requisite periodic testing must be a “CPSC-accepted laboratory” for the test at issue. Luckily, the CPSC has at least made it easy for companies to find laboratories that are “accepted” to perform specific tests by providing a list of CPSC-accepted laboratories on its website (<http://www.cpsc.gov/cgi-bin/labsearch/Default.aspx>).

What is a “sufficient number of samples”?

Unfortunately, the regulations do not provide much guidance on how many samples need to be tested in order to satisfy the periodic testing requirements. It is safe to say, however, that having only one product tested is not enough to satisfy the “sufficient number of samples” requirement. On the other hand, the CPSC has stated that manufacturers are not required to test every batch or shipment if there have been no material changes in the components or manufacturing process to satisfy the “sufficient samples” requirement.

How often does “periodic testing” need to be performed?

The general rule is that manufacturers of children’s products must perform testing at least once a year. If a manufacturer implements a “production testing plan,” periodic testing may be conducted every two years. Manufacturers that conduct continued testing using an ISO/IEC 17025:2005-accredited laboratory may conduct testing every three years. Manufacturers that choose the one-year or two-year testing options must have a written testing plan at each manufacturing facility.

The one-, two- and three-year testing intervals described above go out the door if there is a “material change” in the “product’s design, manufacturing process, or source of component parts for the product which a manufacturer, exercising due care, knows, or should know, could affect

the product’s ability to comply with the applicable children’s product standards.” In that case, all components that are impacted by the “material change” must be tested by a CPSC-approved, third-party laboratory and a new certificate of conformity must be issued based upon the results of the test.

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What type of policy against undue influence is required?

In addition to all of the testing requirements outlined above, the regulations state that manufacturers of children’s products must have a *written statement* by “company officials” that 1) states that the exercise of undue influence on third-party laboratories is unacceptable and 2) directs every “appropriate staff member” to receive training on avoiding undue influence *and* sign a statement attesting to participation in the training. Manufacturers must also inform employees that allegations of undue influence may be confidentially reported to the CPSC and provide a description of the manner in which such a report can be made. Additionally, manufacturers must retrain appropriate staff if there are changes in the CPSC’s undue influence requirements. See 16 CFR § 1107.24.

How long do the testing documents need to be kept?

Manufacturers must maintain periodic testing records for at least five years from the date of production. See 16 CFR § 1107.26. The records must include:

- 1) a copy of the Children’s Product Certificate for each product;

- 2) records of each third-party certificate test (for each manufacturing site);
- 3) descriptions of material changes;
- 4) test values and certification test runs;
- 5) undue influence procedures; and
- 6) one of the following:
 - i. a periodic test plan and periodic test results;
 - ii. a production test plan, production test results and periodic test results; or
 - iii. results of tests conducted by an accredited ISO/IEC17025:2005 laboratory and periodic test results.

And while all of the requirements described above may seem overwhelming, there are more requirements, and even a few limited exceptions, to the periodic testing regulations that are beyond the scope of this article. The bottom line is that manufacturers of children's products need to start implementing processes and procedures

now to make sure they have all the pieces in place to comply with these onerous third-party testing requirements when they go into effect in February of 2013.

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ABOUT THE AUTHOR



Jenifer Keenan represents companies before the Consumer Product Safety Commission in connection with product recalls and reporting activities, and has successfully negotiated with the CPSC to narrow the scope of several voluntary recalls involving a wide range of products. She has also advised clients on the Consumer Product Safety Improvement Act, the Virginia Graeme Baker Pool and Spa Safety Act, the Federal Hazardous Substances Act, ASTM F963 and the Flammable Fabrics Act, and has become a leading expert on the CPSC's consumer safety complaint database—www.SaferProducts.gov. Jenifer is the editor of the Alston & Bird *CPSC Recall Snapshot*, a monthly newsletter that provides an overview of CPSC recalls and civil penalties. She has also advised product manufacturers on warning, labeling and warranty issues.

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