



## Consumer Federation of America

April 17, 2014

Office of the Secretary  
U.S. Consumer Product Safety Commission  
Room 820  
4330 East West Highway, Bethesda, MD 20814  
Via e-mail: <http://www.regulations.gov>  
Docket No. CPSC-2011-0081

**Comments of Consumer Federation of America to the  
U.S. Consumer Product Safety Commission on  
“Reducing Third Party Testing Costs through Determinations  
Consistent with Assuring Compliance”**

### **Introduction**

Consumer Federation of America submits these comments in response to the U.S. Consumer Product Safety Commission (“CPSC” or “Commission”) workshop and request for comment, “reducing Third Party Testing Costs through Determinations Consistent with Assuring Compliance,” docket no. CPSC-2011-0081. We are submitting these comments as a supplement to our comments made in our presentation at the Commission’s workshop on this same matter on April 3, 2014.

### **Background**

Prior to passage of the Consumer Product Safety Improvement Act of 2008 (CPSIA), many consumers reasonably assumed that toys and children’s products were being tested for safety before they came onto the market and before they entered our homes. However, the recalls of millions of toys and children’s products, and too many stories of deaths and injuries related to children’s products, sadly clarified that this was not always the case.

In order to provide assurance and public health protections to children, the CPSIA required that children’s products that are subject to a CPSC children’s product safety rule must be tested by a third party CPSC-accepted laboratory for compliance with applicable CPSC rules.<sup>1</sup>

The CPSIA established limits for the maximum lead content in substrate for accessible component parts of children’s products, established maximum content limits of six phthalates for

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<sup>1</sup> 15 U.S.C. 2063(a)(2)

children's toys and child care articles, and through making the ATSM F- 963 standard for toys mandatory, established heavy metal limits for surface coatings and for the soluble amount of eight metals (antimony, arsenic, lead, barium, cadmium, chromium, mercury, and selenium) permitted in toy substrates. These and other third-party testing requirements under the CPSIA constitute key components of the law; without these pre-market testing requirements, consumers would continue to be exposed to potentially dangerous and unsafe toys and children's products. Third-party testing is, and should continue to be, the standard requirement for most such products. In addition to assuring public health and safety, requiring third-party testing for toys and children's products helps to level the playing field so that no manufacturers are competing on safety, i.e., selling products more cheaply because they are skimping on safety.

At the same time, however, we do recognize that such third-party testing requirements may impose a high cost on manufacturers who produce only very small batches of a certain type of product, and whose gross revenue from the sale of the product is small. We do not want companies to have to test products unnecessarily, and support efforts to reducing testing costs when feasible, but stress that safety cannot be compromised. To that end, Public Law 112-28 (August 12, 2011) (Pub. L. 112-28) directed the CPSC to seek comment on "opportunities to reduce the cost of third party testing requirements *consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation*" (emphasis added).

It is important to note, however, that Pub. L. 112-28 consistently states that the CPSC may revoke any exemptions for pre-market testing in the case that compliance is necessary to protect the public health or safety. We also stress that the burden of proof for seeking any exemptions to the third party testing requirements established under the CPSIA lies with the entity seeking those exemptions.

### **Recommendations**

Currently, the maximum lead content limit for accessible component parts of children's products is 100 parts per million (ppm), and the maximum phthalate content limit is 0.1 percent (1000 ppm). Additionally, the CPSIA made ASTM F963-07, *Standard Consumer Safety Specification for Toy Safety*, or any successor version of the standard that the Commission does not reject, a mandatory consumer product safety standard. Currently, ASTM F963-11 (Toy Standard) is the mandatory version of the standard. Table 1 of section 4.3.5 of ASTM F963-11 lists the limits for the soluble amounts of eight elements (antimony, arsenic, barium, cadmium, chromium, lead, mercury, and selenium) allowable in toy substrates.

As the Commission considers granting manufacturers exemptions to third party testing requirements for these substances, we urge you to incorporate the following principles:

#### ***I. The Burden of Proof Lies with Entity Seeking Exemption, and Any Exemptions Must Have a Solid Scientific Basis***

As recognized by Congress in Pub. L. 112-28, the company seeking exemptions to any third-party testing requirements under the CPSIA should have the burden of proving such exemptions are reasonable, not going to harm public health or safety. Any information provided by

manufactures that indicates that certain materials would never contain lead, other heavy metals or phthalates must be supported by independent and objective scientific evidence. The CPSC should not have to rely on testing conducted by the company's own labs to grant such exemptions; rather, such evidence should come from independent testing and scientific sources.

Any lists provided by entities seeking determinations must be supported by scientific evidence showing that a particular ingredient could not be included in the product or mix with other ingredients that are prohibited or not scientifically possible for particular reasons, e.g., by showing that if such mixing occurred, the ingredient for which the determination is sought would no longer work as intended; or by showing that the chemical composition of the ingredient would not contain other chemicals. While certain chemicals, like phthalates, are not naturally occurring, they are ubiquitous in consumer products and clear evidence will be necessary to prove the absence of such chemicals. Simply providing a list of the composition of a product to CPSC without such supporting evidence should not be sufficient.

We are supportive of CPSC staff's questions at the workshop on April 3, 2014 which consistently asked "why." Why could a specific chemical not be in a particular product? What is the reason? What is the evidence? These types of questions are exactly those which we urge CPSC to keep asking of those seeking exemptions.

## ***II. Supplier Declarations and Supply Chain Monitoring Is Not Sufficient***

During the CPSC's April 3, 2014 workshop, some participants indicated that supplier declarations could be proffered as evidence to support the granting of a determination/exemption from third-party testing. Despite companies' best efforts to monitor their supply chains; such supplier declarations alone are not sufficient evidence supporting that a product does not contain prohibited ingredients.

Regarding component part testing, while Bills of Materials (BOMs), documentation acceptance, and raw material testing are all good pieces of information for manufacturers and importers to know and to have in place, there has been and continues to be a lack of control in the supply chain, particularly for products manufactured overseas. Our concerns about over-reliance on such documents are as follows:

- There is no way to guarantee that the materials listed on the BOM are actually what are used during production.
- There is no way to guarantee that the materials listed on the BOM will not be changed sometime during the production process with non-compliant material.
- In some cases, a desire to save costs by some suppliers, or a lack of control over the supplier, could result in contamination of the product (intentional or not).
- Component parts very often run out during production, and are many times substituted with others that may or may not be compliant.
- When a factory runs into capacity issues, they may subcontract to other factories that may not have the same level of controls in place as the original factory.
- Designs and materials are often changed after merchants place an order in order to save cost in production. How could a regulated entity ensure that such changes by their

suppliers and their subcontractors won't result in prohibited ingredients entering the product?

In addition, the CPSC should define what constitutes a "material change" in a product. The entity seeking the determination that certain components and ingredients do not have to be pre-market tested should also be required to notify the CPSC of such material change, and the Commission should require resubmission of all materials, verification through testing, and independent evidence that the product and/or its components are eligible for the originally-granted determination.

### ***III. Any Exemptions Should "Sunset" to Allow CPSC to Revisit the Current State of Technology and Updated Injury Information***

The CPSIA's third-party testing requirements are still relatively new. Pub. L. 112-28's 2011 directives regarding exemptions from third-party testing are even more recent. Given the maiden nature of this approach, and given that production methods, compliance, and testing mechanisms can evolve over time, we strongly urge CPSC to consider "sun setting" any determinations after some set period of time. After these determinations "sunset," the CPSC should require that those companies seeking a renewal of the exemptions must provide updates to the scientific and other evidence, as well as updates on pertinent testing technology. Prior to granting any renewals of exemptions, the Commission should also review any data or studies regarding the harms from the materials exempted from testing in order to ascertain whether the public health and safety is still adequately protected.

### **Conclusion**

As the CPSC considers determinations that certain materials and components of children's products do not have to be pre-market tested, we strongly urge the Commission to ensure that any changes made to reduce testing burdens do not weaken product safety standards or public health protections. We remind the Commission that those seeking these determinations have the burden of proof, and any information provided by manufactures to support the determination that certain materials would never contain lead, other heavy metals, or phthalates must be supported by objective scientific evidence.

Given that it is difficult for manufacturers to have complete control over their supply chains, especially given the speed of production and pressures to reduce costs, lists of ingredients and supplier declarations alone should not be sufficient evidence to support a determination.

Finally, we urge the Commission to "sunset" and periodically revisit any determinations granted under this provision of Pub. L. 112-28 so that CPSC's authorities stay abreast of evolving manufacturing and testing processes, compliance tools, and public health evidence of harm.

Respectfully submitted,

A handwritten signature in black ink that reads "Rachel Weintraub". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Rachel Weintraub  
Legislative Director and Senior Counsel  
Consumer Federation of America