

Consumer Product Safety Alert

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New Children's Product Testing and Certification Rule Set to Impact Manufacturers and Importers on February 8

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On February 8, 2013, manufacturers and importers of children's products (a consumer product designed or intended primarily for children 12 years of age or younger) will be required to follow certain testing and certification protocols established by the U.S. Consumer Product Safety Commission ("CPSC").¹ The new rule provides guidance on how to ensure a product meets all applicable safety standards over continued production. Understanding the new testing and certification rule is critical for all manufacturers and importers of children's products. The deadline to be in compliance with the rule comes at a time when the safety of children's products continues to receive heightened scrutiny by the federal government.

Brief Background

The Consumer Product Safety Act² (as amended by the Consumer Product Safety Improvement Act of 2008) requires that nearly all children's products undergo third party testing. The law also mandates that manufacturers, importers and private labelers certify that their children's products meet all applicable CPSC rules. Therefore, third party testing serves as the basis for a company to certify, via a "Children's Product Certificate," that its children's products meet all such requirements.

In 2011, the CPSC enacted a final rule establishing protocols with respect to initial and continued testing and certification for children's products. This rule has been called by some the "reasonable testing rule" because it establishes standards for testing and certification programs. Importantly, on February 8, 2013, this rule will become effective and apply to all children's products manufactured after that date. By this time, children's product manufacturers and importers must have a documented testing and certification program, and all products must be made per the terms of this program.

Third Party Testing and Certification

There are three types of third party testing discussed in the new rule: (1) initial testing; (2) material change testing; and (3) periodic testing. It is critical to have an understanding of each phase of testing and certification, and how they affect manufacturing and testing processes.

- **Initial Testing:** Manufacturers of children's products must submit "a sufficient number of samples" to an accredited CPSC third party laboratory to ensure compliance with all applicable product safety rules. The manufacturer or importer must issue a Children's Product Certificate to their retailers and distributors (or to the government upon request) based on these third party laboratory test results.
- **Material Change Testing:** If a material change is made to a children's product (or to a component part of that product) after initial testing and certification, then the product or component part needs to be retested by a third party laboratory and a new certificate needs to be issued.

- **Periodic Testing:** Finally, manufacturers must now document a “periodic testing plan” to any continuing production of a children’s product. If a children’s product initially is tested and certified, and then additional production continues, effective February 8, 2013, periodic testing is required for all the applicable children’s product safety rules, *even if there are no material changes to the product*. The periodic testing plan must provide the manufacturer with a “high degree of assurance” that its children’s products manufactured after the issuance of a Children’s Product Certificate comply with the CPSC rules. Typically, periodic testing must be conducted at least once per year, although the time interval may vary depending on the product and other factors such as high variability in testing results, consumer complaints, or the manufacturing process itself.

A Written Testing and Certification Plan

As of February 8, 2013, manufacturers must also develop a *written* plan for periodic testing of their children’s products, which must include the tests to be conducted, the intervals at which the tests will be conducted, and the number of samples to be tested. The rule also requires that companies include in their plan a protocol to address a material change in product design or manufacturing process, procedures to safeguard against the exercise of undue influence on a third party laboratory, policies regarding employee training, and a recordkeeping plan, among others.

How Can You Ensure that You are Complying with the New Rule?

Firms may need to seek experienced counsel to:

- Assess your current product testing and certification practices and policies and how to bring them into compliance with all CPSC requirements.
- Advise your company on the many other CPSC regulations, guidance documents and enforcement policies, including those dealing with the lead paint and substrate limits; limits on phthalates in certain children’s products; whistleblower protection for employees of product makers and sellers; new restrictions on the exportation of potentially violative products; a new CPSC public database of consumer complaints; and the transformation of voluntary into mandatory standards by the CPSC.
- Advocate for your company or industry group before the CPSC to ensure that your interests and rights under the law are fully protected.

Mintz Levin has assembled a team that is devoted to CPSC-administered laws and regulations. We stand ready to advise and assist clients to anticipate and respond to compliance issues arising under federal, state, and international product safety laws. Practice leader Chuck Samuels has represented clients in the product safety arena for almost 30 years. We are presently advising trade associations, manufacturers, retailers, and importers on how to not only prevent problems from arising, but capitalize on new opportunities.

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Please contact either **Chuck Samuels** or **Matthew Cohen** to find out more about how we can help you both comply with and thrive under the new product safety environment.

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Endnotes

¹ This rule entitled “Testing and Labeling Pertaining to Product Certification” is codified at 16 C.F.R. § 1107.

² 15 U.S.C. §§ 2051- 2089.

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