



## U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY  
BETHESDA, MARYLAND 20814-4408

Record of Commission Action  
Commissioners Voting by Ballot\*

Commissioners Voting:      Chairman Inez M. Tenenbaum  
   Commissioner Thomas H. Moore  
   Commissioner Nancy A. Nord  
   Commissioner Anne M. Northup  
   Commissioner Robert S. Adler

### ITEM:

Stay Notice: Stay of Enforcement of Testing and Certification Requirements for Lead Content  
(Briefing Package dated January 24, 2011)

### DECISION:

The Commission voted (4-1) to approve the publication of the draft notice in the *Federal Register* ("FR") that will announce its decision to revise the terms of its stay of enforcement of certain testing and certification provisions of section 14 of the Consumer Product Safety Act as it is amended by section 102 of the Consumer Safety Improvement Act of 2008. The FR notice will announce an extension of the stay of enforcement pertaining to total lead content in children's products (except for metal components of children's metal jewelry), and certain related products, until December 31, 2011. Chairman Tenenbaum and Commissioners Moore, Nord and Northup voted to approve the draft FR notice with changes. Commissioner Adler voted to not approve the draft notice.

Chairman Tenenbaum and Commissioners Adler and Northup each issued statements regarding this matter.

For the Commission:

A handwritten signature in black ink that reads "Todd A. Stevenson". The signature is written in a cursive style with a large initial "T".

Todd A. Stevenson  
Secretary

\* Ballot vote due January 31, 2011



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

**February 2, 2011**

**STATEMENT OF CHAIRMAN INEZ M. TENENBAUM  
ON THE COMMISSION APPROVAL OF A FINAL EXTENSION  
OF THE LEAD CONTENT TESTING AND CERTIFICATION STAY OF ENFORCEMENT**

As part of a bipartisan Commission decision, I reluctantly voted on January 31, 2011, to support extending – for one final time – the stay of enforcement for third-party testing and certification for total lead content in children’s products. The result of this Commission vote is that the stay on third-party testing and certification to the lead content limits will automatically lift on December 31, 2011.

While I agreed to support this final extension, this vote does not in any way change a very basic and important fact: regardless of the date the stay lifts *children’s products continue to be required by law to be fully compliant with a number of key safety provisions, including lead paint limits, total lead content limits, limits on certain phthalates, small parts hazard requirements and ASTM F963 (the Standard Consumer Safety Specification for Toy Safety).*

This is no small fact. It remains unlawful for children’s products that violate these requirements to be placed on the market. While the Commission has decided to provide additional time for manufacturers and importers of children’s products to take steps to document proof of compliance through third-party testing and certification, I expect the agency to continue to enforce, regardless of the size of the manufacturer, all standards and bans applicable to children’s products.



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

**Statement of Commissioner Robert S. Adler  
Regarding the Extension of CPSC Stay of Enforcement of Testing and Certification  
Requirements on Lead Content in Children's Products**

**February 1, 2011**

Today my colleagues voted to extend the stay of enforcement on testing and certification for lead content under section 102 of the Consumer Product Safety Improvement Act (CPSIA) for ten months, from February 10, 2011 until December 30, 2011. This is the third time the Commission has voted to extend the stay of these requirements, which otherwise would have gone into effect in February 2009, some two years ago. While I respect the thoughtfulness and care that went into the majority's decision, I disagree with it.

Of the three stay extension votes, I have supported only one, partially. In December 2009, I voted to extend the stay of enforcement on lead content from February 2010 until August 2010. I reluctantly supported a six month extension, among other reasons, in order to clarify that testing and certification by component part suppliers could be relied on by manufacturers and importers in meeting their own testing and certification obligations. To my disappointment, the Commission chose to extend the stay six months more, until February 2011, a decision I did not support.<sup>1</sup> As we approach the expiration of the second stay, my colleagues once again have voted to extend it. Once again, I dissent for almost exactly the same reasons I did originally. In addition, I note a few broader policy concerns below.

**Economic Realities and Consumer Concerns**

To be clear, I fully recognize that we live in perilous economic times that are now commonly referred to as the "Great Recession." In fact, I am old enough to have had parents who lived through the Great Depression. Accordingly, I do not take lightly what this downturn means to many Americans, particularly those with small businesses that struggle to survive even in steady economic times. I am hopeful that an extension of the stay of enforcement will reassure the many small businesses who have pleaded with the Commission to extend the stay that their voices have been heard. I am equally hopeful that the Commission will publish the regulations and guidelines that these businesses believe they need to understand how best to comply with the CPSIA's various requirements. I commit here to doing everything in my power to ensure the Commission meets its rulemaking and advisory obligations as fully as possible.

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<sup>1</sup> My dissent is available at <http://www.cpsc.gov/pr/adler12172009.pdf>.

Further, I sympathize with all manufacturers, private labelers, and importers regardless of size when they tell us that complying with CPSIA is a difficult lift and they need as much guidance as we can provide them on how to comply with this complicated law. I am confident that the Commission will do its best to provide such guidance and I point to a helpful document created by our Acting Small Business Ombudsman along these lines.<sup>2</sup>

All of this said, I do not find it to be sufficient justification for extending the stay for another ten months.<sup>3</sup> As a starting point, I remain concerned about the burden on the unknowing consumer. I realize that my colleagues care about consumers as much as I do. But as we approach the third year of the passage of this landmark consumer safety law, I note that consumers still do not have the assurance that the children's products they buy have been reasonably tested, or tested at all, to determine if they meet the federal lead standards required in the CPSIA. I fear that a number of companies will mistake our extending the stay on enforcement and certification as a de facto extended stay of the lead standard itself.

#### Whether the Commission Needed to Promulgate its Testing or Component Parts Rules Prior to Lifting the Stay

Moreover, I continue to object to linking the stay to when our testing and certification rule, called for in section 14(d)(2) of the CPSIA, or our proposed rule on testing component parts of consumer products<sup>4</sup> become effective. Although I recognize that many companies feel having these rules in place is necessary in order for them to proceed effectively, I see little basis for this belief. Were this the case, one wonders how those businesses currently required to meet the testing and certification requirements for lead in paint, full-size and non-full-size cribs, small parts, metal components of children's metal jewelry and the various children's products subject to the Flammable Fabrics Act manage to operate. In fact, as noted in the staff briefing package on the stay, "it is not necessary for the testing rule to be complete to lift the stay as to the initial test for lead compliance. As a practical matter, the only way to ensure compliance with the lead limit is, at the bare minimum, an initial test of the product for lead content."<sup>5</sup>

I strongly suspect that once we have the testing rule and the component parts rule in place, most reputable companies that have raised concerns about having to adjust their manufacturing practices in light of these rules will find that they have to make only the mildest of changes, if any. In fact, I would not be surprised if they conclude that their pushing for the stay to be extended resulted in no significant manufacturing benefit.

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<sup>2</sup> See: "How does this affect my Small Business? Lifting of the Stay of Enforcement of Certification Requirements for Non-Children's Clothing Textiles, Carpets and Rugs, and Vinyl Plastic Film," at: <http://www.cpsc.gov/about/cpsia/smbus/SBOLiftStayCert16CFR1610.pdf>.

<sup>3</sup> I note in passing that the extension of the stay is not just with respect to third party testing. The Commission has also issued a stay with respect to General Conformity Certificates (GCCs) which require only "reasonable testing." Reasonable testing can be done first party by manufacturers by themselves. See *infra* note 6 and accompanying text.

<sup>4</sup> Published at 75 Fed. Reg. 28208 (May 20, 2010).

<sup>5</sup> Memorandum on Stay of Enforcement of Testing and Certification Requirements for Lead Content, pg 7, available at <http://www.cpsc.gov/library/foia/foia11/brief/staylead.pdf>.

### The Clamor Will Continue

What particularly concerns me about the Commission's decision is that it will do little, in my judgment, to reduce the calls to continue extending the stay. I fear that we will face a similar clamor for extending the stay as we approach the new December deadline. I say this because I believe that the primary reason for the objections to our lifting the stay has more to do with industry's reluctance to undertake the third party testing required under section 102 of the CPSIA and to comply with the toy standard, ASTM F-963, mandated in section 106 of the CPSIA. As many members of the regulated community, especially many small manufacturers and importers, see it, the costs and complexity of complying with these CPSIA requirements greatly threaten their financial well-being. Needless to say, they have vigorously objected to any action that the Commission might take to implement these requirements. That fear, and not the lack of a testing rule or a component parts rule, is, I believe, the real reason for the protests to lifting the stay.

I understand this fear. And I sympathize with those small businesses that face heavy third party testing costs once the stay is lifted. I have heard numerous anguished accounts from these companies about the extreme challenge of meeting these costs. Regrettably, that is not a matter over which the Commission or I have any significant control – and should not be a basis for the Commission's extending the stay. If change is to come, Congress is the proper party to approach.

### Additional Concerns: ASTM F-963 Stay and GCCs

Finally, although not directly at issue in our vote on the stay, the so-called toy standard in the CPSIA, ASTM F-963, cannot be ignored as a critical part of the story. Unfortunately, unless the Commission takes decisive action, the testing and certification requirements for this standard – which, to me, lies at the very core of why Congress enacted the CPSIA – continue to be stayed. While it is true that the Commission has never stayed the need for toys to meet ASTM F-963 requirements, the reality is that only way to demonstrate compliance with certain parts of the standard is to perform laboratory tests. However, because the Commission has not issued a Notice of Requirements for this standard, (a statutorily necessary precursor for laboratories to know exactly how to test) there is currently no legal requirement for a toy manufacturer that claims to meet ASTM F-963 to have its claim verified. In fact, the Commission has not even required manufacturers, regardless of size, to issue a General Conformity Certificate (GCC)<sup>6</sup> for toys subject to ASTM F-963 – a matter of extreme regret to me.

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<sup>6</sup> A General Conformity Certificate (GCC) is a certificate based on a test of each product or upon a reasonable testing program that certifies that each product complies with all statutes, rules, bans, standards, or regulations applicable to the product. A GCC is required for those products for which a statute, regulation, rule, ban, or standard is currently in place. (15 U.S.C. § 2063(a)(1)(A)) A GCC does not require third party testing, so it can hardly be considered burdensome for anyone claiming to sell complying products.

What is regrettable about this omission is that since toys must meet the standard, issuing a piece of paper attesting to the fact that the product actually complies would not be difficult – at least for those companies that purport to produce and distribute complying products. And issuing GCCs would demonstrate to consumers and the CPSC that companies know about the toy standard and attempt to comply with it. Moreover, I understand that many retailers currently demand similar certificates from their suppliers, so issuing GCCs would not be unfamiliar to most manufacturers. Accordingly, I encourage the Commission to be more open to issuing GCCs for products subject to its regulations, especially those not yet subject to third party testing requirements.

In sum, I hope that, in the years to come, the controversy surrounding the CPSIA will have disappeared and that the American consumer is presented with safer and more affordable children's products as they make their purchasing decisions. I believe that this will be the case and that the regulated community will continue to be the Commission's partner in achieving this goal, no matter the bumps in the road that face all sides in this difficult, but achievable, task. I am hopeful that my colleagues and I will continue to work towards this goal in the coming weeks and months.



UNITED STATES  
CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE EXTENSION OF THE  
STAY OF ENFORCEMENT ON THE TESTING AND CERTIFICATION OF CERTAIN  
CHILDREN'S PRODUCTS FOR TOTAL LEAD CONTENT

February 2, 2011

On January 31, 2011, I voted with a majority of Commissioners to extend the stay of enforcement pertaining to total lead content in children's products (except for metal components of children's metal jewelry), and certain related products, until December 31, 2011. Extending the stay for an additional 11 months is an important step toward fulfilling the Commission's commitment to allow component parts testing and certification to become a viable compliance alternative for manufacturers *before* third party testing and certification for lead content in most children's products becomes mandatory. Third party testing imposes a financial burden that many manufacturers, and particularly small ones, may never be able to bear. But if there is any hope for their survival, it is essential that the stay not be lifted before there is at least an opportunity for certified component parts to form the basis for the final product certifications of small manufacturers. I am therefore thankful that four commissions were able to reach a fair compromise extending the stay for an additional 11 months.

While I am pleased the stay has been extended to December 31, 2011, I believe it is important to clarify my position regarding the extension. I continue to maintain my long held view that the stay should be continued until one year after finalization of the Commission's rulemaking on both Testing and Labeling Pertaining to Product Certification (NPR at 75 FR 28366), and Conditions and Requirements for Testing Component Parts of Consumer Products (NPR at 75 FR 28208). These proposed rules – referred to by the CPSC as the "15-month rule" and the "component testing rule" -- address, inter alia, the protocols that will govern third-party testing of children's products, including random sampling methods and the availability of component parts testing as a means to encourage compliance further up the supply chain and to provide manufacturers with more options. The Commission is just beginning to consider the final versions of these rules.

The Commission's previous stays on lead content testing were implemented principally based on the recognition that manufacturers would be unable to comply with the third-party testing requirement until both the 15-month rule and the component testing rule had been in effect for a reasonable period of time. This link between finalization of the 15-month and component testing rules and the lifting of the stay was recognized by Commissioners of both parties. As explained in the Commission's February 2009 Federal Register notice, the stay on third-party testing of children's products for lead content was first implemented in response to "confusion as to . . . whether testing to demonstrate compliance must be conducted on the final product rather than on

its parts prior to assembly or manufacture . . . and what sort of certificate must be issued and by whom.” 74 FR 6396 (February 9, 2009). The stay was thus intended to afford the Commission time to promulgate new rules addressing, inter alia, “production testing of children’s products subject to third party testing and certification . . . including random sampling protocols”, so that “the right tests are run on the right products without unnecessary and expensive testing.”

During the December 2009 public briefings to consider whether to lift the original stay, CPSC staff reported that the apparel component manufacturing sector was reluctant to initiate component testing while the breadth of the requirement remains unsettled, and that smaller manufacturers were unable to obtain component parts testing because suppliers were reluctant to undertake the tests until the final rules for component testing and certification are in place. In the face of this evidence, Chairman Tenenbaum acknowledged that she “would never agree to lift the stay” until the 15-month and component parts rules are in place. She voted to extend the stay “in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new requirements.” Commissioner Moore also recognized the need to “give the small manufacturers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead compliant materials.” Commissioner Adler has similarly identified the link between a company’s ability to “rely on component suppliers for compliance with the law” and its potential “to plan production and control costs in a reasonable manner.”<sup>1</sup>

Consistent with the views of all five Commissioners, the Commission “determined that testing of children’s products for lead content by a recognized third party testing laboratory and certification based upon that testing should begin on the products manufactured after February 10, 2011 *to allow component testing to form the basis for certifications for lead content . . .*” 74 FR 68588 (December 28, 2009) (emphasis supplied).

A year has now passed, during which the Commission published proposed 15-month and component testing rules. But in the absence of *final* 15-month and component testing rules, component testing still cannot form the basis for certifications for lead content. Rather, small manufacturers continue to report to the CPSC that component suppliers are refusing to test altogether or are refusing to supply certifications, and that certifications are unavailable from the retail outlets where many small manufacturers obtain component parts. This has occurred because publication of the proposed rules has not provided the regulated community with any certainty regarding the content of the final rules. Indeed, the CPSC’s record of rulemaking over the past year demonstrates that a final rule can change materially from its proposed version and can impose more onerous requirements. It is therefore not surprising that component parts suppliers remain unwilling to incur the expense of providing certifications under a proposed regime that may change substantially before it is finalized. At a minimum then, the final 15-month and component testing rules must be published before the stay is lifted. Otherwise, manufacturers will be in the untenable position of trying to comply with the proposed rule, while anticipating a potentially much different final rule. This would provide manufacturers with insufficient time within which to modify their compliance management processes once the final rule was issued, and would cause needless disruption to business planning, supply chain

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<sup>1</sup> Attached as an appendix to this statement is a more detailed Background on Stays of Enforcement of Third Party Testing and Certification for Lead in Children’s Products.

management, test lab contracting, and other aspects of product manufacturing, due to the rapidly changing requirements.

Under these circumstances, yesterday's vote to continue the stay is consistent with the stated views of all five Commissioners, and I am pleased that a majority has voted to extend the stay for an additional 11 months. I hope and expect that the final 15-month and component testing rules will be published by the end of July 2011, thereby giving industry six months to prepare for compliance before the stay is lifted. But it remains my view that the Commission should continue the stay of enforcement on third-party testing and certification of lead content in most children's products until one year after publication of final 15-month and component testing rules. Considering the lead time necessary for manufacturers between design and production, allowing one year after the two testing rules are finalized is necessary to afford the regulated community time to come into compliance. Otherwise, it may be too late for many small manufacturers to benefit from the component testing rule. Finally, extending the stay for a full year after finalization of the 15 month and component parts rules would comport with the expectation created among regulated industries through the Commissioners' and the Commission's public statements that the stay will not be lifted before component testing becomes a viable compliance alternative for small businesses. Yesterday's vote provides an additional 11 months to work toward achieving that goal.

**Background on Stay of Enforcement of Third Party Testing  
and Certification for Lead in Children's Products**

**First implemented by Federal Register notice at 74 FR 6396-01 (February 9, 2009)**

- Effective until February 10, 2010 at which time Commission intended to vote whether to terminate or continue the stay
- Stay implemented, among other reasons:
  - In response to “confusion as to . . . whether testing to demonstrate compliance must be conducted on the final product rather than on its parts prior to assembly or manufacture . . . and what sort of certificate must be issued and by whom.”
  - To allow time for new rules addressing, inter alia, “production testing of children’s products subject to third party testing and certification . . . including random sampling protocols”, so that “the right tests are run on the right products without unnecessary and expensive testing”
- Lifting anticipated “when these rules are finalized and our ongoing stakeholder information and education efforts have been in place for sufficient time for the new requirements to become known and understood within the regulated community.”

**December 2, 2009, Commission Public Briefing/Meeting to Address Commission Action on Existing Stay of Testing and Certification**

- Jay testifies that apparel component manufacturing sector contacts have informed him that they recognize the value but are reluctant to initiate component testing while the breadth of the requirement remains unsettled, and that smaller manufacturers have reported to him that suppliers are reluctant to undertake component testing until they see the final rule for component testing and certification.
- When pressed by Adler to advise whether he believes the stay should not be lifted until the final rule on component testing is adopted, Jay opines that it is a factor that should be considered by the Commission.
- Jay testifies that problem is greatest for small manufacturers because testing costs are fixed and cannot be spread by smaller manufacturers over a sufficiently large number of products to avoid competitive damage from passing on costs to consumer.
- Adler suggests alleviating burden on “low volume, small revenue” companies, rather than focusing on particular products made in small batches, as high revenue companies also produce niche products.

**December 16, 2009, Commission Public Briefing/Meeting to Address Pending Decision on Existing Stay of Testing and Certification**

- Northup proposes the Commission lift the stay on enforcement of third-party testing and certification of lead in children's products, without requiring another vote, on the date that is six months after the 15-month rule is effective.
- Tenenbaum concedes that "none of us are going to lift the stay if . . . the 15-month rule is not completed . . . so that industry and everyone else knows how to comply with this." But she prefers a date certain "when we anticipate all the rules being finished."
- Nord counters that we cannot predict when rulemaking will end and that component testing has to be working in the marketplace before the stay can be lifted.
- Adler agrees 15 month rule should be in effect before stay is lifted.
- Tenenbaum opines that the Commission cannot lift the stay without the 15-month rule because component parts are essential to manufacturers in terms of testing responsibility, but believes a date certain is preferable. "If at that time the 15 month rule is not in place then we would extend the stay again." She later reiterates that she "would never agree to lift the stay until the 15-month rule were [sic] in place."
- Nord asks what will happen if a new fixed date for lifting the stay arrives and the 15 month rule is not in place. Tenenbaum responds: "Well, then we would vote to extend the stay." Inez continues that she "realize[s] the 15 month rule is crucial for everyone to have before certification and testing." But she prefers to keep the two issues separate for voting purposes.

**Continued until February 10, 2011, by Federal Register notice at 74 FR 68588 (December 28, 2009)**

- "With regard to lead content, the Commission has determined that testing of children's products for lead content by a recognized third party testing laboratory and certification based upon that testing should begin on the products manufactured after February 10, 2011 to allow component testing to form the basis for certifications for lead content . . ."

**Tenenbaum's Statement on the Stay Extension (December 17, 2009)**

- "The extension of the stay was needed in order to give the agency more time to promulgate rules important to the continued implementation of the CPSIA and for the agency to educate our stakeholders on the requirements of those new rules.
- "I voted to extend the stay . . . in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new requirements."

**Moore's Statement on the Stay Extension (December 17, 2009)**

- "[W]e cannot be certain how long it will take for a secondary market in lead-compliant components to develop and I do want to give the small manufacturers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead compliant materials."

- “For smaller manufacturers, the enforcement policy on component testing will relieve them of much of the testing burden once the stay is lifted . . .”

**Adler’s Statement on the Stay Extension (December 17, 2009)**

- “I believe an extension of another six months is necessary to permit market adjustments, especially with respect to the testing and certification by the suppliers of components.”
- Adler no longer believes extension of the stay should be linked to the effective date of the 15-month rule. This is because, inter alia, it is likely the 15-month rule may still be under consideration upon the expiration of the stay, and The Interim Enforcement Policy on Component Testing and Certification (of Lead and Content) that was issued December 16, 2009, “will address the largest set of concerns raised by the manufacturing community regarding testing and certification. Now that companies know they can rely on component suppliers for compliance with the law, they should be able to plan production and control costs in a reasonable manner.”

**Northup’s Statement on the Stay Extension (December 17, 2009)**

- Believes stay should be kept in place until well after the 15-month rule goes into effect, among other reasons, because otherwise:
  - Companies would have to change their compliance management processes twice in quick succession and thereby incur additional retraining expenses;
  - It would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing; and
  - The Commission could unnecessarily put small companies out of business before Congress’ impending consideration of possible statutory changes, a number of which could provide relief to domestic small businesses that make safe products but would not be able to afford to comply with CPSIA’s testing and certification requirements.
- Agreed to fixed calendar date because:
  - She believes the 15-month rule can be completed in time to give the regulated community approximately six months to prepare for it;
  - The new deadline gives Congress one more year to fix the CPSIA; and
  - February 2011 is better than the August 2010 alternative that would otherwise have received majority support.
- Anticipates that the extension to February 10, 2011 “should” result in the 15-month rule having “been issued well before the time the stay lifts.”

**Nord’s Statement on the Stay Extension (December 17, 2009)**

- Believes rule addressing what products must be tested, when testing is required and how it is to be conducted must be finalized and given a chance to be absorbed by the impacted industries before the stay is lifted.
- Component testing offers the potential to reduce the cost and burden of third party testing requirements, but the rules should be in place and the Commission should assess whether

component testing actually works to relieve the significant cost burdens on small manufacturers and crafters before the stay is lifted.

- The 15-month rule must be adopted and industry must have adequate time to implement it before the stay is lifted.