

CPSC Issues New Statement of Policy on Testing and Certification of Lead Content

By Eric Stone, K&L Gates, LLP

On October 21, 2009 the Consumer Product Safety Commission (CPSC) issued a new *Statement of Policy: Testing and Certification of Lead Content in Children's Products* (Lead Policy). This article is intended to answer in "plain language," questions raised about the "lead content" provision of the Consumer Product Safety Improvement Act (CPSIA).

Definition of Children's Product

CPSC notes it looks at each product to determine if it is designed or intended **primarily** for use by children 12 and under. "Not everything a child uses or touches must meet the lead content limit, only those things designed or intended primarily for a child 12 years old or younger." CPSC references its earlier guidance that ball point pens are not "primarily" intended for use by children 12 and under and are "generally sold to consumers of all ages." (The CPSC notes there are "instances when such a pen can become a 'children's product.'") CPSC says it may provide more guidance on what is a "children's product" by rule.

Lead Content Law Requirement

The CPSIA provides that products designed or intended primarily for children 12 years old and younger ("children's products") cannot contain more than 300 parts per million (ppm) of lead in any accessible part. The CPSC refers to this provision as the "lead content limit." This new lead content limit should not be confused with the Commission's 90 ppm limit on lead in paint used on certain products such as furniture and children's toys.

Testing and Certification For Lead

In the future, children's products will need to be tested for compliance with the 300 ppm lead content limit. The tests must be done by a third party conformity laboratory and, based on those—and maybe other—tests, certified as compliant. The third party laboratory must be accredited and the accreditation must be recognized by CPSC. A listing of CPSC-recognized laboratories can be found at <http://www.cpsc.gov/cgi-bin/labapplist.aspx>, but CPSC has not finished accrediting such labs for the lead limit and many other requirements. For more information on who needs to certify children's products for compliance, please see <http://www.cpsc.gov/businfo/frnotices/fr09/certification.pdf>.

The CPSC is scheduled to act in February 2010 to either extend or end the stay of enforcement on the testing and certification provision for the lead content provision. (Testing and certification for the lead paint requirement was not stayed. Paint and surface coatings must be third-party tested and certified for compliance.)

Products Not Needing Testing for Lead

The law limits the CPSC's ability to exempt products from the lead content limit. However, they have found that certain products, by their nature, will never exceed the lead content limit. Those low lead products do not need to be tested to show that they comply with the law. These products or component materials listed by the CPSC as not containing over 100 ppm lead, therefore, do

not need to be tested for compliance. Those “low lead” materials include certain precious and semi-precious gems, wood, paper and paper products, CMYK printing inks, most textiles (dyed and undyed), other plant and animal derived materials, surgical and other stainless steels, and some precious metals.

The products on this list are all things the Commission has determined do not contain lead over 100 ppm, which is within the allowable 300 ppm limit. Thus, they will comply with the law (and must always comply) and, therefore, do not need testing and certification. They do not need to be tested by a third party laboratory to prove they are, in fact, made of something on the list, and they do not need to be tested to prove that they meet the lead content limits. For example, we have determined that natural fibers, such as cotton, by their nature do not contain lead in excess of the lead content limit; this means that cotton blankets or t-shirts (without buttons or appliques), do not need to be tested by a third party laboratory for lead content. It also means that a third party laboratory would not need to test the cotton shirt to show that it is, indeed, made out of cotton. Some retailers may want manufacturers and importers to test and certify their products, but those tests and certificates are not required by the Commission for the materials or products on the list.

Testing of Component Parts

Certifications may be based on tests of components that are incorporated into your products. (And the low lead components do not need to be tested at all.) In other words, the “final product” may not need to be tested for compliance if the components can be shown to comply and there is nothing in the manufacturing process that is likely to add lead.

The CPSC indicates it is preparing a testing rule and will hold a public hearing to discuss testing issues, but offered the following guidance until the Commission completes the testing rule. “Until a final testing rule is issued, the Commission will, on an interim basis, accept certifications of component parts if the component tested is the same in all material respects to the component used on the product.”

1. The Commission does not require separate tests of the parts of the product that are made entirely of items on the list above that have been determined not to exceed the lead limits.
2. The Commission does not require testing for lead content of those parts of a children’s product that are inaccessible, i.e., that cannot be touched by a small child’s finger. . .
3. The Commission does not require lead content testing of certain components of electronic devices designed or intended primarily for children 12 and younger.

To illustrate how this might work, the CPSC offered the following example:

A book made with a cardboard cover glued to pages made with paper and printed with CMYK process printing inks does not need to be tested for lead content and no certificate is required by the Commission. The paper, cardboard, and CMYK ink are all on the list of materials and products that we have determined not to contain lead above the 100 ppm limit, and the glue used for binding is inaccessible. If, however, the book was bound with metal spiral binding rather than inaccessible glue, the metal spiral bindings would need to be third party tested for compliance

with the 300 ppm lead content limit, and the product would need to be certified. If the metal spiral binding was painted, in addition to testing the metal spiral binding for lead content, the paint also would need to be tested to assure that it complies with the 90 ppm lead in paint limit and certified as complying with that standard as well.

The CPSC is due to publish a testing rule proposal in November. This should give everyone an opportunity to comment on the approach the CPSC is proposing before the requirements become final and the stay is lifted.

For more details about these requirements, we urge you to read the actual document for more details that is located at <http://www.cpsc.gov/ABOUT/Cpsia/leadpolicy.pdf>.