

Response of the American Council of Independent Laboratories (ACIL)

Consumer Product Safety Commission: CPSC Docket No. CPSC-2010-0038

Subject: Proposed Rule: Testing and Labeling Pertaining to Product Certification

August 3, 2010

ACIL is delighted to have the opportunity to comment on the subject proposed rule: Testing and Labeling Pertaining to Product Certification.

ACIL was founded in 1937 as the national trade association representing independent scientific laboratory testing. An independent laboratory is not affiliated with any institution, company or trade group that might affect its ability to conduct investigations, render reports, or give professional counsel objectively and without bias. ACIL's 200 member companies operate approximately 400 facilities across the U.S. and abroad. They range from the one-person specialty laboratories to multi-disciplined, international corporations employing thousands of analysts, risk management specialists, consultants and support staff.

ACIL's comments will be limited to three broad categories, and in addition, comment on the particular provisions of the proposed rule where the Commission requests additional comment.

1. The proposed rule fails to differentiate between "firewalled" manufacturer laboratories and independent, third party laboratories.
2. The proposed rule fails to recognize the certification marks of third party conformity assessment bodies.
3. The proposed rule fails to include reciprocity provisions for foreign markets that are closed to US third party laboratories.

The Proposed Rule Fails to Differentiate Between "Firewalled" Manufacturer Laboratories and Independent, Third Party Laboratories

This failure throughout the proposed rule to differentiate between a "firewalled" manufacturer laboratory and that of an independent, third party laboratory is that it allows a manufacturer to submit product to itself even if its reasonable testing program fails to provide a high degree of assurance of compliance with all applicable children's product safety rules.

“Proposed Section 1107.21 (b) would state that, if a manufacturer has implemented a reasonable testing program as described in subpart B of this part...it would be required to submit samples of its product to a third party conformity assessment body for periodic testing to all applicable children’s product safety rules at least once every two years.” Because of the failure to differentiate between the “firewalled” lab and the “independent” lab, the intent of this provision is unclear, or at the very least, construed to mean that the manufacturer may submit its product to its “firewalled” lab and meet the requirements of this provision. ACIL’s opinion is that is not what the commission intended and seeks clarification of this provision as well as to modify the entire rule to differentiate between a “firewalled” manufacturer laboratory and that of an independent, third party laboratory.

Another option that the commission could consider to alleviate concern over this provision as well as to protect against undue influence in general would be to require additional accreditation criteria from “firewalled” manufacturer laboratories similar to that required by OSHA’s Nationally Recognized Testing Laboratory (NRTL) program, ISO/IEC Guide 65 provisions relating to impartiality and conflict of interest, as well as ISO/IEC 17025 4.1.5 b regarding impartiality through ownership and legal structure.

The Proposed Rule Fails to Recognize the Certification Marks of Third Party Conformity Assessment Bodies

ACIL continues to be stunned that the commission is consistently failing to recognize the use of existing Federally-registered certification marks of third party conformity assessment bodies, most of which operate globally.

These marks are relied upon by all stakeholders in the children’s products distribution chain and other participants in the safety system. Introducing the new Certificate of Conformity (CoC) immediately will cause confusion in the marketplace.

At a minimum, the commission should have to justify through a comprehensive and independent study, why it is departing from the existing system and why its proposed system would be better and more reliable.

The Proposed Rule Fails To Include Reciprocity Provisions For Foreign Markets That Are Closed To US Third Party Laboratories

Reciprocity in the international trade context is the exchange of special privileges between countries to the advantage of all.

The system of special privileges that the CPSC is preparing to put in place damages U.S.-based laboratories because it is open to all countries while other countries’ conformity assessment systems are not open to U.S.-based laboratories.

Laboratory services are generally local in nature. Manufacturers prefer to deal with laboratories locally but desire worldwide acceptance. The only way to ensure that trade in services among laboratories is advantageous to all in the supply chain is if the country offering special privileges requires reciprocal treatment from third countries for U.S.-based laboratories; that is, requiring that third countries provide an open laboratory accreditation infrastructure to U.S.-based laboratories under conditions no less favorable to those afforded laboratories in their own country.

The system that the CPSC is preparing to put in place disadvantages U.S.-based laboratories because many of the foreign-based laboratories seeking accreditation operate in countries that deny U.S. laboratories open access to their accreditation infrastructure. This creates a one-way trading relationship and does not advantage all in the supply chain.

However there are more serious consequences to not including reciprocity provisions in the proposed. The very system that the commission is attempting to protect is undermined by government-owned and operated recognition, accreditation and certification infrastructures that are nothing but the fox guarding the henhouse. Under these schemes there is no independence and no impartiality. It is a system that will be imposed on the US because the commission refuses to put in place a system of reciprocity.

Therefore, ACIL believes that the CPSC should amend their proposed requirements to include reciprocity provisions identical to those utilized by the Occupational Safety and Health Administration (OSHA) under its Nationally Recognized Testing Laboratory (NRTL) program as well as those of the Federal Communications Commission (FCC).

Additional Areas Where the Commission Requests Comments

ACIL believes that it has satisfied the commission request for additional comments supra, except in one area and that is the cost to obtain required third party testing product under jurisdiction of the proposed rule.

Regardless of who conducts the testing to prove compliance (first party manufacturer, second party retailer, or third party conformity assessment body), the same tests must be conducted, to the same applicable standards, using the same equipment and test methods by the same type of trained personnel. In fact, third party conformity assessment bodies costs are usually less because they are in the business of certification.

CPSC should look to ACIL and ACIL member laboratories should they wish to investigate product compliance costs.

Conclusion

ACIL appreciates the opportunity to comment on the subject proposed rule and would be delighted to meet and work with the commission in implementing any of ACIL's suggestions.

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