

Comments  
Notice of Availability of a Statement  
of Policy: Testing of Component  
Parts with Respect to Section 108 of  
the CPSIA

Docket – CPSC-2009-0063

Published in the Federal Register  
August 17, 2009 (0001)  
Comments due by September 16,  
2009

Submissions 0002-0019

0002

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009 <b>Received:</b> August 28, 2009 <b>Status:</b> Posted <b>Posted:</b> August 28, 2009 <b>Category:</b> Manufacturer <b>Tracking No.</b> 80a16291 <b>Comments Due:</b> September 16, 2009 <b>Submission Type:</b> Web
--

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0002

Comment from Jennifer Brooks

## Submitter Information

**Name:** Jennifer Brooks

**Address:**

15 Gloucester Ave  
Gloucester, MA, 01930

**Email:** jenn@mettacreations.com

**Submitter's Representative:** unknown

**Organization:** Metta Creations

**Government Agency Type:** Federal

**Government Agency:** CPSC

## General Comment

I am writing to plead for component testing for lead and phalates in children's products. I make custom children's clothing. If it is left that the entire item must be tested I will be out of business, as I only make one of each item. If components, such as zippers, snaps, and buttons are allowed to be tested separately by the manufacturer, I will be able to absorb the increased cost; if component testing is not allowed I will stop making children's products. From the other spectrum, as a consumer, many of my favorite companies will also be put out of business by this law. I feel the law as written punishes the smaller companies who have been the most responsible in creating quality children's products, and lets off easy the larger companies who have been so lax in safety standards. I am the mother of a three year old, a two year old, and a three month old. I want to know the products I use are safe - but please, let's implement the rules in a way that takes the manufacturing process into account. The cost of testing a completed item will put all but the larger manufacturers out of business...which also the disappearance of most American-made goods for children. By and large the American made goods are made by the small companies that will be devastated by this legislation.

0003

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 08, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 10, 2009
<b>Category:</b> Other
<b>Tracking No.</b> 80a1e624
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0003

Comment from Tim Pine

---

## Submitter Information

**Name:** Tim Pine

**Address:**

TAP International LLC  
4310 Artesian Cove  
Denver, NC, 28037

**Email:** timapine@att.net

**Phone:** 704-483-7552

**Submitter's Representative:** Tim Pine

**Organization:** TAP International LLC

---

## General Comment

Please see the attached file for comments.

---

## Attachments

**CPSC-2009-0063-0003.1:** Comment from Tim Pine

Statement of Policy: Testing of Component Parts with respect to Section 108 of the CPSIA  
Consumer Product Safety Commission Docket Number: CPSC-2009-0063  
Comments of Tim Pine  
TAP International LLC  
September 8, 2009

The change in testing method from determining “phthalate content as a percentage of the entire toy or child care article” to determining phthalate content only for “those plastic parts or other product parts which could conceivably contain phthalates” can be positive and desirable providing the following comments are incorporated into the statement of policy:

1. Accessibility must be defined.

With the old test method, all components parts of a product were tested for phthalate content in order to determine the total phthalate content of the entire product. Then, total phthalate content was divided by total product weight to assess compliance with the phthalate requirement. This test method, of course, did not require any standard for accessibility.

Since the new test method is performed at the “component part” level instead of the “total product” level, the new test method must specify that only accessible component parts should be considered for test.

For the three phthalates that are under the interim prohibition (DINP, DIDP, and DnOP), an accessibility standard already exists for toys:

“Any children’s toy that can be placed in a child’s mouth...”

“If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth.”

For the other three phthalates (DEHP, DBP, and BBP) and for child care articles, an accessibility standard would have to be developed and specified in the statement of policy. I recommend that CPSC specify the accessibility standard that is used for section 101, Children’s Products Containing Lead; Lead Paint Rule.

2. Product that was tested, approved, and produced according to CPSC’s previous test method/policy must continue to be considered legal and acceptable for interstate commerce. A new CPSC policy statement and test method must make it clear that product produced in accordance with the previous CPSC policy is deemed legal and not subject to removal risk in the marketplace. There must be no question or confusion that CPSC did not intend this Statement of Policy to immediately supplant the existing policy/test method.

3. Multiple paints on a toy may be considered as a component part for the purpose of phthalate testing.

It is common for a doll, figure, or toy to be painted with many different color paints. Some of the paints might be mixtures of different color paints. The total painted surface should be considered as one coating component for the purposes of finished product audit testing. In other words, if a flexible plastic figure is coated with eight different paints, then one phthalate test using the total eight paints in the sample should be considered acceptable and in accordance with the CPSC test method. It should be acceptable to consider the entire coating as one component.

This interpretation is consistent with both the initial and new CPSC statement of policy, and it supports the CPSC and Industry concern about testing that “can be prohibitively expensive.” It could be extremely difficult and expensive if one had to consider each separate paint as a separate component for the purposes of finished product audit testing. If every freckle, mole, eye ball, eye ball highlight, etc. had to be treated as a separate component part, then it could take a huge number of products and amount of testing to complete the evaluation.

Paints and coating materials on toys, even when considered in total (all colors), make up a very small amount of the total toy weight. Testing all paints as one component when performing product auditing would certainly verify that there is no safety or health risk to children from phthalates.

Thank you for providing this opportunity for comments.

Sincerely,

Tim Pine  
Principal  
TAP International LLC  
4310 Artesian Cove  
Denver, NC 28037  
704-483-7552  
[timapine@att.net](mailto:timapine@att.net)

0004

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 11, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Trade Association
<b>Tracking No.</b> 80a20b80
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0004

Comment from Adrienne Watts

---

## Submitter Information

**Name:** Adrienne Watts

**Address:**

8380 Colesville Road  
Ste. 250  
Silver Spring, MD, 20910

**Email:** awatts@nssea.org

**Phone:** 301-495-0240

**Fax:** 301-495-3330

**Organization:** National School Supply & Equipment Association

---

## General Comment

NSSEA appreciates the opportunity the Consumer Product Safety Commission (CPSC) has given us to comment on the Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act. (Phthalate Policy) We believe the CPSC has an opportunity to revise its guidance to provide more certainty and to make the requirements more reasonable. Please read the attached comments.

---

## Attachments

**CPSC-2009-0063-0004.1:** Comment from Adrienne Watts

**CPSC-2009-0063-0004.2:** Comment from Adrienne Watts



September 11, 2009

Chairman Inez Tenenbaum  
Commissioner Thomas Moore  
Commissioner Nancy Nord  
Consumer Product Safety Commission  
4330 East-West Hwy.  
Bethesda, MD 20814

Re: Proposed Phthalate Policy; Docket Number CPSC-2009-0063

As you may know, the National School Supply and Equipment Association (NSSEA) is an organization of 1,500 businesses who sell educational supplies, equipment and instructional materials to schools, parents, and teachers. Our members care deeply about the safety of children. Most of our manufacturing members are relatively small businesses that do not sell a large volume of products and cannot amortize testing costs over large volumes of products as larger manufacturers can. For that reason, compliance with the Consumer Product Safety Improvement Act of 2008 (CPSIA) is proportionally much more burdensome for our members and impacts on our members' pricing and profitability.

NSSEA appreciates the opportunity the Consumer Product Safety Commission (CPSC) has given us to comment on the *Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act*. (Phthalate Policy) We believe the CPSC has an opportunity to revise its guidance to provide more certainty and to make the requirements more reasonable.

*Plasticized component parts*—NSSEA appreciates the attempt by the CPSC to identify and distinguish “plasticized component parts” from other materials that do not need to be tested. However, the CPSC Phthalate Policy talks about “materials that “do not normally contain phthalates and, therefore, might not require testing or certification.” [p. 4, Emphasis in original.] CPSC followed that listing of materials with a statement about the responsibility of manufacturers and the penalties for non-compliance. To provide more certainty, the CPSC should clearly state that the materials listed as “not normally” containing phthalates **need not be tested**. If you do not do this, other entities, including retailers, may be concerned about the qualified nature of that statement and--given the potential for penalties and liability--may require our members to test the materials even though they are not likely to contain phthalates. Providing more certainty does not prevent the CPSC from revising its guidance in the future if new information about these materials comes to light.

*Costs of Component Testing*—The CPSC has made an argument for testing components rather than entire products based on concern about under-stating the amount of exposure to phthalates. It has further justified this abrupt policy shift by claiming that testing components would benefit industry because it would be cheaper. However, in some cases, products contain multiple components that may need to be tested based on the Phthalate Policy. Testing multiple components for phthalates could be much more expensive due to the additional tests required, than the previous “one test” policy. The CPSC does not appear to have weighed the potential safety benefits of testing components, if any, versus the true costs of such testing.

*Incorporation of risk into the policy guidance*—In our letter to the CPSC of August 4, 2009, we noted that the CPSC policy statement indicated a concern about underestimating exposure to phthalates, but was otherwise largely uninterested in risk. As noted, CPSC's own scientists have testified that phthalates in

toys do not present a significant risk to children. Even consumer and environmental scientists seem to admit that any risk is confined to fetuses and possibly infants. The CPSC should exercise discretion in the enforcement of this provision both to focus its own resources where they will do the most good and to minimize unnecessary costs to the regulated community and consumers. We recommend the CPSC exercise its enforcement discretion to focus the phthalate provision based on the risk data, existing statutory language, children's behavior, and the ease of making the distinctions described below. By bringing this provision more into alignment with actual risk, the CPSC would reduce the huge costs of compliance with the statutory provision that are spent without any benefit to public safety. Further, the CPSC would be able to focus its enforcement efforts where they are more likely to have a safety pay-off for the public.

NSSEA recommends CPSC limit enforcement and testing to toys and child care items intended for **children 3 and under that can be placed into a child's mouth**. There are a number of good reasons for such limitations.

- First, *if* any children are at risk from phthalates, it is those in the earliest stage of development. (For example, consumer groups commenting in response to the CPSC's first request for comments in a January 12, 2009 letter, comment number 42 emphasized the risk of exposure early in the child's development. p. 3. This point was repeated in subsequent comments.)
- Second, the children most likely to mouth toys are those under the age of three. This is the reason the small parts regulation applies to such children. However, section 108(e)(1)(C) of the CPSIA defines "child care articles" using the 3 and under cut-off. A three and under limitation would be consistent with that provision and be slightly more conservative from a risk point of view.<sup>1</sup> On the other hand, a good argument could be made for a limitation to children under 3 based both because such children are more likely to mouth toys, they are arguably more at risk, and because that approach is consistent with the State of California requirement that applies to items that can be placed in the mouth of children *under 3*. *Cal. Health & Safety Code* § 108937.
- Third, the CPSC has done substantial human factors work that helps the CPSC and firms make the "three and under" (or "under 3") determination for toys.
- Fourth, although the CPSIA only speaks about toys that "can be placed in a child's mouth" in the context of the "interim ban," section 108(b)(1) of the CPSIA, mouthing of toys appears to be the only mechanism for ingestion risk that is of real concern for any phthalate. Further, according to the testimony filed with the CPSC, some of the banned phthalates are not even used in children's toys. Congress placed the phthalate most often present in toys, Diisononyl Phthalates (DINP) under this interim ban. In effect, even the CPSIA only applies a ban to the most common phthalate in children's toys **if the toy can be mouthed**.
- Fifth, focusing in on a younger age range and ability to mouth an item greatly reduces the number of products and components that need to be tested. An item that is not accessible and cannot be placed in the mouth presents no risk and would not have to be tested, nor would toys for older children that do not present a risk to younger children. While it may be argued that small children in a household might handle products intended for their older siblings, that is equally true of

---

<sup>1</sup> Support for this cut-off is found in the comments of Carol Pollack-Nelson in her December 8, 2008 comment, #13 in the CPSC docket. Ms. Pollack-Nelson says that while most mouthing activity is associated with such younger children. Even the most conservative age cut-off based on mouthing behavior would cover pre-school age children under 5. Further, CPSC's own study of phthalate risk found that even children from 3 to 12 months spend less than 10 minutes per day in mouthing behavior. *Report to the U.S. Consumer Product Safety Commission by the Chronic Hazard Advisory Panel on Diisononyl Phthalates (DINP)*, June 2001.

items in the household intended for children and adults over 12 and to non-toy items. (Given the CPSC study data showing very limited mouthing of all objects, the mouthing of items not intended for such children is insignificant.) Focusing on products based on the age of the children more likely to be at risk provides the only clean, defensible approach. Limiting the toys and components that need to be tested will save huge amounts of money in testing costs. Undoubtedly, this will make products less expensive to consumers, and will limit some of the inequitable cost disadvantages to smaller businesses. And the beauty of this limitation is that none of these savings will have a negative impact on public safety.

- Sixth, even with the increases in resources provided under the CPSIA, the CPSC is still a very tiny agency with limited testing and enforcement capabilities. Narrowing the CPSC enforcement efforts on phthalates allows the agency to save resources that would have been used in enforcement of a provision that would not impact safety. Those resources can be redirected to other issues based on risk. The result for the public is enhanced safety and risk reduction and an agency that is actually fulfilling its mission.

In sum, by exercising its discretion as recommended, the CPSC has an opportunity to improve its ability to save lives and reduce risk. The refocusing we recommend would have no negative impact on safety. It would save consumers a fortune in testing and compliance costs and reduce inequities between small and larger firms. Finally, the CPSC would gain credibility by applying common sense to implementation of the CPSIA.<sup>2</sup>

Please let us know if we can provide further information in support of these comments.

Cordially,



Tim Holt  
President/CEO  
National School Supply and Equipment Association

NSSEA Board of Directors

CHAIR: Dennis Gosney, Wood Designs  
CHAIR-ELECT: Terry Jenson, Playtime Equipment & School Supply

Kent Brings, Educational Insights  
Mark Carlson, Wiebe, Carlson & Associates  
Kevin Fahy, Fahy-Williams Publishing  
Andy Gattas, Knowledge Tree  
Cameron Logan, Cameron Marketing Services

---

<sup>2</sup> CPSC could exercise similar discretion with regard to the “total lead” provision of section 101 of the CPSIA. It might even read the “any lead” language in the exclusion provision of section 101(b)(1)(A) as meaning “sufficient lead to elevate blood lead levels” as some scientists have suggested. Although CPSC has taken a very narrow reading of that language to date, many members of Congress and the Senate seem to believe the CPSIA gives the agency more discretion. (See, for example, letter of April 9, 2009 from 28 Senators to Acting Chairman Nancy Nord.) A re-reading of this provision and a focus on products that actually place children at risk would be a much more “common sense” approach that would limit compliance costs, focus on products of real risk, and allow the agency to use its resources more effectively.

Anna Longo, Scholar's Choice  
Susan Savoie, Teacher Heaven  
Jennifer Tafflinger, Creative Teaching Press  
Laurie Uherek, Educate & Celebrate  
Cindy Webster, Scholar's Choice  
Jay Rice, Creative Catalog Concepts  
Greg Cessna, School Specialty, Inc.  
Gregory Cooney, Frank Cooney Company  
Ed Gyenes, Virco Manufacturing  
Doug Jehle, Scholar Craft Products, Inc.  
Stephanie Keller, Nickerson New Jersey  
Debbie Moore, Peter Li Education Group  
Greg Moore, MooreCo., Balt/Best-Rite  
Janet Nelson, DEMCO  
Molly Risdall Parnell, Smith System

0005

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 15, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Consumer/Individual
<b>Tracking No.</b> 80a23a05
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0005

Comment from Tim Zacharewski

---

## Submitter Information

**Name:** Tim Zacharewski

**Address:**

Michigan State University  
Biochemistry & Molecular Biology  
East Lansing, MI, 48842

**Email:** tzachare@msu.edu

**Phone:** 517-355-1607

**Fax:** 517-353-9334

---

## General Comment

To: Office of the Secretary, Consumer Product Safety Commission

From: Tim Zacharewski, PhD - Michigan State University

Date: 9/15/2009

Re: Testing of Component Parts With Respect To Section 108 of the Consumer Product Safety Improvement Act

I am concerned the proposed policy for the testing of component parts in respect to section 108 of the CPSIA does not properly consider the basic parameters of phthalate exposure pathways.

My understanding of the policy requires testing for each component of an article. However, the interim ban on DINP, DIDP, and DnOP are only subject to the more limited definition of "children's toy that can be placed in a child's mouth." Given the limits of this temporary regulation, testing for the interim ban should only apply to those components of the article that can be mouthed.

In previous comments to the Commission, I described the importance of exposure pathways and encouraged the Commission to consider not only the route of exposure but also the level of

exposure when deciding which items should be subject to compliance testing.

The most significant route of exposure for a child is through mouthing phthalate-containing products based on migration studies. Therefore, it is unnecessary to require testing on those articles or components that do not present an exposure risk because they can not be mouthed. For example, the following specific categories would fall under the "no routes of exposure" to the child and should be excluded from regulation and testing:

1. Secondary products as they contact the caregiver and not the child
2. Products that are in close proximity but do not have direct physical contact
3. Parts inaccessible to a child
4. Articles in the deflated state as that would not be given to a child to play with or inflated by the child.

With respect to oral exposure (i.e. mouthing), several government and independent studies have shown that the amount of time children spend mouthing soft-plastic

0606

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 15, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Other
<b>Tracking No.</b> 80a23a6b
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0006

Comment from Michael Gidding

---

## Submitter Information

**Name:** Michael Gidding

**Address:**

3201 New Mexico Avenue, N.W.  
St. 242  
Washington, DC, 20016

**Email:** [mjg@brown-gidding.com](mailto:mjg@brown-gidding.com)

**Phone:** 202-237-6008

**Fax:** 202-237-5259

**Submitter's Representative:** Michael J. Gidding

**Organization:** Brown & Gidding, P.C.

---

## General Comment

Letter dated September 15, 2009 from Brown & Gidding, P.C. commenting on behalf of several clients concerning the Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act - Docket No. CPSC 2009-0063.

---

## Attachments

**CPSC-2009-0063-0006.1:** Comment from Michael Gidding



BROWN & GIDDING, P.C.

September 15, 2009

***VIA E-MAIL AND  
FIRST CLASS MAIL***

Office of the Secretary  
Room 502  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

***Comments: Notice of Availability of a Statement of Policy: Testing of  
Component Parts with Respect to Section 108 of the Consumer Product  
Safety Improvement Act; Docket No. CPSC 2009-0063***

To Whom It May Concern:

Several of our clients are affected by the requirements of the Consumer Product Safety Improvement Act (CPSIA) prohibiting the manufacture or sale of certain children's products that contain specified phthalates in concentrations of greater than .1%. On behalf of those clients, I submit these comments on the August 17, 2009 document titled *Notice of Availability of a Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act*.<sup>1</sup>

**General**

**a. Rationale for a new revised test procedure:** In March of 2009, the Commission issued Test Method: CPSC-CH-C1001-09 which laid out the test procedure that the Commission's testing laboratory was to use for the analysis of phthalate content. Unlike the test procedures for evaluating lead, that procedure uses the entire weight of a children's product as the denominator for measuring the concentration of the phthalates enumerated in section 108 of the CPSIA. This approach follows the plain language of section 108 of the CPSIA which states that the concentration limits apply to any children's toy or child care

---

<sup>1</sup> Others have previously submitted to the Commission several of the comments below relating to the logistics of testing, but the agency has not yet addressed those comments.

article.<sup>2</sup> The new proposed guidance alters this policy by making testing applicable to components of toys and child care products that are subject to the phthalates bans and calculating the concentration of phthalates based on the weight of each component rather than that of the entire article. The rationale in the staff briefing package for the change focused on several concerns, many of which appear to be overstated.

1. The briefing package in support of the test procedure change justifies the change in part by questioning whether sample preparation under the existing test procedure would be unduly difficult. In terms of sample preparations, however, the existing procedure expressly recognizes an alternative that parts such as unpainted metal, glass, or ceramic parts that are considered to be phthalate free need not be tested, as long as their weight is included in measuring phthalate concentration. Given the vagueness with which the new procedure defines a "plasticized component," the existing procedure for sample preparation does not appear to differ significantly from that in the new procedure, since every component that had to be tested under the old procedure will still have to be tested under the new procedure.

2. The briefing package expressed concerns that, under the existing test procedure, the measurement of phthalate concentration might be diluted by the presence of non-plasticized components, resulting in a less stringent and less health-protective regulation. It further noted that the existing procedure is not consistent with those of other jurisdictions, and that testing the entire product might not reflect the intent of Congress. While consistency in testing among jurisdictions may be desirable, resolving this issue would appear to be a matter for legislative resolution, since Congress wrote the phthalate provisions of the CPSIA in the way it did. The same is true for the concern about legislative intent, although neither the CPSIA nor its legislative history, sparse though it may be, contain any indication that Congress intended anything other than what the language of the law says. As for the health-protective aspect associated with the legislation, Commission staff analyses have already shown that, at this time, phthalates are not an

---

<sup>2</sup> Unlike the lead provisions of section 101 of the CPSA which addresses "parts" of children's products as items that must meet the standard, section 108 does not do the same either in identifying toys and child care articles subject to the phthalate limits or in the definitions of toys and child care articles themselves.

issue of major concern. While using total product weight, rather than component weight, in computing phthalate concentration, may result in some products complying with the law that would not otherwise comply if the weights of the components tested were used as the denominators for measuring concentration, any incremental increase in risk should be negligible.

3. The briefing package and policy statement expressed concern that the original testing procedure was prohibitively expensive. The original procedure, however, recognized the validity of excluding components from testing considered to be phthalate free, thus in effect requiring only that parts of products that might contain phthalates be tested. The new procedure, on the other hand, identifies products that "do not normally contain phthalates and . . . might not require testing" and then requires testing of all "plasticized components" which it defines as "parts that could conceivably contain phthalates." Given the parameters of the two procedures, the new procedure appears to require about the same or even more testing than the existing procedure.

In sum, while we appreciate the concerns that the Commission attempted to address in revising its test procedure, we continue to believe that those concerns should be addressed to Congress rather than through statements of agency policy.

**b. Consistency:** An additional general concern with the new policy is that it represents a departure from the agency's consistent practice, since the passage of the CPSIA, of following the plain language of the law.<sup>3</sup> I believe that I speak for many members of the CPSC bar, as well as for members of the manufacturing and retailer communities, when I observe that the agency has consistently failed to provide general, let alone definitive, answers to many basic questions about the scope and application of the CPSIA. A year ago, the General Counsel of the Commission stated in a public meeting that the Commission had received some 9000 questions about the act. That list may well have doubled by

---

<sup>3</sup> Litigation over the advisory opinion concerning the retroactivity of the phthalate provisions - the agency's litigation over one foray into interpreting the law based on its relationship to other parts of the Consumer Product Safety Act - resulted in a decision adverse to the agency's position.

this time, yet answers have been few and far between.<sup>4</sup> In the absence of guidance from the Commission, those on the outside have been left to interpret the law based on their reading of the statute as they believe the Commission might interpret it.<sup>5</sup>

While the Commission's consistent plain language reading of the law has led to what some members of manufacturing and retail communities regard as undesirable results and unintended consequences, it has at least provided some predictability in determining how to comply with the various mandates of the act. In the absence of guidance from the Commission or its staff, parties on the outside have had to attempt to decipher the law by applying the same plain language analysis that the Commission has used. The agency's departure from that process in the case of phthalates simply interjects more uncertainty and unpredictability into decision-making outside the agency. This is not to suggest that leaving firms to follow their own plain language interpretation regimen is a solution to the unanswered questions. By far the preferable solution is for the Commission to respond in a timely manner to each of the questions it receives, thus alleviating the need for the public to interpret the law on its own. In the absence of Commission answers to the numerous questions pending before it, however, consistency in analytical approach on the part of the Commission becomes quite important to those trying to comply with the law.

**The Policy Statement** The policy statement itself leaves unanswered several questions of significance to those who manufacture or sell toys and child-care articles subject to the law. These are as follows:

**a. Effective date:** For the last several months, firms have been relying on procedures in the Commission's March 2009 guidance document to evaluate products for compliance with the phthalate requirements. The new policy statement does not contain any indication of when the Commission expects firms to start testing products according to the new procedure. It may be in effect now, it could conceivably go into effect immediately after the

---

<sup>4</sup> It may be that some agency staff have begun to attempt to answer these questions about the CPSIA. However, as the lack of new entries on the Q&A portion of the CPSIA web site shows, those answers, if they exist, have not been disseminated to interested parties. This failure does little to alleviate the mass confusion that currently exists. When the Commission staff answers such questions, it should post the answers on its web site so that all interested parties are informed of the agency staff's position.

<sup>5</sup> The legislative history of the CPSIA typically offers little guidance concerning Congressional intent in enacting most of the specific provisions of the law.

Commission responds to comments, or the Commission could decide to establish a delayed effective date. Should the Commission decide to continue with the new procedure, we believe that establishing a delayed effective date is the most practical and fairest approach. Providing a delayed effective date will give both manufacturers and testing organizations the time to adjust their practices to the new procedures. We suggest that an effective date that is 120 days after the Commission publishes its final guidance would be appropriate to accomplish this objective. To assure that this roughly coincides with the reinstated testing and certification requirements in February, the new procedure should only apply to products manufactured after the effective date of the revised procedure. To apply the new guidance retroactively would be unfair to those companies who relied in good faith on the previous Commission guidance.

**b. Lack of specificity:** While we appreciate the agency's attempts to bring clarity to the issue of phthalate testing, the policy statement falls short. It proposes to limit tests to plastic parts and "plasticized component parts," but then defines the latter as "other product parts that could conceivably contain phthalates (emphasis added)." Similarly, in what appears to be an attempt to narrow the scope of testing, it identifies several types of products that "do not normally contain phthalates and, therefore, *might not* require certification or testing." (Emphasis supplied by the Commission) These constructions with their caveats offer little practical guidance for manufacturers who want to comply with the law and at the same time only test product components that may realistically require such testing. The Commission needs to provide more specific and certain guidance on these issues. If the guidance proves to be incorrect or in need of change, then the Commission certainly can change or modify the guidance in the future. In the interim, regulated entities need certainty so that they can take steps to comply with the law as the Commission interprets it.

Similarly, in the section on responsibility for testing, the guidance document notes that manufacturers know or should know whether a product or one of its components contains one of the phthalates enumerated in the CPSIA. It then seems to suggest that the requirement to test only arises if the manufacturer determines that a product contains a regulated phthalate. Leaving aside the disconnect between imputed knowledge and the decision to test, the guidance document, however, goes on to point out that the failure to test and certify a regulated product subject to section 108 of the CPSIA is a prohibited act. The question then is when, in the Commission's view, are manufacturers required to perform testing? If the position of the Commission is that a manufacturer or importer can rely on formulation data in making a decision whether to test, the guidance document should say so explicitly, but should also

explain how this will fit into the upcoming certification program that goes into effect in February. If, for example, a manufacturer decides not to test based on information about ingredients added to components, does a certification have to reference this decision and provide documentation supporting it? If, on the other hand, testing of all components is required regardless of knowledge of material composition, the policy statement should make that clear and delete the references to knowledge of ingredients. From my clients' perspective, limiting the decision whether to test based on ingredient information has the potential to be a cost-effective practical approach, as long as the guidance document clearly addresses issues relating to certification.

**c. Component accessibility:** The phthalate requirements of the CPSIA address the putative risks that might result from young children ingesting or absorbing phthalates from toys and child-care articles. If the Commission decides to require the new component testing procedure to determine compliance with the phthalate requirements of the CPSIA, it should also address the issue of testing components that are not accessible for mouthing or for physical contact that might result in absorption or hand-to-mouth transfer of phthalates. Congress and the Commission have already recognized that inaccessible components that contain lead are not subject to the requirements of the CPSIA because they do not present a risk. We believe that the Commission should follow the same rationale to exempt from the phthalate requirements components that are inaccessible after use and abuse testing. In the alternative, the agency should exercise its enforcement discretion and not require testing of such components or enforce against them. Either alternative would be an acknowledgement that inaccessible internal components present no conceivable risk to children.

We are aware that, in its prior responses to a previously asked question about accessibility, the agency stated:

"The prohibition on phthalates applies to all parts of a children's toy or child care article as defined in section 108 of the CPSIA. Section 108 does not make an exception or exemption for accessibility for phthalates as is the case for lead in children's products under section 101."

This position was apparently based on a plain reading of the language of the law. Now that the Commission has recognized that the law can be subject to interpretation and that the same Congress that enacted the law has urged it to adopt common-sense solutions, it would appear that the guidance document

provides an appropriate vehicle for addressing this issue anew. If the Commission continues to believe that the plain language of the law prohibits consideration of issues of accessibility, that same analytical approach would dictate that the Commission stand by its original reading of the law that the measure of phthalate content is based on the entire weight of the product and not each component.

**d. Specific Testing Issues:**

1. Sample amounts. On occasion, a component may not be sufficiently large to provide enough material to conduct testing for phthalates. In the past when this issue has arisen with lead-in-paint, the practice has been to take samples of similar paint from multiple products until the amount of paint is large enough to test. Testing for phthalates raises the same issue. We believe that, while using multiple products to obtain sufficient material to test may be scientifically necessary, requiring a procedure to test phthalates similar to that used for lead-in-paint would be wasteful without providing any incremental increase in safety. The new phthalate test procedure requires a minimum of .05 grams of material (about .00176 oz.) for testing. If a sample of a component contains insufficient material to provide the minimal amount of material necessary for testing, it is highly unlikely that any adverse health effects from the phthalate content of the component will occur even if the entire component is ingested. On the other hand, sampling multiple components to obtain the minimum sample amount can require the destruction of many units of otherwise sellable merchandise with little commensurate health benefit. In our view, the better practice would be to simply exempt from the requirements of section 108 of the CPSIA product components that cannot yield sufficient material to test for phthalates. In the alternative, in recognition that such components represent a *de minimis* risk, the Commission should exercise its enforcement discretion and not require that they be tested.

If the Commission decides that the use of multiple samples to obtain the material necessary to test for phthalates is appropriate, the agency should give specific guidance on what practices are acceptable. For example, it is our understanding that the insulated wire on electrical components inside various children's products typically does not yield enough material to perform a component test for phthalates. As a result, some testing laboratories require that applicants provide spools of the types of wires used and use wire from the spools to create a sufficient

sample of insulation for testing, even though there is no assurance that the insulation on wire on the spool is the same as the insulation on wire in the product component tested. On the other hand, removing components from other finished products from the same lot as a product under test to produce a sample sufficient for testing is expensive and time consuming. As is noted earlier, we believe that products that do not contain enough material to yield a sample for testing should not require testing. However, guidance on this general subject would be helpful if the Commission believes that such testing is appropriate.

2. Multiple components. Products often have multiple components made from the same material. If a manufacturer can demonstrate that different components of a finished product are made from the same material, the Commission should accept the test of one component as being representative of all similar components or, in the alternative, should permit the multiple components to be processed in a manner that produces a single sample for testing. Given the expense associated with a single phthalate test, this type of common sense approach is needed if the Commission is to reach the goal of reducing unnecessary testing costs.

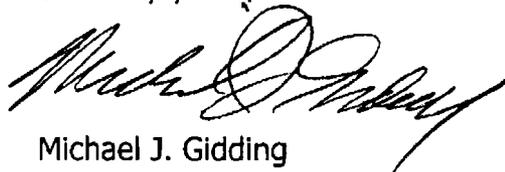
3. Raw material testing. Among techniques the Commission should consider is allowing tests for phthalates on raw materials used to make components to provide the basis for certification, rather than requiring a test of finished components made of those materials. Under this regimen, one test of a raw material could provide the basis for certifying multiple components as long as a manufacturer could link the raw material to specific end products and has controls in place to minimize the possibility of contamination during the manufacturing process.

**e. Unresolved issues:** Over the past nine months, most recently in February, the Commission has requested comments on a variety of issues relating to phthalates, including the identity of products that might contain phthalates and how to define those products that are subject to section 108 of the CPSIA. As the Commission's web postings show, these requests have generated many inquiries and suggestions. To date, however, the Commission has issued little guidance in response to those contacts. We believe that the final guidance document should include, not only information about testing, but also comprehensive responses to those inquiries and comments. Doing so will ensure that phthalate issues are addressed in an integrated rather than piecemeal manner.

Office of the Secretary  
September 15, 2009  
Page 9

I appreciate the opportunity to comment on behalf of my clients.  
Please contact me if you need additional information.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael J. Gidding", written in a cursive style.

Michael J. Gidding

0007

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 15, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Consumer Advocacy Organization
<b>Tracking No.</b> 80a23afc
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0007

Comment from Andrew Langer

---

## Submitter Information

**Name:** Andrew Langer

**Address:**

1250 Connecticut Ave  
Suite 200  
Washington, DC, 20036

**Email:** Andrew.Langer@instituteforliberty.org

**Phone:** 202-261-6592

**Submitter's Representative:** Andrew Langer

**Organization:** Institute for Liberty

---

## General Comment

Attached, in word format, are the comments of the Institute for Liberty.

---

## Attachments

**CPSC-2009-0063-0007.1:** Comment from Andrew Langer



September 15, 2009

Office of the Chairman  
U.S. Consumer Product Safety Commission  
4330 East West Highway, Room 502  
Bethesda, MD 20814

**Comments on the Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act (CPSIA)**

To Whom It May Concern,

I am submitting these comments on behalf of the Institute for Liberty (IFL). IFL is a non-profit, 501C(4) research and advocacy organization. Our role is to offer the perspective of small business in federal public policymaking, specifically how federal regulatory policies impact American small business. Today, we would like to offer this perspective as it pertains to the CPSIA.

Implementation of the CPSIA has already caused headaches and confusion for many small businesses and the testing requirements will add additional financial and regulatory burdens. After reviewing the testing requirements for phthalates outlined by the Consumer Product Safety Commission, I am concerned this expensive and onerous process would incur great costs to small businesses which would ultimately get passed down to consumers.

The testing procedure for phthalates can only be done using the expensive laboratory procedure known as Gas-Chromatography. In addition to high cost of the test and analysis, this procedure requires the destruction of the sample product. This means that small business manufacturers and retailers who do not produce in mass quantities will be required to sacrifice a large percentage of their inventory. These testing costs can range from hundreds to several thousand dollars for each product. While many of the large businesses and manufacturers can afford this testing, these costs have the potential to put family owned manufacturers and local toy makers out of business.

This new law was well-intended to enhance the safety of our children but Congress went too far and passed a law that was overreaching and yielded serious unintended consequences. I am a true believer in the importance of product safety; however, I do not

believe that taking safe products off our shelves will make children any safer. In the case of phthalates, the phthalates most commonly used in children's products are known as high molecular weight phthalates and have been repeatedly proven safe by several government agencies including the Consumer Product Safety Commission (CPSC) and the National Toxicology Program (NTP). Unlike the permanent ban on the low molecular phthalates, the restrictions on these phthalates –DINP, DIDP, and DnOP— are temporary and subject only to mouthing items To require expensive testing for these phthalates on product components that are inaccessible and incapable of being mouthed by children is unnecessary and a waste of money.

The proposed testing requirements are in violation of the law passed as Congress intended. Congress specifically limited restrictions of the high molecular weight phthalates to mouthing items only, therefore to require testing of these phthalates in all products and components would go beyond the scope of the law. To require unnecessary and expensive testing would inflict further harm on already struggling small businesses. In this midst of this economic recession, the government should be looking for ways to help businesses prosper instead of burdening them with additional costs. To help alleviate some of the high testing cost burdens on local and family owned businesses, the CPSC should limit the scope of testing requirements on phthalates to only those products and parts that present an exposure risk for children.

Sincerely,

//s//

Andrew Langer  
President, Institute for Liberty

0008

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Manufacturer
<b>Tracking No.</b> 80a23b38
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0008

Comment from Richard Woldenberg

---

## Submitter Information

**Name:** Richard Woldenberg

**Address:**

380 North Fairway Drive  
Vernon Hills, IL, 60061

**Email:** rwoldenberg@learningresources.com

**Phone:** 847-573-8420

**Fax:** 847-281-1730

**Organization:** Learning Resources, Inc.

---

## General Comment

I have attached my comment in a Word file attached hereto.

---

## Attachments

**CPSC-2009-0063-0008.1:** Comment from Richard Woldenberg

September 16, 2009

To Whom It May Concern:

I am hereby submitting comments in response to the Notice of Availability of a Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act [CPSC Docket Number: CPSC–2009–0063] dated August 17, 2009.

1. Applicability of Component Testing. We believe the clear language of the CPSIA provides that TOTAL WEIGHT OF THE PRODUCT be the basis of any calculation of phthalate content. Sections 108(a) and 108(b)(1) state that “it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children’s toy or child care article that contains concentrations of more than 0.1 percent of [certain phthalates].”

Notably, in the August 7, 2009 Statement of Policy on the Phthalate Testing Standard (the "Statement"), justification for component level testing is based on an argument that Section 108 of the CPSIA uses the term "children's product" incorporates the term "consumer product" which is defined in Section 3 of the CPSA as "any article, or component part thereof, produced or distributed . . . ." The Statement concludes: "Because the term consumer product includes components of an article, the Commission believes that the phthalate limits in section 108 of the CPSIA apply to each component part of any article." This reasoning overlooks the fact that the CPSIA also uses the same term "children's product" in Section 101 in regard to the new lead standards but clarifies it in the following terms: ". . . the lead limit referred to in paragraph (1) is 600 parts per million total lead content by weight for **any part** of the product." [Section 101(a)(2)(A)] [Emphasis added] Rules of statutory construction require that the words of a statute be interpreted to give meaning to all the words used. Therefore, apparently, Congress did not impute an obligation to test components for the term "children's product" in Section 101 and felt it necessary to state plainly that the lead standard applied to "parts", whereas no such limitation was incorporated into Section 108. The reasoning used to justify component testing on this basis is thus faulty. Without further action by Congress, the July revision revision of the March standard previously announced by the CPSC should be revoked and total toy phthalate concentration testing protocols be restored.

2. The Apparent Paradox of a Component in a Hypothetical Toy Containing Phthalates. The introduction to the July 27 Test Method (the "Standard") refers to a hypothetical toy containing a teether with phthalates in excess of permitted levels. The introduction refers to this as a "paradox". In fact, it is hardly paradoxical. The law does not prohibit parts containing phthalates, as illustrated above. In addition, the CPSC has on two occasions (CHAPS in 1998 and 2001) concluded that phthalates do not present a material health risk to children. Thus, I do not understand how the CPSC can express concern that a part in a hypothetical toy contains phthalates that might violate the standards IF the part were a stand-alone toy as the CPSC itself has stated publicly that this would not present a health risk. The apparent meaning of the "paradox" referred to in the Standard is that Congress outlawed six phthalates as a health risk in contravention of the reasoned and well-researched opinion of the CPSC scientists. This conflict does not justify reading the law more broadly than it is written.

Many companies and many valued products will be sacrificed to this "paradox" if the meaning of the underlying law is not respected. I think it is highly unlikely that any parts in a

hypothetical toy will contain the six "bad" phthalates when they are outlawed all over the world. The economic incentive to use them is too low, and legal and uncontroversial substitutes are too readily available. Needless to say, the very existence of the CPSIA (not to mention the EU ban) cuts the market for the six phthalates substantially, if not entirely. With much lower volumes, these chemicals will rise in price and will become harder to find. In due course, manufacturers will literally have to work to obtain supplies of the six phthalates and take considerable risk to use them, all for no economic incentive. In a nutshell, right or wrong, the CPSIA will have the effect of ridding the market of these chemicals as long as they are illegal (which is not the same thing as saying that they are dangerous). YET under the test standards, we must forever test each and every component to prove that these hard-to-find chemicals are not present. That is the true "paradox" of the Standard's example - it is paradoxical that our safety system requires that we prove the absence of chemicals that are not economically or functionally advantageous nor easy to find.

In any event, in the cited hypothetical example, a teether is at issue. Why not simply require testing for all components which are suitable for children up to 36 months old and which can be placed in the mouth? In the past, the CPSC has asked industry to take certain phthalates out of products like this (without controversy, I should add). Companies can certainly test teethers, pacifiers and rattles without testing each other component that is not likely to be placed into the mouth. Given that this test procedure includes items suitable for children up to 12 years old, the Standard will impose widespread economic harm apparently in order to catch teething rings. I think this is unwise and unnecessary and will harm markets.

3. The Rationale Offered for Component Testing. In the Statement, the following rationale for the change to component testing is offered: "Given that testing the phthalate content of an entire children's toy or child care article presents certain difficulties, may lead to dilution of the phthalate concentrations compared to that in one or more of its component parts, differs from similar regulations issued by other jurisdictions, and can be prohibitively expensive, the Commission believes that phthalate testing should be limited to those plastic parts or other product parts which could conceivably contain phthalates ('plasticized component parts')." I have previously addressed the inapplicability of component testing under Section 108. I will now address the other rationales offered in this statement.

Regarding "dilution", it can only be considered an issue here if component testing is required under the law. At the moment, the law as written (as explained above) specifies phthalate levels for the entire toy. Dilution would only be an issue if the law read differently, requiring certification by part, which it does not. As the CPSC has already ruled out in two previous CHAPS that the six phthalates present a material health risk to children, it lacks the legal authority under the FHSA to impose restrictions on products containing them as "banned hazardous substances". It is therefore entirely dependent on Section 108 to justify this new Standard. Dilution is therefore legally irrelevant as a consideration.

It has not been our experience in testing for phthalates that testing the whole toy presents any "difficulties". Testing for phthalates is, in general, prohibitively expensive. The right way to moderate that expense is to run fewer tests. Testing an entire toy is definitely cheaper than testing every component because it requires fewer tests. If a manufacturer encounters "certain difficulties" or finds that testing the entire toy is somehow more expensive than testing components, your rule should permit the manufacturer to opt for component testing. This simple

solution will preserve the benefit those of us who have discovered that testing the entire toy is cheaper.

The concern expressed for coordinating test requirements with other jurisdictions is commendable, but which jurisdictions are the CPSC attempting to align with? If the Statement is referring to a state (like California), the Standard and Federal law should preempt the state standard. I think that industry action can be used to help bring different jurisdictions in line on testing standards. If that is not sufficient, legislative action is the next step. [It is ironic, actually, that this justification for the phthalate standard has been offered, as for many years the CPSC has stood pat and refused to align its testing procedures with European standards, causing U.S. manufacturers to test repetitively to two standards.] In this case, the alignment justification is going to cost industry millions of dollars in excessive and ineffective component testing. Unless the law requires that the CPSC correlate its testing standard, I think the March Standard should be remain in place (toy-level testing).

The Statement also notes: "Testing component parts to the phthalates limits established in section 108 is more protective of human health . . . ." As noted above, the CPSC has twice rejected the notion that phthalates are dangerous in CHAPS in 1998 and 2001. This statement should be struck from the Statement for that reason alone. The fact that Congress outlawed six phthalates does not invalidate the scientific conclusions reached in the agency's two CHAPS.

4. Inaccessible Components. The Statement and Standard do not differentiate between accessible and inaccessible components. Without meaning to contradict my comments above on the invalidity of component testing requirements, I believe there MUST be a distinction in the rules between accessible and inaccessible parts in any testing standard for phthalates. Inaccessible parts should be exempt from testing, whether on a component or whole toy basis, as there is no known health risk possible from inaccessible parts (whether or not the results of the two CHAPS are respected). This is a rather self-evident concept, as phthalates do not have the ability to "leap" from inside a toy into the human body. There is only one mechanism that can transport phthalates from a toy into the human body, namely mouthing or chewing. Inaccessible parts cannot be mouthed or chew without unforeseeable and substantial toy abuse, and thus should be excluded entirely from the testing requirements.

5. Vague Standards. In the Statement as quoted above, the test standard now requires that any "plastic parts or other product parts which could conceivably contain phthalates" be tested. This expansive definition is not only vague and undefined but it is also subject to second guessing. Vague terms like this also tend to cause disagreements in the supply chain, leading to loss of revenue and unnecessary testing. The Standard does not let the manufacturer make this judgment definitively, either. The inability of a manufacturer to rely on a "safe harbor" rule, short of testing every component of every product, is a major economic disincentive and will certainly disrupt markets. The CPSC has already received MUCH data from companies documenting this kind of market disruption. Although the CPSIA may have been cleansed of any reference to money or economics, the CPSC has no legal or moral obligation to promulgate rules that are devoid of sensitivity to market considerations. In this case, please consider that the financial implications of the new Standard making new products too expensive to develop, manufacture or distribute will stifle innovation, reduce the diversity of products available in specialty markets, stunt new company formation and reduce jobs - all to enforce a law which is directly contravenes the results of two CPSC CHAPS. To do so will severely disrupts markets

regulated by the CPSC and disproportionately harm Small Business. In light of the CPSC's stated opinion on the safety of phthalates, this is unacceptable as a matter of public policy.

The Standard should specify which materials are known to contain phthalates and restrict it to known materials meeting physical examination criteria. In other words, it should not be sufficient that it is "conceivable" that phthalates have been used in a particular plastic or component. The part or material itself must also exhibit the characteristics of a plastic or part containing phthalates (in other words, it is pliable). This is a highly effective and low cost way to differentiate between plastics that have phthalates and those that do not. The presence of phthalates is not hard to detect with a physical examination.

*De minimus* risk of phthalates used in low mass components or materials, especially noting the function of the parts, should be exempt from testing. As an example, coatings on parts that are not likely to be mouthed (in other words, they are not intended for children under three years old or cannot be placed in the mouth) should not require testing. In addition, the mass of the possible phthalates in such coatings is likely completely immaterial. The repetitive testing of low value, low risk items or parts will bankrupt companies still remaining in this devastated market. Some exercise of regulatory judgment is necessary to save the children's market here.

6. Multiple Components. If component testing is required in the final standard, the standard should not require repetitive testing of the same component. If a component is used in multiples in a particular product or is used in more than one toy, the testing standard should permit use of a single test on a single component to apply for all of its uses in applicable toys.

It is also our recommendation that raw material testing be accepted in lieu of component testing. That said, raw materials testing is not likely to resolve testing problems under the CPSIA except for the simplest products. While I have consistently written that raw materials testing is an appropriate and effective supply chain management technique, raw materials test reports when compiled for a complex product will tend to raise questions (they will form an unreconcilable, incomprehensible mass of seemingly meaningless reports) and will in fact, detract from assurances that the final product actually complies with law. This flaw, which is highly likely to cause expensive delays at the border when U.S. Customs begins to examine test reports under the CPSIA, will again tend to force companies to test whole products at high expense, simply to keep products moving across borders and to make it easier to sell them into retailers who do not want to accept such reports for legal liability reasons or spend the time or money trying to reconstruct a passing test report on a toy from a pile of raw material test reports.

7. The Phthalates Standard is Effectively a Requirement to Test Every Component in Every Toy. The Statement does not rule out testing of ANY material as far as I can tell. The standard even leaves open the possibility that natural sand, glass, crystal, unfinished metal, cotton textiles or even natural wood might need testing under some circumstances. This is particularly perplexing because the CPSC knows that phthalates are an additive and do not exist in nature. They are also an organic chemical that would not survive the heat necessary to forge steel or melt sand into glass. To suggest that these items "might" have phthalates is quite a stretch - and all manufacturers using these materials will pay dearly for this stretch.

As if that wasn't bad enough, the Statement goes on to note: "Manufacturers either know or should know what materials and components go into the products they make, and if the product or its components contain one of the plasticizers specified in section 108 of the CPSIA,

the manufacturer or importer certifying the product must test the component or product to ensure that it complies with the CPSIA. Failure to comply with section 108 of the CPSIA is a prohibited act under section 19 of the Consumer Product Safety Act (CPSA) and can result in civil and criminal penalties. Likewise, failure to have a product subject to section 108 of the CPSIA tested by an accredited third-party laboratory and have the appropriate certification for that product is also a prohibited act under section 19 (CPSA)." Such remarks are guaranteed to create insatiable demand among risk-averse retailers for complete suites of tests on every component in every toy, no matter what. The Statement could not be clearer that ALL mistakes, oversights or judgments invalidated with 20-20 hindsight by the CPSC will be held against the supply chain selling the product. As the CPSC penalties and saber rattling of the agency have been widely publicized, this rule is certain to depress trade and shrink markets. No one will be willing to take the risks outlined in this paragraph.

I would note also that a standard that puts the onus on manufacturers to make judgments on whether to test or not, and then attempt to get their customers (and testing labs) to go along with their judgments, seems particularly impractical and unrealistic. The scenario is apparently that manufacturers must prove to all of their trading partners, again and again, that their judgment to not test certain components or materials is legitimate. That judgment will not be accepted lightly, with or without documentary proof, by trading partners who have read the Statement's stern warning about liability. In any event, a long inquiry by trading partners and testing labs into any such manufacturer's judgment can be anticipated with a high degree of certainty. While some manufacturers may be looking forward to spending the rest of their working lives arguing with customers to accept a decision to save \$500 in testing costs, I personally find it quite unappealing and unworkable. We have a business to run and cannot spend all day on test reports - we have to make some sales (to pay for the tests). If this is how the rules will work, we will either have to test everything comprehensively or drop the products. Please think realistically about the commercial implications of the rules you are promulgating.

If it is the intention of the Commission to require comprehensive testing of every component of every toy with no exceptions, I think the standard should be rewritten to say so directly and unambiguously. Writing a standard that uses vague language stating that incomplete testing is permissible under some circumstances, but only at high risk of civil or criminal liability, is disingenuous, as the agency knows full well the impact and meaning of those words.

Thank you for considering my views on this important topic.

Sincerely,

Richard Woldenberg  
Chairman  
Learning Resources, Inc.  
380 North Fairway Drive  
Vernon Hills, IL 60061  
Tel 847-573-8420  
[rwoldenberg@learningresources.com](mailto:rwoldenberg@learningresources.com)

0009

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Trade Association
<b>Tracking No.</b> 80a244c9
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0009

Comment from Carter Keithley

---

## Submitter Information

**Name:** Carter Keithley

**Address:**

1115 Broadway  
Suite 400  
New York, NY, 10010

**Email:** ckeithley@toyassociation.org

**Phone:** 646-520-4841

**Fax:** 212-633-1429

**Submitter's Representative:** Carter Keithley

**Organization:** Toy Industry Association

---

## General Comment

Attached are the Toy Industry Associations' comments on the Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act.

---

## Attachments

**CPSC-2009-0063-0009.1:** Comment from Carter Keithley



September 15, 2009

Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

**Re: Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act (Document ID CPSC-2009-0063-0001)**

Dear Mr. Stevenson:

TIA has submitted extensive comments on Section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). The Consumer Product Safety Commission (CPSC) has posted a staff briefing package dated July 31, 2009 that proposes issuance by the Commission of a *Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act* ("Statement of Policy"). The CPSC ballot vote was requested by August 6, 2009. Thereafter the Commission voted to publish and solicit comments. The FR Notice was issued August 17, 2009 and comments were requested to be submitted by September 16, 2009. TIA hopes that these comments will assist the Commission in effectively implementing regulations which impact TIA's more than 500 members. TIA reserves the right to supplement or amend its comments as appropriate.

As noted from our previously filed comments, TIA favors practical common sense approaches to testing products in an efficient cost effective manner that reduces burdens on small businesses, without affecting the inherent safety of toys. The CPSC Statement of Policy seeks to implement changes to existing SOPs already issued and relied upon by the marketplace. Such transition must be handled in an orderly fashion. This can be an opportunity to set reasonable limitations on phthalate testing based upon a refined definition of the scope of toys and child care articles to be included (or excluded), accessibility of whole parts to a child user, rules clarifying excluded interim banned product based upon the likelihood of mouthing exposure and other factors that relate to risk and hazardous exposure (or often the lack thereof). While we appreciate that the CPSC has now expanded materials listed that do not need to be tested, the possibility for

potential expansion of this list should be retained. Clearly exempting certain materials from testing is an effective way of reducing unnecessary testing burdens.

In addition there is enormous confusion about whether the CPSC intended this Statement of Policy to go into effect immediately and apply to previously manufactured product produced in accordance with the CPSC's own previously issued SOP. Any policy statement needs to be clear that product produced in accordance with the previous issued CPSC SOP is deemed legal and not subject to removal risk in the marketplace. A clearly defined effective date applicable to products "manufactured" as of a future date certain is needed. Also, although seeming to seek to harmonize with the EU testing methods and approach, the proposed SOP does not explicitly indicate that compliance to such test standards will automatically provide a safe harbor or avoid duplicative test costs, potentially imposed by laboratories for needles supplemental testing, to U.S. Standards.

### **Adoption of a New SOP Has a Substantive Marketplace Impact.**

If the CPSC intends to substantively change an existing test methodology relied upon for enforcement of the statutory prohibitions contained in section 108 of the CPSIA and the enforcement provisions triggered thereby under the Consumer Product Safety Act (CPSA), it must do so by notice with due opportunity for comment pursuant to rulemaking requirements of the Administrative Procedure Act. Since the proposed Statement of Policy, substantively changes the existing test standard in a way that represents a significant change in testing methodology (which in turn determines application of a statutory ban) provision costs such change may only be accomplished by rulemaking with adequate opportunity for comment, review and rulemaking. There can be no doubt that the Statement of Policy is more than merely "interpretive" and is substantive in its impact on existing test standards and banning of product. As the Supreme Court made clear in *American Hospital Association v. Bowen* (476 U.S. 610 (1986)): "*Substantive rules are ones which 'grant rights, impose obligations, or produce other significant effects on private interests,' or which effect a change in existing law or policy. ... Interpretative rules, by contrast, 'are those which merely clarify or explain existing law or regulations,' are 'essentially hortatory and instructional,' ... and 'do not have the full force and effect of a substantive rule but [are] in the form of an explanation of particular terms.'*"

Generally a rule or test standard with the substantive impact of a rule is not interpretative if it has legal effect. Whether a rule has legal effect can be determined by asking: Whether in the absence of the rule there would not be an adequate basis for enforcement action or other agency action to confer benefits or ensure the performance of duties; Whether the agency has explicitly invoked its legislative authority; or Whether the rule or test standard effectively amends a prior one. In the instant matter there is no doubt that this Statement of policy is substantive and must be subject to §553 of the Administrative Procedure Act due process procedures. Courts have held that an interpretation issued subsequent to a rule issued through notice and comment procedures may constitute an "amendment" to the rule that subjects the later interpretation to §553. (*See Jerri's Ceramic Arts v. Consumer Product Safety Commission*, 874 F.2d 205 (4th Cir. 1989), in which court held an interpretation of a prior rule issued by the CPSC was not an "interpretative rule" because it imposed new duties with the force of law for the Commission to enforce and did not remind anyone of existing duties but instead radically changed an existing position).

We appreciate that the Commission has recognized the substantive impact of this SOP and the importance of clearly setting forth how it will be applied to the marketplace. We appreciate the opportunity to provide comments prior to CPSC's adoption of a new SOP. This should help ensure that there are no unintended consequences or marketplace disruptions associated with substantive changes to existing SOPs. We all have an interest in assuring orderly transitions in the marketplace and adequate stakeholder input.

### **Recommendations for the Process of Changing or Adopting Alternative Test SOPs**

The testing per component alternative is more cost efficient only in situations where a component is standard across numerous products and that testing one sample of the standard component would be considered sufficient to verify compliance for any product using that component. However, the testing of a product in aggregate is a cost effective way of testing a product line when that product line does not have standard components. It requires only one test per product.

It is a reasonable argument that component testing is needed to prevent certification of a product of which only one of its accessible components is high in phthalate content. However, internal components have been unreasonably considered within the scope of CPSIA Section 108 restrictions notwithstanding the fact that there is absolutely no hazardous exposure. Logically we therefore recommend that CPSC further explicitly exclude inaccessible component parts from testing protocols. Furthermore it remains necessary to better define what will constitute a component part for testing. Raw material testing should be permitted as well, since phthalates, unlike lead in pigments, are not likely to a contaminant in toys. Unless, this can be accomplished by CPSC by issuance of a comprehensive clarifying regulation, we would recommend that the verification of non-accessible components also maintain the previously published aggregate test, as a mutually acceptable test alternative.

### **Toxicity and Risk Assessment Information on Phthalates**

There is a wealth of recent and scientifically credible information on the toxicity profile of individual phthalates. Risk assessments have been conducted on a number of phthalates by the European Chemicals Bureau (ECB) and the U.S. National Toxicology Program's Center for the Evaluation of Risk to Human Reproduction (NTP). Given the available scientific information available on phthalates, these risk assessments are necessarily lengthy and provide a wealth of toxicity and exposure information that the CPSC should review thoroughly. The CPSC's own studies of mouthing behavior modeled risk of exposure from mouthing vinyl toys and articles intended for use by children. That risk assessment can be used to model exposure risk from accessible parts of toys and childcare articles.

### **Scope of materials to be tested must be clarified**

The policy contains ambiguous language, including "plasticized component parts" and then defines "other product parts that could conceivable contain phthalates..." Raw material testing should be permitted as well, since phthalates, unlike lead in pigments, are not likely to a contaminant in toys. The scope should also be limited to "accessible plasticized components with durometer readings < 90 Shore A" or equivalent language. There should also be a limit of

material mass that should be tested, i.e. more than 10 grams, etc. If multiple components are formed in the same mold, only one test is required. Manufacturers can advise labs of this situation when it occurs and labs can note on reports that parts come from the same mold. *Raw Material* should be defined as: *A material that is in its final chemical state which becomes a component part of a final product.*

### **Effective date of new policy**

A date of manufacture should be established at which the new policy will become effective. Further, the date should be reasonable, allowing a transition to the new policy without affecting the manufacture and shipping of products that are in process. The CPSC should establish that all products that have been manufactured using the policy of March, 2009 are acceptable for the marketplace and will not have any action taken against them unless they fail to meet the requirement as established at that time.

### **Inaccessible Components should be excluded from testing requirements**

Section “B” of the Statement of Policy contains the following sentence. *“The purpose of section 108 of the CPSIA, generally, is to ensure that children are not exposed to certain specified phthalates while playing, sleeping, or eating (emphasis supplied).”* In connection with the phthalate limits set by Congress, reducing exposure was central to the statutory restriction. Statements indicating that the Commission has no discretion to set forth a test protocol that requires exposure as a condition precedent to testing are misplaced. Too much is being presupposed from the fact that CPSIA Section 101 contains an express exclusion of inaccessible parts. The fact that there is no similar express exclusion under CPSIA Section 108 does not, in and of itself, create an inference that such parts must therefore be tested. We contend when Congress established a requirement restricting phthalate to minimum levels based upon exposure concerns, the CPSC would be well within its regulatory discretion to develop a reasonable hazard based assessment test protocol that excludes unnecessary testing of parts when there is no likelihood of such exposure. Such administrative discretion was recognized under the *Chevron Doctrine* established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

Current Federal rules contain time-tested methods to determine those parts of toys that can be accessed by a child. There is no benefit in terms of child safety in testing a material that is inaccessible after use and abuse testing and in fact diverts limited financial resources away from other areas of testing where improvements to child safety might actually result. An internal mechanism or electronic circuit, as examples, will have a very significant number of components, each component of which could contain several dissimilar materials. We have noted abusive, costly testing of internal diodes and circuit boards on electronic circuitry where there is no risk of phthalate exposure, even to the most precocious child, without destroying the functionality of electronic toys products.

For the phthalate group made up of DINP, DIDP, and DnOP, the accessibility of components should be considered along with the potential for mouthing to determine the overall exposure potential. Certainly inaccessible components cannot be mouthed.

For the phthalate group made up of DEHP, DBP, and BBP, the accessibility of components should also be considered and if a component is determined to be inaccessible, it should not be subjected to the test. This is a common sense approach to establishment of a reasonable regulatory scheme. Testing each electronic component or worse yet, parts of electronic components, on a printed circuit board assembly (PCBA) would be very time consuming, expensive, and senseless. While the agency has no discretion to modify the limits established by Congress for phthalates, when taken as a whole the wording of Section 108 affords the agency the discretion to set forth regulations to best determine which component parts of a toy or child care article are likely to present an exposure risk subject to such limits, and which do not. We urge the Commission to exercise such reasonable discretion.

### **Accessible Components**

The definition of a “*Component Part*” which is currently given as “*Component Part – Individual sub-unit within a product.*” lacks the necessary detail for consistent application and can result in pointless testing. While the Commission has given some liberty to the manufacturer in their Statement of Policy as to what parts require testing, the fact of the matter is that the independent test laboratories determine what to test on behalf of their retail customers. Vague definitions such as these allow laboratories to increase testing revenue.

For example:

\*Adhesive labels - mechanically separating adhesives from some labels is impossible. For those labels where meticulous effort will allow some separation of the adhesive, it may take dozens or hundreds of labels to get a sufficient sample for testing.

\*Paint – Paint on the plastic eye of a stuffed toy or printed on the insulation of a current carrying wire can be mechanically removed. However it may take hundreds or even thousands of samples and countless hours of scraping to obtain the necessary sample size for testing. It is common for a doll, figure, or toy to be painted with many different color paints. Some of the paints might be mixtures of different color paints. The total painted surface should be considered as one coating component for the purposes of finished product audit testing. In other words, if a flexible plastic figure is coated with eight different paints, then one phthalate test using the total eight paints in the sample should be considered acceptable and in accordance with the CPSC test method.

This interpretation is consistent with both the initial and new CPSC statement of policy, and it supports the CPSC and Industry concern about testing that “can be prohibitively expensive.” It could be extremely difficult and expensive if one had to consider each separate paint speck as a separate component for the purposes of finished product audit testing. If every freckle, mole, eye ball, eye ball highlight, etc. had to be treated as a separate component part, then it could take a huge number of products and amount of testing to complete the evaluation. Paints and coating materials on toys, even when considered in total (all colors), make up a very small amount of the total toy weight.

\*Accessible electronics – Toys with accessible electronics, such as a slot car that can be customized by the child by swapping out the motor, chassis, tires, etc. can pose unique problems. Motors may contain plastic end caps, coatings on windings, adhesives, and other parts that may be subject to testing under the current definition. In some instance

these parts may be accessible and in other instances the parts may only be liberated from the motor by the use of a tool or by breaking the assembly apart. Once the “sub-unit” is isolated, it may take hundreds of motors to obtain the necessary number of sub-units.

The following methodology is recommended to address these situations:

If the necessary sample size for testing of an adhesive, coating, or similar material cannot be obtained from one unit and the substrate is subject to testing, then the adhesive, coating, etc. is tested together with the substrate as a composite.

\*If the necessary sample size for testing of an adhesive, coating, or similar material cannot be obtained from one unit and the substrate is *not* subject to testing (e.g. metal), then the adhesive, coating, etc. is not tested.

\*If the adhesive, coating, or similar material cannot be mechanically separated (e.g. scraping) from the substrate and the substrate is subject to testing, then the adhesive, coating, etc. is tested together with the substrate as a composite.

\*If the adhesive, coating, or similar material cannot be mechanically separated (e.g. scraping) from the substrate and the substrate is *not* subject to testing (e.g. metal), then the adhesive, coating, etc. is not tested.

\*Inaccessible portions of accessible electronic assemblies (e.g. the coils on an accessible motor) are not tested. Accessible portions of the motor are subjected to the rules given above.

The phthalates statement of policy references the updated test method, CPSC-CH-C1001-09.2, which was published in conjunction with the statement of policy. The following comments are directed at sections of the test method which is integral to the policy:

### **Measurement of Phthalates in Children’s Products**

There are several methods suitable for the routine identification and measurement of total phthalate concentration for consumer products under Section 108 of the CPSIA.

\*ASTM D7083-04 Standard Practice for Determination of Monomeric Plasticizers in PolyVinyl Chloride (PVC) by Gas Chromatography is a test method to determine monomeric plasticizers including phthalate esters. See <http://www.astm.org/Standards/D7083.htm>

\* The Canada Product Safety Bureau has a test method for total phthalate content in PVC products. This method describes a general procedure for the determination of phthalate esters in consumer products made of PVC by solvent extraction and precipitation of the polymer. More information on this method is available at [http://www.hc-sc.gc.ca/cpsspc/alt\\_formats/hecs-sesc/pdf/prod-test-essai/\\_method-chem-chim/c-34-eng.pdf](http://www.hc-sc.gc.ca/cpsspc/alt_formats/hecs-sesc/pdf/prod-test-essai/_method-chem-chim/c-34-eng.pdf)

\*The European Toy Safety Directive (EN 71 0 Parts 9, 10, 11) specifies analytical methods for the identification and determination of several organic chemicals including DEHP and DINP, but not total phthalate content.

In addition to the methods listed above, there are commercially available methods and commercial laboratories that can test toys to determine phthalate content. The official Chinese test method, GB/T 22048-2008 Toys and Children's products---Determination of phthalate plasticizers in polyvinyl chloride plastic, should be added to the lists of acceptable extraction and

analysis methods.<sup>1</sup> Additionally, it should be noted that X-ray fluorescence is not an accurate screening methods or technologies available for the rapid detection of phthalate esters.

### **Sample Preparation**

The size to which samples are cut affects the extraction efficiency. The procedure now reads “*Prior to analysis, each plasticized component part should be cut into small pieces...*” To improve the reproducibility of test results, we recommend specifying that no dimension of the “*small pieces*” be greater than 2 mm.

For materials such as paints and adhesives, there may be so little on one toy that many toys would be required to obtain the necessary amount of test material. In some instances the required number of toys can reach into to the hundreds or even thousands. If the necessary sample cannot be obtained from a single toy, the test should not be conducted or alternatively, tested together with the substrate material. The need for extremely large sample sizes is directly affected by the definition of a “Component part”. See the above comments for more detail.

### **Excluded Materials**

We agree that Examples of materials that do not normally contain phthalates and, therefore, should not generally require testing or certification are:

- Unfinished metal.
- Natural wood, except for coatings and adhesives added to wood.
- Textiles made from natural fibers, such as cotton or wool, except for printed decorations, waterproof coatings or other surface treatments, back coatings, and elastic materials (especially sleepwear).
- Textiles made from common synthetic fibers, such as polyester, acrylic, and nylon, except for printed decorations, waterproof coatings or other surface treatments, and elastic materials. However, any textiles containing PVC or related polymers must be tested.
- Polyethylene and polypropylene (polyolefins).
- Silicone rubber and natural latex.
- Mineral products such as play sand, glass, and crystal.

We also agree that Manufacturers either know or should know what materials and components go into the products they make. We believe the CPSC should make it clear in any issued policy that the excluded material list compiled, is not exhaustive and similar, related or other such materials may be added. For example many members have indicated that they use Thermo Plastic Rubber (TPR) a synthetic rubber like material without added phthalates.

---

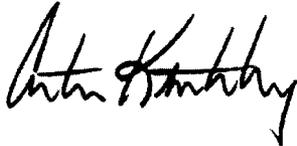
<sup>1</sup> Information regarding the suitability of the Chinese extraction method can be obtained from the following: Connie Ho (officer), hexh@iqtc.cn , Tel: 8620-38290661-229, Fax: 8620-38290599; Lezhou Yi (Co-Author), yiliz@iqtc.cn , Tel: 8620-38290584, Fax: 8620-38290599; Lina Huang (First Author), huangln@iqtc.cn . An unofficial English version of GB/T 22048-2008 has been attached.



## Summary

In conclusion, TIA favors a practical common sense approach to testing more clearly defined toy and childcare products in an efficient, cost effective manner that reduces burdens on small businesses; without affecting the inherent safety of toys. The CPSC Statement of Policy seeks to implement changes to existing SOPs already issued and relied upon by the marketplace. Such transition must be handled carefully. This can be an opportunity to set reasonable limitations on phthalate testing based upon a refined definition of i) the scope of toys and child care articles to be included (or excluded), ii) testing protocols excluding inaccessible parts unlikely to be mouthed and ingested by a child user, iii) a process by which excluded materials can be updated and expanded. In addition any policy statement needs to be clear that product produced in accordance with the previous issued CPSC SOP is deemed legal and not subject to removal risk in the marketplace. A clearly defined effective date applicable to products “manufactured” as of a future date certain is needed. CPSC should also seek to harmonize with the EU testing methods. Thank you for this opportunity to provide additional comment on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Carter Keithley". The signature is written in a cursive, flowing style with a prominent initial "C".

Carter Keithley  
President

0010

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Manufacturer
<b>Tracking No.:</b> 80a24aaf
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0010

Comment from Worth Jennings

---

## Submitter Information

**Name:** Worth Jennings

**Address:** United States,

**Submitter's Representative:** Worth Jennings

**Organization:** ExxonMobil Chemical Company

**Government Agency Type:** Federal

**Government Agency:** CPSC

---

## General Comment

Attached are comments to the Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act.

---

## Attachments

**CPSC-2009-0063-0010.1:** Comment from Worth Jennings

**RESPONSE TO CPSC's REQUEST FOR INFORMATION**  
**Statement of Policy for Testing of Component Parts with Respect to Section 108 of CPSIA**

September 16, 2009

Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

To Whom It May Concern,

The following information is provided by ExxonMobil Chemical in response to the CPSC request for information on the Statement of Policy for Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act, 74 Fed. Reg. 41400 (Aug. 17, 2009).

ExxonMobil Chemical is a producer of two phthalates, Jayflex™ DINP and Jayflex™ DIDP, which are subject to the CPSIA Section 108(b)(1) temporary restriction for DINP and DIDP and will undergo a scientific review by the Chronic Hazard Advisory Panel (CHAP). ExxonMobil strongly believes that testing and prior governmental reviews have demonstrated that DINP and DIDP are safe for their intended use including toys and childcare articles. As confirmed by the CPSC's own 2002 CHAP review, the panel found DINP exposure to be "extremely low or non-existent" and found "no demonstrated health risk posed by PVC toys". We welcome further study by the 2009 CHAP and believe that the findings will result in the removal of the CPSIA's temporary restrictions.

ExxonMobil has focused its comments on the areas of component testing and inaccessible parts for the purpose of this Federal Register notice. We are aligned with the CPSC's view that testing must be conducted in a way that does not present a overburden to manufacturers and small business owners, but highlight that it is necessary to apply testing for DINP and DIDP to only those products that are subject to the temporary restrictions and exclude parts that are inaccessible to the child as they do not pose any risk to children. ExxonMobil thanks the CPSC for the opportunity to comment on these important issues.

For more information regarding this submission please contact:

Worth Jennings  
Global Oxo Marketing Manager  
Email: [worth.a.jennings@exxonmobil.com](mailto:worth.a.jennings@exxonmobil.com)

**RESPONSE TO CPSC's REQUEST FOR INFORMATION**  
**Statement of Policy for Testing of Component Parts with Respect to Section 108 of CPSIA**

**Introduction**

ExxonMobil Chemical produces Jayflex DINP and DIDP which are two of the products that are subject to the temporary prohibition for high molecular weight (HMW) phthalates under the CPSIA. Pending the outcome of the CHAP review, these phthalates are restricted from use in "toys that can be placed in a child's mouth" or in "child care articles" at concentrations greater than 0.1 weight percent. It is important for the CPSC to recognize that Congress did not make a judgment on the safety of DINP and DIDP in its decision to temporarily restrict them. Instead, they instituted "precautionary" temporary restrictions until a Chronic Hazard Advisory Panel has reviewed the scientific evidence around DINP, DIDP, other phthalates and non-phthalate alternatives. We do not agree that the temporary restrictions are necessary based on previous scientific assessments and governmental reviews which have found DINP and DIDP to be safe for their intended use. With that said, it is important to note that DINP and DIDP can continue to be used in PVC toys and children's products that are not covered by the CPSIA temporary prohibition. Our comments relate primarily to items that may be covered by the temporary prohibition and where exposure potential cannot exist.

**Component Part Testing**

The CPSC has stated that it believes that the phthalate concentration limits in Section 108 of the CPSIA apply to each component part of the article. However, it is important to point out that in this context the Commission has reinterpreted the existing language in the CPSIA which states that the phthalates restrictions apply to the "article" and not a component thereof. While ExxonMobil understands the testing phthalate content in toys and childcare articles can be quite expensive, difficult and complex, reinterpreting the legislation may bring forward additional issues.

In the case of Jayflex DINP and DIDP, ExxonMobil does not believe that limiting the testing requirements to plasticized component parts is more protective of human health than the original language of Section 108 where the entire article was tested as products plasticized with DINP and DIDP do not put human health at risk. This was previously confirmed by the 2002 Chronic Hazard Advisory Panel which studied DINP. These temporarily restricted products will be further studied by the upcoming Chronic Hazard Advisory Panel (CHAP) which will review the science for a second time. As discussed below, both the hazard and exposure from these flexible PVC products are extremely low and well within acceptable daily limits.

If the Commission chooses to go forward with their interpretation laid out in the Statement of Policy on Component Testing, then ExxonMobil strongly recommends that the CPSC clarify in its guidance that only components that can be placed in the mouth be tested for DINP, DIDP and DnOP based on the applicable restrictions. This will eliminate the unnecessary extra testing by the laboratories for the HMW phthalates and reduce the testing burden on manufacturers where it is not necessary. Additionally, ExxonMobil strongly suggests that while it is practical to only test the plasticized component of an article, the CPSC should maintain the interpretation that the 0.1 weight percent restrictions apply to the entire article by factoring in the weight of the entire article. This approach addresses the issue of unnecessary and overly burdensome testing while maintaining the overall restrictions to 0.1 weight percent of the article.

For example, consider a child's doll weighing approximately 300 grams which is assembled with a doll's head prepared from flexible PVC and with the remaining body parts prepared from a non-plasticized polymer such as ABS. Assuming the doll's head weighs 40 grams and was found to contain 30 weight percent total

**RESPONSE TO CPSC's REQUEST FOR INFORMATION**  
**Statement of Policy for Testing of Component Parts with Respect to Section 108 of CPSIA**

plasticizer, from which GC analysis determined the plasticizer system to be composed of a mixture of 1% DINP and 99% acetyl tributyl citrate (ATBC), the doll's head would contain 0.3 weight percent DINP. However, based on the total weight of the doll, the total DINP content would be 0.04 weight percent. The manufacturer would only subject the doll's head to phthalate testing, but would submit the entire weight of the article, the doll in this example, to the assessment body. The assessment body would then calculate the overall phthalate content of the article to be within compliance without having to test the non-plasticized polymer body. Therefore, although one component of the toy contains DINP, the overall toy would still comply with the regulation and testing is still limited to the plasticized component part.

**Inaccessible Parts**

The CPSC has stated that the purpose of the CPSIA Section 108 is to “ensure that children are not exposed to certain specified phthalates while playing, sleeping or eating.”<sup>1</sup> This objective is key to understanding how the CPSIA Section 108 is therefore implemented. Both the likelihood of exposure and the route of exposure become essential factors to consider when subjecting products to testing under Section 108. Where there is no exposure to the child, there is no risk and subsequently no scientific reason to measure phthalate content.

When it comes to routes of exposure, it is important to understand the distinction between the two types of phthalates made in the CPSIA; low molecular weight phthalates (DEHP, DBP, BBP) and high molecular weight phthalates (DINP, DIDP, and DnOP). Each phthalate product has distinct toxicological properties and phthalate products with carbon chain backbones greater than six carbons, otherwise known as high molecular weight (HMW) phthalates do not exhibit any adverse human health effects on reproduction or development. Risk assessments have been performed on mouthing articles containing HMW phthalates because, specifically for young children, oral ingestion via mouthing children's objects is the most relevant route of and primary contributor to exposure<sup>2,3,4</sup>. The consideration of route of exposure is therefore acknowledged under the CPSIA temporary restrictions, as defined by Section 108 for HMW phthalates, because it addresses only the toys that can be placed in the mouth and the childcare articles that facilitate sleeping, feeding, sucking and teething which are meant to be mouthed. These restrictions on HMW phthalates attempt to control the primary route of exposure to children - oral exposure. In comparison to oral ingestion, dermal exposure is a minimal contributor to the overall exposure of children<sup>5</sup>. Studies performed in rats<sup>6,7</sup> indicate that the estimated dermal absorption rate is low and calculated maximal daily intakes attributable to dermal contact are significantly less

---

<sup>1</sup> Statement of Policy: Testing of Component Parts With Respect To Section 108 of the CPSIA, August 2009, p. 1.

<sup>2</sup> ECB (2003). 1,2-Benzenedicarboxylic acid, di-C8-10branched alkyl esters, C9 rich and di-isononyl phthalate. Risk Assessment. European Chemicals Bureau, Institute for Health and Consumer Protection, Joint Research Center of the European Commission. EFSA. 2005. Opinion of the scientific panel on food additives, flavourings, processing aids, and materials in contact with food on a request from the commission related to di-isononyl phthalate for use in food contact materials. Question NO. EFSA-Q-2003-194. Adopted July 30, 2005. The EFSA Journal 244:1-18

<sup>3</sup> Gill US et al. (2001). Diisononyl phthalate: Chemistry, environmental path, and toxicology”. In: Reviews of Environmental Contamination and Toxicology, ed. GW Ware, Springer-Verlag, New York. 172, 87-127.

<sup>4</sup> Clark K. (2008). Report on update to the phthalate ester concentration database – 2007. Prepared for American Chemistry Council. June.

<sup>5</sup> Clark K. (2008). Ibid.

<sup>6</sup> Deisinger P, Perry L and Guest D. (1998). In vivo percutaneous absorption of [<sup>14</sup>C]DEHP from [<sup>14</sup>C]plasticized polyvinyl chloride film in male Fischer 344 rats. Food Chem Toxicol. 36, 521-527.

<sup>7</sup> Elsis A, Carter D and Sipes I. (1989). Dermal absorption of phthalate diesters in rats. Fund & Appl Toxicol. 12, 70-77.

**RESPONSE TO CPSC's REQUEST FOR INFORMATION**  
**Statement of Policy for Testing of Component Parts with Respect to Section 108 of CPSIA**

than those attributable to oral ingestion<sup>8</sup>. It should be noted that the physical size of the HMW phthalates impedes the passage of the chemical through the skin. Finally, biomonitoring data<sup>9,10</sup> indicate exposure to HMW phthalates from **all sources** is extremely small and **well below acceptable daily intakes** for DINP and DIDP.

Likelihood of exposure is also a very important consideration when subjecting articles or components thereof to phthalate testing. Inaccessible products or products that do not come into contact with the child but are in close proximity to the child should be excluded from regulation because they represent a "de minimus" exposure. The CPSC has the ability to issue guidance for testing of these components and ExxonMobil believes that these products should be excluded from compliance testing since they **present no exposure potential**. While it is true the CPSIA does not specifically exclude these inaccessible components, it does not preclude the CPSC from issuing guidance on the type of testing required for inaccessible components just as it has issued guidance on the types of products to test. For example, wiring located in the internals of a children's gaming console is inaccessible to the child and is not exposed to the child during play, or to facilitate sleeping, feeding, sucking or teething. Phthalate content in the wiring jacket therefore presents no risk to a child. In addition, the fact that the wiring is not intended to be mouthed, accessible to be mouthed and allowed to be mouthed by parents must be taken into account and excluded from testing requirements. Furthermore, cribs or high-chairs that utilize PVC for parts of the chair that are not likely to have direct oral contact with the child (i.e. non-skid surfaces that touch the floor) should not be subject to CPSIA testing for HMW phthalates. The 2002 CPSC mouthing study found that vinyl toys plasticized with DINP were only in the mouth for 8.8 minutes at the 95<sup>th</sup> percentile<sup>11</sup> which accounts for a very small amount of overall mouthing time for children, and results in DINP exposures well below the acceptable daily intake. Therefore it is extremely improbable that PVC parts inaccessible to children, even if they were to become accessible through unforeseen abuse, would be mouthed by a child for any measurable amount of time; thus any resulting exposure is negligible and would not justify the additional testing.

**Summary**

In summary, ExxonMobil supports the CPSC's effort to set forth guidance to provide a more practical testing alternative for manufacturers. However, ExxonMobil does not support restricting phthalate concentrations to component parts individually rather than the entire article since in practical terms, we believe it does not provide additional protection to children for HMW phthalates. ExxonMobil strongly suggests that the CPSC issue guidance to clarify that testing for HMW phthalates (DINP/DIDP/DnOP) is not be required for items that cannot be mouthed and objects that are inaccessible to children as they do not present an exposure risk.

---

<sup>8</sup> ECB (2003). Ibid.

<sup>9</sup> CDC (2005). Third National Report on Human Exposure to Environmental Chemicals. Phthalates. Centers for Disease Control and Prevention. Atlanta, GA.

<sup>10</sup> Wittasek M et al. (2007). Internal phthalate exposure over the last two decades – A retrospective human biomonitoring study. Int J Hyg Environ-Health 10, 319-333.

<sup>11</sup> Greene M (2002a). Mouthing times among young children from observational data. Tab G of CPSC (2002).

0011

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Trade Association
<b>Tracking No.:</b> 80a24b12
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0011

Comment from William Kovacs

---

## Submitter Information

**Name:** William Kovacs

**Address:**

1615 H Street, NW  
Washington, DC, 20062-2000

**Email:** wkovacs@uschamber.com

**Phone:** 202-463-5457

**Fax:** 202-887-3445

**Organization:** U.S. Chamber of Commerce

---

## General Comment

The U.S. Chamber of Commerce is pleased to submit the attached comments re: CPSC's Statement of Policy: Testing of Component Parts with Respect to Section 108 of CPSIA (docket number CPSC-2009-0063).

---

## Attachments

**CPSC-2009-0063-0011.1:** Comment from William Kovacs

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

WILLIAM L. KOVACS  
SENIOR VICE PRESIDENT  
ENVIRONMENT, TECHNOLOGY &  
REGULATORY AFFAIRS

1615 H STREET, N.W.  
WASHINGTON, D.C. 20062  
(202) 463-5457

September 16, 2009

Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway, Room 502  
Bethesda, MD 20814

**Re: Comments on the “Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Act (CPSIA)”**

The U.S. Chamber of Commerce, the world’s largest business federation representing more than three million businesses and organizations of every size, sector, and region, is pleased to submit these written comments to the Consumer Product Safety Commission (CPSC) regarding the testing of component parts for phthalates.

The original policy guidance<sup>1</sup> and accompanying test method<sup>2</sup> proposed by CPSC for phthalates testing were criticized for failing to address the issue of component parts. Many of the criticisms noted that testing an entire product for phthalates was prohibitively expensive and that a more reasonable approach would be to focus only on those plastic component parts that could conceivably contain phthalates.<sup>3</sup> As such, CPSC revised its statement of policy and now proposes testing for phthalates in individual component parts.

The Chamber commends CPSC for revising its policy guidance to include component testing; nevertheless, the Chamber believes CPSC must distinguish between “accessible” and “inaccessible” component parts to ensure testing comports with the legal restrictions contained in Section 108 of the Consumer Product Safety

---

1 74 FR 8058, February 23, 2009

2 Test Method: CPSC-CH-C1001-09.1

3 Another issue that CPSC needs to clarify is whether sellers who used the earlier test method (referenced in footnote 2) can rely on the results of those tests. Given the retroactive nature of CPSIA, this issue is of critical importance.

Improvement Act (CPSIA).<sup>4</sup> Similarly, CPSC should specifically state that testing for the three types of phthalates subject to the interim ban should be limited to only those products and accessible component parts that can be placed in a child's mouth, in accordance with Congressional intent and Section 108. In support, the Chamber respectfully submits the following comments for your consideration.

The Chamber believes that phthalates testing should only be applied to those product components which are subject to the legal restrictions mandated in Section 108. In its current form, the testing proposal under consideration is overly broad and will result in testing components that are not restricted from use. Specifically, Section 108 mandates that high molecular weight phthalates are temporarily restricted to mouthing items only, therefore the testing for these phthalates should be limited to products and parts that can be placed in the mouth. This distinction should be made clear to the 3<sup>rd</sup> party assessment bodies as well. The potential costs of testing products and parts that are not subject to any restrictions in use could cost millions of dollars with no benefit at all.

CPSIA distinguishes between high molecular weight and low molecular weight phthalates, and the Chamber strongly believes this distinction should be reflected in the testing process. While CPSIA permanently bans three low molecular weight phthalates<sup>5</sup> from use in children's products and toys, high molecular weight phthalates<sup>6</sup> are only banned temporarily in mouthing items. Consequently, it should not be necessary to require testing for high molecular weight phthalates on inaccessible parts or areas of the child care article or toy that cannot be placed in the mouth since there is no exposure to the child.<sup>7</sup>

According to the phthalates testing procedure as outlined in the Commission's Standard Operating Procedure for Determination of Phthalates (July 2009), products will be tested per component part and analyzed by Gas-Chromatography-Mass Spectrometry (GC-MS). This testing requires a complicated laboratory procedure and the destruction of the sample product. If a product is composed of several components, the manufacturer will incur significant testing costs that will almost certainly be passed onto consumers. In an effort to reduce these cost burdens, we

---

4 Public Law 110-314; August 14, 2008.

5 The three permanently banned phthalates are: di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP).

6 Diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DnOP).

7 Congress correctly recognized that the most prevalent exposure pathway for children is through the mouth.

William L. Kovacs  
September 16, 2009  
Page 3 of 3

recommend testing requirements for only those parts which are subject to the restrictions and exposure. This would eliminate the requirements for testing inaccessible parts as well as testing for high molecular weight phthalates in those parts which cannot be mouthed.

The Chamber thanks CPSC for actively soliciting information from the public and providing interested parties the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is written in a cursive style with a prominent initial "W".

William L. Kovacs

0012

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Manufacturer
<b>Tracking No.</b> 80a24b99
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0012

Comment from Roger Hunt

---

## Submitter Information

**Name:** Roger Hunt

**Address:**

555 Christian Road  
Middlebury, CT, 06762

**Email:** rhunt@timexgroup.com

**Phone:** 203-346-5616

**Organization:** Timex Group USA, Inc.

---

## General Comment

Timex comments on the Testing of Phthalates in Childrens Products, requesting reconsideration of testing internal components. See the attached file.

---

## Attachments

**CPSC-2009-0063-0012.1:** Comment from Roger Hunt

**Comments on Statement of Policy –  
Testing of Component Parts With Respect to Section 108 of the Consumer Product  
Safety Improvement Act**

On August 14, 2008 the Consumer Product Safety Commission (“CPSC”) formally published Public Law 110-314, enforcing specific prohibitions on the marketing, distribution, or sale of children’s toys and children’s products from containing a defined set of chemical phthalates in excess of 0.1% by weight (1000 ppm). This law is commonly known as the Consumer Product Safety Improvement Act of 2008 (“CPSIA”). Comments on this Statement of Policy were invited under Docket No. CPSC-2009-0063. Timex Group USA, Inc. (“Timex”) wishes to provide comments requesting exclusion of testing all components of a children’s product for the chosen phthalates, and to propose limiting testing to only the accessible components as is allowed for the lead restrictions in the CPSIA.

The CPSIA regulation for testing of phthalates in children’s products requires the testing of all components (accessible and inaccessible) for the prohibited substances, generally taken to mean plastic components as described above. The prohibition further elaborates on the restriction of a certain subset of these phthalates in products that can be placed in a child’s mouth.

Wristwatches are products that are not normally or regularly mouthed by children since they are wrist-worn devices. Timex concedes that wrist straps and watch casings may be more prone to mouthing and contact and thus should be fully tested to the CPSC regulations defined above.

Timex wristwatch products are provided to children in a variety of methods (normal retail channels, giveaways, packaged as part of a time-telling instructional package or game, etc.) and may be designed in a manner particularly appealing to children. Distinguishing between “toys” and “jewelry” is no longer clear in this aspect, moving us to presume our products are “toys”. Timex fully endorses the efforts of the CPSC to improve the safety of products for children and believes that the prohibition of the described phthalates in the plastics is a vital part of product safety.

Timex also fully supports the need to restrict the level of the described phthalates in components of children’s products that are normally accessible to touch or mouthing. However, Timex does believe that the testing of inaccessible plastic components is an excessive and unnecessary burden on the children’s wristwatch industry, and therefore should be exempted for the following reasons:

1. Because of the water-resistant nature of the product to prevent moisture and dust from affecting product operation, saliva or mouthing of the product would not normally provide the phthalates the opportunity to leach or migrate from internal inaccessible components to an extent that may exceed even modest levels of concern.

2. The mass of inaccessible (internal) plastic in children's wristwatch products is approximately 25-30% of mass of the total of all accessible plastic in the watch body, and as such has only a modest effect on the total phthalate concentration.
3. The European Union Directive on children's toy safety (2009/48/EC) specifically exempts children's fashion jewelry from the definition of a "toy" and therefore exempts the product from the phthalate regulations specified in the REACH Directive 1907/2006/EC.

In addition to the above, testing of internal inaccessible components can add a financial and time-delay burden to the children's wristwatch industry due to increased test costs, increased load at certified test labs and burdensome inventory tracking of certified versus non-certified internal components.

Therefore, Timex respectfully petitions the CPSC to review the position of testing inaccessible components for the prohibited phthalates in products that would be considered as jewelry not normally used in play, allowing exemption of such products from the necessity of testing of internal components for the described phthalates.

Respectfully Submitted,

Roger Hunt  
Quality Regulatory Engineer  
C/o Timex Group USA, Inc.  
555 Christian Road  
Middlebury, CT 06762  
(203)346-5616

0013

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Consumer Advocacy Organization
<b>Tracking No.</b> 80a24d4f
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063  
Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001  
Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0013  
Comment from Diana Zuckerman

## Submitter Information

**Name:** Diana Zuckerman  
**Address:**  
1701 K St. NW  
Ste 700  
Washington, DC, 20006  
**Email:** dz@center4research.org  
**Phone:** 202-223-4000  
**Fax:** 202-223-4242  
**Organization:** National Research Center for Women & Families

## General Comment

Comments of Consumer Federation of America, Consumers Union of U.S., Inc., Kids In Danger, the National Research Center for Women & Families, and U.S. PIRG.  
on "Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act"  
CPSC Docket Number: CPSC-2009-0063

Our groups, representing patient, consumer, science and public health interests, submit the following comments in response to the U.S. Consumer Product Safety Commission's ("CPSC") "Statement of Policy: Testing of Component Parts With Respect to section 108 of the Consumer Product Safety Improvement Act."

Section 108 of the CPSIA prohibits the sale of children's toys and products containing six phthalates (BBP, DBP and DEHP permanently, and DIDP, DINP and DnOP on a provisional basis). The purpose of section 108 is to reduce children's exposure to phthalates.

Given that phthalate concentrations can be diluted in large toys, we agree with Commission staff

that testing phthalate content as a percentage of the entire toy or child care article is less effective than testing materials and component parts that may contain phthalates.

Not all plastic products contain phthalates and we find your examples of “materials that may contain phthalates” and the examples of “materials that do not normally contain phthalates and, therefore, might not require testing or certification” useful. However, we suggest that the Commission clarify that the examples given are merely examples and are not intended to represent an exhaustive or complete list of potential products or components that may contain phthalates. In addition, we suggest that the Commission periodically update this list of examples.

We agree with the Commission that phthalate limits in section 108 of the CPSIA apply to each component part of any article, and are pleased that the Commission has developed a method to test component parts for phthalates.

SEE ATTACHMENT FOR FULL STATEMENT.

---

## Attachments

**CPSC-2009-0063-0013.1:** Comment from Diana Zuckerman



September 16, 2009

Office of the Secretary  
U.S. Consumer Product Safety Commission  
Room 502  
4330 East-West Highway  
Bethesda, Maryland 20814  
Via: <http://www.regulations.gov>

**Comments of Consumer Federation of America, Consumers Union of U.S., Inc.,  
Kids In Danger, the National Research Center for Women & Families, and  
U.S. PIRG.**

on

**“Statement of Policy: Testing of Component Parts With Respect to Section 108 of  
the Consumer Product Safety Improvement Act”  
[CPSC Docket Number: CPSC-2009-0063]**

Our groups, representing patient, consumer, science and public health interests, submit the following comments in response to the U.S. Consumer Product Safety Commission’s (“CPSC”) “Statement of Policy: Testing of Component Parts With Respect to section 108 of the Consumer Product Safety Improvement Act.”<sup>1</sup>

Section 108 of the CPSIA prohibits the sale of children’s toys and products containing six phthalates (BBP, DBP and DEHP permanently, and DIDP, DINP and DnOP on a provisional basis). The purpose of section 108 is to reduce children’s exposure to phthalates.

Testing Components for Phthalates

Given that phthalate concentrations can be diluted in large toys, we agree with Commission staff that testing phthalate content as a percentage of the entire toy or child

---

<sup>1</sup> “Notice of Availability of a Statement of Policy: Testing of Components Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act,” 74 Fed. Reg. 41400 (August 17, 2009).

care article is less effective than testing materials and component parts that may contain phthalates.

Not all plastic products contain phthalates and we find your examples of “materials that may contain phthalates” and the examples of “materials that do not normally contain phthalates and, therefore, might not require testing or certification” useful. However, we suggest that the Commission clarify that the examples given are merely examples and are not intended to represent an exhaustive or complete list of potential products or components that may contain phthalates. In addition, we suggest that the Commission periodically update this list of examples.

We agree with the Commission that phthalate limits in section 108 of the CPSIA apply to each component part of any article, and are pleased that the Commission has developed a method to test component parts for phthalates.

#### New Test Method

Scientists from the National Research and Testing Center at Consumers Union, the non-profit publisher of *Consumer Reports*®, have reviewed the new test method (CPSC-CH-C1001-09.2—Standard Operating Procedure for Determination of Phthalates) and found the new method to be better and more reliable than the CPSC’s previous leaching method test. The new method is similar to the one used by Health Canada and the state of California for the determination of phthalates in PVC children’s toys. However, missing from the CPSC’s new testing measure is a description of the limit of detection (LOD) and limit of quantitation (LOQ). Typically, LOQ should be orders of magnitude lower than the enforcement level. For example, the Health Canada method has a lowest LOQ of 14 ppm (about 0.001%) for dibutyl phthalate (DBP). Further, on the last page of the new test method description, there appears to be an error in the DEHP calculation. Under column C, measured DEHP concentration by GC-MSW is 200 ug/ml. In the final calculation column, 200 ug/ml is mistakenly cited as 20 ug/ml.

For the reasons cited above, we consider component parts testing a common sense approach that will protect children from exposure to phthalates, and reduce testing costs for manufacturers. We also support the new testing method. We look forward to continuing to work with the CSPC staff on implementation of this statute in a manner that continues to make protecting children’s health and safety a top priority.

Respectfully submitted,

Rachel Weintraub,  
Director of Product Safety & Senior Counsel  
Consumer Federation of America

Donald L. Mays,  
Senior Director, Product Safety and Technical Policy  
Consumers Union

Nancy A. Cowles,  
Executive Director  
Kids In Danger

Diana Zuckerman,  
President  
National Research Center for Women & Families

Elizabeth Hitchcock,  
Community Health Advocate  
U.S. PIRG (U.S. Public Interest Research Group)

0014

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Trade Association
<b>Tracking No.</b> 80a24d54
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0014

Comment from Steve Risotto

---

## Submitter Information

**Name:** Steve Risotto

**Address:** United States,

**Organization:** American Chemistry Council

---

## General Comment

The comments of the Phthalate Esters Panel of the American Chemistry Council are attached.

---

## Attachments

**CPSC-2009-0063-0014.1:** Comment from Steve Risotto



September 16, 2009

Mr. Todd A. Stevenson  
Secretary  
Consumer Product Safety Commission  
4330 East West Highway  
Room 502  
Bethesda, MD 20814

Re: Statement of Policy – Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act, 74 *Federal Register* 41400, August 17, 2009 (CPSC-2009-0063)

Dear Mr. Stevenson:

The Phthalate Esters Panel<sup>1</sup> of the American Chemistry Council appreciates the opportunity to provide comments on the Consumer Product Safety Commission's (Commission) Statement of Policy with regard to the testing of products to determine compliance with the restrictions under Section 108 of the Consumer Product Safety Improvement Act (CPSIA). The Panel is composed of all major manufacturers and some users of phthalate esters, including the six phthalates subject to the certification testing requirements and has previously commented to the Commission on the implementation of Section 108 of the CPSIA.<sup>2</sup>

As set forth in the Statement of Policy, the Commission interprets the statutory language to restrict certification testing to "those plastic parts or other product parts which could conceivably contain phthalates ('plasticized component parts')." The Panel agrees with Commission staff that testing component parts "effectuates the intent of Congress to limit children's exposure to phthalates" while reducing the costs and complexity of testing to manufacturers. We are concerned, however, that the Statement of Policy does not go far enough by not also interpreting the statute to exclude from testing component parts that are inaccessible and, therefore, do not contribute to exposure.

Commission staff have indicated that they are constrained in addressing the issue of accessibility by the fact that, unlike the lead restrictions in Section 101, the CPSIA does not contain a specific exclusion for inaccessible parts containing phthalates. To the contrary, the

---

<sup>1</sup> The Panel members are: BASF Corporation, Eastman Chemical Company, ExxonMobil Chemical Company, and Ferro Corporation. Teknor Apex, a major user of materials, is an associate member.

<sup>2</sup> Letter from Chris Bryant, ACC, to Dr. Michael A. Babich (March 25, 2009).



Panel believes that the Commission has ample discretion to exclude inaccessible parts from phthalate restrictions as made abundantly clear in federal case law, including opinions rendered by the U.S. Court of Appeals for the D.C. Circuit. Inclusion of accessibility criteria in the Statement of Policy also is consistent with the Commission's intent to "simplify the testing process, eliminate the unnecessary testing of products . . . , reduce the cost of testing, and harmonize with the European Commission" as described in the staff recommendation for the current testing policy.<sup>3</sup>

Moreover, the interim restrictions on the use of DIDP, DINP, and DnOP of Section 108(b) clearly apply only to the mouthable – and therefore accessible – parts of children's toys and child care articles. That is, a children's toy or child care article may well have some part that "can actually be brought to the mouth and kept in the mouth by a child,"<sup>4</sup> and thus, as a general matter the product may be subject to Section 108(b).

There are several reasons why the Commission must consider the potential for exposure of a child to phthalates from a toy or article, particularly in applying the interim provisions of Section 108(b) for DIDP, DINP, and DnOP. First, it is clear that exposure was Congress' overarching concern in developing Section 108(b). The importance of accessibility is abundantly clear in the repeated reference to "exposure" in Section 108(b)(2). In particular, the Chronic Hazard Advisory Panel mandated by Section 108(b)(2), whose report will play a large role in determining the future of these interim prohibitions, must consider "the likely level of . . . exposure to phthalates, based on a reasonable estimation of normal and foreseeable use and abuse of" products for children.<sup>5</sup> The CHAP also must consider "the cumulative effect of total exposure to phthalates." And it specifically must consider "ingestion," "dermal," and "hand-to-mouth" exposure, as well as any "other exposure." The CHAP must take into account "uncertainties regarding exposure."

We also believe that accessibility is implicit with respect to both toys and childcare articles in that, as correctly noted in the Statement of Policy, "[t]he purpose of section 108 . . . is to ensure that children are not exposed to certain specific phthalates while playing, sleeping, or eating."<sup>6</sup> If the component part is not accessible, no phthalate exposure is possible – regardless of whether the part can be mouthed or not.<sup>7</sup>

---

<sup>3</sup> Memo from Robert J. Howell and Michael A. Babich to Todd A. Stevenson, Section 108 of the Consumer Product Safety Improvement Act – Staff Recommendation to Test the Plasticized Components Rather than the Entire Product (July 30, 2009).

<sup>4</sup> *Id.*

<sup>5</sup> § 108(b)(2)(B).

<sup>6</sup> Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act, at 1.

<sup>7</sup> Although CPSC staff have made reference to the possibility of migration of phthalates from inside the toy to the outside where exposure may occur, the Docket for this rulemaking contains no information to support the suggestion that such migration occurs.

The statutory definitions of "children's toy" and "child care article" reinforce Congress' intent to address actual exposure to all of the phthalates identified in the CPSIA. A "children's toy" is a product designed or intended for "use by the child when the child plays." "Use" indicates contact, which is a potential source of exposure. The definition of "child care article" is even narrower – extending only to use to “facilitate sleep or the feeding of children . . . or to help such children with sucking or teething.” A product intended to help a child "with sucking or teething" will be one on which a child sucks or teethes – creating a particular point of exposure.

There is little legislative history that the Commission can use to inform its Statement of Policy. The House committee simply noted in the concluding paragraph of its report that it was made aware of "possible dangers" from phthalates "late in the process" and would address this issue "in subsequent hearings and legislation."<sup>8</sup> The same was true in the Senate. The legislative language restricting certain phthalates was added on the floor as an amendment approved by voice vote without debate.<sup>9</sup> The House-Senate Conference Committee gave Section 108 one sentence in its report, simply noting that it had "agreed to a modified version of the Senate's provision."<sup>10</sup>

Although legislative history is sparse, there is ample judicial precedent to support the Commission expanding its Statement of Policy to exclude inaccessible parts from Section 108. As set forth in *Chevron*, federal courts assess agency interpretation of statutes in a two-step process. First, the court examines the statutory language to determine if Congress has addressed the precise question at issue. If the Congressional mandate is silent or ambiguous on the issue, the court will uphold an agency's construction of a statute so long as it is a permissible interpretation.<sup>11</sup> Courts give considerable weight to both an agency's construction of a statutory scheme, and "the principle of deference to administrative interpretation."<sup>12</sup>

The fact that the lead provisions in section 101 of the CPSIA contain a waiver for inaccessible parts is not indicative of Congress' intent to preclude the Commission from adopting a similar exception for phthalates in Section 108. Courts have consistently held that, "a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion."<sup>13</sup> Thus, the mere fact that Congress spoke in one section and was silent in another, "can rarely if ever be the 'direct [ ]' congressional answer required by *Chevron*."<sup>14</sup> Because Congress has not directly addressed the issue of accessibility in Section 108, a decision

---

<sup>8</sup> H. Rep. 110-501, at 47 (2007).

<sup>9</sup> Cong. Rec. S1669, S1693 (Mar. 6, 2008).

<sup>10</sup> H. Rep. 110-787, at 68 (2008).

<sup>11</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

<sup>12</sup> *Id.* at 844.

<sup>13</sup> *Catawba County North Carolina v. EPA*, 571, F.3d 20, 63 (D.C. Cir. 2009).

<sup>14</sup> *Cheney Railroad Co. Inc. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990).

to exclude inaccessible parts from the phthalates restrictions will be upheld so long as it is a permissible interpretation of the statute.

As set forth above, including an exception for inaccessible parts to the phthalates restrictions is a permissible interpretation of the CPSIA. In particular, the goal of the phthalates restrictions is to “ensure that children are not exposed to certain specified phthalates while playing, sleeping or eating.”<sup>15</sup> An exception for inaccessible parts is completely consistent with this goal. Because of the broad discretion granted to an agency to interpret statutes that are either silent or ambiguous, the CPSC is entirely within its authority to exclude inaccessible parts from the phthalates restrictions.

Clarification of the current testing policy to address the issue of accessibility is essential to minimize the cost and complexity of testing. Currently testing laboratories may interpret the policy to require that products be fully disassembled in order to test plastic insulation (such as wires and diodes on electronic circuit boards) and other inaccessible parts – at costs exceeding \$300 per test – even though there is no reasonable possibility of access, let alone mouthing or other exposure.

Clarification to incorporate consideration of accessibility in the testing policy also is vital to the Commission’s effort to harmonize US restrictions with those in the European Commission. The issue of accessibility is addressed in guidance developed by the European Commission regarding the restrictions on the use of DINP, DIDP, and DNOP in products that can be mouthed,<sup>16</sup> but can be logically extended to the Section 108 restrictions for all six phthalates. The European Guidance notes that –

Inaccessible parts of articles can also not be taken into the mouth. Articles or parts of articles should be considered inaccessible if, during proper use or reasonably foreseeable improper use by children, they cannot be reached. . . . Inaccessible plastic material, such as cables in toys, cannot be taken into the mouth under normal, foreseeable conditions. Cables made from plasticised material containing DINP, DIDP or DNOP should be safely enclosed inside the toy.

The Panel encourages the Commission to apply this guidance in revising its Statement of Policy so that phthalate restrictions do not apply to inaccessible parts, including cables and other plasticized materials, that are safely enclosed.

---

<sup>15</sup> Statement of Policy: Testing of Component Parts With Respect To Section 108 of the Consumer Product Safety Improvement Act at 1.

<sup>16</sup> Guidance Document on the interpretation of the concept “which can be placed in the mouth” as laid down in the Annex to the 22nd amendment of Council Directive 76/769/EEC. (Available [http://ec.europa.eu/enterprise/sectors/chemicals/files/markrestr/guidance\\_document\\_final\\_en.pdf](http://ec.europa.eu/enterprise/sectors/chemicals/files/markrestr/guidance_document_final_en.pdf))

Mr. Todd A. Stevenson  
September 16, 2009  
Page 5

In summary a decision to amend the current Statement of Policy to exclude inaccessible component parts from the phthalate testing requirement under Section 108 is supported by a plain reading of the statutory language and by the judicial precedent. The exclusion of inaccessible parts, moreover, is consistent with the Commission's efforts to simplify the testing process, eliminate the unnecessary testing of products, reduce the cost of testing, and harmonize U.S. toy restrictions with those in the European Commission.

Please free to contact me at 703-741-5501 or [steve\\_risotto@americanchemistry.com](mailto:steve_risotto@americanchemistry.com) if you have any questions about the above information.

Sincerely,

***Steve Risotto***

Stephen P. Risotto  
Senior Director, Phthalate Esters

0015

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Consumer Advocacy Organization
<b>Tracking No.</b> 80a25119
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0015

Comment from Sarah Janssen

---

## Submitter Information

**Name:** Sarah Janssen

**Address:** United States,

**Organization:** Natural Resources Defense Council

---

## General Comment

Submitted comments from NRDC on CPSC 2009 0063.

Sarah Janssen, MD, PhD, MPH

Staff Scientist

Natural Resources Defense Council

111 Sutter St., 20th floor

San Francisco, CA 94104

(415) 875-6100 (office)

(415) 875-6161 (fax)

---

## Attachments

**CPSC-2009-0063-0015.1:** Comment from Sarah Janssen



NATURAL RESOURCES DEFENSE COUNCIL

September 16, 2009

To: Consumer Product Safety Commission  
Office of the Secretary  
Submitted electronically: <http://www.regulations.gov>.

Re: Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act.  
CPSC Docket Number: CPSC-2009-0063

These comments are submitted by Natural Resources Defense Council (NRDC), who on behalf of our 1.3 million members and online activists, uses law and science to ensure a safe and healthy environment for all living things. NRDC has no financial interest in phthalates, PVC, or children's toys or childcare articles.

The CPSC has requested comments on the Statement of Policy: Testing of Component Parts with Respect to section 108 of the Consumer Product Safety Improvement Act. This statement of policy clarifies that the CPSC believes that phthalate testing should be limited to those plastic parts or other product parts which could conceivably contain phthalates ("plasticized component parts"). The Commission has developed a method to test component parts for the specified phthalates and will only require testing of plasticized component parts as defined above. In the Statement of Policy, CPSC has identified materials that "may" contain phthalates and materials that are not likely to contain phthalates and may not require testing.

CPSC states:

"Examples of materials that may contain phthalates are:

- Polyvinyl chloride (PVC) and related polymers, such as polyvinylidene chloride (PVDC) and polyvinyl acetate (PVA). These materials should always be tested.
- Soft or flexible plastics, except polyolefins.
- Soft or flexible rubber, except silicone rubber and natural latex.
- Foam rubber or foam plastic, such as polyurethane (PU).
- Surface coatings, non-slip coatings, finishes, decals, and printed designs.
- Elastic materials on apparel, such as sleepware.
- Adhesives and sealants.
- Electrical insulation.

Examples of materials that do not normally contain phthalates and, therefore, might not require testing or certification are:

- Unfinished metal.
- Natural wood, except for coatings and adhesives added to wood.
- Textiles made from natural fibers, such as cotton or wool, except for printed decorations, waterproof coatings or other surface treatments, back coatings, and elastic materials (especially sleepwear).
- Textiles made from common synthetic fibers, such as polyester, acrylic, and nylon, except for printed decorations, waterproof coatings or other surface treatments, and elastic materials. However, any textiles containing PVC or related polymers must be tested.
- Polyethylene and polypropylene (polyolefins).
- Silicone rubber and natural latex.
- Mineral products such as play sand, glass, and crystal.

NRDC agrees that all materials that contain PVC or related polymers must be tested as well as any products containing inks or adhesives that are likely to contain phthalates.

While we agree that certain materials such as unfinished metal, natural wood and silicone or natural latex products are not likely to contain phthalates, exempting certain types of plastics but not others from the testing requirements is likely to create more confusion, lapses in testing, and the potential for continued use of phthalates in products. Because there is no requirement for the labeling of the types of plastics used in a toy, the consumer will be left in the dark about whether the product has actually been tested or just assumed to be phthalate-free because of the type of plastic the manufacturer states is being used. CPSC should require all plastic components of childcare products and articles to be subject to the testing requirements.

NRDC also agrees with CPSC to require that each individual plastic component is tested separately, because if the whole toy is tested, it will dilute the total phthalate content and underestimate the amount of phthalate in the product.

However, as written, CPSC's phthalate test methods are cumbersome and impose unnecessary steps that will increase inter-laboratory variability, increase laboratory turn around time and therefore increase cost to the manufacturers.

Specifically, CPSC is requiring the each component is ground up into a fine powder (< 500 microns), for determining phthalate content. Whereas this will allow for a very precise calculation of the phthalate content, this step is time consuming and adds additional expense to the testing methods. Further, because there will be variation in how different laboratories will conduct this step, it introduces the possibility of significant inter-laboratory variability. This step also does not recognize the exposure route for phthalate exposure. Since phthalates leach from plastics, it is the surface of the component that will come into contact either with a child's mouth or skin, or will be the surface from which phthalates leach into house dust. Therefore, the component could be surfaced tested to determine phthalate content.

Instead of requiring the component to be ground up, CPSC could develop a methodology for surface testing of components. For example, a representative sample could be submerged in an appropriate solvent (THF) for a specified amount of time (24 hours), sonicated and warmed to optimize leaching, and then the solvent extracted for phthalates. This is similar to how lead testing has been conducted in the past.

Secondly, CPSC is requiring that each component is tested in triplicate and then a mathematical average is calculated to determine the phthalate content. This increases the testing cost three times as well as the testing time. Both could be reduced if instead composite testing were done. Three representative samples of each component could be combined and subjected to the same extraction as a group. As long as the laboratory has quality control samples and measures, this should result in a representative estimate of the phthalate content.

The SOP proposed by CPSC will result in a very precise calculation of the phthalate content of product components but will triple the cost and substantially increase the turn around time for testing. Section 108 stipulates that the phthalate content is no more than 0.1% which will require laboratory methods that are able to detect levels to 4 decimal places, not to such a precise degree as would be obtained with CPSC's proposed methodology. Detection limits that reach the standard of section 108 could easily be achieved with changes described above and would substantially reduce the testing costs and time.

NRDC looks forward to an open and transparent process as CPSC continues their guidance for the testing of phthalate content in children's toys. We encourage CPSC to issue a final and clear guidance to the public on the phthalate guidelines as soon as possible after the close of this comment period. CPSC did not issue this phthalate guidance until after the implementation date of the CSPIA and this delay has created considerable frustration for and confusion in all stakeholders.

We welcome any opportunity to participate in or give further clarification on these comments or other matters relevant to the implementation of CSPIA section 108.

Respectfully submitted,



Sarah Janssen, MD, PhD, MPH  
Natural Resources Defense Council

111 Sutter St., 20th floor  
San Francisco, CA 94104  
(415) 875-6100 (office)  
(415) 875-6161 (fax)  
[sjanssen@nrdc.org](mailto:sjanssen@nrdc.org)

0016

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Trade Association
<b>Tracking No.</b> 80a25129
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0016

Comment from Rebecca Mond

---

## Submitter Information

**Name:** Rebecca Mond

**Address:**

1601 North Kent St

Suite 1200

Arlington, VA, 22209

**Email:** rmond@apparelandfootwear.org

**Phone:** 703-797-9038

**Organization:** American Apparel & Footwear Association

---

## General Comment

Attached are AAFA's comments on The CPSC Statement of Policy on Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act.

---

## Attachments

**CPSC-2009-0063-0016.1:** Comment from Rebecca Mond

**CPSC-2009-0063-0016.2:** Comment from Rebecca Mond



April 7, 2009

Office of the Secretary  
Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, Maryland, 20814

Dear Mr. Todd Stevenson:

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association of the apparel and footwear industries and their suppliers – I am writing in response to the Consumer Product Safety Commission's (CPSC) request for comments on the draft guidance regarding which children's products are considered "children's toys" and "child care articles" and therefore subject to requirements of the Consumer Product Safety Improvement Act's (CPSIA) Phthalate Standard.

We are in receipt of the letter (see Attachment A) dated *October 17, 2008* which states that footwear is not covered by the definition of "children's toy" or "child care articles," and therefore not subject to the CPSIA phthalate ban. As we have noted several times previously, we agree wholeheartedly with this opinion and would encourage the CPSC to enshrine the letter further in regulations it issues governing application of the phthalate ban.

We are also in receipt of the CPSC letter (see Attachment B) dated *November 25, 2008*, which exempts most apparel items from the definitions of "children's toy" or "child care articles" and therefore from the phthalate ban. As we stated in previous comments, we agree with much of what is stated in the letter though we feel it incorrectly characterizes children's sleepwear and bibs as childcare articles. The letter states, "children's sleepwear or bibs, while not considered to be toys, would be considered childcare articles as defined under Section 108, and, therefore, subject to the ban on phthalates." As we explained in previous comments dated *January 12, 2009* (see Attachment C), we find no information to support such a conclusion and, in fact, believe there is substantial information to the contrary. Accordingly, we believe that children's pajamas and bibs do not fall under the definition of "child care articles" and therefore *all apparel items* should be exempt from the phthalate ban as well.

We are also in receipt of the letter dated *March 12, 2009* (see Attachment D) to the Travel Goods Association articulating that travel goods are not covered by the ban. We agree with this assessment, further elaborated by the recent submission of the Travel Goods Association (TGA) (See Attachment E).

Section 108 defines "child care article" as a "consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething." Accordingly, while bibs and pajamas are *used when* a child is feeding and sleeping (respectively), they do not *facilitate* either action (we elaborated more on this in our *January 12, 2009* comments, Attachment C). The CPSC's determination of which products are subject to the requirements of the phthalate standard should fall within the parameters outlined in those comments.

We believe this distinction between "facilitating sleeping and feeding" versus "used while sleeping and feeding" is significant, and strongly urge the CPSC to consider this distinction as it addresses risk factors as well. We will address each in turn.

## **Sleepwear**

It is clear from the intent of Section 108 that Congress has constructed a very narrow definition of childcare articles to focus on sustained oral activities for children aged 3 and under. The legislation identifies a number of such oral activities – such as feeding or sucking – since the principal risk associated with phthalates has to do with mouthing components of articles that contain phthalates. It would seem, particularly given the very intense debate that occurred over phthalates as Congress drafted this provision, that the authors intended to create a targeted provision to address a specific risk – namely that associated with mouthing.

It is with this in mind that the reference to “facilitating sleeping” must be understood. The mouthing activities associated with sleep are those related to a small child sucking on something – such as a pacifier or a bottle – to help fall and stay asleep. Congress was not looking to cover all articles that are related to sleep or nighttime activities. Rather, it was focused specifically on those related to mouthing to help an infant or small child fall and stay asleep.

Indeed, as we mentioned in previous comments, this was specifically noted in guidance issued by the European Union as it applied a ban on verbatim that is widely viewed as a precursor to the CPSIA phthalate ban. The European Union’s Phthalate Directive applies to “child care articles” though the European Commission issued guidance stating “The main purpose of pyjamas is to dress children when sleeping and **not to facilitate sleep** [emphasis added]. Pyjamas should therefore be regarded as textiles and, like other textiles, do not fall under the scope of the Directive.”<sup>1</sup>

Moreover, with respect to sleepwear, the CPSC has most often cited the plasticized non-skid footies in pajamas as the source of concern in this particular garment. On this point, we would make several observations. First, while pajamas are worn *when sleeping*, a child is not likely to suck on the footie of a pajama when it is sleeping or when he is falling asleep. Incidental, random, and non-sustained mouthing of the footie, while awake, might occur just as it could occur with any article that may be within a child’s grasp – be it a dog toy or another household item. In addition, the footie is explicitly a component of the pajama designed not to facilitate sleeping, but rather to facilitate walking. Given the narrow Congressional focus on the mouthing activities associated with the facilitation of sleep, we believe it entirely inappropriate to include in the definition of child care article sleepwear just because that garment is used during sleeping and sometimes contains a component that facilitates walking.

## **Bibs**

Bibs on the other hand, are not products “*designed or intended by the manufacturer*” to either facilitate feeding or to be mouthed by the child while feeding. Other products that *facilitate* feeding are designed with some sort of mouthing function (such as baby bottles). Again, Congress carefully crafted a phthalate ban that would limit phthalates in articles that are associated with sustained mouthing. Bibs may be mouthed occasionally but do not meet this narrow definition.

Moreover, bibs are “*designed or intended by the manufacturer*” to facilitate keeping a child’s clothing clean. In this role, they should be seen as something that facilitates an adult’s activity, not a child’s. Like a high chair or a placemat that is placed under a child’s plate to prevent a stain on a table, a bib is an article that is primarily used by the parent when the child is being fed, rather than as an article that helps the child consume the food.

It is our strong recommendation, therefore, that bibs not be classified as child care articles for purposes of the CPSIA.

As the CPSC understands, the range of the new phthalate ban, including the last minute retroactive application of the ban, has created considerable disruption. We welcome the actions of the CPSC to articulate clear guidance and definitions, and urge that they be published at the earliest possible moment.

---

<sup>1</sup> [http://ec.europa.eu/enterprise/chemicals/legislation/markrestr/guidance\\_document\\_final.pdf](http://ec.europa.eu/enterprise/chemicals/legislation/markrestr/guidance_document_final.pdf)

Thank you for your time and consideration in this matter. If you have any questions, please contact Rebecca Mond with my staff at 703-797-9038 or at [rmond@apparelandfootwear.org](mailto:rmond@apparelandfootwear.org).

Sincerely,

A handwritten signature in cursive script that reads "Kevin M. Burke". The signature is written in black ink and is positioned above the typed name and title.

Kevin M. Burke  
President and CEO



September 16, 2009

Office of the Secretary  
Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, Maryland, 20814

Dear Mr. Babich,

I am writing on behalf of the American Apparel & Footwear Association – the national trade association representing the apparel and footwear industries, and their suppliers – with regard to the request for comments on the Consumer Product Safety Commission’s (CPSC) “Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act (CPSIA)” (Statement of Policy).

The Statement of Policy limits phthalate testing to those component parts that could contain phthalates. AAFA generally supports component phthalate testing because it better protects children from phthalate exposure (versus testing the entire product which may dilute the phthalate concentration in any single component). Furthermore, limiting phthalate testing to components that may contain phthalates in them will be more cost effective to manufacturers. As you know, we strongly support a similar component part testing concept with respect to lead.

However, as Commissioner Nancy Nord accurately pointed out, the Statement of Policy represents a significant change of policy with regard to the phthalate standard. ***We therefore request that the CPSC grant industry at least one year before implementing the new interpretation of the phthalate standard and that the CPSC does not apply the interpretation retroactively.*** The CPSC originally interpreted the Section 108 regulation as 0.1% total phthalate content of the entire product (for the six regulated phthalates). However, this Statement of Policy changes this interpretation to 0.1% total phthalate content of any component part of the product. The retroactive nature of the phthalate standard makes this change in policy all the more significant because manufacturers who, in good faith, complied with the phthalate standard as the CPSC originally interpreted it must now go back to the shelves and retest products that were compliant prior to the Statement of Policy’s publication. Allowing manufactures time to implement the new testing procedures and applying the Statement of Policy prospectively will give industry a fair chance at complying with the new regulation without seriously disrupting businesses.

Moreover, we believe that the Statement of Policy should further limit the required testing of plasticized components. Phthalates are chemicals that are intentionally added to the manufacturing process and therefore products do not risk unintentional contamination. The CPSC should recognize that many suppliers have removed phthalates entirely from all manufacturing processes and taken deliberate steps to not permit their introduction. Therefore, even plasticized component parts that may have traditionally or historically contained phthalates no longer have any possibility of phthalate contamination. Using a continuing guarantee system where suppliers and manufacturers certify that they have not used restricted phthalates in their products will further cut down costs to manufacturers without adding any additional risk to children.

To that end, we recommend that the CPSC allow supplier certification of component parts and allow suppliers and manufacturers to test components of the product for phthalates and other applicable

standards before the final product is assembled. Manufacturers are currently wasting unnecessary resources on product-based testing for the four standards that the stay of testing and certification has not covered because such commonsense approaches have not yet been incorporated into those protocols. When the stay lifts and manufacturers will be required to test according to other standards like phthalates, this problem will become exponentially worse. The current product-based testing regime leads to repetitive testing of the same components (buttons on different styles of jeans for example) and the unnecessary destruction of multiple finished products in order to obtain adequate samples to test. Allowing supplier testing will provide significant and much needed relief to industry.

The CPSC should also allow composite testing and other flexible testing procedures for phthalates. Phthalate testing is incredibly expensive and the CPSC should grant as much testing relief as possible to the manufacturing community without undermining any assurance that the product is compliant with the phthalate standard. Often components like screen prints are made by blending a few colors together to make several additional different colors. In the event that these screen prints are materials that may contain phthalates in them (and are used on child care articles or children's toys), the CPSC should approve a testing procedure that would allow the manufacturer to send in samples of the original colors before they are blended into the final colors. Any results would be weighted according to the amount of the original colors that are used to make the final color. Mathematically the results should be identical to any tests done on the final color itself.

Finally, component parts that are inaccessible should be exempt from the standard. Additionally, the CPSC should use a definition of inaccessibility that considers exposure risk of the regulated phthalates. The phthalate standard already begins to address risk assessment in the application of the phthalate standard by limiting the standard to children's toys and child care articles – presumably, products that a child will interact with more than others and are intended to or likely to mouth. Furthermore, the interim prohibition of DINP, DIDP and DnOP is limited to toys that can be placed in a child's mouth and child care articles. The CPSC also began to lay out some parameters for risk assessment by distinguishing between primary and secondary child care articles. Secondary child care articles have no (or limited) contact with the child and are therefore outside the scope of the CPSIA. Similarly, component parts that do not risk phthalate absorption should not be subject to the phthalate standard.

In addition to the Statement of Policy regarding phthalate testing, the CPSC needs to come out with definitive guidance on what products are covered by the phthalate standard. While the CPSC issued draft guidance, many manufacturers are still unclear as to whether their products (like pajamas) are covered by Section 108 of the CPSIA. Manufacturers need clarity from the CPSC to ensure they are compliant with the appropriate standards. Moreover, the Statement of Policy must clarify that the examples of products that may contain PVC (“toys, floor and wall coverings, household furnishings, building materials, wire and cable insulation, footwear, rainwear, and automobile interiors.”) are not necessarily covered by the phthalate standard. While these examples are intended to be demonstrative, some manufacturers have wrongly interpreted them to mean that these products (like footwear and rainwear) are covered by the standard. AAFA has previously commented on this issue and our comments are attached for easy reference.

Thank you for your consideration in these matters. Please contact Rebecca Mond (at [rmond@apparelandfootwear.org](mailto:rmond@apparelandfootwear.org) or at 703-797-9038) with our staff if you have further questions.

Sincerely,



Kevin Burke  
President and CEO

Attachment

0017

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Trade Association
<b>Tracking No.</b> 80a24e1f
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0017

Comment from Jonathan Gold

---

## Submitter Information

**Name:** Jonathan Gold

**Address:**

325 7th Street, NW  
Washington, DC, 20004

**Email:** goldj@nrf.com

**Phone:** 202-626-8193

**Organization:** National Retail Federation

---

## General Comment

Attached are comments from the National Retail Federation on the CPSC's Statement of Policy.

---

## Attachments

**CPSC-2009-0063-0017.1:** Comment from Jonathan Gold



September 16, 2009

Todd A. Stevenson  
Secretary  
Consumer Product Safety Commission  
4330 East-West Highway  
Room 502  
Bethesda, MD 20814

**RE: CPSC Docket Number: CPSC-2009-0063 – Statement of Policy: Testing of Component Parts With Respect to Section 108 of the CPSIA**

Dear Mr. Stevenson:

The following comments are submitted on behalf of the National Retail Federation (NRF) in response to the Consumer Product Safety Commission's (CPSC) Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act (CPSIA). NRF strongly supports the CPSC's Statement of Policy on component testing which now limits testing for phthalates to the component which could contain phthalates as opposed to the entire product.

We appreciate the CPSC's recognition that this will not only provide more protection, but will help to reduce the testing costs for business. However, NRF would suggest and encourage the CPSC to clarify that only the plasticized components of a covered product need to be tested. As it has done with lead, the CPSC needs to exempt certain materials from testing requirements for phthalates. Since phthalates are used as softeners for plastics, the testing requirements should only be limited to those components of covered parts which contain a plastic. Inaccessible component parts should be exempted from testing, as they are with lead testing. The CPSC should continue to use a risk assessment methodology and focus on where the greatest risk of exposure for a child mouthing a covered product. If the component is inaccessible, it will not be mouthed by the child; therefore it should not be subject to the phthalate testing requirements.

The CPSC should allow industry time to adapt to the new testing requirements. Companies will need sufficient time to change their testing methods from the entire product, as previously required, to just the component parts which may contain phthalates. To that point, we would strongly encourage the CPSC to allow for components to be tested before they are incorporated into the final product. This approach is more sensible and will allow companies to identify problems before the component is incorporated into the final product.

Liberty Place  
325 7th Street NW, Suite 1100  
Washington, DC 20004  
800.NRF.HOW2 (800.673.4692)  
202.783.7971 fax 202.737.2849  
www.nrf.com

We also encourage the CPSC to publish a definitive listing of products covered by Section 108. As we noted in our comments on March 25<sup>th</sup> on the Draft Guidance, it is critical for the CPSC to identify what products are covered and which are excluded from the testing requirements. Companies are still having a difficult time identifying which products are covered and which are not. The CPSC cannot continue to let companies guess which products need to be tested.

By way of background, NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 24 million employees - about one in five American workers - and 2008 sales of \$4.6 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

NRF welcomes the opportunity to share our thoughts on the CPSC's Statement of Policy: Testing of Component Parts With Respect to Section 108 of the CPSIA. If you have any questions, please contact Jonathan Gold ([goldj@nrf.com](mailto:goldj@nrf.com)), NRF's Vice President, Supply Chain and Customs Policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Pfister". The signature is fluid and cursive, with a large, stylized initial "S".

Steve Pfister  
Senior Vice President  
Government Relations

0018

# PUBLIC SUBMISSION

<b>As of:</b> September 18, 2009
<b>Received:</b> September 16, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 18, 2009
<b>Category:</b> Retailer
<b>Tracking No.:</b> 80a24e22
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Web

**Docket:** CPSC-2009-0063

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001

Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0018

Comment from Stephanie Lester

---

## Submitter Information

**Name:** Stephanie Lester

**Address:**

1700 North Moore Street  
Suite 2250  
Arlington, VA, 22209

**Email:** stephanie.lester@rila.org

**Phone:** 703-600-2046

**Organization:** Retail Industry Leaders Association

---

## General Comment

Please find attached comments from RILA regarding the CPSC Statement of Policy on Testing of Component Parts With Respect to Section 108 of the CPSIA.

---

## Attachments

**CPSC-2009-0063-0018.1:** Comment from Stephanie Lester



1700 N. Moore Street, Suite 2250, Arlington, VA 22209

Phone: (703) 841-2300

Fax: (703) 841-1184

Email: [info@rila.org](mailto:info@rila.org)

Web: [www.rila.org](http://www.rila.org)

September 16, 2009

Todd A. Stevenson, Secretary  
Office of the Secretary  
U.S. Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, MD 20814

**Re: Notice of Availability of a Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act  
74 FR 41400 (August 17, 2009)**

Dear Mr. Stevenson:

The Retail Industry Leaders Association (RILA) appreciates the opportunity to comment on the Consumer Product Safety Commission ("Commission" or "CPSC") Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act (74 FR 41400, August 17, 2009).

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry--retailers, product manufacturers, and service suppliers--which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

### **Component Testing**

RILA agrees with the CPSC staff that component testing of children's toys and child care articles is supported by the language in the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). Testing the entire product (plastic and non-plastic components) does not effectively achieve the intent of the CPSIA to protect children from phthalate exposure, as phthalates by definition are plasticizers, and would not be found in non-plastic components during industry-accepted manufacturing practices. In addition, as noted by the staff, testing the plastic and non-plastic components together to get an aggregate phthalate total would dilute the actual concentration of the phthalate content in the plastic components. However, composite testing of plastic components should be permitted, similar to the compositing permitted for lead in coatings, because the risk of dilution is absent, but the cost-reduction benefits of limiting the number of tests conducted upon an individual component remain.

### *Component Samples Should Be Allowed to be Tested*

RILA believes the staff should take an additional step to allow test labs to request components of the finished product from the finished product manufacturers rather than requiring the finished product manufacturer to submit enough finished product samples to grind up the components that will need to be tested. Because of the destructive nature of phthalate testing, many finished product manufacturers incur large expenses in sending samples that will be destroyed when the labs disassemble the product into its component parts for testing. In implementing the lead testing requirements of the CPSIA, test labs frequently have to request large numbers of samples from finished product manufacturers to obtain sufficient material to complete the requisite test, sometimes imposing huge cost burdens on suppliers with products that have small profit margins or low retail values.

As an example of the unnecessarily high testing costs associated with requiring components of finished products to be used for testing (rather than only the components themselves), in the case of lead, one test lab requested a high sample number of light sticks to test the white coating used for the date code for lead. These lightsticks were packaged in two different manners: single pack (retail value \$1) and 10-pack assortment (retail value \$4). In this particular example, the test lab wanted 5,000 samples of the 10-pack assortment, which would have cost the supplier approximately \$20,000 just in sample costs, not including the testing expenses or shipping costs.

### *Inaccessible Component Parts*

The CPSC should address accessible versus inaccessible parts with regard to component testing for phthalates. RILA believes the CPSC should only require accessible component parts to be tested for phthalates. If a component is inaccessible to a child, then by definition, there is no risk that a child could be exposed to phthalates from such a component.

For the three phthalates that are under the interim prohibition under section 108(b) of the CPSIA (DINP, DIDP, and DnOP), the statute already contains an accessibility standard:

Section 108(b)(1)--“ . . . any children’s toy that can be placed in a child’s mouth...”

Section 108(e)(2)(B)--“ . . . a toy can be placed in a child’s mouth if any part of the toy can actually be brought to the mouth and kept in the mouth by a child so that it can be sucked and chewed. If the children’s product can only be licked , it is not regarded as able to be placed in the mouth. If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth.”

For the three phthalates that are permanently prohibited (DEHP, DBP, and BBP) and for child care articles, the CPSC should develop and specify an accessibility standard.

### **Testing Method**

The CPSC noted in its Statement of Policy that manufacturers may “use an alternative [testing] approach if the approach satisfies the requirements of the CPSIA.”<sup>1</sup> RILA believes the CPSC should either standardize the test method, or approve multiple industry-accepted test methods, such as those developed by the American Society for Testing and Materials (ASTM) or the U.S. Environmental Protection Agency.

RILA also believes the CPSC should approve reasonable screening methods, such as pyrolysis, because such screening methods will help make available much-needed laboratory time for other products, as well as provide a cost-benefit to manufacturers and ultimately the consumers.

RILA recommends that the CPSC should define which substrates should be tested (and should not be tested) for phthalates and should dictate which test method should be used when testing for phthalates in toy and child care article components. Allowing test labs to choose which components to test and which test method to employ when testing for phthalates may lead to inconsistent test results that will delay the test process and cause manufacturers to incur additional expenses.

#### **Reasonable Implementation Period**

Retailers have already individually developed their own testing protocols to ensure that products comply with the CPSIA phthalate requirement. RILA anticipates that this testing will continue until the new testing requirements go into effect. Once the CPSC issues its guidance for phthalate testing, sufficient time will be necessary to convert systems and processes and to educate the supply chain on the new testing standard. RILA respectfully requests that the CPSC require the new testing standard to apply on products manufactured one year after the final testing guidance is provided.

#### **Conclusion**

RILA members place the highest priority on ensuring the safety of their customers and the products sold to them. RILA appreciates this opportunity to comment on the Commission’s Statement of Policy: Testing of Component Parts With Respect to Section 108 of the CPSIA. Should you have any questions about the comments as submitted, please don’t hesitate to contact me by phone at (703) 600-2046 or by email at [stephanie.lester@rila.org](mailto:stephanie.lester@rila.org).

Sincerely,



Stephanie Lester  
Vice President, International Trade

---

<sup>1</sup> Statement of Policy: Testing of Component Parts With Respect To Section 108 of the Consumer Product Safety Improvement Act.

0019

# PUBLIC SUBMISSION

<b>As of:</b> October 27, 2009
<b>Received:</b> September 21, 2009
<b>Status:</b> Posted
<b>Posted:</b> September 22, 2009
<b>Category:</b> Trade Association
<b>Tracking No.</b> 80a29018
<b>Comments Due:</b> September 16, 2009
<b>Submission Type:</b> Paper
<b>Number of Items Received:</b> 8

**Docket:** CPSC-2009-0063  
Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Comment On:** CPSC-2009-0063-0001  
Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act

**Document:** CPSC-2009-0063-0019  
Comments from Robert Waller, Jr. - JPMA

---

## Submitter Information

**Name:** Robert Waller, Jr.

**Address:**

15000 Commerce Parkway, Suite C  
Mt. Laurel, NJ, 08054

**Submitter's Representative:** Robert B. Waller, Jr. - President

**Organization:** Juvenile Products Manufacturers Association, Inc. (JPMA)

---

## General Comment

See attached - 2 letters (submitted on different dates)

---

## Attachments

**CPSC-2009-0063-0019.1:** Comments from Robert Waller, Jr. - JPMA



September 16, 2009

Office of the Secretary,  
Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, MD 20814

OFFICE OF THE SECRETARY  
FREEDOM OF INFORMATION

2009 SEP 21 P 3:30

**Re: Comments on Statement of Policy: Testing of Component Parts With Respect to Section 108 of the CPSIA (Document ID CPSC-2009-0063-0001)**

JPMA has previously submitted comments on Section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). The Consumer Product Safety Commission (CPSC) has proposed issuance by the Commission of a *Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act of 2008* ("CPSIA") ("Statement of Policy"). The CPSC voted to publish and solicit comments per a *Federal Register* Notice issued on August 17, 2009 and comments were requested to be submitted by September 16, 2009. JPMA is submitting these supplemental comments on behalf of its 350 members, including manufacturers of toys and child care articles impacted by implementation of CPSIA Section 108 requirements. JPMA reserves the right to supplement its comments as appropriate.

JPMA favors practical approaches to testing products in an efficient and cost effective manner. Testing costs for phthalates can be high when indiscriminately applied to product component parts. This is a burden on small businesses. The CPSC Statement of Policy seeks to implement changes to an existing SOP issued and relied upon by makers of childcare articles. Any change must be prospective and handled in an orderly process. As CPSC proceeds, it remains to clarify the definition and scope of "child care articles" to be subject such restrictions. In addition a better definition of "component parts" is required as well as rules excluding inaccessible parts based upon the absence of mouthing exposure and other factors indicating no risk of hazardous exposure to children. JPMA supports the development of listed materials that do not need to be tested. Clearly exempting certain materials from testing is an effective way of reducing unnecessary testing burdens. The same rationale should be provided as a basis for expanding such listings in the future. In the event of issuance of alternate test methods, there can be no confusion about the establishment of a prospective effective date and clear guidelines that indicate that products previously produced in accordance with the CPSC's own previously issued SOP, can continue to be sold. After confusion about the scope of products subject to the initial ban and reversal, without appeal, of the CPSC stated position that the manufacture date governs, products cannot be once again subject to removal risk in the marketplace. An "Effective Date" applicable to products "manufactured" as of a future date certain is required. Unless these practical solutions can be implemented by CPSC with issuance of a comprehensive clarifying regulation, we would recommend that CPSC also maintain the previously published aggregate test, as an acceptable test alternative.

---

**Juvenile Products Manufacturers Association, Inc.**

15000 Commerce Parkway, Suite C • Mt. Laurel, NJ 08054 • 856.638.0420 • 856.439.0525  
E-mail: [jpma@ahint.com](mailto:jpma@ahint.com) • Website: [www.jpma.org](http://www.jpma.org)



While Commission comments recognize that it is desirable to harmonize with the EU testing methods and approaches, the proposed SOP should explicitly indicate that compliance to such requirements will provide a “safe harbor”. Unless, this can be accomplished by CPSC by issuance of a clarifying regulation, we would recommend that the previously published aggregate test be maintained as an acceptable test alternative.

We have previously noted that if the CPSC intends to substantively change an existing test method relied upon for enforcement of the statutory prohibitions contained in Section 108 of the CPSIA, it must do so by notice with due opportunity for comment pursuant to rulemaking requirements of the Administrative Procedure Act. There is no doubt that the proposed Statement of Policy, substantively changes the existing test standard in a way that represents a significant change in testing methodology currently being relied upon by industry. There can be no doubt that the proposed Statement of Policy is more than merely “interpretive” and is “substantive” in its impact on existing test protocols and banning of product<sup>1</sup>.

This is the case in the instant matter. As regards CPSC, courts have held that an interpretation issued subsequent to a rule issued through notice and comment procedures may constitute an “amendment” to the rule that subjects the later interpretation to §553<sup>2</sup>. This was recognized in Commissioner Nord’s voting statement and implied by Chairman Tenenbaum’s agreement to solicit comments prior to implementing a substantive policy change.

We appreciate that the Commission has recognized the substantive impact of this SOP and the importance of clearly setting forth how it will be applied to the marketplace. This should help ensure that there are no unintended consequences or marketplace disruptions associated with substantive changes to existing SOPs.

JPMA notes that testing per component can indeed be more cost efficient when a component is standard across numerous products and that testing one sample of the standard component would be considered sufficient to verify compliance for all products using that component. However, the testing of a product in aggregate could actually be more cost effective if a product line does not have standard components, since it requires

---

<sup>1</sup> In *American Hospital Association v. Bowen*(476 U.S. 610 (1986)the Court noted: “Substantive rules are ones which ‘grant rights, impose obligations, or produce other significant effects on private interests,’ or which effect a change in existing law or policy.’ ...Interpretative rules, by contrast, ‘are those which merely clarify or explain existing law or regulations,’ are ‘essentially hortatory and instructional,’ ...and ‘do not have the full force and effect of a substantive rule but [are] in the form of an explanation of particular terms.” Here we have a substantive rule.

<sup>2</sup> See *Jerri’s Ceramic Arts v. Consumer Product Safety Commission*, 874 F.2d 205 (4th Cir. 1989). The Court held an interpretation of a prior rule issued by the CPSC was not an “interpretative rule” because it imposed new duties with the force of law for the Commission to enforce and did not remind anyone of existing duties but instead radically changed an existing position.



only one comprehensive test or calculation of percentage of total weight for a single product test.

Without a clear definition of components the testing alternative could be less practical and more costly if multiple parts (indeed parts of parts) are required to be tested by laboratories. In addition when internal components are tested (notwithstanding the fact that there is absolutely no hazardous exposure), the test load under a component part protocol could be too costly. Logically, we therefore recommend that CPSC further explicitly exclude inaccessible component parts from testing protocols. Furthermore, as noted it is necessary to better define what will constitute a component part for testing purposes.

### **Materials subject to Testing Must be Better Defined**

The policy contains ambiguous language, including “plasticized component parts” and then defines “other product parts that could conceivably contain phthalates...” Raw material testing should be permitted under such policy, since phthalates, unlike lead in pigments, are not likely to be a contaminant in product. Raw material testing should be permitted as well, since phthalates, unlike lead in pigments, are not likely to be a contaminant in many products. The scope should also be limited to “accessible plasticized components with durometer readings that indicate a hard plastic unlikely to contain phthalates. There should also be a limit of material mass that should be tested, (i.e., more than 10 grams, etc.). If multiple components are formed in the same mold, only one test should be required. Finally, *Raw Material* should be defined as: *A material that is in its final chemical state which becomes a component part of a final product.*

### **Excluded Material**

We agree that examples of materials that do not normally contain phthalates and, therefore, should not generally require testing or certification are: Unfinished metal; natural wood, except for coatings and adhesives added to wood; textiles made from natural fibers, such as cotton or wool, except for printed decorations, waterproof coatings or other surface treatments, back coatings, and elastic materials (especially sleepwear); textiles made from common synthetic fibers, such as polyester, acrylic, and nylon (except for printed decorations, waterproof coatings or other surface treatments, and elastic materials, and any textiles containing PVC or related polymers); polyethylene and polypropylene (polyolefins); silicone rubber and natural latex; and mineral products such as play sand, glass, and crystal. The CPSC should make it clear in any issued policy that the excluded material list compiled is not exhaustive and similar, related or other such materials may be added. For example some manufacturers have indicated they use Thermo Plastic Rubber (TPR) a synthetic rubber-like material without added phthalates which should be recognized as excluded as well.



We also agree that manufacturers either know or should know what materials and components go into the products they make and can derive much data from upstream supplier MSDS sheets and representation letters, which should be able to be relied upon.

### **Effective Date**

A future date of manufacture should be established for effective dates that any new policies will become effective. Further, the date should be reasonable, allowing a transition to the new policy without affecting the manufacture and shipping of products in process. The CPSC should establish that all products that have been manufactured using the policy of March, 2009 are acceptable for the marketplace and will not be subject to any retroactively imposed new requirements.

### **Inaccessible Components Should be Excluded From Testing**

The Statement of Policy indicates that the intent of the Congressionally imposed restrictions is to establish standards so children are not exposed to certain specified phthalates while playing, sleeping, or eating. The Commission has more discretion to set forth a test protocol that requires exposure as a condition precedent to testing than has been exercised to date. The fact that CPSIA Section 101 contains an expressed exclusion of inaccessible parts, while CPSIA Section 108 does not, in and of itself, does not create an inference that such parts must be tested. Since Congress established a requirement restricting phthalates to minimum levels based upon exposure concerns, the CPSC would be well within its regulatory discretion to develop a reasonable hazard based assessment test protocol that focuses on testing of parts where there is a likelihood of such exposure. Such administrative discretion was recognized under the *Chevron Doctrine* established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and is particularly applicable when regulations are issued to provide greater clarity as to how restrictions mandated by statute will be applied. CPSC has already modeled likely exposure to children from mouthing, sucking and chewing toys and childcare articles. There is no benefit in terms of child safety in testing a material that is inaccessible to children so as to present a health risk. An internal mechanism, structure or electronic circuit, may have a very significant number of components that are not accessible to a child and present no hazard.

For DINP, DIDP, and DnOP, the accessibility of components should be considered along with the potential for mouthing, sucking and chewing (not licking)<sup>3</sup> to determine the overall exposure potential. Certainly inaccessible components cannot be mouthed and there are many accessible components that are not likely to be mouthed, chewed or sucked with product in an assembled, intended for use state.<sup>4</sup>

---

<sup>3</sup> Conditions specifically set forth by Congress in the statutory language under CPSIA Section 108.

<sup>4</sup> Use and abuse testing under 16 CFR 1500.48-53 are customarily applied to products in an "assembled" state, a practice CPSC should apply as a condition to test requirements under CPSIA Section 108.



For the phthalate group made up of DEHP, DBP, and BBP, the accessibility of components should also be considered and if a component is determined to be inaccessible, it should not be subjected to the test. This is a common sense approach to establishment of a reasonable regulatory scheme. Testing each electronic component or worse yet, parts of electronic components, on a printed circuit board assembly (PCBA) would be very time consuming, expensive, and senseless. While the agency has no discretion to modify the limits established by Congress for phthalates, when taken as a whole the wording of Section 108 affords the agency the discretion to set forth regulations to best determine which component parts of a toy or child care article are likely to present an exposure risk subject to such limits, and which do not. We urge the Commission to exercise such reasonable discretion.

### **Accessible Components**

The definition of a “*Component Part*” which is currently given as “*Component Part – Individual sub-unit within a product,*” lacks the necessary detail for consistent application and can result in pointless testing. The Statement of Policy requires greater clarity. Vague definitions invite chaotic over-testing of parts.

Interpretations that permit micro-testing of parts of parts and that ignore the nature of whole component parts and an assessment of whether they are capable of mouthing, are consistent with both the initial and new CPSC Statement of Policy, and it supports the CPSC concern about prohibitively expensive testing. For example it is extremely difficult, expensive and impractical to consider each separate paint speck, by color, as a separate component for the purposes of finished product audit testing. Paints and coating materials on toys, even when considered in total, make up a very small amount of the total weight of the product. The same rationale applies to each circuit in electronic parts and each part made of the same plastic material. De minimus limits are needed and a precondition that “the whole part be capable of insertion into the mouth” should be required prior to imposition of a parts based testing requirement.

### **Measurement of Phthalates**

The phthalates statement of policy references the updated test method, CPSC-CH-C1001-09.2. The CPSC should create a flexible correlative policy that permits use of several methods suitable for the routine identification and measurement of total phthalate concentration for consumer products under Section 108 of the CPSIA. For example:

- ASTM D7083-04 Standard Practice for Determination of Monomeric Plasticizers in PolyVinyl Chloride (PVC) by Gas Chromatography is a test method to determine monomeric plasticizers including phthalate esters.
- The Canada Product Safety Bureau has a test method for total phthalate content in PVC products. This method describes a general procedure for the determination of phthalate esters in consumer products made of PVC by solvent extraction and precipitation of the polymer.

---

#### **Juvenile Products Manufacturers Association, Inc.**

15000 Commerce Parkway, Suite C • Mt. Laurel, NJ 08054 • 856.638.0420 • 856.439.0525

E-mail: [jpma@ahint.com](mailto:jpma@ahint.com) • Website: [www.jpma.org](http://www.jpma.org)



- The European Toy Safety Directive (EN 71 0 Parts 9, 10, 11) specifies analytical methods for the identification and determination of several organic chemicals including DEHP and DINP, but not total phthalate content.
- There are also commercially available methods and the official Chinese test method, GB/T 22048-2008 Toys and Children's Products - Determination of Phthalate Plasticizers in Polyvinyl Chloride Plastic, should be added to the lists of acceptable extraction and analysis methods

### **Conclusion**

In conclusion, JPMA supports a practical cost effective approach to testing with clearly defined toy and childcare products. Protocols should reduce test burdens on small businesses. While the new CPSC Statement of Policy seeks to implement changes to existing SOPs already issued and relied upon by the marketplace, such transition must be handled with caution. There is an opportunity to set reasonable limitations on phthalate testing based upon a refined definition of i) the scope of toys and child care articles to be included or excluded, ii) testing protocols excluding inaccessible parts for all phthalates, iii) testing protocols excluding whole component parts unlikely to be mouthed and ingested by a child, iv) a clear indication that excluded materials are excluded from testing, including testing to determine materials if information can be otherwise obtained, v) a process by which the excluded materials list can be reasonably updated and expanded, vi) a statement that product produced in accordance with the previous issued CPSC SOP can continue to be distributed in the marketplace, and vii) an established future effective date applicable to products "manufactured". CPSC should further consider harmonization opportunities with applicable EU testing methods for the same product categories.

JPMA appreciates consideration of these comments. Supplemental comments may be submitted as additional issues arise.

Sincerely,

Robert B. Waller, Jr.  
President



August 6, 2009

Ms. Jaqueline Elder  
Acting Executive Director - CPSC

RE: Comments on the CPSC staff's Statement of Policy: Testing of Component Parts With Respect to Section 108 of the CPSIA (7-31-09).

Dear Ms. Elder:

The Consumer Product Safety Commission (CPSC) has posted a staff briefing package dated July 31, 2009 that proposes issuance by the Commission of a Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act (CPSIA) ("Statement of Policy"). The CPSC ballot vote is requested by August 6, 2009.

I am writing on behalf of the Juvenile Product manufacturer's Association (PMA) and our more than 250 members in response to the posted notice on the above matter and as follow-up to our previously submitted comments on Section 108 of the CPSIA (See JPMA letter filed as part of the public record on CPSIA Section 108). We strongly favor practical common sense approaches to testing products in an efficient manner so as to reduce burdens on small businesses which constitute more than 90 percent of our membership. We believe this can be done while maintaining an absolute commitment to the safety of child care articles.

The CPSC Statement of Policy seeks to implement changes to existing Standard Operating Procedures (SOPs) for testing and assessing compliance to the phthalate limits set forth in Section 108 of the CPSIA (Test Method: CPSC-CH-C1001-09.1. Standard Operating Procedure for Determination of Phthalates. U.S. Consumer Product Safety Commission. March 3, 2009). These procedures are already being relied upon in the marketplace. Any Statement of Policy that modifies these must allow an orderly marketplace transition in the manufacturing and distribution cycle. This can be an opportunity to set reasonable limitations on phthalate testing based upon a refined definition of the scope of toys and child care articles to be included, or excluded (as cited in ASTM F-963 and our previously filed comments), accessibility of whole parts to a child user, rules clarifying excluded interim banned product based upon the likelihood solely of mouthing exposure and other factors that relate to risk and hazardous exposure (or often the lack thereof). While we appreciate that the CPSC is willing to identify materials that do not need to be tested because they are unlikely to contain restricted phthalates, greater definition and specificity with respect to additional materials that need not be tested remains to be determined. Clearly exempting certain materials from testing is an effective way of reducing unnecessary testing burdens.

---

**Juvenile Products Manufacturers Association, Inc.**

15000 Commerce Parkway, Suite C • Mt. Laurel, NJ 08054 • 856.638.0420 • 856.439.0525  
E-mail: [jpma@ahint.com](mailto:jpma@ahint.com) • Website: [www.jpma.org](http://www.jpma.org)

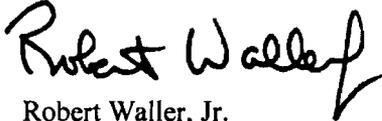
In addition there is enormous confusion about whether the CPSC intended this Statement of Policy to supplant or supplement the existing SOP; to go into effect immediately and apply to previously manufactured product produced in accordance with the statute and CPSC's previously issued SOP; or to be phased in only for product manufactured after a set future date. Any policy statement needs to be clear that product produced in accordance with the previous issued SOP is deemed legal and not subject to removal risk in the marketplace. Also, although seeming to seek to harmonize with the EU testing methods and approach, it does not explicitly indicate that compliance to such test standards will automatically provide a safe harbor or avoid duplicative test costs, potentially imposed by laboratories. The proposed publication of a Statement of Policy should address these essential issues or allow an opportunity for comment, rule making and orderly marketplace transition. These safeguards are necessary given the substantive impact the Statement of Policy will have in marketplace. Some laboratories are already applying such procedures with different interpretations resulting in off sale of safe goods. A clear enforcement policy is required.

The proposed Policy Statement is not simply an interpretive refinement of existing test methods and enforcement protocols. It is a revision of test methods relied upon to enforce a banning standard. As such it constitutes a substantive revision of existing policy, requiring notice, comment and due process protections afforded under rule making requirements of the Administrative Procedure Act.

The Commission should view this as an opportunity to add needed clarification and explain its intentions as part of a cohesive enforcement policy. Problems resulting from a chaotic February 2009, enforcement policy on phthalates needs to be avoided so as to avoid economic damage to the free flow of safe goods in the marketplace. We urge the Commission should take this opportunity to avoid unintended consequential damage to the marketplace and provide clearer enforcement guidance as part of any change in its Statement of Policy.

Thank you for your consideration of these important issues and please provide our feedback to the Commission.

Sincerely,



Robert Waller, Jr.  
President