



## Footwear Product Safety Intel Document Series

### The CPSC's New Product Testing & Certification Program Regulations

**Background and Overview** -- The Consumer Product Safety Improvement Act of 2008 (“CPSIA”) requires importers of children’s products into the U.S. to “submit sufficient samples” of that product or “samples that are identical in all material respects” to be tested at an independent third-party lab, accredited by the CPSC, to determine whether those products comply with CPSC-mandated product safety standards.<sup>1</sup> Based upon those third-party test results, importers are required to issue a certificate (now called a Children’s Product Certificate (“CPC”)) certifying that each children’s product meets all applicable CPSC-mandated product safety standards. The CPSC calls this “Initial Product Certification.”

The CPSIA also directed the CPSC to issue regulations implementing certain aspects of the CPSIA’s product testing and certification requirements. In November 2012, the CPSC issued those regulations, which are called, “Final Rule, Testing and Label Pertaining to Product Certification,” 16 C.F.R. Part 1107 (“the Part 1107 Rule”). Although the Part 1107 Rule imposes requirements on manufacturers of children’s products, the Rule defines “*manufacturer*” as the party responsible for issuing a CPC. So if you read the Rule and see the word “*manufacturer*” throughout, understand that the CPSC’s Rule is not referring to a factory that manufactures your company’s footwear, but rather to the companies that import footwear into the U.S.

**A New Way to Look at Compliance With Product Safety Standards** -- The CPSC’s Part 1107 Rule, which became effective on February 8, 2013, requires importers of children’s products to have a factually-supported basis (what the Rule calls “*a high degree of assurance*”) that all of its children’s products are compliant with applicable children’s product safety standards, not simply the products that have passed tests conducted by a third-party lab. The Part 1107 Rule defines the important phrase “*a high degree of assurance*” as: “an evidence-based demonstration of consistent performance of a product regarding compliance based on knowledge of a product and its manufacture.”

**A “Sufficient” Number of Samples Must be Tested** -- The Part 1107 Rule also requires that children’s products certification testing be conducted on a “sufficient” number of samples of the children’s product. However, rather than give straight-forward guidance as to the appropriate sample size for testing, the CPSC’s Part 1107 Rule obliquely explains that the number of samples selected for testing must be sufficient to provide the certifying party a “*high*

---

<sup>1</sup> Many of the requirements discussed in this memo also apply to domestic manufacturers of children’s products.

*degree of assurance*” (that important phrase again) that the tests conducted demonstrate the ability of the children’s product to comply with all children’s product safety rules.

**Periodic Testing** -- The Part 1107 Rule also requires that issuers of CPCs have their children’s products tested by independent third-party labs on a periodic basis “at least once a year.” In addition, an issuer of a CPC is required to develop and implement a Periodic Testing Plan as part of its Product Testing & Certification Program. According to the “Preamble” to the Part 1107 Rule, the purpose of a Periodic Testing Plan is to enable a manufacturer to ensure that it has a “**high degree of assurance**” (that phrase, again) that children’s products manufactured after it issues its initial CPC, or since previous periodic testing was conducted, continue to comply with all applicable children’s product safety rules.

As a practical matter, the periodic testing requirement is not likely to impact most footwear manufacturers because most have manufacturing runs that are relatively short, certainly less than one year. If, however, you conclude that your company is required to engage in periodic testing, the Part 1107 Rule requires that your Periodic Testing Plan must include: (1) the tests to be conducted; (2) the number of samples to be tested; and (3) the intervals at which the tests will be conducted.

**Testing after a Material Change** -- The Part 1107 Rule also requires additional testing by a third-party lab after there has been a *material change* in the products design or its manufacturing process, which includes the sourcing of component parts.

The Part 1107 Rule defines “*material change*” as “any change in the product’s design, manufacturing process, or sourcing of component parts, that a manufacturer exercising “*due care*,” knows, or should know could affect the product’s ability to comply with the applicable rules, bans, standards, or regulations.” Leaving no doubt that a lawyer wrote this definition, the Rule defines “*due care*” as “the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.”

**Selection of “Representative Samples” for Testing** -- As discussed above, issuance of an Initial Product Certificate for a children’s product must be based upon third-party lab testing of “sufficient samples” of that product or “samples that are identical in all material respects.” In December 2012, the CPSC issued additional regulations, entitled “Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children’s Products” (the “Representative Sample Rule”) that established requirements for the selection of “representative samples” for periodic testing by third-party labs.

Even if your company only conducts Initial Product Certificate testing and is not required to conduct periodic testing, the CPSC’s Representative Sample Rule provides guidance on how to select representative samples. In order to have a “**a high degree of assurance**” (that phrase, again) that your company’s children’s products are compliant with all children’s product safety standards, **both Initial Product Certification and periodic third-party lab testing** should be conducted on samples from a production lot that are representative of that entire production. Remember the purpose of third-party testing is not just to get a passing result, but

rather so that your company can reasonably conclude that the product that **was not tested** is as compliant with product safety standards as the product that **was tested**. It stands to reason that such a conclusion can only be reached if the samples selected for testing are “representative” of the entire production.

**Component Part Rule** – Many companies that import footwear do not commission their own third-party testing. Rather, they issue GCCs based upon third party test results provided to them by the manufacturers of component parts and/or the factories that manufacture their footwear. The CPSC’s regulations permit such practices as long as the requirements of the CPSC’s Component Part Rule are followed.<sup>2</sup>

The Component Part Rule requires that an issuer of a CPC “exercise **due care** (those lawyers are at it again) to ensure” that all testing is done using required test methods and a sampling protocol and that the CPC issuer not rely on any component part or finished product testing unless such component part or finished product is traceable. “Traceable” means that a certifier is able to identify all testing parties of a component part or a finished product, including the name and address of the party commissioning the third-party test and the lab that conducted the test.

**Product Testing & Certification Program** -- The Part 1107 Rule requires importers of children’s products to develop and implement a children’s product testing and certification program. Keeping all of the above in mind, your program should discuss in detail:

- the steps your company has taken to ensure that all of your children’s products are consistently compliant with applicable product safety standards; and
- why the steps that your company has taken provide it with a reasonable basis to conclude that the company has a “**a high degree of assurance**” (that phrase, yet again) that its children’s products that that all of its children’s products are compliant with applicable children’s product safety standards, not just the products that have passed third-party lab tests.

---

<sup>2</sup> The Component Part Rule is formally called “Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party’s Finished Product Testing or Certification, to Meet Testing and Certification Requirements.”