

January 5, 2024

VIA E-MAIL AND U.S. MAIL

Ms. Alberta E. Mills
Secretary of the Commission
U.S. Consumer Product Safety Commission
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Re: Petition of Consumer Technology Association to Amend the Direct Final Rule,
Safety Standard for Button Cell or Coin Batteries and Consumer Products
Containing Such Batteries

Dear Chairman Hoehn-Saric:

Petitioner, the Consumer Technology Association (“CTA” or “Petitioner”)¹, pursuant to 16 C.F.R. Part 1051, respectfully requests that the U.S. Consumer Product Safety Commission (“CPSC” or “Commission”) amend the Direct Final Rule *Safety Standard for Button Cell or Coin Batteries and Consumer Products Containing Such Batteries*, 88 Fed. Reg. 65,274 (Sept. 21, 2023) (the “Final Rule”) as follows. Petitioner requests that the Commission extend the effective date of the Final Rule until September 21, 2025, for the reasons outlined below. In the alternative, CTA requests that CPSC extend the 180-day period of enforcement discretion, currently scheduled to end on March 19, 2024, until September 21, 2025.

CTA members fully support the need to further enhance the safety of button cell and coin batteries and consumer products that contain such batteries. However, in order to comply with the recently issued Final Rule, producers require additional time to allow redesign, development, and third-party certification of covered products. Additional time is necessary to manage the regulatory burden across the producers affected by the Final Rule.

It is vital that the timeline for compliance be extended to permit necessary supply chain changes. CTA members have stated that they need to know as soon as possible, likely by the middle of January, to avoid disruption due to lead times for supply chain changes and certifications.

¹ [CTA](https://cta.tech) is North America’s largest technology trade association. CTA’s members help support more than 18 million American jobs. CTA also owns and produces CES® — the most powerful tech event in the world. CTA members operate in a competitive marketplace to produce innovative products that provide enormous benefits to consumers, focusing on product safety and energizing the U.S. economy.

CTA and its members support the goals of Reese’s Law and the Commission’s implementing regulations and prioritize consumer safety, particularly for children. CTA’s members constantly innovate in all areas, including product safety, and are committed to meeting and exceeding the requirements of the law and the agency’s regulatory implementation of it. To that end, CTA engaged extensively with the CPSC in the development of the Final Rule. CTA submitted technical comments on the proposed rule, a related information collection request, and on the Final Rule itself.² CTA appreciates that some of its members’ concerns were addressed in the Final Rule. However, with respect to the time needed to come into compliance, as explained throughout CTA’s comments, manufacturers face significant design, production, and testing constraints that mean, through no fault of their own, they may not be able to redesign products and secure third-party certification testing by March 19, 2024. Because this will impose substantial burdens on producers and disrupt product availability for consumers, CTA seeks relief from the CPSC through this petition.

Enforcing the Final Rule beginning in March of 2024 will not advance the laudable goals of Reese’s Law; rather, consistent with the comments on the proposed rule, the evaluation of CPSC staff, and as further confirmed by predicted testing bottlenecks now forming, enforcement beginning on March 19 will only create substantial hardships for manufacturers that wish to comply but lack timely access to testing facilities, while also potentially removing products from the market unnecessarily and to the detriment of consumers.

Given the incredible breadth of products covered by the Final Rule and the relative lack of available testing capacity, CPSC should not create a system in which access to the market is determined by the queue at the testing facility. Nor should CPSC encourage a system in which individual manufacturers and industries are compelled to separately petition for their own specific extensions to the Final Rule for their product or industry. As discussed in further detail on the following pages, the requested extension will permit a fair and comprehensive path to compliance with UL 4200A-2023 as a mandatory consumer product standard.

CTA believes it is necessary to file this petition seeking an extension of the compliance date (*i.e.*, the later of the effective date, if the effective date is amended, or the end of enforcement discretion, if the effective date is not amended) for all consumer products containing coin or button cell batteries that must comply with UL 4200A-2023 as set forth in the Final Rule and specifically in 16 C.F.R. § 1263.3. This petition does not seek any relief in connection with the battery packaging requirements of Reese’s Law Section 3 or its implementing regulations.

The following sections discuss, in turn, why the record overwhelmingly supports an extension of the compliance date, why CPSC has authority to grant that extension, and how the need for an extension has been confirmed by developments following the issuance of the Final Rule.

² See Regulations.gov Doc. IDs: CPSC-2023-0004-0044, (Mar. 13, 2023); -0065 (June 12, 2023) and -0094 (Oct. 4, 2023)

The Record Overwhelmingly Supports that Substantially More than 180 Days is Needed

The Final Rule implements Section 2 of Reese’s Law.³ The Final Rule requires that, subject to certain exceptions, consumer products containing coin or button cell batteries comply with the UL 4200A-2023 standard.

The UL 4200A-2023 standard includes construction, performance, and marking requirements. Due to the construction requirements, a manufacturer may need to redesign a product even if it would pass the performance requirements in its current configuration. The performance testing requires a suite of abuse tests to confirm that any button or coin cells in the product will not become accessible or come loose from the product during use. The new marking requirements require redesign and reprinting of existing product packaging, instruction manuals, and new marking for certain product components as well.⁴ Given the sheer number and diversity of consumer products that use coin and button cell batteries, complying with these requirements would be a substantial undertaking even if testing were readily available, which it is not and will not be by March of 2024.

Any product that requires redesign will, after being redesigned, require testing to confirm compliance with the performance requirements. For children’s products, conformance with the standard must be certified by a CPSC-accepted third-party testing laboratory. For general use consumer products, CPSC-accepted third-party testing is not required (the tests may be performed by the manufacturer or another third-party) but, as discussed herein, many manufacturers rely on third parties with dedicated testing facilities due to the nature of the tests.

CTA, and many others, commented that 180 days was not long enough to redesign products and complete the necessary testing, in large part because testing facilities would require time to develop the capacity to test the large number of products that would require testing. After reviewing these comments, the CPSC staff recommended an 18-month extension of the effective date of the Final Rule from publication. This time period would “provide the time needed for industry to come into compliance including redesign, prototyping and testing [and would] address the consumer need for safer consumer products containing button cell or coin batteries *at the earliest time that is reasonably possible.*” See CPSC Staff Briefing Package, Draft Final Rule to Establish a Safety Standard for Button Cell or Coin Batteries and Consumer Products Containing Such Batteries (Aug. 31, 2023) (the “Staff Briefing Package”), Briefing Memorandum at 41 (OS 146) (emphasis added).

³ Pub. L. No. 117-171, 136 Stat. 2094, codified at 15 U.S.C. § 2056e.

⁴ Updating instruction manuals and product marking can take substantial time for many manufacturers with extensive product lines. Going through the formal revision update process, ensuring that factories and printers have the necessary updated files and directions, and integrating compliant manuals and packaging into the supply chain and transporting the product to market can take as much as 40 weeks depending on supply chain structure.

The CPSC Reese's Law EXHR Team stated that staff:

recommends an 18-month effective date [as that] would provide laboratories sufficient lead time to accommodate the expected demand in testing, and will allow *most* manufacturers sufficient time to verify existing designs and implement new designs, if necessary. An 18-month effective date also limits consumers' exposure to unsafe products (including knockoffs, counterfeits, and other products which can evade compliance measures) that may result from safe but untested products being removed from the market. CPSC staff recommends an effective date of 18 months to minimize disruption in the marketplace and acknowledge manufacturers' and laboratories' needs for more resources to safely and effectively comply with the rule.

Staff Briefing Package, Tab A at 66 (OS 171) (emphasis added). Consistent with these findings, CPSC's Economic Analysis Directorate's Final Regulatory Flexibility Analysis stated:

due to the diversity of the products subject to the final rule, many manufacturers may not be equipped to create a reasonable testing program in 6 months. An effective date of 12 to 24 months would allow manufacturers and labs to acquire the staff and resources needed to perform the required tests. Given the large and extremely diverse set of industries/products affected and the capacity limitations of accredited laboratories, an extension of the effective date may be a reasonable accommodation to ensure availability of the products within the scope of the final rule.

Staff Briefing Package, Tab F at 141 (OS 246). A footnote to this discussion confirmed that timelines provided by various industry group comments ranged from 18 to 36 months. It also referred to a CPSC interview with an accredited lab in which the lab confirmed that "a 12-month lead time is required to *acquire the necessary staff and facilities* to accommodate the expected increase in product testing volume that may occur as a result of the mandatory standard." *Id.*, n.12 (emphasis added). And that estimate does not account for the backlogs that would develop while such staff and facilities are acquired.

CPSC staff found the industry comments, which universally stated the need for a longer implementation period, to be "credible and of particular significance" given the broad scope of the rule, Briefing Memorandum at 41 (OS 146), and recommended an 18-month rather than a 180-day delay in the effective date. This recommendation was embodied in the regulatory text initially proposed by staff. Staff Briefing Package, Tab G at 1 (OS 250).

This recommendation was altered in the draft of the Federal Register notice to announce the Final Rule circulated with the vote sheet to provide for a 30-day delay in the effective date coupled with a separate advisory concerning enforcement discretion from CPSC's Office of Compliance and Field Operations. See Draft Federal Register notice accompanying Ballot Vote Sheet at 53, 73 (OS 56, 76). The duration or terms of enforcement discretion that may have been provided by this separate advisory was not stated.

In approving the Final Rule for publication, the Commission made only one change; it removed all references to forthcoming enforcement discretion guidance from the Office of Compliance and Field Operations and instead specified that the Commission was “granting a 180-day transitional period of enforcement discretion, to begin” on the date of publication in the Federal Register. See Record of Commission Action on Reese’s Law Implementation (Sept. 12, 2023). No explanation was provided for this change in the Record of Commission Action or in the accompanying statements of the Commissioners.

Because the Commission ultimately adopted UL 4200A-2023 through a direct final rule, it established an additional comment period after its promulgation. CTA filed comments on the Final Rule expressing concern with CPSC’s interpretation that it could consider UL 4200A-2023, which was published on August 30, 2023, to be immediately “in effect” for purposes of establishing a compliance timeline. See Regulations.gov Doc. ID CPSC-2023-0004-0094. CTA also reiterated the issue of the critical limitation on testing capacity on which this petition expands.

CTA is aware that the American Watch Association (“AWA”) has sought judicial review of the Final Rule in the D.C. Circuit. *Am. Watch Ass’n v. CPSC*, No. 23-01322 (D.C. Cir. filed Nov. 20, 2023). Although the AWA’s statement of issues filed on December 27, 2023, is general in nature, the AWA previously raised concerns both with substantive elements of the Final Rule (including that it exceeds the mandate and authority provided by Reese’s Law by requiring construction standards in addition to performance standards) and with the fact that “the rule ignores the CPSC staff’s recommendation” for a substantially longer transition period. See Regulations.gov Doc. ID CPSC-2023-0004-0100. CTA is optimistic that the agency will consider in good faith the relief sought by the AWA. While CTA cannot speak for AWA, CTA believes that the extension of the compliance date requested in this petition, in addition to being practically necessary for the reasons discussed, could also facilitate resolution of questions concerning how the new rules do, and should, apply to specific industries with unique products before the compliance date, as opposed to after.

As discussed in the next section, the Commission is empowered to either extend the effective date of the rule or the period of the Commission’s enforcement discretion. The record already compiled and reviewed by CPSC staff supports either action. Following the discussion of the Commission’s authority to extend the compliance date in the next section, the final section of this document describes the representative experiences of several CTA members following the publication of the Final Rule. That discussion confirms that the testing shortages and other difficulties raised by industry commenters are now occurring, providing further support for an extension of the compliance date.

CPSC Has Authority to Extend the Effective Date or the Duration of Enforcement Discretion

CTA respectfully requests modest, common-sense relief that is within the authority and discretion of the Commission to grant in order to prevent harm to consumers and manufacturers that cannot complete product redesign and/or obtain certification testing in time for the March 2024 deadline. The Commission may formally amend the rule to make it effective as of September 21, 2025, or may alternatively extend enforcement discretion to that date.

Regarding formal amendment, Reese’s Law provides that a voluntary standard determined by the Commission to meet the requirements of Reese’s Law (such as UL 4200A-2023, per the Final Rule) shall be treated as a consumer product safety rule promulgated under Section 9 of the Consumer Product Safety Act. 15 U.S.C. § 2056e(e)(1). Section 9 provides that the Commission “may by rule amend or revoke any consumer product safety rule,” 15 U.S.C. § 2058(h), and specifically states that the Commission may consider delayed effective dates for such amendments “for good cause shown that a later effective date is in the public interest.” *Id.* Reese’s Law itself confirms congressional intent that the Commission retain its ordinary authority to “modify the requirements” of established standards by rulemaking after standards are initially adopted. 15 U.S.C. § 2056e(g).⁵ And the Commission has previously exercised this authority with respect to other consumer product safety rules.⁶

Regarding a further extension of enforcement discretion, nothing constrains the Commission’s ordinary ability to extend reasonable enforcement discretion. The Commission’s provision of the 180-day period of discretion confirms the Commission can extend enforcement discretion even though Reese’s Law contained provisions that together governed when a voluntary standard must be initially “treated as a consumer product safety rule” by, see 15 U.S.C. § 2056e(d), (e). None of those provisions prevented the Commission from extending further enforcement discretion beyond the effective date, as it did.⁷ Nor is there any reason that 180 days must be the limit of additional discretion granted by the Commission; while the Consumer Product Safety Act establishes 180 days as the presumptive maximum interval between promulgation and *effective date*, see 15 U.S.C. § 2058(g), there is no constraint on enforcement discretion, and even the 180-day presumption concerning effective dates may be extended “for good cause shown.” *Id.* Nothing in Reese’s Law establishes a constraint on discretion after the effective date beyond 180 days either.

⁵ “At any time after ... a voluntary standard is treated as a consumer product safety rule under subsection (e), ... the Commission may initiate a rulemaking ... to modify the requirements of the standard or revised standard.”

⁶ See, e.g., Virginia Graeme Baker Pool and Spa Safety Act Drain Cover Standard, 85 Fed. Reg. 58,263, 58,263–64 (Sep. 18, 2020) (extending effective date from 18 months after Federal Register publication to 24 months).

⁷ CTA wrote separately about its concern with CPSC designating the then-one-day-old UL 4200A-2023 standard as being “effective,” but does not repeat those concerns here as the relief sought is the same as the relief sought in this letter. See CTA’s letter to the Chair dated Oct. 4, 2023, Regulations.gov Doc. ID CPSC-2023-0004-0094.

If the Commission had chosen to discharge its obligations under Reese’s Law by promulgating a final consumer product safety standard itself rather than adopting a voluntary standard, it would have been obligated only to “promulgate” that standard, which would be treated as a standard under Section 9, by a certain date. 15 U.S.C. § 2056e(a). As noted above, 15 U.S.C. § 2058(g) provides a presumptive, but not absolute, interval of 180 days between “promulgation” of a standard and the “effective date” of such a standard. When establishing the interval, the Commission must include a finding that the effective date of the rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury. *Id.* § 2058(f)(3)(A).

A recent case suggests that the 180-day interval the CPSC applied here is too short and would not survive judicial scrutiny under that standard. In *Window Covering Manufacturers Ass’n v. Consumer Prod. Safety Comm’n*, 82 F.4th 1273, 1290 (D.C. Cir. 2023), all but one industry commenter expressed concerns about the compliance date substantially similar to those raised in connection with this rule. As here, the Commission’s own staff concluded that a short-term compliance date would “be very disruptive for producers and consumers” and that postponing the effective date would be appropriate. In that case, the Commission cited a comment of a single manufacturer that claimed the 180-day lead time was feasible for industry. *Id.* at 1291. The Court held that the Commission’s reliance on the single comment as opposed to the majority view of industry and its own staff’s conclusions was arbitrary. *Id.* Here, in connection with the Final Rule there was not even a comparable industry comment supporting the 180-day compliance window.

Notably, the *Window Covering Manufacturers* Court also rejected the general argument that industry should be expected to start taking steps to comply with requirements in proposed rules before they are finalized, an argument which is sometimes deployed in support of unrealistically short compliance intervals after promulgation of final rules.⁸ And here, that would have been impossible as even the voluntary standard was published just one day prior to its adoption.

In sum, in view of *Window Covering Manufacturers Ass’n*, it is doubtful that a 180-day interval between promulgation and effective date for the Final Rule would have survived scrutiny, if the Final Rule had been a rule developed by the Commission and promulgated pursuant to 15 U.S.C. §§ 2056e(a), (c) and § 2058 rather than through adoption of UL 4200A-2023 under 15 U.S.C. §§ 2056e(d) and (e). The Commission should not rely solely on its questionable determination that UL 4200A-2023, which was published on August 30, 2023, only one day before the ballot vote sheet proposing its adoption was circulated to CPSC Commissioners, was “in effect” immediately upon its publication for purposes of 15 U.S.C. §§ 2056e(d), to attempt to evade its responsibility to make a reasoned judgment concerning when compliance should be required. Revising the effective date, or extending enforcement discretion, is a reasonable path forward which could address any argument that the Commission unlawfully circumvented its obligations to more fully consider an appropriate compliance date initially.

⁸ See, e.g., the joint comments submitted to CPSC concerning the proposed rule by American Academy of Pediatrics, Consumer Federation of America, Consumer Reports, Kids in Danger, Public Citizen and the U.S. Public Interest Research Group (March 13, 2023) (“Even without knowing the specifics of the Final Rule, these manufacturers have been provided with sufficient information to be put on notice of the overall requirements and they must reasonably be expected to have engaged in efforts to meet the requirements.”)

Developments Since the Publication of the Final Rule Confirm that More Time is Needed

CTA recognizes the gravity in making this request for relief. It has become imperative though to ask the agency to permit more time for companies to complete needed product changes and also to get certification testing done given the current lack of testing capacity.

As summarized above, industry comments on the proposed rule and in response to the Final Rule highlighted that substantially more than 180 days would be needed for product redesigns, related updates to manufacturing facilities, re-printing packaging, and, for products produced abroad, to prepare the products for importation. One CTA member estimates, based on the requirements of the Final Rule, that it will require 18 months just to implement changes to its product line, specifically requiring the following time frames for various phases of the updates: Concept Design (9 weeks); Prototype Design (28 weeks); Factory Bring Up (23 weeks); Manufacturing Pilot Run (11 weeks); and Mass Production Ramp (6 weeks). Other CTA members face similar timelines. Given the complexity of many of CTA member's products, the diversity of their product lines, and the realities of global supply chain management, time frames like these are common for many of CTA's members. And this timeline does not include the most significant bottleneck now forming, which applies to all members: severely limited availability of certification testing.

Manufacturers and third-party labs are now working to develop the testing infrastructure needed to handle the massive amount of products that will need to be tested – both initially, as existing products come into compliance, and on an ongoing basis, since all newly developed products, even small batch products, will need to be tested. For children's products, this testing can only occur at a CPSC-accepted third party laboratory. For general use products, this testing can be done by anyone, but CTA has confirmed that a large number of its members rely on third party testing firms even for general use products.

There are elements of UL 4200A-2023 that make performance of the tests in-house impractical for many businesses, particularly smaller businesses, including: the preconditioning requirements (involving day-long use of a circulating air oven capable of containing the product); the marking permanence verification procedure (requiring use of 85% n-hexane, a highly flammable substance whose use may also trigger obligations under RCRA or other environmental laws); and many of the abuse testing and compliance verification steps that require the application of a precise amount of force by a specialty tool. Small businesses are unlikely to possess either the tools or calibrated equipment needed to confirm application of the correct amount of force. *E.g.*, UL 4200A-2023 § 6.4 (requiring application of a 20 ± 2 Newton force with a specified test hook). For a small business, obtaining the required test equipment, and continually retraining limited staff to perform the needed tests is not practical, which is why these businesses tend to rely on third party testing services even for general use products.

While large multinational corporations have more resources, they frequently use third party laboratories for many of the same reasons as small businesses. Also, many multinational companies use the IECEE CB Scheme, which is an international system for mutual acceptance of test reports and certificates dealing with the safety of electrical and electronic components, equipment, and products.⁹ Use of the CB Scheme requires companies to have their products

⁹ See What is the IECEE CB scheme?, available at <https://www.iecee.org/who-we-are/cb-scheme> (last accessed Jan. 2, 2024).

tested by approved test labs. More generally, companies are required to perform a multitude of tests on their products, not just those required by CPSC's new button/coin cell battery rules, and so it is substantially more efficient to use a third party capable of running all needed tests at the same time.

In addition to capability, capacity is also an issue. CPSC's own list of CPSC-accepted testing laboratories, which are mandatory for children's products, and which CPSC is statutorily required to keep up-to-date, contained only two labs for UL 4200A-2023 testing as of December 18, 2023, one in Hong Kong and one in Guangzhou, China. That week, a third lab was added, in Cabiato, Italy, and those three remain the only ones listed as of the first week of January.¹⁰ While many consumer technology products are tested at laboratories overseas, many are also tested in the United States. CTA is a U.S.-based trade association representing companies with a presence in North America. It is important that companies in the United States are able to have their products tested domestically.

Although other labs may be in the process of confirming their approval with the agency, it is unreasonable to expect industry-wide testing to be available for children's products within the next three months, given the scope of this rule, when only three foreign labs are currently listed as approved. By comparison, there are more than 100 CPSC-accepted testing laboratories for other standards.

Availability of third-party testing facilities for general use products is also severely constrained, even if the manufacturer already has the product to be tested in-hand, *i.e.*, it is a product model that (subject to confirmation through testing) will not require any modifications to be manufactured or imported after enforcement begins. Many manufacturers are already redesigning and re-prototyping products; they will not be able to join the testing queue until after those prototypes are complete and ready for testing. Even if more labs begin to come online in Q1 and Q2 of 2024, the request for an extension until September 21, 2025, is reasonable to ensure that market access does not become an accident of where in the testing backlog a particular product is located.

Simply put, the three-plus months that have elapsed since the promulgation of the Final Rule have confirmed what the comments warned against; testing capacity is not available to permit compliance by March of 2024.

¹⁰ See CPSC, List of CPSC-Accepted Testing Laboratories, list of labs accepted to test in accordance with 16 C.F.R. § 1263, available at <https://www.cpsc.gov/cgi-bin/labsearch/> (last accessed Jan. 3, 2024).

Conclusion

CTA's members are committed to compliance with Reese's Law and the elimination of tragic coin and button cell ingestions by children. Third-party labs are working to expand testing capacity while manufacturers are confirming compliance for existing products and products now in development. But it is not possible that necessary testing, across the broad array of products covered by the Final Rule, can be anywhere near complete by March of 2024.

Holding to that timeline is not in the public interest. Doing so will cause many CTA members to cease manufacture and import of consumer products subject to the Final Rule for many months until testing can be completed. As CPSC staff recognized, until those products can be tested and return to the market, the gap will be filled, if at all, by knockoffs, counterfeits, and other products from companies that are not committed, like CTA's members are, to compliance with Reese's Law. See Staff Briefing Package, Tab A at 66 (OS 171). CTA's members are already redesigning products as needed and lining up for the limited testing available. The requested extension until September of 2025 will not slow down their efforts to bring tested products to market as quickly as possible.

CTA asks that the Commission consider this petition and provide a response as soon as practicable, as some CTA members will have to wind down product supply chains for products that will not be able to be timely tested under the current March 19, 2024, compliance date in the coming weeks. We are available to discuss this request at the Commission's convenience.

Respectfully submitted,

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cc: Commissioner Peter A. Feldman
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