

§ 1610.62 Reasonable and representative testing to assure compliance with the standard for the clothing textiles.

(a) *Background.* (1) The CPSC administers the Flammable Fabrics Act (FFA), 15 U.S.C. 1191-1204. Under the FFA, among other things, the Commission enforces the Flammability Standard for Clothing Textiles (the "general wearing apparel standard"), 16 CFR Part 1610. That standard establishes requirements for the flammability of clothing and textiles intended to be used for clothing (hereinafter "textiles").

(2) The general wearing apparel standard applies both to fabrics and finished garments. The standard provides methods of testing the flammability of textiles, and sets forth the requirements that textiles must meet to be classified into one of three classes of flammability (classes 1, 2 and 3). 16 CFR 1610.2. Class 1 textiles, those that exhibit normal flammability, are acceptable for use in clothing. 16 CFR 1610.3(a)(1). Class 2 textiles, applicable only to raised fiber surfaces, are considered to be of intermediate flammability, but may be used in clothing. 16 CFR 1610.3(a)(2). Finally, class 3 textiles, those that exhibit rapid and intense burning, are dangerously flammable and may not be used in clothing. 16 CFR 1610.3(a)(3). The manufacture for sale, offering for sale, importation into the U.S., and introduction or delivery for introduction of Class 3 articles of wearing apparel are among the acts prohibited by section 3(a) of the FFA, 15 U.S.C. 1192(a).

(3) CPSC currently uses retail surveillance, attends appropriate trade shows, follows up on reports of non-compliance and previous violations, and works with U.S. Customs in an effort to find textiles that violate CPSC's standards. The Commission has a number of enforcement options to address prohibited acts. These include bringing seizure actions in federal district court against violative textiles, seeking an order through an administrative proceeding that a firm cease and desist from selling violative garments, pursuing criminal penalties, or seeking the imposition of civil penalties for "knowing" violations of the FFA. Of

particular relevance to the latter two remedies are whether reasonable and representative tests were performed demonstrating that a textile or garment meets the flammability standards for general wearing apparel. Persons who willfully violate flammability standards are subject to criminal penalties.

(4) Section 8(a) of the FFA, 15 U.S.C. 1197(a), exempts a firm from the imposition of criminal penalties if the firm establishes that a guaranty was received in good faith signed by and containing the name and address of the person who manufactured the guaranteed wearing apparel or textiles or from whom the apparel or textiles were received. A guaranty issued by a person who is not a resident of the United States may not be relied upon as a bar to prosecution. 16 CFR 1608.4. The guaranty must be based on the exempted types of fabrics or on reasonable and representative tests showing that the fabric covered by the guaranty or used in the wearing apparel covered by the guaranty is not so highly flammable as to be dangerous when worn by individuals, *i.e.*, is not a class 3 material.¹ Under 16 CFR 1610.37, a person, to issue a guaranty, should first evaluate the type of fabric to determine if it meets testing exemptions (16 CFR 1610.37(d));² if not, the person issuing the guaranty must devise and implement a program of reasonable and representative tests to support the guaranty. The number of tests and frequency of testing is left to the discretion of that person, but at least one test is required.

(5) In determining whether a firm has committed a "knowing" violation of a flammability standard that warrants imposition of a civil penalty, the CPSC

¹The person proffering a guaranty to the Commission must also not, by further processing, have affected the flammability of the fabric, related material or product covered by the guaranty that was received.

²Some textiles never exhibit unusual burning characteristics and need not be tested. 16 CFR 1610.37(d). Such textiles include plain surface fabrics, regardless of fiber content, weighing 2.6 oz. or more per sq. yd., and plain and raised surface fabrics made of acrylic, modacrylic, nylon, olefin, polyester, wool, or any combination of these fibers, regardless of weight.

considers whether the firm had actual knowledge that its products violated the flammability requirements. The CPSC also considers whether the firm should be presumed to have the knowledge that would be possessed by a reasonable person acting in the circumstances, including knowledge that would have been obtainable upon the exercise of due care to ascertain the truth of representations. 15 U.S.C. 1194(e). The existence of results of flammability testing based on a reasonable and representative program and, in the case of tests performed by another entity (such as a guarantor), the steps, if any, that the firm took to verify the existence and reliability of such tests, bear directly on whether the firm acted reasonably in the circumstances.

(b) *Applicability.* (1) When tested for flammability, a small number of textile products exhibit variability in the test results; that is, even though they may exhibit class 1 or class 2 burning characteristics in one test, a third test may result in a class 3 failure. Violative products that the Commission has discovered since 1994 include sheer 100% rayon skirts and scarves; sheer 100% silk scarves; 100% rayon chenille sweaters; rayon/nylon chenille and long hair sweaters; polyester/cotton and 100% cotton fleece/sherpa garments, and 100% cotton terry cloth robes. Since August 1994, there have been 21 recalls of such dangerously flammable clothing, and six retailers have paid civil penalties to settle Commission staff allegations that they knowingly sold garments that violated the general wearing apparel standard.

(2) The violations and resulting recalls and civil penalties demonstrate the critical necessity for manufacturers, distributors, importers, and retailers to evaluate, prior to sale, the flammability of garments made from the materials described above, or to seek appropriate guaranties that assure that the garments comply. Because of the likelihood of variable flammability in the small group of textiles identified above, one test is insufficient to assure reasonably that these products comply with the flammability standards. Rather, a person seeking to evaluate garments made of such materials should

assure that the program tests a sufficient number of samples to provide adequate assurance that such textile products comply with the general wearing apparel standard. The number of samples to be tested, and the corresponding degree of confidence that products tested will comply, are to be specified by the individual designing the test program. However, in assessing the reasonableness of a test program, the Commission staff will specifically consider the degree of confidence that the program provides.

(c) *Suggestions.* The following are some suggestions to assist in complying with the general wearing apparel standard:

(1) Purchase fabrics or garments that meet testing exemptions listed in 16 CFR 1610.37(d). (If buyers or other personnel do not have skills to determine if the fabric is exempted, hire a textile consultant or a test lab for an evaluation.)

(2) For fabrics that are not exempt, conduct reasonable and representative testing before cutting and sewing, using standard operating characteristic curves for acceptance sampling to determine a sufficient number of tests.

(3) Purchase fabrics or garments that have been guaranteed and/or tested by the supplier using a reasonable and representative test program that uses standard operating characteristic curves for acceptance sampling to determine a sufficient number of tests. Firms should also receive and maintain a copy of the guaranty.

(4) Periodically verify that your suppliers are actually conducting appropriate testing.

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PART 1611—STANDARD FOR THE FLAMMABILITY OF VINYL PLASTIC FILM

Subpart A—The Standard

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