



October 5, 2023

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

RE: Consumer Product Safety Commission Direct Final Rule;
Safety Standards: Button Cell or Coin Batteries and Consumer
Products Containing Such Batteries; Docket No. CPSC-2023-0004

Dear Ms. Mills:

The Association of Home Appliance Manufacturers (AHAM), The Power Tool Institute (PTI), and Retail Industry Leaders Association (RILA) (collectively, the Joint Commenters) respectfully submits these comments on the Consumer Product Safety Commission's (CPSC or Commission) Direct Final Rule on Safety Standards for Button Cell or Coin Batteries and Consumer Products Containing Such Batteries; Docket No. CPSC-2023-0004; FR 2023-20333 (September 21, 2023).

The Joint Commenters collectively produce and sell hundreds of millions of products each year. We and our members know how much consumers rely on our products. Our top priority is to design and sell products that are as safe as they are useful. As such, we and our members have demonstrated a commitment to strong safety design, labeling, and testing. The Joint Commenters support the goals of Reese's Law and appreciate the Commission's leadership in protecting young children from the hazards associated with ingestion of button cell or coin batteries. It is, however, critical that implementation of the requirements is on a realistic timeframe. Accordingly, the Joint Commenters respectfully request that the Commission reconsider the implementation of this Direct Final Rule as the 180-day compliance date is unacceptable and will make it exceedingly difficult, if not impossible, for the rule's reforms to be implemented effectively.

I. An Immediate Effective Date And 180-Day Enforcement Discretion Is Unacceptable And Does Not Allow Sufficient Time For Effective Implementation.

The Joint Commenters support the Commission's incorporation of UL 4200A-2023 in its direct final rule. Section 2(e) of Reese's Law states that the requirements of a voluntary standard the Commission determines to meet section 2(a) of Reese's Law shall be treated as a consumer product safety rule promulgated under section 9 of the CPSA (15 U.S.C. 2058) beginning on the

date that is the later of either the date the Commission makes the determination under section 2(d), or the effective date in the voluntary standard.

A. UL 4200A-2023 Was Not Well-Established When The Final Rule Was Approved.

The intent of this clause is for the CPSC final rule to become effective as soon as possible if the voluntary standard in question is well-established and already in use, or conversely, when the voluntary standard becomes effective if the standard is new to the marketplace and not well-established. The latest referenced UL standard, 4200A-2023, was published on August 30, 2023 and does not include an effective date. In ipse dixit style, the direct final rule states that because the CPSC is codifying its incorporation of UL 4200A-2023, a voluntary standard that was published in advance of the direct final rule, manufacturers will have adequate time to comply. This is a fallacy and undermines the timelines established by Section 2(e) of Reese's Law. While publication of UL 4200A-2023 did technically occur before publication of the Commission's determination, there were just nine days between the voluntary standard's publication date of August 30, 2023 and the Commission's vote on September 8, 2023. The assumption that manufacturers had already made significant strides in complying with UL 4200A-2023 within that timeframe is neither reasonable, supported by substantial evidence, nor consistent with the facts.

The Joint Commenters are also concerned about the feasibility of a 30-day lead-in period to comply with this rule and standard. We recognize that the Commission indicated it will grant enforcement discretion for 180 days from publication to allow more time for implementation. But both the 30- and 180-day timeframes are unrealistic, thereby making the direct final rule unacceptable and ineffective. The Commission has not justified the need for such aggressive timeframes, as it is bound to do under the law. As such, issuance of the direct final rule is arbitrary and capricious and will present a significant burden on the regulated community without any reasoned basis.

B. Industry And CPSC Staff Agree That 180-Days Is Insufficient.

Significant work must be done in order to ensure compliance with the requirements. A 180-day implementation timeline is not sufficient for the industry to redesign, source new materials and component parts, update production processes, have the products third-party tested as would be required by the end product standard certification, manufacture products, update and reprint labels and manuals for products and their packaging, and complete testing and certification. Moreover, there are significant concerns about the ability of third-party test laboratories to conduct this testing on such a short timeframe. Typical for a single product certification with third-party agencies require six to twelve weeks to obtain approval. No testing laboratories of which we are aware have indicated that they are able to perform this testing now. Therefore, it is highly likely that there will be insufficient global laboratory capacity, considering the sheer number of products needing to be tested and the likely very few labs that will be able to do so. The Commission has no contrary analysis. In fact, the CPSC staff analysis *supports* this conclusion and the need for a later effective date.

These concerns are not new. Numerous commenters *and CPSC’s own staff* recognized the many challenges associated with such a short timeframe. More than half of the comments posted to the public docket on the March 2023 Notice of Proposed Rulemaking (NPRM) recommended an extended timeline in response to the CPSC’s request for comment on “whether a later or an earlier effective date would be appropriate to comply with the proposed requirements...”.¹ In light of the comments submitted by stakeholders, CPSC staff recommended that the effective date of the Final Rule be extended from six months after publication, as proposed in the NPRM, to 18 months after publication, “to ensure availability of safe, compliant products and accommodate an expected high volume of laboratory product testing for a variety of product types that use button cell or coin batteries.”² CPSC staff again emphasized the need for an extended timeline in the briefing package stating: “CPSC staff now recommend an effective date of 18 months to minimize potential disruption in availability of safer *button battery powered products*.”³

The direct final rule, unfortunately, goes against the preponderance of the evidence and the recommendations of CPSC’s own staff and implements not only a 30-day timeline for compliance, but an inadequate measure of enforcement discretion. A direct final rule that disrupts such a broad range of consumer product manufacturing and testing with an effective date of 180 days is unacceptable and unfortunately, ineffective at ensuring that safe and compliant button battery powered products are available on the market, as argued by CPSC staff. Fortunately, it is within the Commission’s discretion to extend the deadline.

The Commission should withdraw the direct final rule and reissue a proposed final rule with a more acceptable effective date based on the guidance from stakeholders and CPSC staff. Ideally, a final rule would provide sufficient time for compliance—i.e., at least 18 months—rather than rely on enforcement discretion so that companies are not concerned about being out of compliance and left to rely on government discretion. At a minimum, however, CPSC should follow staff recommendations and extend the enforcement discretion to 18 months rather than six.

II. CPSC’s Direct Final Rulemaking Authority Is Not Clear In This Case.

In Recommendation 95-4, the Administrative Conference of the United States (ACUS) endorsed direct final rulemaking as an appropriate procedure to expedite rules that are noncontroversial and that are not expected to generate significant adverse comments.⁴ ACUS recommends that agencies use the direct final rule process when they act under the “unnecessary” prong of the good cause exemption in 5 U.S.C. 553 (b):

¹ Notice of Proposed Rulemaking on Safety Standards for Button Cell or Coin Batteries and Consumer Products Containing Such Batteries; Docket No. CPSC-2023-0004; FR 2023-02356 (Feb. 9, 2023).

² Staff Briefing Package: Draft Final Rule to Establish a Safety Standard for Button Cell or Coin Batteries and Consumer Products Containing Such Batteries (Staff’s Final Rule Briefing Package); August 31, 2023.

³ *Id.*

⁴ Notice of Adoption of Recommendations from the Administrative Conference of the United States; 60 Federal Register 160 (August 18, 1995); p. 43108-43113.

“when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, **unnecessary**, or contrary to the public interest.” (emphasis added)

The direct final rule adopts a voluntary standard, UL 4200A-2023, that was published and made publicly available just days in advance of the rule’s publication. There were also significant changes to the requirements proposed in the NPRM as compared with the direct final rule, including to the labeling and performance requirements, based on stakeholder feedback. To be clear, the Joint Commenters support adoption of UL 4200A-2023. But, given the direct final rule’s reference to this new, revised standard and various changes from what was originally proposed, CPSC is wrong to consider normal notice and public procedure for this final rule as unnecessary before creating the burden and uncertainty of this direct final rule.

Ample time to review the revised voluntary standard, UL 4200A-2023, as well as the proposed changes between the NPRM and final rule, is necessary and appropriate in order for stakeholders to thoughtfully comment on the matter and for manufacturers to appropriately comply. Therefore, the Commission’s decision to pursue direct final rulemaking in this case was unjustified and the rule should be reissued as a proposed rule to provide adequate time for review and comment. Failing to allow this opportunity for comment prior to issuance of a final rule means that the current direct final rule is lacking in adequate rationale and is arbitrary and capricious; thus, it must be withdrawn and revised. Any such proposal should include at least an 18-month compliance date, as supported by the existing record in this rulemaking and these comments.⁵

III. Additional Considerations

The Joint Commenters would also like to recommend further improvements to direct final rule. The current labeling requirements severely limit the available space on product packaging for other relevant, timely or important safety information. Additionally, the current labeling requirements fail to take into account a manufacturer’s need or desire to include multiple languages. Many of the Joint Commenters conduct business in both the United States and Canada, including Quebec, which has various French language requirements for businesses including language parity requirements, at a minimum effectively doubling the footprint of any safety labeling.

Furthermore, the definition of “product display panel” specifies that “For consumer products with nonreplaceable button cell or coin batteries, the product display panel is visible upon access to the battery compartment.” This definition is problematic because in most cases when the button cell or coin battery is nonreplaceable, the consumer does not have access to the battery compartment, rendering a warning label completely ineffective and unnecessary. This makes the direct final rule ineffective and further supports the argument that it is arbitrary and capricious, with no rational basis for creating additional burdens on the regulated community. The proposed final rule should revise the term “product display panel” to exclude consumer products with

⁵ As a less desirable alternative, CPSC could also issue an enforcement policy that changes the six month enforcement discretion period to 18 months.

nonreplaceable button cell or coin batteries as the panels themselves are inaccessible to consumers by definition.

Lastly, the direct final rule defines a button cell or coin battery in different terms than the voluntary standard that it references, UL 4200A. The direct final rule defines button cell or coin batteries as (1) a single cell battery with a diameter greater than the height of the battery; or (2) any other battery, regardless of the technology used to produce an electrical charge, that is determined by the Commission to pose an ingestion hazard. In contrast, UL 4200A defines a button/coin cell battery as a single cell battery having a diameter of 32 mm (1.25 in) maximum, and diameter greater than its height. The Joint Commenters recommend that the direct final rule align with the voluntary standard in order to avoid third-party testing lab and manufacturer confusion.

The Joint Commenters appreciate the opportunity to submit these comments on the CPSC's Direct Final Rule on Safety Standards for Button Cell or Coin Batteries and Consumer Products Containing Such Batteries. We support effective implementation of Reese's Law, and we encourage the CPSC to provide for more realistic compliance with UL 4200A-2023. We would be glad to discuss these matters in more detail should you so request.

IV. The Joint Commenters

The Association of Home Appliance Manufacturers (AHAM) represents more than 150 member companies that manufacture 90% of the major, portable and floor care appliances shipped for sale in the U.S. Home appliances are the heart of the home, and AHAM members provide safe, innovative, sustainable and efficient products that enhance consumers' lives. The home appliance industry is a significant segment of the economy, measured by the contributions of home appliance manufacturers, wholesalers, and retailers to the U.S. economy. In all, the industry drives nearly \$200 billion in economic output throughout the U.S. and manufactures products with a factory shipment value of more than \$50 billion.

The Power Tool Institute (PTI) represents the market-leading brands in the areas of portable and stationary power tools. Founded in 1968, PTI's primary objectives are to encourage high standards of safety in the manufacture of power tools (and lithium-ion batteries); to prepare and distribute information about safe use of power tools; to promote the common business interests of the power tool industry; to represent the industry before government; and to educate the public as to the usefulness and importance of power tools.

Retail Industry Leaders Association (RILA) is the U.S. trade association for leading retailers. RILA convenes decision-makers, advocates for the industry, and promotes operational excellence and innovation. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

(signatures on next page)

Respectfully Submitted,

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