

October 4, 2023

Mr. Alexander Hoehn-Saric  
Chair  
U.S. Consumer Product Safety Commission  
4330 East-West Highway  
Bethesda, MD 20814

**Re: Direct Final Rule in CPSC Docket No. 2023-0004 (Safety Standard for Button Cell or Coin Batteries and Consumer Products Containing Such Batteries)**

Dear Chair Hoehn-Saric:

The Consumer Technology Association (CTA) respectfully submits the following response to the direct final rule in CPSC Docket No. 2023-0004, published in the *Federal Register* on September 21, 2023. 88 Fed. Reg. 65,274. This rule adopts a safety standard for button cell or coin batteries and consumer products containing such batteries. In CTA's view this direct final rule is not feasible because its effective date does not comply with Reese's Law. As a result, the CPSC should withdraw its direct final rule or, at a minimum, revise the compliance date of the rule to a more realistic implementation, such as September 21, 2025.

CTA is North America's largest technology trade association. CTA's members are the world's leading innovators—from startups to global brands—helping support more than 18 million American jobs. CTA also owns and produces CES®—the most influential tech event in the world. CTA members operate in a competitive marketplace to produce innovative products that provide enormous benefits to consumers and power the economy.

As explained in more detail below, the principles of administrative law, the clarity of the law mandating the circumstances when and if the CPSC may mandate a standard, the factual marketplace and testing laboratory time constraints, clear CPSC staff advice and even the views of those vigorously advocating for adoption of this standard all indicate that the CPSC's overly aggressive mandate timetable will not withstand judicial scrutiny.

The CPSC may not exceed its statutory mandate, 5 U.S.C. § 706(2)(C), which it does here by establishing the effective date of its rule prior to the effective date of the standard it adopted, 15 U.S.C. § 2056(d)(1). In its direct final rule CPSC adopted UL 4200A-2023 as a consumer product safety rule. Reese's Law requires the effective date of this action to be the later of the effective date of UL 4200A-2023 or the date CPSC determined that UL 4200A-2023 meets its requirements for a standard. 15 U.S.C. 2056e(e). Clearly the intent of this clause is for the new CPSC rule to become effective as soon as possible if the voluntary

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standard in question is well established and already in use, or when the voluntary standard becomes effective if the standard is new to the marketplace and not well established. An existing, established standard that is already effective can be made mandatory immediately by CPSC. 15 U.S.C. 2056e(e)(2)(A). A new, not-yet-effective standard cannot be made mandatory until it becomes effective. 15 U.S.C. 2056e(e)(2)(B).

UL 4200A-2023 was quickly completed so CPSC could adopt it as a consumer product safety rule in response to Reese's Law. UL 4200A-2023 was published on August 30, 2023, only one day before the ballot Vote sheet proposing its adoption as a consumer product safety rule was circulated to CPSC commissioners for vote.

It is both arbitrary and capricious for CPSC to conclude that a one-day old standard with no effective date is well-established enough for 15 U.S.C. 2056e(e)(2)(A) to apply. *See* 5 U.S.C. § 706(2)(A) (a court may hold unlawful and set aside agency action ... [that is] found to be arbitrary [and] capricious"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action must include relevant data and include an explanation that includes a rational connection between the facts found and the choice made.) Establishing a 180-day "enforcement discretion period," 88 Fed. Reg. 65,274, is insufficient to remedy that flaw.

When Reese's Law was adopted on August 16, 2022, the then-effective standards development procedures governing development of UL standards said this about effective dates (UL Standards' ANSI Accredited Procedures – Approved by ANSI on May 20, 2021, p. 3):

Effective Date – The date at which the requirements in the standard must be complied with by certification organization customers. This is set by the respective certification organization. Effective dates may be included in the standard but are not part of the ANSI approved text and are not subject to these consensus procedures.

Clearly it was the intent of Reese's Law that CPSC only make a consumer product safety rule based on a voluntary standard effective immediately if it was already the case that certification organizations were requiring their customers to comply with the standard. In its decision in Docket No. 2023-0004 CPSC provides no evidence that certification organizations have been requiring their customers to comply with UL 4200A-2023. How could it, the standard was only one day old when distributed to CPSC commissioners for vote. Further, CPSC acknowledges that UL 4200A-2023 does not include an effective date. 88 Fed. Reg. 65,276. These facts all point to the same conclusion, UL 4200A-2023 was not yet effective when CPSC made its determination that it was an appropriate basis for a consumer product safety rule.

Given that UL 4200A-2023 was not yet effective when CPSC made its determination, 15 U.S.C. 2056e(e)(2)(B) should establish the effective date for CPSC's new consumer product safety rule, and that date should be the date established by certification organizations for when their customers must comply with the new standard. CPSC staff noted that certification organizations are expected to need 12 months to acquire the necessary staff and facilities to accommodate the expected increase in product testing volume from the new rule. The ballot vote sheet says, "CPSC staff also interviewed an employee of a CPSC-accepted

lab who stated 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.” Reese’s Law ballot vote sheet, August 31, 2023, OS 149, footnote 19. Given that labs need 12 months to prepare, manufacturers need time beyond that to get into the queue and have their products tested.

Even this is a very aggressive schedule. To implement the new rule industry must redesign products, acquire substitute parts, perform internal quality assessments, retool factories, obtain quality and safety certifications, redesign packages, rewrite user instructions, redesign product labels, and ship, import and deliver the new products. Redesigning a product, acquiring parts and retooling a factory can take from nine to 12 months. In the case of CPSC’s new rule, compliance testing may be delayed while waiting for labs to become accredited for testing to the new requirements. Lab accreditation typically takes about three months. Of the 641 CPSC-accepted testing laboratories listed at <https://www.cpsc.gov/cgi-bin/labsearch/> there do not appear to be any that include UL 4200A within their scope. Of the 21 laboratories recognized by the U.S. Occupational Safety and Health Administration’s Nationally Recognized Testing Laboratory program, 14 have UL 62368-1 as one of their recognized testing standards while none of them have UL 4200A as one of their recognized testing standards. <https://www.osha.gov/nationally-recognized-testing-laboratory-program/current-list-of-nrtls>. The following table provides the details.

<b>National Recognized Testing Laboratory</b>	<b>UL 62368-1 a recognized testing standard?</b>	<b>UL 4200A a recognized testing standard?</b>
Bay Area Compliance Laboratories	Yes	No
Bureau Veritas Consumer Products Services, Inc.	Yes	No
CSA Group Testing and Certification Inc.	Yes	No
DEKRA Certification, Inc.	Yes	No
Element Materials Technology Portland – Evergreen Inc.	Yes	No
Eurofins Electrical and Electronic Testing NA, Inc.	Yes	No
FM Approvals	No	No
International Association of Plumbing and Mechanical Officials EGS (IAPMO)	No	No
Intertek Testing Services NA, Inc.	Yes	No
LabTest Certification Inc.	No	No
Nemko North America, Inc.	Yes	No
NSF International	No	No
QAI Laboratories, LTD (QAI)	Yes	No
QPS Evaluation Services Inc.	Yes	No
SGS North America, Inc.	Yes	No
SolarPTL, LLC	No	No
Southwest Research Institute	No	No
TUV Rheinland of North America, Inc.	Yes	No
TÜV SÜD America Inc.	Yes	No
TÜV SÜD Product Services GmbH	No	No
UL LLC	Yes	No

The vast majority of safety compliance testing performed on consumer electronics products is performed by accredited third-party laboratories. Once the ability of test labs to determine compliance with the new CPSC rules has been established it typically takes three to six months for labs to complete testing of manufacturers' products. Given the broad spectrum of products impacted by this new rule, test lab lead times are expected to increase due to the high demand for testing. In addition to the 12-18 months needed for new products to be compliant with the new rules, there is also additional time needed for shipping, importing, delivery, and ensuring warehouses and distributors have enough time to work through existing stock so existing inventory does not have to be reworked or scrapped. **All in all, a minimum of 24 months is needed to get to the point where all products sold at retail are compliant with the new CPSC rules.**

CPSC staff recognized the need for a later effective date, writing:

Staff assesses that due to the broad scope of the rule, a large increase in the number of products tested at accredited laboratories may occur. Manufacturers are not required to third-party test general use products, but due to the diversity of the products subject to the Draft Final Rule, many manufacturers may not be equipped to create a reasonable testing program in 6 months as proposed in the NPR. 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.<sup>19</sup> 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 Draft Final Rule. In addition, a shorter effective date may result in a short run volume increase in lower quality non-compliant products as staff expects total aggregate demand for these products to remain largely unchanged as a result of the rule.<sup>20</sup> **CPSC staff now recommend an effective date of 18 months to minimize potential disruption in availability of safer button battery powered products.** (Reese's Law ballot vote sheet, August 31, 2023, OS 149, emphasis added)

Even consumer advocates recognize the time it takes for new products to be compliant with new standards. In joint comments submitted to CPSC on March 13, 2023, the American Academy of Pediatrics, Consumer Federation of America, Consumer Reports, Kids in Danger, Public Citizen and the U.S. Public Interest Research Group, argued:

The CPSC should finalize the proposed rule expeditiously and apply an effective date that is as early as possible and not more than 180 days after the publication of the final rule. The CPSC should note that button cell battery manufacturers have been aware of the requirements in Reese's Law since its introduction in 2021 and did not oppose the bill. 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.

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The time between the date Reese’s Law was introduced in the U.S. House of Representatives (September 21, 2021) to March 19, 2024 (180 days after publication of the final rule in the Federal Register on September 21, 2023) is two and a half years. While these consumer advocates clearly recognize the time it takes for product changes to work their way through the supply chain, the significant error in their logic is the argument that the two-and-a-half-year clock should have started ticking when Reese’s Law was introduced in Congress. They argue the clock should have started ticking then because industry was “put on notice of the overall requirements” at that time.

Reese’s Law directed the Commission to consider how well existing voluntary standards address the issue of button or coin cell battery ingestion by children six years old or younger. As explained in great detail in CTA’s comments in docket 2023-0004, there is an existing standard that addresses this hazard for audio, video, information and communication technology equipment. That standard (UL 62368-1, Ed. 2) became effective on December 20, 2020. It was certainly reasonable for industry to believe that compliance with UL 62368-1, Ed. 2 might satisfy the requirements of Reese’s Law. It was not until CPSC published its decision on September 21, 2023, that industry was “put on notice of the overall requirements.” Using this date and looking forward two and a half years yields an appropriate effective date of March 21, 2026.

Given the above, the effective date is not feasible. As a result, the CPSC must withdraw its direct final rule and adjust the effective date of the rule. Otherwise, the CPSC risks the Court vacating its rule, just as it did weeks ago for imposing an impermissibly short period for compliance for a new consumer product safety standard. *Window Covering Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, No. 22-1300, slip op. at 24-29 (D.C. Cir. Sept. 12, 2023) (vacating the CPSC’s rule because it was unlawfully arbitrary for the CPSC to set an effective date of a new consumer product safety standard so soon that compliance would not be feasible); *see also Bluewater Network v. EPA*, 370 F.3d 1, 22 (D.C. Cir. 2004) (holding that a court will defer to agency’s prediction of the feasible pace of implementation only if it has adequately explained the basis of that prediction).

In summary, CTA believes the direct final rule in Docket No. 2023-0004 is not feasible—and is, therefore, arbitrary and capricious—because it includes an impractical effective date that does not comply with Reese’s Law.

Thank you for considering these comments.

Sincerely,

*J. David Grossman*

J. David Grossman  
Vice President, Regulatory Affairs

*Dave Wilson*

Dave Wilson  
Vice President, Technology & Standards