

## Client Alert

### CPSC Proposed Significant Changes and New Obligations for Importers Relating to Certificates of Compliance

May 15, 2013

The Consumer Product Safety Commission (CPSC) recently voted to approve a proposed rule amending 16 C.F.R. Part 1110 *et. al.*, more commonly known as the '1110 rule.' Released in the Federal Register at 78 FR 28,080, the proposed amendment proffers numerous changes to the rule, including who is required to certify, what information is listed on the certificate, and when and how long the certificates must be issued and maintained. Importantly, if finalized, the rule would require electronic filing of certificates with each shipment as a requirement for imported products to make entry into the United States. In one of the most significant changes discussed below, the CPSC proposes to impose a certification requirement on common carriers, freight forwarders, and third party logistics providers that assume the role of "importer of record" for direct to consumer shipments from foreign manufacturers.

Parties must comment on the proposed rules by July 29, 2013, to provide the CPSC with information on all issues, including:

- whether including the name of the foreign manufacturer on a certificate of compliance creates issues because that information is proprietary;
- what issues are presented by requiring the filing of certificates at the time of filing an entry with the U.S. Customs & Border Protection (CBP);
- what, if any, issues are presented by allowing, but not requiring, certificates to be filed electronically with CBP in advance of filing an entry;
- whether and when products subject to the Federal Hazardous Substances Act (FHSA) and regulated by the CPSC as banned hazardous substances require certificates;
- what compliance burden the rule imposes upon importers and manufacturers of regulated products.

#### Background

In the 2008 Consumer Product Safety Improvement Act (CPSIA), codified as 15 U.S.C. §§ 2051 *et al.*, Congress mandated that manufacturers, importers and private labelers of regulated products certify that regulated consumer products comply with certain CPSC administered product safety rules based on testing conducted for each product or on a reasonable testing program. The statute required this certificate for both imported and domestically manufactured products. Regulated children's products require a certificate attesting to their compliance based on testing conducted by a third party conformity assessment body.

Since 2008, the CPSC has promulgated additional testing, labeling and certification regulations relating to consumer products in continued implementation of the CPSIA. Notable examples include testing rules under 16

C.F.R. Part 1107, which established standards and protocols for continued testing of regulated children's products that went into effect on February 8, 2013 and rules under 16 C.F.R. Part 1109 related to component part testing and certification that became effective in December, 2011. To update the 1110 rule for consistency with these new rules at parts 1107 and 1009, the CPSC staff presented proposed amendments to the then-existing 1110 rule in December, 2012. After months of delay, a slightly modified proposed rule was voted on by the Commission on May 1, 2013 and published in the Federal Register on May 13, 2013, 78 FR 28,080.

### Key Proposed Changes

The proposed 1110 rule would strike and replace the existing 1110 rule in its entirety. Key changes to the existing 1110 rule and their implications include:

- new definitions specifying the different types of certificates required under the CPSIA such as children's product certification, general conformity certificate, finished product certificate and component part certificate, among others;
- a new definition of "importer" to mean 'importer of record' as used in the customs statute, 19 U.S.C. § 1484(a)(2)(B), and an indication that a common carrier, express courier, third-party logistics provider or freight forwarder will become subject to the certification requirements of the statute if such party "chooses to become a licensed customs broker and . . . agrees to serve as the importer of record;"
- clarification that the importer must certify products manufactured outside the United States, except when foreign manufacturers sell and ship products directly to consumers in the U.S., such as those purchased via the Internet;
- confirmation that brand owners are not required finished product certifiers unless they are the importer of record, domestic manufacturer or otherwise meet the 'private labeler' definition;
- additional requirements for the use of certain electronic certificates, including identification by a unique identifier or URL at an accessible location without password protection, identified on the product, its packaging, or its invoice, and available to the CPSC as soon as the product or shipment itself is available for inspection, which is clarified to be 'on or before the date the finished product is distributed in commerce;'
- expansion of the information required on a certificate including the certification date and scope of products covered by the certificate, a requirement to list the specific location where the product was manufactured (down to the street address), including foreign manufacturer locations;
- clarification that the harmonized tariff code and the registered identification number, or RN number, for apparel are not sufficiently unique identifiers of a product on a certificate;
- imposition of a requirement that certificates for imported merchandise must be electronically filed with CBP at the time of entry, along with the other customs documents required for entry (either .pdf copy or upload of 10 required data elements) creating additional compliance obligations and risk, which is further discussed below;
- indication that certificates for imported products *may* also be required up to 24 hours in advance of arrival as part of an importer's current Importer Security Filing ('ISF' or "10+2") obligations;

- a requirement that the certifier attest to the accuracy of the certificate to the best of the certifier's knowledge, information, and belief, and an acknowledgement of an understanding that it is a federal crime to knowingly and willfully make any materially false, fictitious, or fraudulent statements, representations or omissions, on the certificate;
- confirmation that duplicative testing to the same standard is not necessary when a CPSC rule (such as the lead paint ban or the small parts standard) is incorporated by reference in another standard which becomes law (such as the crib standard or the toy standard);

### **Impact to Import Compliance**

The proposed rule would require certificates to be electronically filed and made available at the ports, upon request. The certificate, in essence, is required for the right to make entry of the imported products. The lack thereof, then, permits CBP to deny entry of the products into the United States. Additionally, as the certificates will now be a component of the entry process for imported merchandise, they will be subject to CBP's rules for entry documentation, record keeping and penalties, which are separately regulated and enforced from CPSC's rules. While the proposed 1110 does not impose any new CPSC recordkeeping requirements, under CBP's regulations, import documents and any records supporting or substantiating information required for the entry of merchandise must be kept at least five years from the date of entry. For example, in addition to the certificate, the supporting testing documentation would also likely be required for retention. This would be similar to CBP's current requirements for supporting documents to substantiate other governmental agency import registrations and forms or preferential duty claims made under a free trade agreement. Likewise, recordkeeping penalties imposed by CBP would also likely be separate from any CPSC action. The CPSC has estimated that the additional burdens for importers related to the certificates are acceptable. The CPSC seeks comments on the format for electronic filing of certificates at entry as well as the resource issue presented to importers as they move to include the certificate as another electronic entry document.

### **Certifying to Bans**

In the CPSIA, Congress mandated certification that products comply with all bans "applicable to the product." The language "applicable to the product" provides the Commission with the flexibility it needs to provide guidance as to what products must be certified as to which bans. For example, the lawn dart ban applies only to "devices with elongated tips that are intended to be used outdoors and that are designed so that when they are thrown into the air they will contact the ground tip first." Logic suggests that the lawn dart ban is not "applicable" to every children's toy and that only such items that fall within the definitions of the ban would need to be certified by an accredited third party laboratory to demonstrate compliance with the lawn dart ban. To date the Commission has not accredited labs for many of the Commission's bans, especially FHSA bans. While not tackling that issue directly, the Commission states that a "finished product certifier is responsible for knowing what rules, bans, standards, or regulations apply to each product and for listing them all on the certificate." The CPSC's discussion of this issue opens up an important, controversial question with significant cost and safety implications.

## **Certification by Common Carriers**

The proposed 1110 rule does not provide any policy rationale for imposing new certification requirements on common carriers and making them the guarantor of product compliance when they act as the importer of record. The Commission fails to explain why a carrier should bear that burden and not the foreign manufacturer. It appears that the foreign manufacturer is only required to certify product compliance on sales and shipments directly to the consumer, in which the consumer serves as the "importer of record," unless the product bears a private label.

## **Penalties**

Failure to furnish a certificate required by the statutes enforced by the Commission is an unlawful, prohibited act under section 19 of the CPSA subjecting the person who knowingly violates section 19 to civil penalties of up to \$15,000,000 for any related series of violations as well as potential criminal liability. CBP can also impose penalties against any party whose importations are contrary to law (*e.g.*, lack of certification or failure to file), or any party who imports products by means of a material false statement or omission. As CBP operates on a transaction by transaction (*i.e.*, per shipment) basis, each entry is viewed as a separate transaction and also potential violation of the statute. The monetary penalties may be up to the full domestic value of the merchandise or the amount of an importer's customs bond.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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