RETAIL INDUSTRY LEADERS ASSOCIATION
Retail's Future…Educate, Innovate, Advocate

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Office of the Secretary
U.S. Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD 20814

Re: Section 102 Certificate Requirements

Dear Secretary:

Please accept the following comments from the Retail Industry Leaders Association (RILA) on behalf of our members in response to the Consumer Product Safety Commission's ("Commission") Request for Comments and Information; Section 102 of the Consumer Product Safety Improvement Act ("CPSIA" or "Act"); Requirements for certificates for conformity testing and third party testing.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry--retailers, product manufacturers, and service suppliers--which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

First, thank you for your important work on behalf of American consumers, many of whom we are proud to say are our members' customers. Our members have followed with great interest the development of the Consumer Product Safety Improvement Act (CPSIA), and they are working hard to ensure full compliance with the myriad provisions in the CPSIA. Many of our members have created their own product safety standards and auditing programs to enforce compliance to those standards. Our members have learned many valuable lessons through this process, which they have freely shared with each other and their suppliers and will take this opportunity to share with the Commission.

Certification

Section 102(a)(1) requires "every manufacturer of a product which is subject to a consumer product safety rule under this Act or similar rule, ban, standard, or regulation under any other

Act enforced by the Commission and which is imported for consumption or warehousing or distribution in commerce (and the private labeler of such product if such product bears a private label) shall issue a certificate" of compliance.

The Consumer Product Safety Act defines manufacturer as "any person who manufactures or imports a consumer product." 15 USC § 2052(a)(4).

RILA appreciates this opportunity to provide comments to the Commission on certificates for conformity testing and third party testing. While several issues the Commission has requested comments on are discussed in detail below, the issue of whether certificates can be generated and transmitted electronically is of the utmost importance to our members, their suppliers, and the vast support network behind today's global supply chain. RILA appreciates the Commission's recognition that in today's marketplace the vast majority of transactions take place electronically, which reduces previously burdensome paperwork requirements and allows for information to be easily called up and analyzed. Besides factoring in the environmental benefits of switching to a paperless system, Congress importantly recognized the benefits of electronic information technology to the Federal Government in 1995 when it enacted the Paperwork Reduction Act (14 U.S.C. 3501), which seeks to "ensure the greatest public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government…" and aides in the "reduction of information collection burdens on the public…"

In the strongest terms possible, RILA urges the Commission to allow issuers of certificates for conformity testing and third party testing the opportunity to transmit certificates to the Commission (and other qualified parties) electronically. We concur with the assessment of CPSC staff's opinion in a recently-released "Frequently Asked Questions" document that "so long as the Commission has reasonable access to the certificate electronically and it contains all the information required by Section 102 of the CPSIA, electronic certificates can be used to satisfy the CPSIA." A return to paper-based transactions would present a logistical nightmare for importers, slow down operations at ports, and do little to help ensure product safety and compliance.

Multiple Certificates and Multi-Party Certificates

RILA urges the Commission to require only one certificate of compliance for each product issued by one firm having a domestic U.S. presence. Hence, if a domestic U.S. firm actually manufactured the product overseas or had it manufactured overseas and issues a certificate of compliance meeting the requirements of the Act, the importer and the private-labeler should not also be required to issue separate certificates of compliance or join in the certification of compliance with the manufacturer.

As an example of how this may occur, retailers often import the first shipment of a product and the manufacturer imports the remaining shipments of the product. The retailer's supplier is the manufacturer, but the retailer also fits the definition of "manufacturer" as the importer of the first shipment. In this scenario, a certification from the manufacturer should be sufficient for all shipments, including those imported by the retailer, since the supplier/manufacturer is a domestic U.S. firm. After all, the manufacturer is in the best position to proactively make certain that the product complies and to certify compliance.

As a practical matter, the product will be subjected to one design review, one manufacturing quality control process and one testing program. Consequently, if the private labeler AND the importer must each issue separate certificates of compliance or join in the manufacturer's certificate of compliance, each would do so based on the same set of supporting documents. This would leave the private labeler and importer in the position of not only relying in good faith on the manufacturer's certification, but essentially guaranteeing the validity of the certification on the basis of design, manufacturing, and testing processes they do not control.

Direct-to-Consumer E-Commerce Sales

As previously discussed, Section 102(a)(1) requires "every manufacturer of a product which is subject to a consumer product safety rule under this Act or similar rule, ban, standard, or regulation under any other Act enforced by the Commission and which is imported for consumption or warehousing or distribution in commerce (and the private labeler of such product if such product bears a private label) shall issue a certificate" of compliance. In some instances, retailers engage in direct-to-consumer or direct to business e-commerce sales, where a consumer or business purchases a product on the website of a retailer but the product is shipped directly from the manufacturer to the consumer or business without the retailer taking possession of the merchandise. In such instances, we urge the Commission to clarify that general conformity certificates do not have to accompany the merchandise to the end user; it should be sufficient that the manufacturer "furnish" the conformity certificate to the retailer and make it available to the Commission upon request, but not actually physically travel with the merchandise.

Certificate Presentation

The Commission has undoubtedly received many comments about how the certificate of compliance should be presented so as to meet the Section 102 requirement that the certificate "accompany" each shipment of the certificated product. The Act is silent on the question of exactly what it means for the certificate to "accompany" each shipment of the product. The Commission should allow flexibility on how the certificate is supplied and transmitted. For example, the Commission should consider allowing as an acceptable means that the certificate be transmitted to U.S. Customs and Border Protection ("CBP") and maintained with other records specified in 19 U.S.C. 1509(a)(1)(a) (commonly known as the "(a)(1)(a) list") which are required by law or regulation for the entry of merchandise. These records are required to be maintained and produced upon demand (whether or not CBP requires their presentation at the time of entry). The items on the (a)(1)(a) list include, but are not limited to, statements, declarations, documents, or electronically generated data required by government agencies for the entry of merchandise. By treating the conformity certificate the same as other items in the entry document package, the certificate would "accompany" the shipment, would be produced upon request, and would be maintained in accordance with CBP's recordkeeping requirements.

CBP and the vast majority of importers operate in a paperless environment where entry related documents are transmitted and stored electronically. As CBP is not currently prepared to accept electronic submissions of the certificate, allowing the certificate to be included with other documents in the (a)(1)(a) list and requiring it to be available upon request allows for enforcement without overwhelming CBP and/or the Commission or unreasonably burdening

commerce. Having the entry filer retain the certificate as part of the entry document package satisfies the intent of having the documentation accompany the shipment in the same way that commercial documents accompany the shipment and allows trade to continue functioning in a paperless environment.

Certificate Distribution

Section 102(g)(3) of the Act provides that "[e]very certificate required under this section shall accompany the applicable product or shipment of products covered by the same certificate and a copy of the certificate shall be furnished to each … retailer of the product. Upon request, the manufacturer or private labeler issuing the certificate shall furnish a copy of the certificate to the Commission."

A major concern of our members is determining how far into the distribution chain the certificate of compliance must accompany shipments of the product. Our members urge the Commission to clarify this point, and only require that the certificate of compliance accompany any shipment of the product presented to CBP at any U.S. port of entry, but no further. We believe this position squares with a careful reading of the requirement set out in Section 102(g)(3) of the Act.

If it was Congress's intent to require every shipment of the product leaving the port on its way to a retailer or distributor to include the certificate, it would not have been necessary to also require the issuer of the certificate to provide a copy to each retailer, since they would get it anyway on receipt of the product. Having specifically stated that the issuer of the certificate should furnish a copy to each retailer, it can be concluded that Congress did not intend to require that the certificate actually accompany every shipment of the product on this side of the U.S. port of entry.

In order for the certificate to accompany shipments of the product on this side of the U.S. port of entry, the certificate would have to be with each individual unit or in each master carton (case pack) of the product. It is literally impossible to include the certificate in each individual unit or master carton, since in most cases the product has already been packaged by the time the production test results come back upon which the certification would be based. Hence, inserting the certificate in each individual unit or master carton would necessitate unpacking the merchandise, inserting the certificate and repackaging the product before it could be shipped. Alternatively, by requiring that the certificate accompany the certificated product through the (a)(1)(A) list, the certificate will be with the product when it is presented at any U.S. port of entry. Meanwhile, retailers, distributors and any others in the U.S. stream of commerce, short of the ultimate consumer, can obtain the certificate directly from the issuer.

Certificate Retention

We expect many suppliers will send our members unsolicited copies of their certificates of compliance. Our members are left to wonder if they receive the certificate from the issuer, whether they have to retain it and if so for how long. We ask the Commission to clarify that the Act does not require retailers to retain certificates of compliance they did not issue, especially since the Commission will likely require the issuer of the certificate to retain it and the

supporting test documents, consistent with the Commission's regulations on certification of bicycle helmets. See 16 CFR §1203.41.

The Act also does not specify how long the issuer has to keep certificates of compliance. We ask that the Commission consider requiring issuers of certificates, whether retailers, importers, manufacturers or private-labelers, to retain the certificates they issue for at least 3 years after issuance. We also recommend that the Commission allow issuers of certificates 48 hours to produce the certificates and supporting test documents upon request from any designated officer or employee of the Commission.

Recertification

The Act does not specify how long a certificate may be used for shipments of the certificated product. We urge the Commission to permit the use of a certificate for any shipment of the product presented to U.S. Customs on or before a date that is 2 years after issuance of the certificate, understanding that the testing supporting the certificate may have to be conducted more frequently. However, as with certification of bicycle helmets under 16 CFR §1203.33(b)(2), if there is a change in the product or its production that could affect the validity of the certificate, a new certificate should be issued.

Contents of the Certificate

Section 102(g)(1) provides that "[e]very certificate required under this section shall identify the manufacturer or private labeler issuing the certificate and any third party conformity assessment body on whose testing the certificate depends. The certificate shall include, at a minimum, the date and place of manufacture, the date and place where the product was tested, each party's name, full mailing address, telephone number, and contact information for the individual responsible for maintaining records of test results."

The Act does not specify whether a product manufactured in multiple locations requires separate certificates for each location of production. We urge the Commission to hold that one certificate per product is sufficient, provided the certificate contains the information required by Section 102(g)(1) for all manufacturers, manufacturing dates and places of manufacture of the product.

Likewise, we ask the Commission to clarify whether the certificate must list the locations of production of each component of the product. The Act seems only to require certification of finished goods. However clear the answer may seem, we would prefer not to guess, and therefore we urge the Commission to confirm our understanding of the Act on this point.

Finally, we stress to the Commission that the name and exact location of a manufacturer is highly confidential and considered business proprietary information. Whether intentioned or not, simply listing the manufacturer's name on a conformity certificate could compromise the competitive advantage many firms have with respect to their suppliers. In many cases, imported containers are shipped by suppliers directly to the merchant, in which case the manufacturers' identity may be compromised. Instead, we urge the Commission to only require that the city and country (for example, Shenzhen, China) be listed on the conformity certificate. As an alternative, RILA suggests that the CPSC allow manufacturers to be identified by the

Manufacturer Identification Code (MID) created for U.S. Customs and Border Protection (CBP). In the instance where there is a problem with a product or the Commission would like more information, any designated officer or employee of the Commission may, consistent with Section 16(b) of the Consumer Product Safety Act, 15 U.S.C. 2065(b), ascertain the name of the manufacturer while taking all necessary precautions to protect the indentify of the manufacturer.

Certification Labeling

Section 102(b) adds new section 14(d)(2) of the Consumer Product Safety Act which provides that "[n]ot later than 15 months after the date of enactment of the [CPSIA]…the Commission shall by regulation---initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements of…" the Act.

Under the Commission's regulations on certification and testing of bicycle helmets, a similar label was developed. In the case of bicycle helmets manufacturers were directed to "issue certificates of compliance for bicycle helmets…in the form of a durable, legible, and readily visible label…" See 16 CFR 1203.34(a). The Commission's regulations went on to say that the label would be considered sufficient to meet the certification requirements of the law provided it contained specific information, not unlike the information required for certificates under Section 102(b)(g)(1).

RILA urges the Commission to develop this label on an expedited basis. We further urge the Commission to provide, as it did with bicycle helmet certifications, that the label will suffice to meet the certification requirements of the Act, provided it contains the information required by the Act. At the same time, the Commission should allow flexibility and not require a label as the only means to comply with the certification requirement.

Finally, the Commission should provide that the certification requirements of the law can be met by affixing a valid label signifying conformity to an industry conformity assessment regime, such at the Toy Industry Association's Toy Safety Certification Program. These industry conformity assessment regimes contain all the elements of a reasonable testing program that the Commission is likely to require to support a valid certification. Furthermore, these industry conformity assessment regimes contain many other elements critical to safety that goes beyond the requirements of the law, such as design analysis and quality control measures. Wherever possible, the Commission should take the opportunity to steer more manufacturers into these programs.

Enforcement Discretion and Phase-In Periods

RILA members are working hard to ensure full compliance with the myriad requirements in the Act. As the Commission is well aware, some deadlines are extremely tight. The conformity certificate requirement is scheduled to go into effect only 10 business days after the end of the comment period on this issue. This does not provide sufficient time for the Commission to analyze all the comments and issue a rule. Accordingly, RILA respectfully requests that the Commission state in writing that it will use its enforcement discretion for the three-month (90 day) period beginning after the November 12 effective date for requirements related to

conformity certificates. Until the Commission publishes clarifications to Section 102, importers will not be able to provide full guidance to suppliers as to their requirements under the Act.

There are significant systems changes and third party lab capacity changes that the industry is dealing with in order to comply with the Act. An enforcement discretion period would allow importers time to establish processes to comply with the new conformity testing requirements, while not penalizing those that are genuinely striving to comply with the Act.

RILA urges the Commission to consider a phased in approach for the conformity certificate which focuses first on high risk products. A similar approach has recently been taken by other agencies to delay a new declaration requirement related to illegal logging under the amended Lacey Act. See Federal Register: October 8, 2008; Implementation of Revised Lacey Act Provisions (73 FR 58925).

Testing

Section 102(a)(1) provides that "every manufacturer of a product which is subject to a consumer product safety rule under this Act or similar, rule, ban, standard, or regulation under any other Act enforced by the Commission…shall issue a certificate which (A) shall certify, based on a test of each product or upon a reasonable testing program, that such product complies…"

Section 101(a)(2) requires that "every manufacturer of…children's products...shall (A) submit sufficient samples of the children's product, or samples that are identical in all material respects, to a third party conformity assessment body accredited under paragraph (3) to be tested for compliance…"

RILA and our members have concerns with Commission staff statements that component testing will not be accepted, and that only tests on finished goods are sufficient. We urge the Commission to reconsider this position to follow its past practice and allow the testing of the products components to serve as the basis for the certifications. Mandatory testing of finished goods would not allow sufficient flexibility and would result in redundant and costly testing for products for which the same component is used in multiple products. A variety of components of apparel products, e.g. zippers, rivets, snaps, buttons, rhinestones, dyes for screen prints, are used in many styles of apparel carried by different retailers. For example, a specific size of rivet from one of the major hardware manufacturers may be used in six styles of girls' jeans for seven different retailers. Using component testing, the rivet would only be tested once by the rivet manufacturer rather than being tested 42 separate times if testing of the final product is required. Final product testing is extremely costly. In the example used, if the cost of lead testing is $100 - $200 per component, then the cost of final product testing would be $4200 - $8400 for just that component. Under component testing, each apparel supplier would base its certification of compliance for each of the styles it produces on the testing from the rivet manufacturer along with testing of all the other components used in that product. Similarly, a manufacturer of screened t-shirts for boys would be allowed to use testing of the fabric and tests of the inks used in each screen print as the basis for a compliance certification rather than requiring the retesting of the same inks multiple times if the inks are used in ten different screen designs.

A certification process that relies upon component testing, with strong chain of custody documentation requirements that demonstrate that the component was used in the final product, will provide a greater assurance of safe products rather than requiring the testing of a few samples of final products. Manufacturers already have similar documentation and record keeping requirements for any products claiming special customs treatment under a trade preference program. In those instances, upon request from the CBP, manufacturers are required to provide production documentation including the records that support the claim that the required inputs were used in the specific products. RILA respectfully urges the Commission to clarify that component testing is an acceptable basis for certification of compliance.

Meanwhile, phthalate testing is also expensive and time-consuming and should only be required when relevant. If every component of every toy and child care article must be tested for phthalates to support a certificate of compliance, enormous unnecessary costs and delays will be introduced. The universe of materials where phthalates might be found is relatively small. For example, phthalates are used in PVC, but they are not used in polycarbonate plastics. Therefore, it makes no sense to require polycarbonate plastic components to be tested for phthalates. Likewise, wood, metal and rubber components will not contain phthalates. Hence, testing components made of materials that we know will not contain phthalates adds nothing to the safety of the product or assurance of its safety, but could add substantially to the cost of the product and the time needed to bring it to market.

RILA urges the Commission to create a list of materials from which toy and child care articles are made that require phthalate testing. Until such a list can be created, the Commission should only require that certificates of compliance be supported by testing accessible PVC components of toys and child care articles for phthalates.

Conclusion

RILA members place the highest priority on ensuring the safety of their customers and the products they sell, and RILA appreciates this opportunity to comment on the Commission's Request for Comments and Information; Section 102 of the Consumer Product Safety Improvement Act; Requirements for certificates for conformity testing and third party testing. Should you have any questions about the comments as submitted, please don't hesitate to contact me by phone at (703) 600-2046 or by email at stephanie.lester@rila.org.

Sincerely,

Stephanie Lester
Vice President, International Trade