

## Important Changes Proposed for CPSC Product Certification

By Charles E. Joern Jr. – December 5, 2013

The U.S. Consumer Product Safety Commission (CPSC) has issued a new proposed rule on how businesses must certify that their products comply with CPSC safety rules. The new rule would totally strike the existing rule on certificates of compliance and replace it with a new regulation (16 C.F.R. § 1110). This proposed rule has important ramifications for every business that manufactures, imports, distributes, or sells consumer products. Although the rule has yet to be adopted, its potential impact has brought up numerous concerns for companies ranging from manufacturers, distributors, and retailers to many national industry organizations and even shipping organizations.

The new rule regulates how companies must certify consumer products as compliant so that they may be imported into or sold in the United States. In general, every specifically regulated consumer product must be accompanied by a certificate confirming that the product has been properly tested and meets all applicable rules, bans, standards, or regulations enforced by the CPSC. Certification and the underlying required testing is expensive and time consuming. However, it is a violation of the Consumer Product Safety Act for a company to manufacture, import, distribute, or sell a consumer product without a required certificate of compliance.

What does the proposed rule change? There are a number of areas with significant differences:

**Finished products and component parts.** The new rule distinguishes between “finished products” (which must be certified) and “component parts” (which do not necessarily have to be certified). Finished products are intended for sale to or use by consumers. Component parts are incorporated into a finished product and are not sold for use by consumers. The designation of a finished product as opposed to a component part determines numerous obligations and options under CPSC rules.

**Who has to certify.** As under the current rule, importers would have to certify compliance of products manufactured outside the United States. However, the new rule would also require certification for products made overseas that are purchased on the Internet and delivered directly to consumers in the United States. In those cases, the foreign manufacturer would have to certify the product unless the product is “privately labeled,” in which event the private labeler would have to issue the certificate.

Under the proposed rule, importers are the importer of record as defined under the Tariff Act. This means that customs brokers (among others) who agree to serve as the importer of record will be responsible for issuing a valid certificate of compliance. For products

manufactured in the United States, the domestic manufacturer will have to certify unless the product bears a private label.

**Electronic certification.** Importers of regulated finished consumer products would be required to make electronic certificates accessible to the CPSC and to Customs and Border Protection (CBP) agents on or before the product is distributed in commerce.

Although the certificate may be made electronically available through a “unique identifier” allowing CBP and CPSC access through the Internet, the electronic certificates will have to be accessible without password protection. Several business groups have expressed fears that these certificates, which contain important commercial information, would be publicly accessible if password protection is prohibited.

**Required information.** Certificates of compliance already require a number of items of specific information on the product. The proposed rule would add three new areas of content on each certificate: (1) the date of initial certification, (2) the scope of the product range for which the certificate applies, and (3) an attestation of compliance.

**Certifying a negative.** The preamble to the proposed rule makes it clear that in certain situations, ironically, manufacturers of products must certify that their products are not banned. Because confusion can arise in this area, the CPSC included a detailed table showing which bans require certification and which bans do not. In the same vein, certifiers must include in their certificate of compliance not only the rules to which they are demonstrating testing compliance but also the rules the certifiers are exempt from and do not have to comply with.

**Recordkeeping.** Some existing product safety rules have their own recordkeeping provisions, while others are not subject to a specific time period for retaining test records. The new proposed rule changes this and requires that all certificates of compliance (and supporting test records) for non-children’s products must be maintained for five years regardless of the underlying standard’s recordkeeping requirements.

The proposed rule has completed the public comment period and now awaits final deliberation and adoption by the CPSC . Companies and their counsel should stay alert to the progression of this rule, which may significantly affect businesses.

**Keywords:** litigation, products liability, Consumer Product Safety Commission, finished product, certification, certificate of compliance

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