

TOMPKINS & DAVIDSON, LLP
Counselors At Law

5 Hanover Square
15th Floor
New York, N.Y. 10004

Phone: (212) 944-6611
Fax: (212) 944-9779
e-mail: customs@tdllp.com
internet: <http://www.tdllp.com>

November 14, 2008

RE: Consumer Product Safety Improvement Act Certificate Requirement Takes Effect

This week, the Consumer Product Safety Commission (CPSC) issued its interim final rule with respect to the requirement that merchandise be “accompanied” by a General Conformity Certificate that is “furnished” to distributors and retailers. The Consumer Product Safety Improvement Act requires manufacturers and importers to provide the certification for “any product that is subject to a consumer product safety rule, ban, standard, or regulation”, if that product is manufactured on or after November 12, 2008. The certificate must specify each such rule, ban, standard, or regulation with which the product must comply. “Any” product includes adult products as well as children’s products. The rule becomes effective upon publication in the *Federal Register*, scheduled for Tuesday, November 18, 2008.

In the explanatory section of its notice, the CPSC advises that its initial focus will be on the safety standards it administers, rather than the certificate or the form of the certificate. This coincides with reports that Customs & Border Protection will not imminently engage in detentions based on certificate issues. Although these indicate enforcement of the certification requirement should initially be light, this does not mean that there will not be enforcement of the regulations, which can result in destruction of violative merchandise and additional penalties if such products do not have proper certificates or false certificates. As stated in the notice, “Importers should be aware that after this initial period of adjustment, failure to abide by the general certificate requirement will subject shipments to refusal of admission into country and potential destruction”.

Under the rule, certificates for imported products must be available to the CPSC as soon as the product or shipment is available for inspection in the United States; for domestic production, the certificates must be available to the CPSC upon request before the product or shipment is introduced into domestic commerce. Presentation may be by hard copy or by an electronic certificate, identified by a unique identifier, if this can be accessed by Internet or other means, and if the unique identifier is available to the CPSC or CBP at the time the goods become available for inspection.

In general, the certification, which must be in English, must be based on a test of each product or upon a reasonable testing program for the product class. The certificate must now include, at minimum, the following:

1. Identification of the product;
2. Citation to each product safety regulation to which the product is subject, which can include compliance with labeling requirements in addition to compliance with test standards;
3. Identification of the importer or domestic manufacturer who is certifying compliance;

4. Contact information of the person maintaining records of test results (or record that the product is exempt from testing), including name, e-mail address, full mailing address and telephone number;
5. The city or administrative region and country, as well as the month and year in which the product was manufactured, with a street address being required if the manufacturer has more than one plant within the same city;
6. The date and place where the product was tested, if a third party testing lab was not used, and identification of any third party laboratory on whose testing the certificate of compliance rests, including the laboratory's name, full mailing address and telephone number.

Note that the CPSC recommends a minimum holding period of three years for laboratory test results. Also, the testing details in the General Conformity Certificate will change for many children's (up to age 12) products, as these become subject to "mandatory testing" protocols that require certifications be based on tests of a "sufficient number" of samples of the product, or products identical in all material aspects, solely by CPSC accredited third party laboratories. The various "mandatory testing" requirements are being implemented on a rolling schedule, with the first being applicable to the certifications for lead paint testing of children's products manufactured on or after December 21, 2008. For mandatory tests, the accredited laboratory's name, full mailing address and telephone number will always be required on the certification form.

The CPSC has not been able to respond to the many inquiries concerning what bans, standards, etc. may be applicable to particular consumer products. In the notice, the CPSC states "It is the responsibility of the manufacturer of the product as a normal incident of doing business to know what legal requirements of the Commission or otherwise apply to its products", while noting that companies are rightly concerned about the "reach" of rules that may potentially affect products, raised by such comments during meetings by staff that companies "probably" must certify that products do not contain strong sensitizers or need to certify to flammability standards under 16 CFR 1500 that many have considered inapplicable to their products. Going forward, overlooking regulations unlikely to be applicable, but which might apply in very limited circumstances, can result in destruction of merchandise for lack of the proper certification.

The CPSC's General Counsel indicated at the November 6th meeting on the lead paint standard that her office was formally reconsidering its earlier opinion that each new product safety rule, ban, standard, or regulation will apply to ALL existing inventory as of the date that standard, ban, rule, etc. takes effect. This remains a matter of utmost concern. Should her office's opinion not change, industry appeals to Congress may be necessary to protect against the potential impact of such a rule on inventory value and financing arrangements based on use of inventory as collateral. We will keep you apprised on this issue.

Should you wish to discuss the products you import and the applicable regulations that require certification, or require assistance in preparation of certificates, please contact us.

Firm Contacts: Barbara Wierbicki (bywierbicki@tdllp.com); Robert Stack (rstack@tdllp.com); Louis Shoichet (lshoichet@tdllp.com).

Note: The above comments are intended for general information only, and not as legal advice. Legal advice can only be offered after a review of a client's specific facts and circumstances, which may affect the applicability of any general comments contained herein.