

General Conformity Certificates Must Accompany Many Consumer Product Shipments Starting November 12, 2008

October 14, 2008

Manufacturers and Importers Beware

Pursuant to the newly enacted Consumer Product Safety Improvement Act (the "Act"), a major new product certification requirement (the "New Certification Requirement") goes into effect on November 12, 2008 (the "Certification Date"). The Act, which was prompted by a surge in highly publicized recent toy recalls, makes dramatic changes to the laws enforced by the Consumer Product Safety Commission (the "CPSC") and provides little lead time for compliance. Any product that does not comply with the New Certification Requirement will be (1) denied entry into the United States and/or (2) prohibited from being distributed in the United States via interstate commerce.

Applies to All Manufacturers/Importers/Private Labelers

The Certification Date is the first significant deadline of the Act to fall into place. Pursuant to the New Certification Requirement, manufacturers and importers (as well as private labelers, when applicable) must issue a "General Conformity Certificate" for every consumer product that is subject to any applicable CPSC rule, ban, standard or regulation. The General Conformity Certificate must certify that the product complies with all applicable CPSC rules, bans, standards and regulations based on a test of each product or upon a reasonable testing program. The General Conformity Certificate must accompany a product shipment. Additionally, the manufacturer/importer/private labeler must furnish such a General Conformity Certificate to retailers and distributors. The Act currently provides that the product testing may be self-imposed. However, as discussed below, children's products will soon be required to be tested by third-party labs that have been approved by the CPSC.

Includes Many but Not All Consumer Products

Not all of the 15,000 different types of consumer products regulated by the CPSC will be subject to the New Certification Requirement because not all consumer products are subject to CPSC rules, bans, standards and regulations. Below are a few examples of the potentially affected products.

- **Children's Products.** Beginning on the Certification Date, children's products must be accompanied by a certificate that certifies compliance with a number of CPSC standards, including lead paint and small parts standards. The Act also sets forth additional certification requirements for children's products that will fall in place over the next few months (*i.e.*, lead content, phthalates, ASTM F963-07).

Moreover, children's products will eventually be required to be third-party tested and certified (as opposed to just self-tested) by approved labs. The third-party test/certification requirements will be phased in over the next year.

- **Apparel and Footwear.** Beginning on the Certification Date, all apparel must be accompanied by a General Conformity Certificate that certifies compliance with CPSC flammability standards. Children's sleepwear must be certified against even stricter flammability standards. Additionally, painted buttons on children's apparel and children's shoes must be certified as to lead paint standards. When the lead content standard goes into effect shortly, children's apparel and children's shoes must also be so certified.

As the third-party testing requirement is phased in over the next year, children's apparel and children's shoes will also be required to be third-party tested (as opposed to just self-tested) by approved labs.

- **Products that Require Child Resistant ("CR") Packaging.** The CPSC requires CR packaging for various products, including prescription drugs, certain over-the-counter drugs (such as aspirin, acetaminophen and ibuprofen), mouthwash, naproxen and various other products. As a result, beginning on the Certification Date, such products should be accompanied by a General Conformity Certificate that certifies compliance with CR packaging regulations.
- **Hazardous Substances.** Consumer products that contain hazardous substances require warning labels. CPSC representatives have taken the position that beginning on the Certification Date, these products must be accompanied by General Conformity Certificates that certify such labeling. Some of the consumer products affected include batteries and many household cleaners that require such warning labels. See further discussion below.
- **Consumer Fireworks.** Beginning on the Certification Date, consumer fireworks must be certified as compliant with CPSC fireworks regulations.
- **House Paint.** Beginning on the Certification Date, house paint must be certified as compliant with the CPSC lead paint regulation.

The above list highlights only a few of the impacted products and is in no way representative of all the products that must be certified. Any manufacturer/importer/private labeler should consider whether their products are subject to CPSC rules, bans, standards and regulations. If so, the New Certification Requirement is triggered and a General Conformity Certificate must accompany the product.

Recent CPSC Responses to Certification Questions

The CPSC held a public forum on October 2, 2008, to assist the industry in understanding many of the new requirements associated with the New Certification Requirement. At the meeting, CPSC representatives noted that the CPSC has received thousands of questions about the new Act, including many certification questions. A few of the key issues discussed include the following:

- **No Signature Requirement.** CPSC representatives confirmed that there is no requirement that a General Conformity Certificate be signed.
- **Hazardous Label Certification.** A number of questions were asked on whether certification is necessary for products that contain hazardous substances and are subject only to warning label requirements. Such a General Conformity Certificate would certify the product is properly labeled. Many have questioned why this extra burden is necessary, when compliance could be verified by examining the warning label already on the product. CPSC representatives were less than clear on this issue and, therefore, out of caution such a certificate should at this stage accompany these products.
- **Import Exemptions.** CPSC representatives noted that certain products may be exempt from the certification requirement, including items imported solely for testing, items imported solely for trade shows and items that will be re-exported and not consumed in the United States.
- **Reliance on Foreign Manufacturer Testing.** CPSC representatives stated that the CPSC has permitted an importer to certify based on testing arranged by a foreign manufacturer when the importer is a U.S. resident or has a U.S. resident agent and a copy of the test records (in English) is maintained in the United States for three years. In order to avoid any problems with such reliance, an importer should satisfy itself that the manufacturer-arranged testing is valid and accurate. Simply having the manufacturer make bald statements about testing is not enough.
- **Date Manufactured.** CPSC representatives noted that the New Certification Requirement applies to products manufactured on and after the Certification Date.
- **Multiple Certificates.** Manufacturers (foreign and domestic), importers and private labelers must all issue General Conformity Certificates. The CPSC is now asking for suggestions of ways to utilize a single General Conformity Certificate with multi-party certifications.
- **Must Physically Accompany.** CPSC representatives stated that for now a General Conformity Certificate must physically accompany the product (*i.e.*, in the shipping container). However, the CPSC is considering suggestions as to how this may be accomplished electronically and may change this stance.
- **Not Required to Be Filed with U.S. Customs and Border Protection.** There is no requirement at this stage that the General Conformity Certificate be filed with U.S. Customs and Border Protection or the CPSC. However, the Certificate must be provided to U.S. Customs and Border Protection or the CPSC upon request.
- **Focus on Compliance.** The CPSC emphasized that at this early stage it is most interested in basic compliance. It will work with U.S. Customs and Border Protection to identify and inspect imported products. Products without the required General Conformity Certificate will be denied entry into the United States. Moreover, civil and criminal penalties may be sought in worst-case scenarios, including placing false information on a Certificate.

For Further Information

If you have questions about this Alert or would like more information, please contact [Robert B. Hopkins](#), [Sharon L. Caffrey](#), [Karen Shichman Crawford](#), [Andrew E. Mishkin](#), [Paul S. Rosenlund](#) any other [member](#) of the [Products Liability and Toxic Torts Practice Group](#) or the attorney in the firm with whom you are regularly in contact.