

## New Requirements To Certify Certain Consumer Products Become Effective On November 12

*One of the most sweeping new requirements of the Consumer Product Safety Improvement Act (“CPSIA”) becomes effective on November 12, 2008. Beginning then, foreign and domestic manufacturers, importers, and private labelers of products subject to any consumer product safety rule, ban, standard, or regulation under any act enforced by the Consumer Product Safety Commission (“CPSC” or “Commission”) must issue certificates of conformity to accompany every shipment of such products and to be furnished to each distributor and retailer. The requirement covers products from toys and baby cribs to clothing and walk-behind lawn mowers. Although the Commission has issued some guidance for compliance, the requirement has created logistical burdens that companies must address quickly.*

### COVERED PRODUCTS

Beginning November 12, all manufacturers, importers, and private labelers of consumer products (1) imported for consumption and warehousing or (2) distributed in commerce must issue a general conformity certification if the product is subject to any consumer product safety rule under the CPSIA or similar rule, ban, standard, or regulation under any act enforced by the CPSC. The Commission staff plans to issue a list of covered products at some point, and, in the meantime, has suggested that companies refer to the CPSC’s website,

[www.cpsc.gov](http://www.cpsc.gov). The following is a list of some of the products that will require a general conformity certification starting either November 12 or as soon as the applicable regulations become effective:

- Children’s products (certification regarding lead paint or other surface coatings and lead content);
- Children’s toys and child care articles (certification regarding phthalate content);
- Clothing;
- Bicycle helmets (children and adult sizes);
- Bicycles (children and adult sizes);
- Mattresses;
- Walk-behind power lawn mowers; and
- Rattles and pacifiers.

The CPSC staff has also indicated that the requirement would apply to products that require a warning, such as certain household products regulated by the Federal Hazardous Substances Act, even if they are not required to pass a certain test.

### BASIS FOR THE GENERAL CONFORMITY CERTIFICATION

The general conformity certification must certify that, based on a test of each product or upon a “reasonable testing program,” such products comply with the applicable standards. For “children’s products,” as defined in the CPSIA, the certification must be based upon testing by a CPSC-accredited third-party laboratory. The CPSC is publishing accreditation requirements on a rolling basis, and the CPSIA prescribes a timeline for when specific products must be tested by an accredited third-party laboratory.

Other than the specific requirements for testing by an accredited third-party laboratory for children's products, companies have some flexibility in determining what constitutes a "reasonable testing program" for purposes of the general conformity certification. For example, the Commission staff has stated informally that it does not always require the involvement of an outside laboratory. The staff has also suggested that, where a standard or other regulation prescribes a particular testing methodology (e.g., how to test for sharp points or edges), such methodology should serve as a helpful baseline standard to determine what level of testing is reasonable. The Commission has 15 months to issue additional guidance.

### CONTENT AND FORM OF CERTIFICATES

The CPSC staff has provided some guidance about the content and form of the general conformity certifications. Under the CPSIA, every certificate must identify the manufacturer or private labeler issuing the certificate and any third-party conformity assessment body on whose testing the certificate depends. The certificates must be legible, in the English language, and include, at a minimum, the following information:

- Date and place of manufacture;
- Date and place where the product was tested;
- Each certificate issuer's name, full mailing address, and telephone number;
- Contact information for the individual responsible for maintaining records of test results; and
- The standard(s) with which the product is certified to comply.

The CPSIA expressly authorizes the issuance of a single, combined certificate that contains information on a product's compliance with several different rules and standards, but the standards must be individually specified – a certificate cannot state generally that a product complies with "all applicable rules and standards."

The ability to use the same certification does not, however, relieve any entity's obligation to issue the certificate. During its public meetings, the Commission staff has stated that where several parties in a chain of distribution are required to issue certifications (e.g., a foreign manufacturer → domestic manufacturer → private labeler), all the parties may use the same certifications as long as the documents meet all the CPSIA requirements.

The CPSC staff is currently seeking comments about the potential use of electronic certifications and the use of multiple certifications (e.g., certifications issued by the manufacturer, importer, and/or private labeler) for the same product.

### "ACCOMPANY" AND "FURNISH" REQUIREMENTS

The general conformity certifications must "accompany" each applicable product or shipment of products and be "furnished" to each distributor and retailer of the product. Certification is considered to be product-specific; thus, while one large shipment of identical products may be covered by a single certificate, one large shipment containing an assortment of three different types of products would require separate certificates for each. The issuer must also furnish a copy of the certification for a particular product to the CPSC upon request.

The Commission staff is currently seeking specific recommendations for how the certificates, electronic or paper, can "accompany" the shipment of products such that they (1) can be available for immediate inspection for compliance and enforcement, and (2) can be tied to specific shipments of products as required by the CPSIA. The staff is also seeking specific recommendations for how the certificates should be "furnished" to distributors and retailers of covered products, electronically or otherwise.

**Our August 14, 2008, client advisory, *President Signs Consumer Product Safety Improvement Act of 2008 Into Law* ([www.kelleydrye.com/resource\\_center/client\\_advisories/0367](http://www.kelleydrye.com/resource_center/client_advisories/0367)), provides additional information about the CPSIA.**

**KELLEY DRYE & WARREN LLP**

Kelley Drye & Warren's Consumer Product Safety Practice Group is experienced in providing advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary, we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies.

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