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July 29, 2013

Todd A. Stevenson
Secretary, Consumer Product Safety Commission
Office of the Secretary
Consumer Product Safety Commission, Room 820
4330 East West Highway
Bethesda, MD 20814

Re: Proposed Amendments to Part 1110 (Docket Number CPSC-2013-0017)

Dear Secretary Stevenson:

We respectfully submit the following comments regarding the proposed amendment to the regulations governing certificates of compliance at 16 CFR Part 1110. 78 Fed. Reg. 28080 (May 13, 2013). We appreciate the opportunity to provide our perspective on this important change, and we ask you to consider our comments carefully as you finalize the rule.

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 providers – 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. RILA members are also among the largest US importers.[1]

RILA members appreciate the Commission's unswerving dedication and efforts to improve the safety of consumer products. We support the CPSC's goals of developing effective risk targeting for imported products and implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA). RILA's members have a tradition of driving compliance and working with the CPSC to address consumer product safety issues. For example, following the passage of the CPSIA, some retailers asked suppliers to test and certify products to safety standards on a more aggressive timetable than that set out in the statute, even before the CPSC began enforcing certification requirements. Several of RILA's members also participate in trusted partnership programs, including the CPSC's Voluntary Retailer Reporting Program, providing the Commission with comprehensive customer complaint data on a weekly basis and the combined Customs & Border Protection (CBP)/CPSC Importer Self-Assessment Product Safety Pilot (ISA-PS) program. RILA's member retailers regularly cooperate with the CPSC to recall products

[1] *See*, CBP's list of Top 5000 importers for 2012, http://www.cbp.gov/xp/cgov/trade/trade_outreach/trade_info/, and Journal of Commerce Top 100 Importers in 2012, May 24, 2013.

when manufacturers are unable or refuse to consent to a voluntary recall and to promote CPSC's consumer education programs. Through these efforts and others, RILA's members have worked with the CPSC to find practical ways to address consumer product safety issues.

RILA members appreciate the CPSC's proactive leadership on product safety matters, including consumer education campaigns, stakeholder and industry outreach, and its leadership on international regulatory alignment. Members further appreciate that over the past several years, the CPSC has dedicated significant resources to thoughtfully implementing the CPSIA in a manner that achieves targeted safety goals and is least burdensome for the regulated community. RILA members share the CPSC's goal of ensuring the safety of all consumer products sold to U.S. consumers. RILA submits these comments detailing our serious concerns regarding the proposed Part 1110 rule in this spirit of collaboration and partnership. We look forward to the opportunity to work with the CPSC on this critically important issue.

I. EXECUTIVE SUMMARY

In promulgating the current Part 1110 rule, the CPSC sought to provide a clear, uniform and predictable rule that would provide the safety benefits intended by Congress when it passed the CPSIA.[2] The existing Part 1110 rule, which was promulgated just five years ago, accomplished that goal. It creates a clear, two-path system for identifying the entity responsible for issuing certificates of compliance. The current regulation thus ensures that CPSC always has sufficient jurisdiction to enforce its laws: domestic manufacturers are responsible for domestic products and importers are responsible for the foreign products that they bring into the country. The rule also establishes a process that allows for the timely provision of certificates to government regulators while ensuring the protection of business confidential information.

The proposed Part 1110 rule makes sweeping changes to that certification system. RILA members are concerned that the proposed changes will negatively impact safety, fail to protect American consumers, result in significant changes in business relationships, potentially expose confidential business information to the detriment of innovation and commercial activity, and increase costs to the manufacturing and retail industries. Importantly, RILA members have invested millions of dollars to build systems to comply with the CPSIA and the existing regulations promulgated by this Commission governing certificates of compliance. The proposed rule jeopardizes the investment made in those systems *without any articulated enhanced safety benefit to the consumer*.

We have summarized our specific primary concerns below.

First, the Administrative Procedure Act (APA) requires agencies to set forth adequate explanations for agency actions, including situations where the agency reverses or revises a prior rule. The proposed rule fails to provide any credible explanation or rationale supporting the CPSC's proposed dramatic changes to the current Part 1110 rule. Given the significant investment made by industries to comply with the current certification program over the past five

[2] 73 Fed. Reg. 68328.

years, the CPSC's move away from the current rule without setting forth a good reason for the policy change potentially violates the APA.

We urge the CPSC to suspend the current rulemaking process until it has the opportunity to review implementation of the current rules, identify any enforcement challenges to the current procedures, and then, in coordination with the regulated community, work to develop appropriate solutions. At that time, the Commission will have the data and be able to articulate a reasonable rationale to support a proposed rule correcting identified issues.

Second, the proposed rule replaces the current clear standard with vague language that implies a transfer of the certification obligation for domestic products from the domestic manufacturer to private labelers. If so, the new language would effectively remove the certification obligation from the manufacturer (with its direct knowledge of factory operations, raw material sourcing, and product safety) and transfer it to the retailer who has little or no manufacturing expertise and would be at least one layer removed from this information. To address the shift in liability for products over which the retailer has no direct control, the retailer would be required to build new testing and compliance programs to exercise due diligence over domestic manufacturers, which will impose new burdens on the supply chain. Capital and resources will be required for retailers to build new programs, which will increase end-use consumer prices and have a potential negative impact on interstate commerce. This is not accounted for in the proposed rule. Despite the magnitude of the proposed change, CPSC has not identified any basis for the change, such as a safety concern that has not been met, an increase in regulatory violations, or recalls regarding domestically manufactured private label products.

Accordingly, we encourage the CPSC to keep the system that it established in 2008 assigning the responsibility for certification of domestically products to the domestic manufacturer instead of implementing this proposed change.

Third, the proposed rule requires importers who are required to file certificates electronically with CBP and domestic manufacturers and private labelers who choose to use electronic certificates to make those certificates available to the CPSC via a website without password protection. Although RILA and its members support the flexibility that allows for electronic certificates, the proposal would require electronic certificate issuers to disclose business confidential information by posting certificates on the Internet for public view. These certificates include information about suppliers and products that would normally be protected by the statute; accordingly, the proposal could violate Section 6(b) of the Consumer Product Safety Act (CPSA).[3] Moreover, publishing unprotected certificates would undoubtedly create a security risk, potentially allowing fraudulent companies access to legitimate documents, furthering their ability to falsify certificates of compliance.

This part of the proposed rule should be withdrawn or revised to provide adequate protections for confidential business information consistent with Section 6(b).

[3] 15 U.S.C. § 2055(b).

Fourth, we are concerned that CPSC's well-intentioned proposal to require importers to submit portable document format (pdf) versions of their certificates electronically at the time of entry will add burden - to industry and the agencies - without furthering the laudable goal of increasing the government's ability to target unsafe products. Currently, importers must provide certificates to CBP and CPSC "on demand." The system works well from industry's perspective and the Commission does not identify any demonstrable gap in the current system.

Nonetheless, the CPSC proposes to require certificates to be filed electronically. The rule cannot be implemented as written. The current CBP electronic filing system which allows for the transmission of data elements electronically does not currently have a sufficient number of automated fields to allow for the electronic transmission of certificate data elements. Additionally, CBP's Document Images System, which would allow for the submission of pdf document, does not currently have the functionality to accept CPSC certificates and there are no plans to add this functionality in the near future.[4] As a result, it is unclear how importers are supposed to submit the certificates to CBP electronically as CPSC has left this critical operational aspect of the rule to CBP's discretion.[5] Scanning and attaching documents is in itself a significant step backward in the automated customs process. Moreover, as pdf documents cannot be searched electronically, government employees will essentially need to review these documents manually. We recognize that both CPSC and CBP are stretched extremely thin for resources and doubt that manual document review is feasible or cost-effective for either agency.

We strongly encourage CPSC not to finalize the proposal requiring importers to "electronically" file certificates of compliance at the time of entry. Instead, we urge the CSPC to identify enforcement challenges with the current "on demand" system and to work collaboratively with industry to identify and implement appropriate solutions. If the Commission moves forward with the "at entry" filing requirement, implementation should be delayed until after robust CPSC-CBP consultations and implementation of CBP program systems upgrades to allow for completely electronic filing. If despite the lack of supporting technology systems, CPSC insists on immediate implementation of the "at entry" filing requirements, at a minimum, companies who are members of trusted partner programs, ISA, ISA-PS and retailer reporting should be exempted from any "at time of entry" filing requirements and allowed to continue to present certificates "on demand."

Fifth, as discussed more fully below, the proposed rule's revised content requirements are unclear and, in some instances, would require information that is unobtainable and/or unnecessary. The revised certificate content requirements coupled with the lack of password protection for electronic certificates noted above raise serious concerns about protection of confidential business information. Additionally, the increased recordkeeping requirements add costs that retailers will have to absorb without any rationale for making those changes or any safety benefit.

[4] http://www.cbp.gov/linkhandler/cgov/trade/automated/modernization/single_window.ctt/single_window.pdf

[5] 78 Fed. Reg. 280989.

The proposed rules should be revised in accordance with the suggestions contained in these comments.

Finally, although we appreciate that the CPSC recognizes the utility and importance of conducting a benefit-cost analysis as an important tool for the development of sound regulations, we are gravely concerned that the CPSC's current analysis is based on incomplete information and does not adequately reflect the true costs of the regulations if finalized as proposed. For example, the Commission's analysis does not have complete information on the import volume and number of entries requiring certificates. Even the smallest miscalculation of the burden given the number of entries made by importers could potentially cost millions.

For this reason, we urge the CPSC to revise its analysis to reflect accurate estimates of the benefits and cost of implementation of the proposed rule. Specifically, the Commission should consider: 1) a realistic number of entries requiring certificates when calculating the cost to importers in terms of increased manpower and costs related to the proposed process requiring submission of pdf certificates at entry; 2) the additional costs that will be borne by importers to convert to any potential future true electronic filing system; and 3) the costs to private labelers of domestically produced products to create and implement new testing and certification processes. We further urge the Commission to carefully balance the absence of any enhanced safety benefits of the proposed rule against its significant burden and costs and to develop a rule that will truly enhance product safety without imposing unnecessary burdens.

Our comments are discussed more thoroughly below.

II. STATUTORY FRAMEWORK AND REGULATORY HISTORY

The Consumer Product Safety Improvement Act was enacted in 2008, substantially changing the landscape of consumer product safety law. Under the CPSIA, products must be certified as compliant with applicable safety standards based on a reasonable testing program for general use products or third party testing for children's products. The statute specifies the information that must be included on the certificates and the timeframe in which they must be made available.[6]

When multiple parties may be responsible for certifying a particular product, the CPSIA expressly authorizes the CPSC to "designate one or more of such manufacturers or one or more of such private labelers (as the case may be) as the persons who shall issue the certificate . . . ."[7] The CPSIA authorizes the CPSC to impose penalties for failure to comply with testing and certification requirements, including civil and criminal penalties that may be levied against

[6] 15 U.S.C. § 2063(g). Congress also gave the option for the Commission to "provide for the electronic filing of certificates . . . up to 24 hours before arrival of an imported product," when done by rule "[i]n consultation with the Commissioner of Customs."[6]

[7] 15 U.S.C. § 2063(g)(4) A "manufacturer" is defined to include anyone "who manufactures or imports a consumer product." 15 U.S. C. C. § 2052(a)(11). A private labeler is defined as an "owner of a brand or trademark on the label of a consumer product which bears a private label." A private labeler is not the product manufacturer, and the product manufacturer's brand or trademark cannot by definition also appear on the label of a privately labeled product. 15 U.S.C. § 2052(a)(12)(A), (B).

corporations or individuals.[8] The statute also provides a safe harbor for those who hold certificates provided by their suppliers; such certificate-holders will not be subject to enforcement for selling noncompliant products that are certified compliant, assuming the certificate-holder did not know that the products did not conform to the underlying safety standards.[9]

The Commission promulgated the current Part 1110 rule in November 2008. As authorized by the CPSIA and the APA, the regulation was promulgated without notice and comment because the Commission found it would have been impracticable and contrary to the public interest, given the quick statutory deadline for certificates, "substantial confusion" about how to comply, and the CPSC's lack of resources.[10] To streamline the certification requirement, the CPSC applied its express statutory authority to designate importers and domestic manufacturers in the current Part 1110 regulations as the only entities responsible for issuing certificates.[11] The Commission noted its power to so designate certain entities as the "person(s) who shall issue the required certificate and to relieve all others of that responsibility."[12]

The existing Part 1110 rule establishes that certificates may be maintained in hard copy or electronically; if the latter, the certificate must be "identified by a unique identifier and can be accessed via a World Wide Web URL or other electronic means . . . ."[13] In terms of timing, the regulations provide that certificates for imported products must be made available "as soon as the product or shipment itself is available for inspection in the United States;" certificates for domestically manufactured products must be available at the time the products are introduced into commerce in the U.S.[14] Certificates must be produced for inspection when requested by the CPSC or CBP.[15]

In November 2011, the CPSC issued new rules further articulating product testing and certification requirements. New regulations at 16 CFR Part 1107 set forth requirements for periodic and material change testing for children's products as well as mandatory employee undue influence training for children's product certifiers, consistent with the CPSIA.[16] Part 1109 enables certifiers to rely on component part and finished product testing done by others, specifically addressing the need identified by certain brand owners shipping product to multiple importers for a means to streamline the certification process. The provisions of Part 1109 allow certification based on finished product testing done by the manufacturer or brand owner and set conditions and requirements for doing so. Those rules were developed after the Commission had more experience with the testing and certification process, three years after the initial Part 1110 rule was finalized.

[8] *See* 15 U.S.C. §§ 2068(a)(6), 2069, 2070.
[9] 15 U.S.C. § 2069(b).
[10] *See* 5 U.S.C. § 553; 15 U.S.C. § 2063(a)(3)(G); 73 Fed. Reg. 68,331 (Nov. 18, 2008).
[11] *See* 73 Fed. Reg. 68,328.
[12] *Id.*
[13] 16 CFR § 1110.13.
[14] 16 CFR § 1110.7.
[15] 16 CFR § 1110.13(a)(1).
[16] *See* 15 U.S.C. § 2063(i).

I. ANALYSIS

A. The Proposed Rules Potentially Violate the Administrative Procedure Act Based on the Lack of Any Rational Justifications Supporting the Shift to Private Labeler Certifications, New At Entry Certificate Filings, and Required Public Disclosure for Electronic Certificates

The Administrative Procedure Act, 5 U.S.C. §551, *et seq.*, sets forth the governing principles for agency rulemaking. Agencies are required to "examine the relevant data and articulate a satisfactory explanation for its action" when promulgating regulations and rules.[17] The statute makes no distinction between an initial agency action and a subsequent agency action undoing or revising that action. The Supreme Court in *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-11 (2009) provided guidance to agencies when revising or undoing an initial agency action. In that case involving the FCC's revocation of a prior agency interpretation and enforcement policies, the Court determined that the APA requires an agency to "display awareness that it *is* changing its position" and show that there are "good reasons for the new policy."[18] Although the Court declined to impose a heightened level of judicial review when an agency changes course, the Court did require the agency to "provide *some* explanation for a change, 'so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.'"[19]

Here, the CPSC does not provide *any* justification at all for transferring the certification obligations from domestic manufacturers to private labelers, let alone any data to support the major changes in the supply chain that would be required to comply with its proposed regulation.

The Commission merely states its opinion that duplication of effort "should not occur" and that the rule "should not necessarily result in a change to existing relationships with regard to testing products and issuing certificates."[20]

Not only is this assumption not true, it is patently insufficient to meet the agency's burden of establishing that there are good reasons for such a significant change in policy, particularly one that will fundamentally alter commercial relationships, increase testing and cost, and likely reduce safety of products if the entity responsible for certifying is not the entity that actually *made* the product. In fact, based on past experience with the domestically manufactured private label product category, there is no justification for the proposed change. As evidenced by the Commission's Annual Reports to Congress, the overwhelming number of violations of certification requirements and CPSC standards has involved imported products, and not privately labeled, domestically manufactured products.[21]

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[17] *Motor Vehicle Mfrs Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983)
[18] *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-11 (2009) (emphasis in original).
[19] *Id.* at fn 2 citing Atchison, T. &S.F.R. Co. v. Wichita Bd. Of Trade, 412 U.S. 800, 808 (1973)(emphasis in original).
[20] 78 Fed. Reg. 28,084.
[21] 2012 CPSC Report to the President and Congress, 49-170.

Similarly, the Commission has failed to provide a reasonable explanation for its proposal to change the timing of when certificates must be available to the CPSC and CBP. The rationale provided by the CSPC is a statement of anticipated enforcement benefits that depend on non-existent facts and circumstances stating that the "Commission's ability to target shipments for inspection and track the accuracy of certificates" would be enhanced *if* the certificates were filed "with the CBP in the form of data elements." [22] As detailed more fully in a later section of these comments, the CBP currently does not have the ability to accept certificates in the form of data elements, nor does its public priorities for future enhancement of those systems include such functionality. An additional justification articulated by the proposed rule is that "[s]uch a change would aid the Commission in enforcing the requirement to certify regulated products." [23] However, there is no explanation of any deficiencies or enforcement challenges with the current "on demand" system of supplying certifications.

The Commission has also failed to provide a reasonable rationale to justify the elimination of password protection for electronic certificates. The proposed rule merely states that elimination of password protection "would ensure that access to electronic certificates is easy and efficient and does not require significant CSPC time and resources" and that maintenance of passwords "could become burdensome." [24] However, the proposed rule ignores the fact that issuers are currently allowed to use passwords to protect the confidential information on electronic certificates and has provided no evidence that the current practice limits or restricts the CPSC's enforcement capabilities in any way.

Retailers and the rest of the regulated community have expended considerable resources to build significant infrastructure and programs to implement and comply with the requirements the CPSC put in place in the 2008 regulations. If the proposal is finalized as written, retailers would need to tear down and rebuild this compliance infrastructure, which will require an additional expenditure of resources with no apparent benefit to safety. Given the reliance of retailers have placed on important elements of the current regulatory regime (such as reliance on the ability to rely on manufacturer certification for domestically produced private label products, the current on demand process for certificates for imported products, and the ability to protect confidential information on electronic certificates provided for in the existing rule since 2008) and the lack of data suggesting a safety issue or other need for the change, it would be arbitrary and capricious, in violation of the APA, for the Commission to move forward with the proposed rule in the absence of articulated rationale and data to support this change in course.[25]

Therefore, we urge that the current rulemaking process be put on hold until the CPSC has an opportunity to conduct a robust review of the practices and procedures under current Part 1110 in order to identify any related enforcement concerns. It is only at that time, that the Commission will have adequate data and be able to articulate reasonable rationale to support a proposed rule correcting identified issues. We further urge the CPSC to work collaboratively with the regulated community to develop appropriate solutions.

[22] 78 Fed Reg. 28089.
[23] *Id.*
[24] 78 Fed. Reg. 28085.
[25] *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-11 (2009).

B. The CPSC's Proposal to Shift Certification Obligations from Domestic Manufacturers to Private Labelers will Fundamentally Change Manufacturer/Private Labeler Relationships, Reduce Safety, Result in Duplicative and Unnecessary Testing and Negatively Impact Small Private Labelers and Domestic Manufacturers

1. The CPSC's Original Decision to Designate Domestic Manufacturers as the Party Responsible for Certification of Domestically Manufactured Products is Consistent with the CPSIA, Good Public Policy, and Existing Commercial Practices

The CPSIA specifically provides the Commission with the discretion to designate manufacturers, importers or private labelers as the party required to issue certificates.[26] The Commission appropriately exercised this discretion in the original 2008 rule when it devised the current, elegantly simple solution: domestic manufacturers are responsible for certification of domestically produced products and importers are responsible for certification of foreign produced goods. Over the past five years, manufacturers, retailers and importers have dedicated resources and implemented compliance programs in reliance on the current designation of responsible parties. Despite the absence of any explanation supporting the change, proposed § 1110.7 now seeks to shift the responsibility for certification of domestic products away from domestic manufacturers to private labelers "unless the manufacturer issues the certificate."[27]

When developing the current certification program requirements, the CPSC expressly noted the need to "minimize confusion on the regulated community" and to "allow for fairness."[28] The CPSC achieved its stated goal as the current rule provides a uniform, consistent, and predictable means of certification. However, the proposed rule creates uncertainty and confusion unnecessarily undoing the Commission's prior achievement. Under the proposal, domestically manufactured products are certified by the domestic manufacturer, *unless*, they are privately labeled, in which case it is the private labeler's responsibility to certify, *unless* the manufacturer certifies. This creates uncertainty and an inconsistent and unpredictable environment that will lead to duplication of efforts, requiring both manufacturers and private labelers to pursue certification programs, rather than allowing manufacturers to focus on good manufacturing practices and retailers to focus on identifying good supplier partners.

From a policy perspective, the original rule got it right. It puts the certification burden on the domestic manufacturer, which is the party with knowledge of the product design and the party that actually *constructs* the product. The proposed shift away from domestic manufacturer certification to private labeler certification could result in a decrease in product safety and will inevitably lead to increased costs from duplicative testing along the entire supply chain.

[26] 15 U.S.C. § 2063(g)(4).
[27] 78 Fed. Reg. 28,107-28,108.
[28] 73 Fed. Reg. 68330.

2. The Shift Away from Domestic Manufacturer Certification Could Result in a Decrease in Safety

The Commission's original rule requiring the domestic manufacturer to certify product compliance places the responsibility on the party most knowledgeable about the product design and the manufacturing process, including the sourcing of raw materials and components and any material changes in the manufacturing process that might affect product safety and compliance. The proposed rule shifting the responsibility for certification reflects a misunderstanding of the role and responsibilities of private labelers and the extent of their involvement in the manufacturing process.

Indeed, the level of a private labeler's influence over the manufacturing process can vary greatly and will depend on the specific product involved and the resources of the private labeler. A private labeler may provide some product specifications details (for example, design, sketches, color, fabric, sizes, trim, allowable tolerances, etc.) or only more general characteristics or performance product specifications to a domestic manufacturer. However, under either scenario, it is the domestic manufacturer who is responsible for the sourcing and quality of the raw materials and components needed to produce the product, and for developing, operating and overseeing the product manufacturing process. Distancing the certification requirement from the domestic manufacturer increases the likelihood that a change affecting product compliance might be missed. Thus, the rule as proposed could potentially have a negative impact on safety.

3. The Proposed Rules Will Result in a Fundamental Change in Domestic Manufacturer/Private Labeler Business Relationships

The transfer of the requirement to issue the certificate also implies the transfer of the responsibility of "due care" from the manufacturer to the private labeler. A private labeler cannot rely solely upon the manufacturer's certification to issue a certificate when it is unlawful "to issue a false certificate if such person **in the exercise of due care** has reason to know that the certificate is false or misleading in any material respect."[29]

Read together, the proposed rule implies that, if the private labeler has the responsibility of due care in certifying the finished products, it also has the responsibility for the underlying compliance with all CPSC standards. As a result, the private labeler, who currently does not have any visibility into the manufacturing process, will necessarily need to become much more involved in the manufacture of the product. This will create unnecessary tension between private labelers with no manufacturing expertise trying to insert themselves into the manufacturing process in order to meet the new certification requirements and domestic manufacturers who seek to maintain sole control over their confidential and proprietary business operations. The result will be a decrease in innovation and further increase in cost as the manufacturer will have to provide more detail in order for the private labeler to certify a product's compliance with CPSC safety standards. The proposed approach over-engineers a solution to a non-existent problem but does nothing to improve safety.

[29] 15 U.S.C. § 2068(a)(6).

4. The Proposed Rules Will Result In Duplicative Testing and Are Inconsistent with the Certification Requirements in Parts 1107 and 1109

The Commission issued new Parts 1107 and 1109 regulations last year. These regulations clarified the requirements for periodic and material change testing in children's products and streamlined and eliminated duplicative testing by enabling certifiers to rely on component part and finished product testing done by others.[30] The CPSC has stated that the proposed Part 1110 revision is intended in part to bring the certification requirements in line with the Part 1107 and 1109 rules.[31] Unfortunately, the clarity and efficiencies provided by the new Parts 1107 and 1109 regulations will be completely undermined by the proposed regulation.

As noted above, shifting the certification burden from domestic manufacturers to private labelers implies a corresponding transfer of responsibility of "due care" for compliance to private labelers as well. Thus, in order to meet their 'due care" responsibility, private labelers concerned about the potential increased individual liability in the new proposed attestation requirement will insist on using test results from labs designated by the private labeler rather than relying on the domestic manufacturer's tests. For the same domestically manufactured product shipped to more than one retailer, additional multiple certificates and duplicative testing will ensue as each such retail private labeler will be compelled to do additional testing to ensure compliance in the name of due diligence. Such testing is inefficient, undermines the goals of Part 1107 and Part 1109 regulations and will impose a cost on industry that will not result in a safety benefit for consumers.

The likelihood of unnecessary, duplicative testing is especially concerning in difficult economic times and will inevitably lead to higher prices without any additional benefit to the consumer. Such duplication of effort is inefficient and contrary to the goal of promoting product safety while eliminating unnecessary compliance requirements, a goal that the CPSC just further promoted in the promulgation of amendments to Parts 1107 and 1109.

5. The Proposed Rules Create New and Unnecessary Burden for Small Business Private Labelers

Rather than streamlining the certification process and limiting adverse impacts on small businesses, the proposed rules do exactly the opposite. Under the current rules, it is the manufacturer of the product, who certifies the compliance of the product. As noted above, private labelers, in particular small business private labelers, rely on manufacturers' expertise in the areas of product design and manufacturing and to ensure that the product meets all applicable safety standards.

The proposed rules would require small business private labelers, who have limited resources and no expertise in manufacturing to now develop new costly testing and certification program that will have no added safety benefit. In the hyper-competitive U.S. retail market, private label

[30] 16 CFR 1107 and 1109.
[31] 78 Fed. Reg. 28,080.

products are used by retailers to distinguish themselves from competitors and to develop brand recognition and customer loyalty. The cost of the implementing the proposed duplicative testing and certification program may prove to be prohibitive to some small business private labelers. The end result will be that some small business private labelers will be forced to abandon a vitally important merchandise category, private label products, that helps them compete. In light of the lack of any enhanced safety benefit that will result from the proposed rules, to impose such a burden on small business private labelers is unreasonable.

6. The Proposed Rules Will Unfairly Disadvantage Domestic Manufacturers

The current system under which domestic manufacturers certify compliance (and assume the responsibility for the exercise of due care) encourages increased domestic purchases because retailers can depend on their domestic suppliers to absorb the liability costs for the products that they sell. That is, even if domestic products are a little more expensive, that increase in cost can be weighed against the financial benefit to the retailer of not having to assume compliance for those products. If private labelers are required to issue certificates and, therefore, assume additional liability for domestic products, domestic products will be less competitive because private labelers will no longer have an incentive to purchase from domestic manufacturers. Although assuredly unintended, one very real potential consequence of the proposed rule amendments could be for private labelers and retailers to decrease reliance on American manufacturing.

C. CPSC's Proposal To Eliminate Password Protection of Certificates and Require Public Disclosure of Confidential Business Information Will Eliminate Incentives to File Certificates Electronically, Violate Section 6(b) of CPSA, Increase the Risk of Fraudulent Certificates, and Will Impose Tremendous Economic Burdens on Issuers

The proposed rule requires parties that issue electronic certificates to provide CPSC with access to those certificates via a website without password protection. Specifically, proposed § 1110.9(c) provides:

> An electronic certificate meets the requirements of §§ 1110.13(a)(2), 1110.13(a)(3), 1110.13(b), and 1110.13(c) if it is identified prominently on the finished product, shipping carton, or invoice by a unique identifier and can be accessed via a World Wide Web uniform resource locator (URL) or other electronic means, provided that the certificate, the URL or other electronic means, and the unique identifier are accessible, along with access to the electronic certificate itself, *without password protection*, to the Commission, CBP, distributors, and retailers, on or before the date the finished product is distributed in commerce. [32]

The motivation behind the proposal is unclear as CPSC also has not explained why there is good reason to change its existing rule and policies, which currently allow for password protection and

[32] 78 Fed. Reg. 28,108 (emphasis added).

appear to be functioning well. As noted above, the CPSC's failure to do so raises potential APA concerns.[33] In making the change, the CPSC reasons that removal of password protection will be "easy and efficient" and that maintaining passwords for certifiers "could become burdensome" for the Commission.[34] However, there is no indication that CPSC has considered the burden that the removal of password protection would impose on certificate issuers.

As further detailed below, elimination of password protection will expose business confidential information to competitors and bad actors that will create numerous problems for certificate issuers, which CPSC should consider before finalizing the rule. Although we appreciate the need to ensure that certificates are easily available to regulators, the proposal is very risky. Accordingly, we recommend that the CSPC work with industry (including RILA) to develop a better solution.

1. The Proposed Rule Undermines the CPSC's Efforts to Reduce the Paperwork Burden of Hard Copy Certificates by Allowing for Electronic Certificates

Certificates contain a great deal of confidential business information. For example, they include details related to supply chains, product sourcing and manufacturing locations – and will include even more information now that CPSC has proposed to require specific details about the manufacturer's location on the certificate.[35] Certificate issuers often include proprietary product classification and numbering on a certificate as well, in order to precisely identify the product covered by the certificate. In fact, the proposed rule requires that such detailed information be included to identify the scope of the product covered.[36] In addition, where a finished product certifier relies on component part certificates, pursuant to Part 1109, details of the entire proprietary supply chain may be apparent on the face of a certificate.

As a result, certificate issuers closely guard the confidentiality of their certificates and the underlying data, and only provide them on an "as needed" basis. By eliminating the ability to password protect electronic certificates, this confidential information will be available not only to the Commission, CBP, distributors, and retailers as set forth in the proposed rule, but it will also be available to the general public, including domestic and foreign business competitors who will have unfettered access to proprietary supply chain information that may have taken retailers years to develop, as well as bad actors who seek to use the information to produce fraudulent documentation. Rather than encouraging certificate issuers to use electronic certificates, the proposed rules will have the perverse effect of creating an incentive (protection of business confidential information) for issuers to return to the laborious, twentieth century paper environment. Such a step backwards is clearly not in the best interest of government or business.

[33] *See FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1010-11 (2009).
[34] 78 Fed. Reg. 28,085.
[35] 78 Fed. Reg. 28,108 (proposed § 1110.11(a)(7)).
[36] 78 Fed. Reg. 28,108 (proposed § 1110.11(a)(3)).

2. The Proposed Rule Undermines the Protections Accorded to Confidential Business Protections Provided by Section 6 of the CPSA and Increases Potential for Counterfeit Certificates

The proposal is contrary to Section 6 of the CPSA, which exists to protect confidential details about manufacturers and private labelers from public disclosure.[37] As detailed above, the data contained on a certificate falls within the ambit of Section 6 of the CPSA and should be afforded the same protection. Section 6 recognizes that in some situations, the CPSC will require business confidential information in order to effectively investigate incidents and concerns about the potential safety of a product. The assurance of confidentiality provided by Section 6 allows manufacturers and private labelers to cooperate with the CPSC and disclose confidential information without fear that the information will be publically disclosed and potentially damage their business operations. The proposed rule to require companies to make certificates available without password protection would, in effect, force public disclosure, essentially undermining the purpose of the statutory protections afforded by the CPSA.

Further, under the proposal, certificate issuers would have no visibility as to how their proprietary information is being used by others and absolutely no control over where and how that information is handled. In addition to the competitive fairness issues raised above, we are concerned that counterfeiters around the world will have open access to details about the manufacturing process and will be able to copy and use those certificates to import illegal products into the U.S.

3. The Elimination of Password Protection for Electronic Certificates Will Create Tremendous Financial Burdens on Issuers

The current rules give issuers flexibility in the electronic platforms they use to maintain certificates. An electronic certificate meets the certification requirements if it can be accessed "via a World Wide Web uniform resource locator (URL) or other electronic means."[38] Today, GCCs are often not maintained in any web-based fashion and are often maintained on third-party sites (for imports), or at the suppliers (for domestic). These are "other electronic means" as permitted currently and under the proposed rule. However, as a practical matter certifiers will no longer be able to continue to be use these "other electronic means" without costly security modifications or transfer of the data to a certifier's unique electronic location.

Furthermore, eliminating password protection for electronic certificates will require retailers to build unnecessary redundancies into their systems. First, many retailers will create a new electronic system for certificates in order to protect their company networks from internet hackers. Without this measure, a savvy hacker would be able to access data far beyond what appears on the face of the certificate. Second, certificate issuers who will understandably want to avoid exposing details of their supply chain to the general public will not rely on component

[37] *See* 15 U.S.C. § 2055.
[38] 16 CFR Part 1110.

part certificates and will instead conduct duplicative testing to certify finished products, thereby eliminating Part 1109's intended efficiencies.[39]

Finally, our members appreciate the need to devise a workable solution to make certificates openly available to regulators while still protecting confidential information. However, leaving certificates easily accessible to anyone with internet access is very risky and imposes excessive costs on industry. Instead, we recommend that the CPSC work with industry to address specific concerns it may have regarding the current process of requesting and providing on-demand certificates. We would welcome the opportunity to work with the CPSC on this issue.

D. Proposed Requirement To Attach PDF Certificates to Import Documentation Will Not Further Laudable CPSC Goal of Increasing Agency Visibility to Non-Compliant Products

Proposed § 1110.13 would require the importer to file the required GCC or CPC electronically with CBP at the time of filing the CBP entry or the time of filing the entry and entry summary if both are filed together. We recognize and applaud the changes that CPSC has made to this section over the evolution of the proposal. Although the current proposal more clearly addresses the timing of certificate submission, as discussed in more detail below, it still propounds an unworkable solution that will overwhelm the CPSC in unnecessary paperwork and frustrate the import process for both CBP and the trade community.

1. <u>The Proposed Regulations Provide No Evidence Demonstrating Concern with the Current "On-Demand" Approach or Demonstrating that the Proposed Shift to "At Entry" Filing Will Enhance CPSC's Ability to Target Risk More Effectively</u>

We agree with the CPSC's long-term goal of targeting risk more effectively by utilizing the data on the certificates. However, the proposed rule does not explain how it will achieve this goal given CBP's current systems limitations that prevent true electronic filing of data.

Documents required for entry and automatic release are clearly enumerated in 19 U.S.C. § 1509(a)(1)(A). Most of these documents, including those related to other governmental agency requirements, are required to be maintained and available 'on demand' of the agency. The 'on demand' approach is also aligned with all other governmental agencies that have the right to make entry requirements.[40] The 'on demand' approach also follows CBP's recordkeeping requirements for import-related documents.[41] To the extent that the CPSC has concerns regarding the timeliness of importers responding to "on demand" requests, members would

[39] *See* 76 Fed. Reg. 69,546 (Nov. 8, 2011) ("[I]t may be more efficient to test component parts of consumer products before final assembly).
[40] Examples of agencies that use an "on demand" approach for entry requirements include the Federal Drug Administration, the US Department of Agriculture, the Federal Trade Commission, the Fish and Wildlife Service, the Animal Plant Health Inspection Service (with the exception of the Lacey Act).
[41] 19 C.F.R. Part 163 (Entry records shall be produced within 30 calendar days of a CBP request. *See* 19 C.F.R. § 163.6).

support the establishment of a reasonable timeframe (no less than 48 hours) within which importers would be required to furnish certificates subject to penalties for non-compliance.

2. The CPSC Should Heed the Example of the Lacey Act and Not Proceed with an "At Entry" Requirement

The import community and the U.S. Department of Agriculture (USDA) are still reeling from the "at entry" requirements of the Lacey Act, also passed in 2008.[42] The most recent amendments to Lacey Act were enacted to combat world-wide illegal logging and require importers to detail the genus/species and country of origin of the wood in imported products at entry. USDA has been inundated with the declarations required by that statute to be filed at entry, even though USDA is only part way through the Act's implementations (which arguably covers fewer products than the number of products that require certification under CPSC standards) and USDA has more staff available to process these documents.

Ironically, those who criticize the Lacey Act's statutorily imposed import documentation requirement point to the wisdom of the CPSIA and its optional provision for import documentation submission as a model for Lacey Act changes and one that could provide the USDA with a way to dig out from under the massive pile of paper with which it is currently faced.[43] CPSC should utilize the sound option provided by its statute to keep its "documents on demand" system using a more sensible risk-based approach in order to enhance its ability to identify problematic cargo without generating additional costs with absolutely no safety benefit to consumers.

3. The CPSC Should not Move Forward with the Proposed Unworkable Rule and Instead Should Consult with CBP to Develop a Rule to Meet the CPSC's Strategic Goals Without Unduly Burdening Importers

When Congress gave the Commission the authority to "provide for the electronic filing of certificates . . . up to 24 hours before arrival of an imported product," it mandated that any such new requirements be developed "[i]n consultation with the Commissioner of Customs."[44] The proposed rules do not indicate that the CPSC has consulted with CBP regarding key elements such as: the resources and personnel needed to handle the proposed electronic filing of certificates (whether by filing data elements or pdf documents); the utility or lack thereof of collecting data from pdf documents; and planning and funding for a system that will allow for the electronic filing of certificate data elements. Instead, the proposed rule suggests a lack of coordination with CBP on the important operational implementation of the proposed electronic certificate, leaving the "technical requirements" of implementation with CBP.[45] As noted below, there are significant "technical" issues with the implementation of the proposed rule to require "electronic" filing of certificates "at entry."

[42] 16 U.S.C. § 3371 *et. seq*.
[43] *See e.g.,* Oversight Hearing on "The 2008 Lacey Act Amendments," House Committee on Natural Resources, May 16, 2013 http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=332895.
[44] 15 U.S.C. § 2063(g).
[45] 78 Fed. Reg. 28090.

CBP's Automated Commercial Environment (ACE) portal does allow importers to file entries by electronic transmission of data elements. Currently, the ACE portal does not have the capacity to accept the data elements from the certificates electronically. Upgrading ACE presents a continuing funding challenge for CBP and funding to complete development of currently identified objectives beyond 2013 remains uncertain and pending in Congress.[46] The proposed rule fails to provide any information on whether or when CBP's ACE system will be upgraded to allow electronic upload of the data elements.

Additionally, even if the ACE system were updated to allow for the transmission of data elements, this option would only be available to importers that use the ACE system. Currently, over 90% of customs entries are filed electronically. However, at this time only approximately 25% of all importers are submitting entries through ACE. The remaining 75% who submit their entries electronically through another alternative system, would be left without an option to submit this information.

The CPSC suggests that a certificate could be filed as a pdf document and inserted "with the entry."[47] However, there is currently no system in place to do so. CBP does have a Document Image System (DIS), which allows participants to submit electronic images of a specific set of CBP and partner government agency (PGA) forms electronically. CBP recently announced that phase two of the DIS test will support additional PGA forms and documents. However, in the lengthy laundry list of new PGA forms and documents to be included in phase two, CPSC certificates are conspicuously absent. [48]

Therefore, the proposed rule effectively requires importers to submit certificates to CBP at the time of entry either in hard copy or as a pdf sent to the CBP through some other method of electronic communication. Both of these options are a step backwards from the paperless environment that CBP and importers have been working towards for years and would impose significant burdens on importers. A brief survey of our members indicated that over 95% of entries are paperless. The average RILA importer files 33,465 entries each year with several member importers filing significantly more entries per year. Of these entries, on average 54% are products that require a certificate of compliance. At a minimum, this is a manual upload burden relating to at least 18,071 entries annually, but is probably higher because almost 40% of the respondents file consolidated entries covering multiple shipments with approximately 5,100 individual SKUs covered by a certificate of compliance. The proposed rule does not appreciate the duplicative nature of the filing request as a single certificate will likely cover products shipped in multiple or repeated shipments, exponentially increasing the administrative burden associated with the submission of duplicative certificates.

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[46] *See* S. 662 § 206, "Trade Facilitation and Trade Enforcement Reauthorization Act of 2013" (Latest action listed on THOMAS is that hearings have been held by the Committee of Finance).
[47] 78 Fed. Reg. 28029.
[48] http://www.cbp.gov/linkhandler/cgov/trade/automated/modernization/single_window.ctt/single_window.pdf

In addition, filing certificates as a pdf document, a format which is unsearchable, would not facilitate effective data correlation and targeting by CPSC and CBP. In order to review the information contained in a pdf certificate, CPSC or CBP personnel will be required to manually open and physically review individual documents. Neither CPSC nor CBP has the internal resources to manually search these documents to effectively target risk. Therefore, the CPSC is proposing to require the collection of a significant amount of information, which will greatly increase the administrative burden on importers, without articulating how requiring certificates at the time of entry rather than 'on demand' would help target risk.

The proposed rules should be put on hold until the CPSC has meaningful consultations with CBP to develop a process for obtaining adequate information to allow CPSC to conduct risk analysis while maintaining CBP's paperless automated entry process and minimizing the burdens on trade. These provisions should not be finalized until consultations are completed and the provisions are revised accordingly. In the meantime, the Commission should continue with the 'on demand' method.

4. <u>The Proposed Rules Do Not Adequately Consider the Lower Safety Risks Posed by Importers Designated by CBP as Low Risk</u>

The proposed rule also treats all importers the same, without acknowledging the extensive efforts undertaken by CBP and within the importing community to increase trade facilitation for those importers who have shown reduced compliance risk through voluntary participation in CBP's Importer Self-Assessment (ISA) program and/or the combined CBP/CPSC Importer Self-Assessment Product Safety Pilot (ISA-PS) program.

ISA is designed to assist CBP by identifying companies who have implemented auditable compliance procedures around their import function, thereby allowing CBP to focus its efforts on companies that pose a higher risk. To become a member of the ISA-PS program, an importer must demonstrate to the CPSC that it has aligned with the risk identification goals articulated by CPSC in its desire to collect the information listed on the certificates. CBP has worked closely with trade over the years to establish benefits for low risk importers in the ISA and ISA-PS programs. One such benefit is paperless releases, which means importers provide entry information in an Electronic Data Interchange (EDI) transmission of entry data elements. Shipments are automatically cleared without the need to provide supporting documentation at entry. Any questions about or requests by CBP for entry documentation are made after the shipment has already cleared customs. The proposed rule will negatively impact low risk importers in the ISA and ISA-PS programs by decreasing paperless release rates and slowing down cargo flow.

As noted above, we do not believe that the CPSC should move forward with the proposed "at entry" filing requirement. However, in the event that the CPSC decides to do so, CPSC should also consider a tiered approach to importers based on their proven ability to develop and implement internal controls for import operations.

5. The Proposed Rule May Violate the World Trade Organization Agreement on Technical Barriers To Trade Because It Disproportionately Impacts Importers

The proposal would require importers to file electronic certificates but allow domestic manufacturers to choose whether to produce a hard copy or electronic certificate.[49] In practice, a domestic manufacturer may avoid making its confidential business information publicly accessible on a website without password protection by electing to use hard copy certificates. Importers that must issue electronic certificates, however, will not have that choice and will be forced to publicly disclose confidential business information.

In addition, the increased administrative burden placed upon importers by the proposed rule presents a technical barrier to trade that may not have been fully appreciated by the CPSC and requires additional analysis by the Office of Management and Budget (OMB).[50] As noted above, on average, RILA member importers file 33,465 entries per year and 54% of the imports are products that require a certificate of compliance. Given the possible combination of the number of covered products within an entry, an entry covering multiple shipments, and multiple entries delivering one covered product, the CPSC should reconsider the disproportionate administrative burden it is asking of importers versus domestic manufacturers.[51]

6. The CPSC Should Clarify Operational Aspects of the Implementation of the Proposed Rule Changes.

The current proposal lacks information and details regarding the specific operational implementation of the proposed rule. For example, there is no discussion of the consequences of failing to provide certificates at the time of entry. We are concerned that the absence of the certificate could lead to the shipment being denied release, delayed at the border or other administrative penalties. Additionally, the proposed rules do not indicate how the certificates will be maintained and retained after entry, or which agency will be the custodian of the documents.

The potential impacts to the customs clearance process and operational implementation of the proposed rule should be clarified by the CPSC and CBP prior to finalization so that importers can plan their supply chains appropriately. At a minimum, the CPSC should delay the effective date for these requirements to allow for adequate coordination between CPSC and CBP and to allow importers to prepare adequately.

[49] 78 Fed. Reg. 28,108 (proposed § 1110.13(a)(1) ("[T]he importer must file the required GCC or CPC electronically with CBP . . . .").
[50] *See* The Agreement on Technical Barriers to Trade, World Trade Organization http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.
[51] The CPSC is also imposing duplicative requirement of requiring importers to submit the certificates at the time of entry and then to also provide access via a non-password protected website for electronic certificates. *See* proposed § 1110.9(c).

7. The CPSC Should Form a Multi-Party Working Group to Develop a Workable Solution that will Enable CPSC to Effectively Target Unsafe Products Prior to Importation

Government-industry partnership in tackling difficult challenges can yield significant benefits for both the government agency and industry involved. An example of such a government-industry partnership is the CBP's partnership with the Advisory Committee on Commercial Operations (COAC. CBP works closely with COAC to develop implementation strategies for key agency initiatives in a manner that is least burdensome on trade. [52] As the CPSC looks to identify alternative solutions to better target risk through the importing process, we encourage the Commission to establish a joint working group with importers and CBP to collaborate on developing solutions that will address the concerns of all parties.

D. The Proposed Record Keeping Requirements and Additional Certificate Contents are Unclear, Add Significant Burdens with No Added Safety Benefit and Should be Modified

The proposed rules make significant changes to the content requirements for certificates.

As detailed below, retailers have concerns with several aspects of the new content proposal.

1. Proposed 1110.11(a)(1)(4) (Identification of the Component Part or Finished Product) Should be Clarified to Ensure that Industry Maintains the Efficiencies and Benefits of Part 1109 (the Component Testing Rule)

Part 1109 clarifies the responsible party for component part certification and streamlines the certification process. However, these efficiencies and benefits could be negated if the proposed rule is read to require listing the test results for all component parts of a product on a certificate, whether a GCC or a CPC. We are also concerned that interpreting the rule to require a listing of all components and applicable rules, standards, or bans, combined with the suggestion that the Commission seeks to require certification to exemptions, converts the certification process into a bill of materials for the product adding significant burden to the process. Such a requirement would add an enormous amount of volume to the certificate increasing issuers' administrative and record keeping burdens contrary to the essential purpose of Part 1109, which is to lessen the burden on certifiers by allowing them to rely on testing of component parts that was conducted earlier in the supply chain. We assume the Commission is proposing to require certifiers to list the rule to which a component part is being certified only as an option when a component part certification is being created as permitted in the 1109 rule. Accordingly, we urge the Commission to clearly state the requirement in the final rule to clean up this ambiguity.

[52] See, CBP's May 31, 2013 Press Release touting the importance of public-private collaboration and partnerships. http://www.joc.com/regulation-policy/customs-regulations/us-customs-regulations/cbp-and-coac-meet-discuss-progress-trade-modernization-and-facilitation_20130602.html.

2. Proposed 1110.11(c) (Certification of Statutory or Regulatory Testing) is Inconsistent with the Commission's Stated Policy and Goal of Reducing Unnecessary Testing and Paperwork

The Commission has consistently stated that the purpose of certification is to ensure issuers take the necessary precautions through a reasonable testing program to ensure the safety of consumer products sold on the U.S. market. The goal has not been testing and certification just to have a piece of paper. The Commission also has consistently indicated that it is unnecessary for companies to evaluate a product to standards that cannot possibly apply to the product. For example, in the CPSC's *Statement of Policy: Testing and Certification of Lead Content in Children's Products*, the Commission found that "certain products, by their nature, will never exceed the lead content limit so those products do not need to be tested and do not need certifications to show that they comply with the law."[53] Therefore, we question the utility of requiring certification that a particular standard does not apply to a product or that the product falls under an exception to a rule, standard or ban. The rule should be revised to eliminate this requirement. If the Commission moves forward with this requirement, it should develop a list of products and materials that are excluded from this requirement.

3. Proposed 1110.11(a)(2) (Date of Initial Certification) is Based on a Misunderstanding of Product Supply Chains and Should be Deleted in its Entirety as Fatally Flawed

The proposed rule would impose a new requirement for issuers to identify the date of the product's initial certification on the certificate of compliance. Although a seemingly simple addition, such a requirement would instead add significant recordkeeping requirements. As the Commission did not explain the reasoning behind the proposal, CPSC may not fully understand the impact the proposed rule would have as explained more fully below.

Retailers carry a broad range of consumer products from fashion and "trend right" products, which may have very short lifecycles, to core or basic items, which may remain part of the retailer's product line up for years, if not decades. Over this time period, the raw materials, components and supplier manufacturer may change multiple times even though the "product" remains the same. The potential combinations increase exponentially the longer a retailer carries a product.

The proposed requirement would impose significant burden if the Commission expects certificate issuers to trace back to earlier versions of products with different manufacturers and different suppliers of different components over time. The problem would be compounded if language of the proposed rule is also read to require retailers to track testing and certification of same or similar products for years beyond the required record keeping period for individual certificates.

[53] http://www.cpsc.gov/PageFiles/110720/leadpolicy.pdf . See also, the Commission's *Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act at* http://www.cpsc.gov/PageFiles/126588/componenettestingpolicy.pdf listing various materials that "do not normally contain phthalates and, therefore might not require testing or certification."

In addition, the proposed date of initial certification requirement conflicts with the Part 1107 reasonable testing requirements. Pursuant to those rules, a new product must be certified when a material change has been made to a product necessitating an additional test. Accordingly, CPSC should not require retailers to trace back to prior iterations of products with the same or similar design prior to a material change even if the certifier is relying on some earlier test results for components for which there has been no material change.

Moreover, although the Part 1107 periodic testing requirements mandate the minimum requirements for timing of the testing and certification of products, many retailers test their products more frequently than required by the regulation. However, proposal's requirements would increase the burden of issuing a certificate. As a result, the proposed rules could incentivize less frequent testing – clearly not the intended goal of the rule.

Consequently, the Commission should finalize the rule without the proposed initial certification requirements and clarify that a new certificate, without such onerous recordkeeping requirements, can be issued each time the certifier decides that new testing is necessary to demonstrate compliance.

4. Proposed 1110.11(a)(10) (Attestation of Compliance) and Proposed 1110.11(a)(5) (Identification of Certifying Party) Are Unnecessary, Will Increase the Cost of Compliance and Will Provide No Additional Safety Benefit

Proposed 1110.11(a)(10) would require certificates to include an attestation of knowledge regarding the criminal ramifications of making false statements to the government. We are deeply concerned that such an attestation when coupled with the requirement for identification of the individual certifying proposed 1110.11(a)(5) raises the specter of individual criminal liability. This result is well beyond the scope or intent of the CPSIA.

The CPSIA was intended to raise consumer confidence in the safety of products on store shelves and ensure that companies that make those products are responsible for compliance with CPSC. The statutory language related to certifications identifies entities, such as domestic manufacturers and importers, as the parties responsible for certification, not individuals. Nor does the legislative history of the Act suggest that Congress intended for the certification process to be a "gotcha" for individual liability for paperwork violations. The CPSIA was not intended to put individuals at risk of criminal sanctions for potentially minor paperwork violations.

While we appreciate the Commission's statement that the attestation "would make plain to everyone the scope and gravity of the obligation being made," the Commission has acknowledged in other rules that certification can be based on the certifications of others or reasonable due diligence. The criminal sanction language here runs contrary to the Commission's recent efforts to facilitate the movement of certificates through the system in a way that alleviates some of the difficulties and expense of certification. Needless to say, the threat of criminal sanctions and the uncertain definition of a "knowing" misstatement (as compared to the Commission's requirement for the exercise of due diligence), adds significant

uncertainty and burden to the certification process that are not accounted for in the Commission's time and cost estimates.

Accordingly, we urge the Commission to expressly recognize in the final rule that any individuals identified on a certificate of compliance are acting in their representative capacities on behalf of the issuer and not in their individual capacities.

5. Proposed 1110.11(a)(3) (Identification of Certificate Scope) Should be Clarified To Provide Issuers with Clear Options for Defining the Certificate Scope To Ensure Consistency with Part 1107

Proposed 1110.11(a)(3) requires certifiers to "[i]dentify the scope of finished product(s) or component part(s) for which the certificate applies, such as by a start date, start and end date, lot number, starting serial number or serial number range, or other means to identify the set of finished product(s) or component part(s) that are covered by the certificate." [54]

Our members are concerned that the proposed rule, as written, could be interpreted to require certifiers to update the certificate with every shipment to account for new production. Such a result would conflict with the Commission's decision in its protocols and standards for continued testing of children's products to allow certification on a once yearly basis. The Commission has not identified, nor can we, any added safety benefit to such updates if the product has not changed. Moreover, issuing an updated certificate with each shipment would create significant additional burdens and costs for production. Such burdens have not been considered in the Commission's cost-benefit analysis. Accordingly, we recommend that the Commission finalize this provision in a manner that allows issuers the option of how to identify the products covered by the certificate.

6. Proposed 1110.11(a)(7) (Date and Place of Manufacture) Should be Modified to Reflect the Realities of the Sourcing Process

Proposed 1110.11(a)(7) requires certifiers to provide the date (month and year, at a minimum) and place (including a street address, city, state or province, and country or administrative region) where the finished product(s) or component part(s) were manufactured, produced, or assembled. As discussed more fully below, we are concerned that all of this information may not be available in every instance, and therefore, recommend that the final rule incorporate some flexibility in this provision.

For example, when a certificate is first issued for a new product, the certifier may not know the end date of the production likely to be covered by the certificate. Production might continue for some period of time, stop when orders fall off, and then restart again when a new order comes in with no material change in the product or manufacturing process that would necessitate a new certificate. As a result, importers may continue to receive shipments of products covered by a certificate well after the first shipment and certificate is issued. As written, the proposed rule

[54] 78 Fed. Reg. 28,086.

could be read to require a new certificate with every shipment to account for renewed production despite the fact that the product has not changed. Similar to the concerns we expressed in subsection 5 above, such a requirement could create significant additional burdens and costs with no added safety benefit further conflicting with the Part 1107 rules, which allow certification on an annual basis.

Additionally, the requirement for a street address for the manufacturer fails to recognize that such information is not always available in different parts of the world. In Asia, in particular, factory addresses are not necessarily listed in the street address format we are accustomed to here in the United States. Accordingly, the final rule should not incorporate the proposed requirement to provide street address information in all circumstances, but instead allow reasonable flexibility for identifying the location of the facility. In addition, the final rule should not require certificates to identify the specific date of manufacture.

7. Proposed 1110.11(a)(5) (Contact Information for the Party Certifying Compliance) and Proposed 1110.11(a)(6) (Contact Information for Individual Maintaining Records) Should be Amended to Ensure That the CPSC has Current Information for Product Safety Monitoring and Enforcement Purposes

The current language of proposed 1110.11(a)(6) requires the specific email and mailing address of the individual signing the certificate. Given that individuals with this responsibility for an issuer may change over time, the rule should be clarified to allow the certifier to use a group email account so that the email can go to the person holding that position at any given time, not a specific individual's email address who may have moved on to different responsibilities or left the company. Allowing for the use of a group email address will ensure that the Commission's inquiries will be directed to the appropriate individuals currently responsible for certification.

Similarly, the records custodian is another position likely to change over time. In order to ensure that the CPSC has current contact information for a company's record custodian and eliminate any potential delays in obtaining needed information, we suggest allowing a group email and the designation of the title or position in the certifying organization rather than a specific named individual to account for likely changes over time.

8. CPSC Should Harmonize the Recordkeeping Periods for GCC's and CPC's to Three Years.

As initially envisioned, the proposed rule would have required issuers to maintain CPC's for five years and GCC's for three years.[55] Ultimately, however, the Commission proposed to "harmonize" these time periods and instead require the maintenance of both types of certificates for five years.[56]

[55] 78 Fed. Reg. 28,086.
[56] 78 Fed. Reg. 28,109.

The CPSC provides no evidence of additional safety benefits or justification for choosing the longer period for record keeping rather than harmonizing to the shorter three year period. The Commission takes the position that electronic storage costs are negligible, and therefore assumes that lengthening the record retention period will create minimal burden for certificate issuers.[57] This assumption is not factually correct. Disk space, maintenance, and storage do cost money and, depending on the volume of information to be retained, the costs can be substantial. The costs related to record retention will increase dramatically if private labelers are required to maintain duplicative testing and certification records. Additionally, implementation of the proposed certificate requirements without the modifications and clarifications suggested in these comments, will increase the volume of information impacting record keeping costs. In contrast, the CPSC provided no evidence of additional safety benefits or other justification to support the longer period for record keeping. Indeed, in the absence of a clear rationalization, the Commission could have chosen to "harmonize" the recordkeeping requirement at three years, which is the standard that we would propose that the Commission adopt.

E. The CPSC's Inadequate Cost-Benefit Analysis Does Not Support Moving Forward with Proposed Provisions that Do Not Enhance Product Safety

Benefit-cost analysis is an important tool for the development of sound regulations. Both the current administration's executive orders[58] and the recent recommendations from the Administrative Conference of the United States[59] recognize the value of ensuring in a transparent manner that the benefits of a proposed rule justify its costs. Accordingly, we were pleased that the Commission included a benefit-cost analysis as part of the regulatory flexibility analysis section in the proposed rule. Unfortunately, as detailed more fully below, the analysis does not consider many of the true costs that the regulation would impose if finalized as proposed.

1. <u>The Significant Costs of the Proposed "At Entry" Filing Requirement Are Not Justified by the Lack of Any Enhancement of Product Safety</u>

The proposed rule would replace the current "on demand" system with a requirement to file certificates when the product enters the United States. As discussed more fully above, the Commission did not identify any *realistic* increase in safety or other benefits that would result from the proposal for "at entry" filing. This is because current government systems do not currently have the ability to accept electronic certificate data elements. Therefore, industry would be required to incur significant costs to change its systems to permit them to file PDF copies of the reports manually A survey of our members suggests an average number of entries per year of 33,465 entries each year with several member importers filing significantly more entries per year. Most companies do not file one entry per individual product type suggesting that a pdf system for the certificates would result in confusion as to which certificate covers which product in a shipment. Moreover, consolidated entries can cover multiple shipments, which again suggests that confusion may arise at the ports as to which certificates in which entry

[57] 78 Fed. Reg. 28,091.
[58] Exec. Order No. 13,563, 76 Fed. Reg. 381 (Jan. 21, 2011).
[59] http://www.acus.gov/sites/default/files/documents/Recommendation%202013-2%20%28Benefit-Cost%20Analysis%29.pdf

cover which shipment. Those details should be specified in the rule and as written the burden and cost of working through those issues falls to the importer and CBP and is not reflected in the proposed rule's regulatory flexibility analysis.

Just implementing the information technology and system resources to convert the present "on demand" certificate system to one where entries are filed in a pdf format at the port is estimated to cost over $250,000 on average by members who participated in our survey and would require companies to add additional personnel and to make changes to their companies' IT system. The number is only an estimate and could greatly increase depending on specifics of the final requirements. Companies also estimated that the proposed rule would take at least 18 months to implement. Moreover, if 90 percent of the existing entries require even an additional thirty minutes to process requiring the addition of full time employees, the cost to the importers and retailers could potentially cost millions. An accurate financial estimate would require a better understanding of the IT systems that would be needed with the proposed rule. The cost could be double if companies are required to develop and implement an interim system allowing scanning and processing of pdfs and a future system to input data directly to the CBP's automated entry system from certificate data fields.

Moreover, the fact that pdf copies would need to be manually searched means that the proposed system would not provide a benefit such as increased product safety, but would instead, impose costs on the agencies responsible for manually reviewing the certificates. However, none of these costs or the absence of benefit is reflected in the Commission's analysis. This is all the more reason to delay the proposed rule, coordinate with CBP first, clearly define the system that will be used, and implement it with sufficient notice and coordination with the importer and broker community to avoid unnecessary expenses.

2. <u>CPSC has Also Failed to Consider the Costs Associated the Proposed Elimination of Password Protection for Electronic Certificates</u>

Similarly, the CPSC has failed to adequately evaluate the burden that will be imposed by the proposal to eliminate password protection for electronic certificates. As discussed above, the potential for disclosure of confidential information and access to company's networks will require companies to build new systems to protect company networks and information. Additionally, currently companies often use "other electronic means" permitted by the current rule to maintain certificates. These "other electronic means" include maintaining certificates on third-party sites (imported products), or at the supplier's site (domestic products). Although maintaining certificates by "other electronic means" would be allowed under the proposed rule, however, as a practical matter "other electronic means" will not be able to continue to be used without costly security modifications or transfer of the data to a certifier's unique electronic location.

3. CPSC's Analysis Does not Include Any Costs Related to Duplicative Private Labeler Testing

The CPSC has concluded that the proposal to shift the responsibility for certification to private labelers of domestically produced products should not result in the duplication of efforts.[60] This assumption is incorrect. As detailed above, the proposed shift in responsibility for certification implies a corresponding transfer of responsibility of "due care" for compliance to private labelers as well. In order to meet their 'due care" responsibility, private labelers concerned about the potential increased individual liability in the new proposed attestation requirement will insist on creating and implementing new testing and certification processes. The cost of this unnecessary, duplicative testing has not been considered by the CPSC.

We urge that the Commission take into consideration the significant costs identified above and revise its analysis to reflect accurate estimates of the burden and cost of implementation of the proposed rule. Then, the absence of any enhanced safety benefits of the proposed rule should be carefully balanced against its significant burden and costs.

CONCLUSION

RILA members recognize the CPSC's leadership in the area of product safety. RILA members share the CPSC's commitment to ensuring the safety of all consumer products sold in the U.S. market. Our comments are intended to inform the CPSC of the serious concerns regarding and potential unintended consequences related to the proposed rule. We urge the Commission to use our suggestions and comments to develop a rule that will truly enhance product safety without imposing unnecessary burdens on industry.

Specifically, we request the CPSC:

1. Suspend the current rulemaking process until it has the opportunity to review implementation of the current rules, identify any enforcement challenges to the current procedures, and then, in coordination with CBP and the regulated community, work to develop appropriate solutions;
2. Continue to designate domestic manufacturers as the entities responsible for certification of domestically manufactured products;
3. Withdraw the proposal to eliminate password protection for electronic certificates, or alternatively, ensure that the final rules provides adequate protections for confidential business information consistent with Section 6(b);
4. Continue with the current "on demand" system and delay the implementation of the proposed "at entry" filing requirement until the action identified in point 1 above is completed and after adequate IT systems are in place;
5. Exempt companies who are members of trusted partner programs, ISA, ISA-PS and retailer reporting from any "at time of entry" filing requirements and allowed these companies to continue to present certificates "on demand;"

[60] 78 Fed. Reg. 28084

6. Establish a joint government/industry/stakeholder working group, similar to CBP's COAC that can work collaboratively to develop solutions to enforcement challenges and on implementation of CPSC's strategic initiatives;
7. Revise the proposed certificate content requirements in accordance with the suggestions contained in these comments, including a clarification that a party certifying the safety of a product is doing so in a representative not individual capacity; and lastly,
8. Revise its analysis to reflect accurate estimates of the burden and cost of implementation of the proposed rule and carefully balance the absence of any enhanced safety benefits of the proposed rule against its significant burden and costs.

We appreciate your consideration of our comments and look forward to our continued partnership. Do not hesitate to contact me if you have any questions or need any additional information.

Sincerely,

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