Todd Stevenson
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

RE: Comments on CPSC Docket No. CPSC-2013-0017 (Notice of Proposed Rulemaking: Certificates of Compliance, May 13, 2013)

Dear Mr. Stevenson:

The Footwear Distributors & Retailers of America (FDRA) appreciates the opportunity to comment on the U.S. Consumer Product Safety Commission's (CPSC) notice of proposed rulemaking regarding Certificates of Compliance, 16 CFR part 1110.

Founded in 1944, FDRA is the oldest, largest, and most effective footwear trade association in the U.S. It represents the full breadth of the footwear industry, supporting more than 100 companies and over 200 brands, from research, design and development, to manufacturing and distribution, to retailers selling to consumers all over the globe.

FDRA members are thoroughly committed to producing and selling footwear that meets all product safety requirements. Many of FDRA's members participate in the Association's Product Safety Working Group, holding regular calls to discuss important product safety regulatory compliance developments. In addition, FDRA hosts in the U.S. a twice annual product safety and environmental compliance conference at which CPSC commissioners have frequently spoken. FDRA also annually organizes and hosts several product safety and environmental compliance conferences in different locations in China which are attended by representatives of a large number of factories that produce footwear for FDRA members and American consumers.

Proposed §1110.11(a)(7) What must the Certificate Contain?

This proposed regulation requires that the certificate include the "place (including a street address, city, state or province, and country or administrative region) where the . . . product(s) . . . were manufactured . . ." §1110.11(a)(7). The Preamble explains that "place" is meant to include a street address in all circumstances . . ." 92 *Fed. Reg*. 28087. Further the Preamble explains that "[t]he Commission is considering requiring certificates to state not only the place of manufacture . . . but also to identify the manufacturer, including foreign manufactures." *Id*.

It's clear that the requirement that the certificate include the street address of the manufacturer is an attempt by the CPSC to get to the identity of the manufacturer through "the backdoor." The Preamble leaves little doubt that this is the purpose of requiring the address on the certificate, because the Preamble states that the CPSC is considering requiring that the certificate "identify the manufacturer." *Id*.

In proposing to add the identity of the manufacturer to the certificate, the CPSC seems to forget that in 2008 when the CPSC issued its initial 16 CFR part 1110 Rule, the regulated community strongly opposed the requirement that certifiers identify their foreign manufacturers on their certificates. The CPSC responded by backing away from its initial suggestion that the identity of the manufacturer be included on the certificate. Almost five years later the CPSC is back proposing once again that the identity of foreign manufacturers be included on certificates. However, in the five years since the promulgation of the initial part 1110 Rule, the commercially sensitive nature of that information has not changed. For some of FDRA's members, the identity of the manufacturer of the footwear that it imports is private, commercially valuable, information that it considered highly proprietary. The CPSC acknowledges as much: "Stakeholders have argued in other contexts that the name of a foreign manufacturer is proprietary." *Id*. at 28090.

The CPSC claims that the identity of the manufacturer would "be useful to the Commission and distributors in recall situation . . ." *Id*. But this is not the reason that the CPSC wants an importer to identify the manufacturer, because in the limited situations that result in a recall the importer would be obligated to provide the identity of the manufacturer of the goods being recalled to the CPSC. The real reason that the CPSC wants this information is that explained by Carol Cave, the CPSC's Director of the Office of Import Surveillance, during her numerous public presentations. The CPSC intends to select goods to be inspected at the port based, in part, upon the identity of the manufacturer of those goods.

The CPSC appears to be operating under the false assumption that if a foreign-based manufacturer produces *some* goods that are not compliant with a product safety rule then there is high likelihood that *all* goods that the factory produces will be non-compliant. This premise is much too simplistic, because it fails to take into account the much more important role that the importer plays in the process. It is the importer that contracts with the factory for the production of the goods and it is the importer that mandates to the factory the steps that the factory must take, consistent with the importer's obligations under its product certification and testing program, 16 CFR part 1107, to ensure that the goods that it produces for that importer meet all product safety rules. Thus, FDRA's members object to the suggestion that their goods should be stopped for inspection at a port because of the identity of the manufacturer of those goods. That approach ignores the many hours of effort that FDRA members put forth to ensure that their products are compliant with all product safety rules.

Proposed §1110.11(c) Statutory or Regulatory Testing Exclusions

This proposed amendment states that "[i]f a certifier is claiming a statutory or regulatory testing exclusion to an applicable consumer product safety rule . . . in addition to listing all applicable rules, . . . a certifier shall list all applicable testing exclusions and include on the certificate the basis for the statutory or regulatory testing exclusion . . ." § 1110.11(a)(c).

Although FDRA has sought guidance from the CPSC staff on the meaning of this proposed amendment, the FDRA remains uncertain as to how the CPSC would interpret this provision should the CPSC adopt as final proposed § 1110.11(a)(c). Based upon the proposed § 1110.11(a)(4)[1] and the example given in the preamble to the proposed rule,[2] FDRA understands the proposed rule to require a certifier to list all applicable product safety rules on a product's certificate, even if the certifier need not test that product to demonstrate compliance with one or more such product safety rules. Because children's footwear is subject to two primary CPSC-mandated product safety rules—the lead in substrate and lead in paint rules—and because FDRA members address compliance with both of those rules on the finished product certificates that they issue,[3] proposed § 1110.11(a)(c) does not appear to impact FDRA members. The FDRA however requests that the CPSC make clear the limited purpose of proposed § 1110.11(a)(c).

FDRA is, however, concerned that the CPSC might improperly try to expand the interpretation of proposed § 1110.11(a)(c) to require a certifier to list each accessible component part on its finished product certificates and state whether each such component part has been tested to demonstrate compliance or has been exempted by the CPSC from such testing. The CPSC should not interpret proposed § 1110.11(a)(c) in that manner, because such an interpretation would: (1) lack statutory authority; (2) be contrary to CPSC long-standing policy (since the CPSC issued its initial Part 1110 Rule on November 18, 2008, 73 *Fed. Reg*. 68328) that importers of children's products have implemented successfully for years; and (3) burden importers with a new and entirely unwarranted, costly administrative burden.

First, the Consumer Product Safety Act (CPSA) would not authorized the CPSC to implement a regulation requiring issuers of finished product certificates to "deconstruct" a children's product and list that product's multiple components that are all subject to the same product safety rule. Rather, Section 14(a)(2) of the CPSA requires an importer of a children's product to "issue . . . a . . . certificate that certifies compliance with all applicable children's

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[1] Proposed § 1110.11(a)(4) does not require finished product certificates to identity applicable product safety rules on a component-by-component basis. Rather the proposed regulation states: "(a) *Content requirement*. Each certificate must: (4) State each consumer product safety rule under the CPSA . . . to which the finished product(s) . . . are being certified. Finished product certificates must identify separately all applicable rules, bans standards or regulations . . ."

[2] The preamble to the proposed regulation gives an example where the certifier would not otherwise address the lead in substrate rule, but for the application of the proposed §1110.11©. The proposed regulation's preamble makes this point by way of an example: a certificate for a non-toy children's product that is made from painted, but otherwise untreated, wood would have to list both the "Commission's rule on lead in paint" (16 CFR part 1303) and "the lead content requirement of section 101 of the CPSIA." The proposed rule would require that the lead content rule be listed on the certificate even though the certifier need not test the wood because the certifier "can rely on the Commission's determination at 16 CFR 1500.91 that untreated wood does not contain more than 100 ppm lead content." 92 *Fed. Reg*. 28088.

[3] Many of the FDRA's member's certificates include the following, or substantially similar, language: "The product identified above and its applicable component parts are hereby certified to meet all applicable U.S. Consumer Product Safety Commission standards, as identified below: Lead in paint 16 CFR 1301—90 pm; Lead in substrate CPSIA HR4040—100 ppm."

product safety rules, in which case each such rule shall be specified." The CPSA does not authorize the CPSC to issue a rule requiring a finished product certifier to list each component in a children's product and requiring separate product safety rule certification of each component part.

Second, such a rule would be entirely unnecessary, because FDRA members understand full well, from years of practical experience, their obligation to certify their footwear's compliance with each applicable product safety rule whether an accessible component part must be tested for compliance or exempt from such testing by the CPSC's determinations in 16 CFR § 1500.9(d). And, in any event, the third-party labs that FDRA members use for their lead in substrate compliance testing also are fully aware of which materials are and are not exempt from compliance testing.

Finally, such an interpretation would have a significant adverse and costly impact on FDRA members, because footwear components are often made from materials that the CPSC has determined do "not exceed the lead content limits under section 101(a) of the CPSIA," and are thus exempt from testing.[4] *See* 16 CFR §1500.9.

FDRA strongly encourages the CPSC not to adopt such an unauthorized and unwarranted approach. To do so would unnecessarily multiply many times over the complexity and cost associated with the many children's product certificates FDRA members prepare and issue.

Proposed §1110.13(a)(1) When Must Certificates Be Made Available?—Requirement to File a Certificate "Electronically" with CBP for Product Manufactured Outside of the U.S. and Imported into the U.S.

Proposed §1110.13(a)(1), requires that a certificate for products manufactured outside of the U.S. and imported into the U.S be filed "electronically" with United States Customs and Border Protection ("CBP") at the time of entry or entry summary when both the entry and entry summary are filed at the same time. Such a requirement is entirely premature because the CPSC has not met the prerequisites for such a requirement. Finalization and implementation of this proposed rule would cause confusion among importers. The CPSC should withdraw proposed §1110.13(a)(1) and follow the statutorily-required steps before proposing such a ground-breaking regulation.

[4] Footwear components may be made from a variety of materials that the CPSC has determined do "not exceed the lead content limits under section 101(a) of the CPSIA," as delineated in 16 CFR § 1500.9(d) (4) wood; (5) paper and similar materials made from wood or other cellulosic fiber . . ., (7) textiles . . . consisting of: (i) natural fibers (dyed or undyed) . . .; (ii) manufactured fibers (dyed or undyed). . .; and (8) other plant-derived and animal-derived materials . . ."

Section 14(g)(4) of the CPSA permits the CPSC "[i]n consultation with the Commissioner of Customs" to provide "for the electronic filing of certificates" "up to 24 hours before arrival of an imported product." Neither the proposed rule nor its Preamble states or even suggests that the CPSC has engaged in the "consultation with the Commissioner of Customs" that is a condition precedent to issuance of proposed §1110.13(a)(1). The CPSC admits that it has yet to obtain CBP assistance or cooperation—"CPSC requires the assistance and cooperation of the CBP to implement and maintain the receipts of certificates in an electronic format . . ." 92 *Fed. Reg*. 28089.

The CPSC has "jumped the gun" and has proposed requirements that are vague, not capable of being understood or implemented by an importer. The CPSC admits as much—"The Commission would leave the technical requirements for filing certificates electronically with CBP broad (sic), to accommodate CBP's system resources." *Id*. The CPSC also admits that the software to implement such a requirement does not even exist at any level—". . . we realize that such a requirement may require software upgrade by CBP, CPSC and stakeholders that must be included in stages." *Id*. Further the CPSC admits that this proposed regulation would strain "resource limitations" and it euphemistically acknowledges that the proposed regulation would require "stakeholder adjustments in implementing this new requirement." *Id*. Having little idea as to the practical implications of this proposed requirement, the CPSC is left to "welcome comments on the resources required to file the certificates electronically with CBP." *Id*.

The Preamble states that the CPSC "would likely allow filing of certificates in two ways: (1) inserting an electronic copy of the certificate with entry, such as a pdf file of the document; or (2) uploading the 10 required data points on a certificate into CBP's designated system of records." *Id*. FDRA understands that the transmission of data elements to CBP is not available at this time and there is no certainty that the capacity to accept such transmissions will be in place when the proposed regulation goes into effect. The alternative is to file what is essentially a paper document in PDF format. Although CBP is able to accept PDF documents, filing will have to be made separate from entry data and the certificate would have to be annotated with the entry number in order to connect the two. FDRA understands that this approach will require manual handling, a circumstance that inevitably will result in increased processing times and increased costs. Further, the filing of a PDF will occur in an environment in which entries are paperless, except in the now rare situation where CBP requires documents prior to release. Finally, if the CPSC decided to adopt proposed §1110.13(a)(1), which FDRA believes would be extremely unwise, the CPSC would need to provide a long lead time before the requirement went into effect.

The Preamble (at 92 *Fed. Reg*. 28092) suggests, as an alternative to proposed §1110.13(a)(1), that certificates be permitted to be filed at entry of imported products but that such filing of certificates not be mandated. If this approach is adopted, the certificate would still have to be available for inspection upon request, as is present practice. This is a more efficient approach than proposed §1110.13(a)(1) and one that would be more compatible with the normal entry process. FDRA urges that this alternative approach be adopted. The CPSC has expressed concern that this approach could degrade the ability to identify entries that warrant inspection. FDRA suggests this is not the case. Entry information available from CBP should be adequate to allow the identification of shipments that require inspection. The information includes the name

of the importer, the country of origin, a general description of the merchandise and the name of the manufacturer as presented to CBP. This information is often available as many as five days prior to a vessel's arrival since the Customs Regulations (19 C.F.R. § 142.2(b)) allow filing at that time. This provides the CPSC, after reviewing the entry data, adequate time to identify shipments as to which the more complete data found in the certificate is necessary and this would occur in advance of release of the shipment. Thus, retaining the current requirement, *i.e.* that the certificate must be available at time of entry but need not be submitted until requested, will not in any way jeopardize product safety or the CPSC's efforts to enforce compliance with its product safety rules. Furthermore, this method will allow CPSC to more efficiently utilize its resources to target specific imports, as opposed to managing hundreds of thousands of PDF files and paper certificates in which it likely will have no interest.

Thank you for the opportunity to provide comments to the CPSC's notice of proposed rulemaking regarding Certificates of Compliance, 16 CFR part 1110. FDRA and its members are committed to manufacturing, importing and selling safe products for the American consumer and consumers worldwide. We look forward to receiving the Commission's final rule and hope that a commonsense approach will be adopted when considering these important issues.

Sincerely,

Matt Priest
President