FOOD MARKETING INSTITUTE

October 29, 2008

Mr. Todd A. Stevenson
Secretary
Consumer Product Safety Commission
4330 East-West Highway
Room 502
Bethesda, MD 20814

Re: Comments on CPSIA Section 102: Requirements for Certificates for Conformity Testing and Third Party Testing

Dear Mr. Stevenson:

The Food Marketing Institute[1] (FMI) submits the following comments on behalf of the supermarket industry and the wholesalers that serve them in response to the Consumer Product Safety Commission's ("CPSC" or "Commission") Request for Comments on Section 102 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). FMI represents a variety of retail entities, from national chains to independent supermarkets and from niche food markets that specialize in exotic produce to "big box" warehouses that sell a full assortment of consumer products in addition to food. Different retailers have different customer bases, needs and capabilities in terms of supply chain management.

Although all of FMI's members are retail food stores or wholesalers and, therefore, focus on retail sales of foods and food products, today's "food retailers" also offer a wide variety of other consumer products, from household cleaners to vases, books and magazines, DVDs, toys, kitchen towels, cookware, cosmetics, over the counter and prescription drugs and many other items. FMI members are working hard to understand and ensure compliance with Section 102 and other requirements of the CPSIA, but need more guidance on some of the potentially complex supply chain and records management issues raised by the conformity assessment provisions. As discussed more fully below, we urge the Commission to adopt a flexible approach, such as the one

[1] Food Marketing Institute (FMI) conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

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outlined in CPSC's recent guidance document, regarding retailers' and distributors' obligations with respect to the conformance certificates that the CPSIA requires manufacturers to provide to our members.

In brief, Section 102 of the CPSIA requires manufacturers of products subject to a consumer product safety rule under the CPSIA or a similar rule ban, standard, or regulation under any other Act enforced by the Commission to certify (1) that the product complies with the applicable standards and (2) the standards with which the product complies. In addition, Section 102 requires a certificate "to accompany" the applicable product or shipment of products and requires manufacturers to "furnish" a copy of the certificate to each distributor or retailer of the product. The Commission recently updated its guidance explaining these latter provisions as follows:

> Q. Must each shipment be "accompanied" by a certificate?
>
> A. Yes, the law requires that each import (and domestic manufacturer) shipment be "accompanied" by the required certificate. The requirement applies to imports and products manufactured domestically. *CPSC staff believes that an electronic certificate is "accompanying" a shipment if the certificate is identified by a unique identifier and can be accessed via a World Wide Web URL or other electronic means, provided the URL or other electronic means and the unique identifier are created in advance and available with the shipment.*
>
> Q. Must I supply the certificate to my distributors and retailers?
>
> A. You are required to "furnish" the certificate to your distributors and retailers. CPSC staff believes that *this requirement is satisfied if you provide your distributors and retailers a reasonable means to access the certificate*.

General Certification of Conformity: Sample, Instructions for Completion and Frequently Asked Questions at http://www.cpsc.gov/about/cpsia/cpsia.html (updated October 27, 2008) (emphasis added).

Retailers and distributors have been struggling to understand the statutory language and what they must do in order to comply with the new requirements. Although the statute requires the certificates to "accompany" certain consumer products and requires manufacturers to "furnish" these certificates to distributors and retailers, the statute is remarkably silent on what, if anything, retailers and distributors are required to do with these certificates. Nonetheless, based on the statutory language and the interpretation offered by CPSC staff, we have the following comments and recommendations.

We ask the Commission to recognize that records maintenance and tracking can be extraordinarily burdensome for retailers, particularly independent operators, and it would be unrealistic and unfair to expect retailers and distributors to maintain these certificates,

particularly in the absence of any statutory requirement for them to do so. Depending on the scope of products that the Commission ultimately determines to be covered by the statutory certification requirement and whether a paper certificate would need to be included with each shipment, grocery stores could become buried in mountains of paperwork. We strongly urge the Commission not to take this route.

Electronically including the information with each shipment to a distributor or retailer would obviate the physical paperwork challenges, but electronic tracking itself may be problematic. First, not all retailers utilize electronic systems. Second, even those retailers and distributors that use electronic systems are not prepared to receive and maintain the myriad different certifications that might be coming at them from a wide variety of consumer products manufacturers. Working with suppliers to obtain standardized information and re-engineering systems would be a significant challenge that the supermarket industry is not prepared to handle.

We do, however, believe that the Commission staff has suggested a viable alternative in the interpretation set forth in the Q+A document excerpted above, *i.e.*, permitting manufacturers to satisfy their obligation to provide the information to their customers by establishing a website and posting the information there. As you know, conducting business by electronic means has long been accepted and encouraged on a national level through, for example, the Electronic Signatures in Global and National Commerce Act ("E-Sign Act") and the Paperwork Reduction Act. Congress specifically acknowledges the possibility of using of electronic certificates in Section 14(g)(4) of the CPSA. Indeed, the current importation process is already essentially electronic. Therefore, as explained more fully below, we believe it is appropriate for the Commission to adopt the centralized website database approach here.

First, as a matter of law, this approach satisfies the statutory requirements and congressional intent. Congress was obviously trying to ensure that the information establishing compliance of the products was available. A website to which retailers and distributors have access is a minimally burdensome means to accomplish the intended goal. Moreover, the burden is borne by the entities responsible under the statute for providing the information and in what is likely to be a minimally burdensome way for them. Requiring distributors and retailers to bear the burden of establishing systems to maintain certificates is not consistent with the statutory language. The website approach would also allow access to the information for inspection and review by regulatory officials, including CPSC and Customs and Border Patrol (CBP) personnel, in a manner that would be more efficient for the agencies than physically tracking down paper certificates.

Second, the centralized website database approach is sound policy. Establishing a central website would eliminate unnecessary paperwork and the attendant costs of sending and storing enormous amounts of paper. Instead of requiring each product and each shipment of mixed products to be accompanied by the many pieces of paper related to certification of each product's compliance with different standards or regulations, the website approach collects the information in one remotely accessible location. Tracking paper certificates would create logistical complexities

and duplicative paperwork. Requiring retailers and distributors to build new electronic systems would be costly as well. Using a centralized website will also permit information to be available for products that are sold through a retailer's internet site and shipped directly from the manufacturer to the consumer. Thus, a centralized website approach obviates many operational challenges while still fulfilling the statutory goal.[2]

The Commission should, however, clarify the term "unique identifier" that is used in the Q+A document. We would encourage the Commission to utilize something like a product code or number that can be found on the product itself to obviate the need for tracking the product through the supply chain and to ensure that the information in the centralized website can always be connected to a product, even after it has been sold to a consumer.

The procedural aspects of Section 102 on which the public was asked to comment raise collateral issues as well that we respectfully ask the Commission to consider. In particular, we need more guidance on which products are covered. For example, as a jurisdictional matter, the Commission has long recognized the authority of the Food and Drug Administration (FDA) to regulate foods, food additives, food packaging and other food-contact materials under the Federal Food, Drug, & Cosmetic Act. We assume that the CPSC will defer to FDA on questions that arise under the CPSIA related to food and food-contact products in a manner consistent with the Commission's Memorandum of Understanding (MOU) with FDA.

In addition, the statute states that the products covered are those that are subject not only to the CPSA but also to "similar rules, bans, standards or regulations." In public meetings, the CPSC staff has indicated that certifications will be required in connection with Federal Hazardous Substances Act (FHSA) labeling and Poison Prevention Packaging Act (PPPA) requirements. Our industry was surprised by this interpretation as we do not view typical FHSA labeling requirements or PPPA packaging to be "similar" to a consumer product safety standard for purposes of Section 102. In addition, it is not clear to us that mandating certifications for products that self-evidently comply with their regulations will serve the public good.

That is, products that are labeled in accordance with the FHSA or packaged in accordance with the PPPA are self-evidently in compliance with the relevant regulations, unlike, for example, the lead level in a children's product that cannot be ascertained simply by looking at it. A certificate that "certifies" that a product is properly labeled under the FHSA (when all one would need to do is look at the label) will not make that product any safer, nor make the consumer better informed (since certifications do not have to be furnished to consumers). The same logic applies to products subject to the PPPA packaging requirements. If a manufacturer erroneously concluded that child-resistant packaging was not required for a particular product, it would not furnish a certificate; conversely, a manufacturer that properly packages a product requiring child-resistant

[2] We understand that, at the October 2, 2008 public meeting, the Commission recommended that manufacturers retain certificates of conformity for at least three years. Utilizing a centralized website would allow the information to be maintained indefinitely.

packaging in the proper packaging has no need to certify that the product has child-resistant packaging. The fact is self-evident. If the products are not in compliance with the applicable regulations, then they are misbranded or violative products, subject to adverse action under the applicable statutes. Requiring an additional level of "certification" under the CPSIA is duplicative and unnecessary.

FMI believes that it is within the CPSC's authority to exclude, by rule or guidance, from the Section 102 certification requirements those products subject to FHSA or PPPA requirements. Under Section 3 of the CPSIA, the CPSC has the authority to "issue regulations, as necessary, to implement this Act and the amendments made by this Act." Thus, the Commission can clearly determine that FHSA labeling or PPPA packaging is not "similar" to other referenced consumer product safety standards, rules, bans or regulations for purposes of the certification requirements of Section 102. Accordingly, we urge the Commission to exercise its discretion in this regard.[3]

Finally, the identity of the "manufacturer" of a covered consumer product is often viewed as confidential business information. The Commission has authority to allow for procedures to maintain business confidentiality of this information, possibly through use of a "CBI" designation or through a coding system under which the actual identity of the manufacturer is shielded through the supply chain but subject to disclosure by the certifier to the CPSC and to CBP.

* * *

FMI appreciates the opportunity to submit our comments on this matter and looks forward to working with the Commission staff to clarify the requirements. Of course, if you have any questions regarding our comments or if we may be of assistance in any way, please do not hesitate to contact me.

Sincerely,

Deborah R. White
Senior Vice President &
Chief Legal Officer

[3] We note that such discretion would not prevent the CPSC from determining, for other purposes of other provisions of the Act, that the FHSA and PPPA each qualify as a "similar rule, regulation, standard, or ban" for those specific purposes.

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