

May 4, 2010

Consumer Product Safety Commission Accepting Comments on “Children’s Products”

The Consumer Product Safety Commission (the “CPSC”) is currently accepting comments on its proposed rule interpreting the phrase “children’s products.” Manufacturers and distributors of finished products and components of products should review the full text of the proposed rule and submit comments if appropriate. The CPSC is particularly interested in comments on how manufacturers generally determine the age of the consumers for whom their products are primarily intended and what other criteria, if any, should be considered in determining whether a consumer product is a children’s product. Comments are due by June 21, 2010.

In August 2008, then-president Bush signed into law the Consumer Product Safety Improvement Act of 2008 (the “CPSIA”) to enhance the powers of the CPSC to protect American consumers from unsafe products. One of the fundamental purposes of the CPSIA is to regulate the manufacturing and distribution of children’s products, which the CPSIA defines as “consumer product[s] designed or intended primarily for children 12 years of age or younger.”

When a product is determined to be a children’s product, it is subject to a strict set of rules and restrictions, including testing by a third-party facility, restrictions on acceptable levels of lead and phthalates, mandatory tracking labels, and required cautionary statements in advertising. These rules are different from those for general use products, which are subject to far less stringent controls. Manufacturers and distributors of products that could potentially be regulated under the CPSIA have expressed concern that the term “children’s products” is not sufficiently clear. In response, the CPSC has proposed an interpretive rule to provide more specific guidance as to what products will be considered children’s products. To that end, the proposed rule focuses on three things: (1) clarifying the definition of children’s products, (2) expanding on the interpretive factors already provided by the rule, and (3) providing additional guidance through examples.

1. Designed or Intended Primarily: The proposed rule clarifies the phrase “designed or intended primarily for children 12 years of age or younger” to apply to consumer products designed or intended *mainly* for children 12 years old or younger. By way of illustration, the CPSC has focused on the product’s appeal: products that may be used by 12-year-olds but that have a declining appeal for teenagers will likely be considered children’s products. In contrast, if a product may be just as appealing for a child older than 12, or if potential consumers older than 12 are as likely or more likely



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to use the product, those products will not be considered children's products.

2. Clarification of Factors: The statutory definition of children's products specifies certain factors that are to be taken into consideration when making that determination. The proposed rule aims to clarify and expand on those factors, as well as to clarify the definition of the phrase "for use," which the CPSC interprets "to generally mean that children will physically interact with such products based on the reasonably foreseeable use and misuse of such product."

- i. Manufacturer's Statement – The current rule articulates that a statement by a manufacturer about the product's intended use, such as a product label, is a factor to be considered in determining whether a product is primarily intended for children 12 years of age or younger. The proposed rule emphasizes that such a statement is not determinative. A manufacturer's statement that a product is not intended for children does not necessarily preclude a finding that the product is a children's product if the primary appeal of the product is to children 12 years of age or younger. However, a label on a product that says "Ages 10+" may lead to a determination that a product is a general use product if 10 years old is considered the youngest age of a likely prospective user, although not necessarily the age for which the product is primarily intended.
- ii. Product Presentation – Another current factor is whether the product is packaged, displayed, promoted, or advertised as a product appropriate for use by children 12 or younger. The proposed rule makes clear that representations about age appropriateness can be express or implied, and that the location and prominence of any portrayal of the product's intended users may affect the determination. The product's physical location in a retail store or on a web site could imply suitability for a certain age group. The proposed CPSC rule also recognizes some grey areas; for example, instances where a general use item is included in a set of products intended for children 12 or under, or when a product that is commonly recognized as intended for children is packaged with an adult product.
- iii. Commonly Recognized by Consumers: Another factor in determining whether a product is designed or intended primarily for children 12 or under is consumer perception. Traditional board and table games, which are equally attractive to children and adults, are to be considered general use products unless and until the manufacturer includes additional marketing portrayals or packaging that make the items more attractive to young children. The CPSC proposed rule includes four considerations that aim to clarify how a product may be perceived by consumers:
 - a. *Features and Characteristics*. The proposed rule text provides examples of "childish features"—such as small sizes, exaggerated features that simplify the product's use, safety features not found on similar products intended for adults, colors and decorative motifs commonly associated with childhood, features that do not enhance the product's utility but contribute

to its attractiveness to children, and “play value”—that distinguish children’s products from general use products.

- b. *Principal Perceived Uses.* When evaluating principal perceived uses, the CPSC may consider the product’s reasonably foreseeable uses and misuses, with the principal uses of the product taking precedence over other uses, even when those ancillary uses may appeal to children. The CPSC provides the broom as an example. A broom is considered a general use item even when it may be used by a child “as an imaginary knight’s lance [or a] magical flying vehicle.”
 - c. *Cost Considerations.* On this issue, the CPSC sets out the general proposition that products intended for children tend to be less expensive than products intended for adults.
 - d. *Children’s Interaction with the Product.* On this issue, the CPSC states that most products intended for children will involve the child having physical interaction with the product. Products that are intended for use in a child’s environment, but that are not for use by the child, do not fall under this category but are generally considered home furnishings.
- iv. The 2002 Age Determination Guidelines. When making determinations about age-appropriate user groups, the CPSC will consider those actions that children of certain ages can successfully perform with a product *even if* the specific product or product type is not specifically mentioned in the guidelines.

3. Examples: Finally, the proposed rule sets out examples to help manufacturers and other interested parties evaluate what constitutes a children’s product. The CPSC specifically addresses items in the following categories:

- Furnishings and fixtures
- Collectibles
- Jewelry
- DVDs, video games, and computers
- Art materials
- Books
- Science equipment
- Sporting goods and recreational equipment
- Musical instruments

Resources:

- Proposed Rule, Consumer Product Safety Commission, Docket No. CPSC-2010-0029, 75 Fed. Reg. 20533 (proposed Apr. 7, 2010) (to be codified at 16 C.F.R. Part 1500).
- Consumer Safety Improvement Act of 2008, Pub. L. 110–314, 122 Stat. 3017 (2008), <http://www.cpsc.gov/cpsia.pdf>.

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