

June 21, 2010

Office of the Secretary
U.S. Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD 20814

Re: Definition of a Children's Product

Dear Secretary Stevenson:

The Retail Industry Leaders Association (RILA) appreciates this opportunity to provide comments on the Consumer Product Safety Commission's (CPSC) proposed rule interpreting the definition of the term "children's product" in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(2), as amended by the Consumer Product Safety Improvement Act of 2008 ("CPSIA") (See 75 Fed. Reg. 20533 - April 20, 2010). As we have in past, RILA members look forward to working with the CPSC to continually improve consumer product safety while at the same time assisting the agency to determine feasible measures to advance this shared mission.

By way of background, 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 suppliers--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.

Background

RILA members are active as importers of many products that are children's products or may be considered children's products, as well as many general use products. As importers, it is critical to our compliance programs that we have a clear understanding of which products will be subject to children's product standards. Accordingly, our comments focus on clearly understanding the application and breadth of the definition, to assure that it is accurately applied to the products that RILA members will import. Correct application of the definition has many benefits, including active protection of children by providing safe products for their use. Overbroad application of the definition, however, can be detrimental, imposing unnecessary testing burdens on importers and excessive costs upon consumers.

Finally, we are concerned with the statement that the proposed rule is effective when published. If something that was not previously considered a children's product would become a children's product upon publication of the final rule, would retailers be required to pull product not previously classified as children's product and test to make sure it meets children's product requirements? We suggest a sell through period to allow retailers to ensure that their current inventory complies with the various requirements for children's products.

Definitions

As the agency works to promulgate the rule, terms such as "physical interaction" require a clear definition. Children move through an adult world, and will often be found to interact with adult products, even where those products are not specifically intended for children's use. A definition of physical interaction would help in applying the standard. Similarly, definitions relating to "foreseeable use and misuse" should be provided to clarify which interactions by children with a product that might otherwise be considered to be a general use product will convert that product to a children's product.

An enhanced definition for "themes that are inappropriate" for a child would be helpful. Moreover, such themes should not be dispositive. For example, a Hello Kitty lighter is clearly unintended for use by a child, but a stuffed Hello Kitty toy will generally be considered to be a children's product. In addition, the type of theme that one family may find appropriate may be considered inappropriate in another family. Accordingly, a definition of such themes will standardize application. For example: one retailer provides guidance to its suppliers that Halloween costumes based on rated R themed movies are for adults. The CPSC may be able to utilize existing age guidance systems (movie ratings, game ratings, music advisories) to identify "adult" themes and more carefully define them for the standard.

The term "products *mainly* for use by consumers older than 12 years of age" requires a definition of the term "mainly." Examples focused upon households that include children could help clarify this (for example: examples focused on the kitchen, bath or garage).

RILA has also identified other, specific definitional issues in the individual sections outlined below.

Description of the Proposed Interpretative Rule

A. Designed or Intended "Primarily" for Children

The term 'for use' within the definition of a children's product is interpreted by the CPSC to mean "that children will physically interact with such products based on the reasonably foreseeable use and misuse of such product." We would like the term "foreseeable use and misuse" removed from the definition as it is too broad. Anything we can interact with will have foreseeable misuse by a child. For example, children frequently jump on or climb over general use furniture. Alternatively, if this will be left in as part of the definition we would like to see a clear definition of foreseeable use and misuse, as well as examples. For example, does foreseeable misuse refer to a misuse of the item while it is being use in its intended purpose?

The CPSC also states that "General use products are those consumer products mainly for consumers older than 12 years of age." We request the term 'mainly' further defined.

Determining if a product loses appeal to a child as the child moves past the age of 12 is a subjective exercise that will be difficult to establish. Examples are requested from the CPSC to make this determination.

The CPSC has stated that foreseeable misuse of a product would indicate that a product is a children's product. At the same time, the agency has also specifically outlined examples of foreseeable misuse (such as a broom used as a flying object) as not being indicative that the product is intended for use by children. The agency should explain how to reconcile the examples within the definition.

B. Factors Considered (Proposed § 1500.92(a) Through 1500.92(d)

As mentioned above, the "foreseeable use or misuse" statement should be removed and the "physical interaction" factor needs to be defined clearly by the CPSC. We believe a decision tree accompanying the four factors that are to be taken into consideration when making a determination about "*whether a consumer product is primarily intended for a child 12 years of age or younger*" would be extremely valuable. RILA believes that whether the product was primarily intended for the child should be the main contributing factor.

1. Manufacturer's Statement.

RILA agrees that the manufacturer's label itself is not determinative by merely stating that a product is not intended for children and should not preclude a product from being regulated as a children's product. By contrast, however, manufacturers and importers should be able to use labeling to assist the consumer in understanding that a general use product that may have some features (such as a decorative theme) that appeal to children is not safe for, or intended for their use. We ask that the CPSC clarify how labeling may appropriately be used to help consumers understand proper use of the product.

2. Product Presentation

We respectfully disagree with the CPSC's determination that "The prominence, conspicuousness, and or other emphasis given to each portrayal of a product's uses or intended users on packaging or in advertising media can be weighted differently according to which images or messages are the strongest and most obvious to the consumer at the point of purchase." Simply put, if it is on the product at all, it should be a determining factor.

While RILA asks for more examples and guidance, unfortunately the paper clip and candle examples are confusing. In the paper clip example, this product is considered a children's product solely because it is packaged with a children's product. In the candle example, the candle is not a children's product even though it is packaged with a children's product. What is the distinction? Is the determination based on the audience for the primary packaged product? Using the examples in the proposed rule, is the difference because the magnet set is intended for children and happens to include a paper clip but the candle is general use and happens to include a stuffed animal? If this is the case we would need the CPSC to issue guidance on how to determine the primary packaged product to clear up any possible confusion.

Another illustration of confusion is how the CPSC would view a gift basket for a new baby that includes products like a grooming kit, infant sleeper and booties. We would suggest that the grooming kit is primarily intended for use by the caregiver while the sleeper and booties are primarily intended for use by the infant. How would a retailer determine the primary packaged product in this example?

3. Commonly Recognized by Consumers

(i). Features and Characteristics of Children's Products

RILA believes that there needs to be a distinction in the 'Decorative Motif' factor. A clearer explanation is requested. One example that has been used in the past is that of a jungle theme. Cartoon like jungle animals would be considered a child-like theme while a realistic portrayal of a jungle animal on a product would be considered a general use theme.

RILA believes the 'pen with a silly head' example is unclear. The CPSC states that it "may have just as much appeal to adults as it would to children" but then the agency does not affirmatively say whether the pen would be considered a children's product or a general use product.

(ii). Principal Perceived Uses

As previously stated, RILA would like the "foreseeable use or misuse" statement to be removed.

(iii). Cost Considerations

RILA does not agree that cost consideration should be a determinative factor. Cost has not historically been accepted as valid reasoning for determining whether or not a product is a children's product by the CPSC. Also, the statement that expensive products are intended for general use (adult) and cheap products are intended for children is inaccurate. Price is relative to the income of the consumer and the complexity of the product (for example, a video game) and not the age of the user.

(iv). Children's Interaction With the Product

The lamp example used in this section is an example where we would benefit from, as previously stated, a clearer definition of the term "physical interaction."

The DVD example is very confusing and hard to implement. What is the cut-off age for nursery aged children to go to next age group? One suggestion is the elimination of the distinction and recognizes it all as children's products. It is too gray of a line to draw a distinction between children less than 2 years old and greater than 2 years old, as the same movies could appeal to both age ranges. An example of this would include Baby Einstein movies and Elmo movies.

Please note that the toy train lamp example seems to contradict the fireman lamp example later in the document. The CPSC needs to make it clear that there is a difference between 'play value' interaction and just general physical interaction. Our interpretation of the statement is if something has play value, it becomes a children's product. This reasoning cannot be applied across the board to all products because it would inappropriately broaden the definition of a children's product.

4. The Age Determination Guidelines (2002)

ii. Capabilities of Various Age Groups

We believe appeal needs to be weighted with the ability to actually use a product.

Also, the magnifying glass example provided by the CPSC contradicts other reasoning in the proposed rule. This example states that “Because a magnifying glass is generally marketed to the adult population, it would not be considered a children’s product.” This eliminates the use of any other factors explained in the proposed rule including but not limited to foreseeable use and misuse.

III. Examples (Proposed § 1500.92(d)(1) through (d)(9))

(B) Collectibles

RILA requests a definition for “themes that are inappropriate for children 12 years of age or younger.”

The determination of whether a collectible item is a children’s product or a product for general use depends on marketing and how the product is being advertised or packaged. For example, if the product comes with hooks or pedestals it is more likely to be a collectible. At the same time, a toy car that comes with a plastic pedestal is not a collectible because it is marketed to children as a toy.

Determining factors should also include whether or not a product is part of a limited release.

The scope of when something becomes a collectible should be defined. For example, a popular collectible item is a ‘Beanie Baby’ which is a stuffed animal toy. Is this product no longer a children’s toy because it has become a highly collectible item? If so, at what point is it a collectible and no longer a toy? These examples need to be incorporated or at least addressed in this section of the proposed rule.

(C) Jewelry

As previously stated, we do not agree with the cost factor. Inexpensive jewelry intended solely for adults is widely available.

Also, the CPSC states that “potential attractiveness to children, alone, does not make the piece of jewelry into a product intended for children.” This is an example of the ‘foreseeable use or misuse’ factor being difficult to apply. This is also an example where appropriate labeling to assist the guest in understanding which jewelry products are not intended for children could be applied, and should be considered.

(D) DVDs, Video Games, and Computers

While we agree with the video game console reasoning, we find the reasoning behind the CD and DVD determinations confusing. It would be easier to base the determination on the already established rating systems:

- Rating System for DVD/VHS à All 'G' and 'PG' rated products would be children's products. All 'PG-13,' 'R,' and 'NR' rated products would be for general use.
- Rating System for TV Programs on DVD/VHS à All 'TV-Y,' 'TV-Y7,' and 'TV-G' rated products would be children's products. All 'TV-PG,' 'TV-14,' and 'TV-MA' rated products would be for general use.
- Rating System for Video and PC Games à All 'EC,' 'E,' and 'E10+' rated products would be children's products. All 'T' and 'M' rated products would be for general use.

(E) Art Materials

Marketing/labeling and ease of use of art materials are good factors for this determination. We believe that only art materials that are specific for children should be considered children's products.

(F) Books

Retailers have concerns about the suggestion to use prior sales data when determining whether a product is a children's product. For example, it is usually an adult that buys a product for a child. The sales data factor either needs to be more clearly defined or removed as a possible factor.

(H) Sporting Goods and Recreational Equipment

RILA has two main concerns with this section:

(1) A clarifying statement should be added to this section that indicates that a product that is sized so that it is unusable by a child aged 12 or under but is decorated with childish features will still be a general use product. For example, an adult sized baseball glove that includes a picture of Mickey Mouse should be considered a general use product.

(2) In the wading pool example the CPSC states that "children's pools are shallow and have extra play features that promote playful interactions..." By using the word 'and' in the above sentence the CPSC makes it a requirement that a small wading pool must have play features for it to be a children's product. This is not an accurate statement. A wading pool can be intended for children based on size alone regardless of whether or not it contains additional play features. In addition, we would like a definition for the term "shallow" in reference to wading pool depth.

Conclusion

Thank you for inviting comments on this interpretive rule. As the proposed rule and these comments reflect, the task of identifying when a product is a children's product can be challenging and complex. If you have any questions, please do not hesitate to contact me at (703)-600-2022 or jim.neill@rila.org.

Sincerely,

A handwritten signature in black ink that reads "Jim P. Neill". The signature is written in a cursive style with a large, stylized 'J' and 'N'.

Jim Neill
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