

June 21, 2010

Via Regulations.Gov

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

**Re: Comments on the Interpretation of the Term “Children’s Product”
(Docket No. CPSC-2010-0029)**

Dear Mr. Stevenson:

On behalf of the National Association of Manufacturers and the undersigned organizations (hereinafter “Coalition”), we offer these comments in response to the Consumer Product Safety Commission’s (“CPSC” or “Commission”) April 20, 2010 Federal Register notice¹ regarding the proposed interpretation of the term “children’s product,” as used in the Consumer Product Safety Act (CPSA) and amended by the Consumer Product Safety Improvement Act of 2008 (CPSIA).² The definition of a children’s product applies to products subject to the lead limits of Section 101 of the CPSIA. The lead limits are a regulation under the Federal Hazardous Substances Act (FHSA), suggesting a broader intent by Congress that the CPSC use the CPSIA definition as a standard definition for “children’s products.”

In adopting CPSIA, Congress considered a variety of alternative definitions. It ultimately agreed that children’s products are those designed and intended **primarily** for children 12 and under. Ultimately Congress declined to define “children’s products” as products that were foreseeably used by children. Under the definition ultimately adopted by Congress, the Commission must give primary consideration to a manufacturer’s intent, not its appeal or the ability of a child to use a product, in determining whether a product is a children’s product. The analysis involves consideration of the totality of the circumstances surrounding the design, marketing and sale of the product. While the Commission offers some useful guidance, the Coalition is concerned that the proposed interpretive rule might improperly weigh certain elements and did not include factors that are important to understanding a manufacturer’s intent. The Coalition also disagrees with the Commission’s reference to use of the *Age Determination Guidelines: Relating Children’s Ages to Toy Characteristics and Play Behavior*. These Guidelines apply, by their name and nature, only to toys.

The proposed interpretive rule is more than an interpretation; it includes elements that are contrary to the express statutory factors and thus is not in accord with the CPSIA. The Coalition urges the Commission to clarify the rule as recommended here.

Statutory Factors

¹ See “Interpretation of Children’s Product,” 75 Fed. Reg. 20533 (April 20, 2010) (Docket No. CPSC-2010-0029), available at: <http://www.cpsc.gov/businfo/frnotices/fr10/childproduct.pdf>.

² Pub. L. No: 110-314, 122 Stat. 3,016 (August 14, 2008).

Congress considered a variety of definitions in discussions about product safety legislation. Ultimately, however, Congress agreed that children's products should not be defined as products whose substantial use by children was reasonably foreseeable; instead, Congress agreed that children's products are consumer products that are designed and intended primarily for children. In rejecting proposals to define children's products based on "foreseeable use" by children, Congress recognized that under such an expansive interpretation, virtually any product in the home or that a child might use or encounter would be a children's product, subject to burdensome testing and certification requirements.

Under Section 3(a)(2) of the CPSA, as amended by CPSIA, a children's product is defined as "a consumer product designed or intended primarily for children 12 years of age or younger." As noted above, this definition applies to the lead limits of Section 101, which are FHSA regulations by operation of law. Thus, although the CPSIA definition of a children's product is intended to be broadly applied by the Commission, the definition is a narrow one. The statute outlines four factors that help determine whether the product is a "children's product":

- A statement by a manufacturer about the intended use, including a label if such statement is reasonable;
- Representations in packaging, display, promotion, or advertising that the product is appropriate for use by children 12 and under;
- Whether the product is commonly recognized by consumers as being intended for use by a child 12 and younger; and
- The CPSC's Age Determination Guidelines.

Coalition members agree that the term "designed or intended primarily" for children 12 years of age or younger means that such products are "mainly" for use by children 12 and younger. Coalition members disagree, however, with the staff's interpretation that the term "for use" by children generally means that "children will physically interact with such products based on the *foreseeable use and misuse* of such products."³ Application of this interpretation risks turning many household items into children's products, contrary to the express statutory intent. Because Congress has spoken to the precise question at issue, and its intent is clear, the Commission must give effect to the unambiguously expressed intent of Congress in any interpretation of when a product is a children's product.⁴

Some general comments about the Commission's discussion of the four statutory factors appears below.

1. Manufacturers statement about intended use. It is no accident that the first factor specified among the four statutory factors is a manufacturer's statement about the intended use, including a label if reasonable. This was the topic of considerable discussion with Congressional staff as the bill underwent review. The manufacturer's intent to reach a particular demographic user group may be reflected in initial design drawings and in brand or marketing plans for the product. These documents, often created at the design phase of the product, are

³ See Proposed § 1500.92(a).

⁴ *Natural Resources Defense Council, Inc. v. U.S. Consumer Product Safety Commission*, 597 F. Supp. 2d 370 (S.D.N.Y. 2009), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

not referenced in the proposed interpretive rule, but are highly relevant to the age determination. Intended users are also, very importantly, indicated on packaging and labeling. Age-grading is common on toys and certain children's products; sizes, particularly in children's clothing, are another sort of label that immediately identifies a children's product. NAM Coalition members believe that just as an age reference about suitability for use by children of a certain age should be given effect as reflecting the manufacturer's intended population of users, so, too, should negative age labels or age warnings ("Not intended for children age 12 and under"). Unless evidently unreasonable under all the circumstances surrounding the design, marketing and distribution of the product, positive and negative age labels and warnings may be the most important type of extrinsic information that helps illuminate the intended target user for certain product categories.

2. Representations in packaging, display, promotion or advertising. The way products are packaged, displayed, promoted or advertised is key to any determination about whether a product is designed or intended primarily for children, and is listed just behind labeling in the four factors set forth by Congress. Kid-oriented packaging or displays in kids' stores or areas, promotions targeting use by children, and advertising featuring children using the product are potentially important indicia that the product is primarily designed and intended for children. Congress also recognized that common sense should control. An ad depicting a queen size bed where a parent is seen holding a child does not turn the bed into a children's product; it remains a general use product. Although it is foreseeable that kids will jump into bed with a parent, that foreseeable use does not make the bed a children's product. A twin bed or mattress displayed in a furniture or mattress store is not a children's product. Although it is foreseeable that a substantial number of children might have a twin bed, it is equally foreseeable that a twin bed will be used in a teen's or guest room. A car-themed bed advertised as "perfect for a kids' room," on the other hand, is a children's product. The majority of intended users are likely to be children 12 and under, even if an occasional guest might sleep in the car-themed bed.

Advertising a product on child-directed television programs or websites also reflects an intent to target child users. Child-oriented packaging, or sales and display racks in children's stores or areas also reflect an intent to target children. Stores may feature children's departments or displays; products displayed or sold in those areas would be presumed to be children's products. In contrast, display, promotion and sales in non-children's venues (e.g. a women's department of a store) are strong evidence that the product is not designed or intended primarily for children 12 and under. However, location of a product within a store should not be the only factor in determining the age category of a product as a general use product may be inadvertently placed in a children's department of a retail store.

3. Whether the product is commonly recognized as a children's product. The discussion in this section of the proposed interpretive rule risks undercutting the premise of the statute through an apparent focus on foreseeable use by children or a child's ability to interact with the product. This third factor, listed after labeling and representations in packaging, promotions and displays, should not be elevated in importance in determining when a product may be a children's product. We comment on the four sub-factors discussed in the proposed interpretive rule.

Features and characteristics. The Commission discusses "features and characteristics of children's products" that it suggests distinguish children's products from adult products generally, noting that there are exceptions. We agree that there are likely many exceptions. In fact, for some categories the features or characteristics that the Commission suggests are

associated with children's products will be equally representative of the features and characteristics of products for older consumers. Small sizes not comfortable for adults are characteristic of clothing, jewelry and furniture for very young children. However, older children today are sometimes the size of small adults. They can wear and use items that are not primarily intended for them, including items that include attractive, colorful and eye-catching features. Bright colors, decorative motifs, and whimsical elements are commonly associated with consumer products like accessories, clothing, jewelry and shoes because they are fashion items. This does not turn them into a children's product. Labeling, packaging, display and the like are much more instructive as to categorization in the fashion category. For other categories, like furniture or furnishings, the addition of child-oriented non-utilitarian features, like a train on a lamp, would require further analysis as to whether the item is a children's product. Thus, the analysis of features and characteristics of children's products must be made within the framework of the category of product.

Principal Perceived Uses. The discussion of principal perceived uses provides a useful framework, so long as the focus remains on the actual intended use of the product. We agree that no one would "commonly recognize" a broom as a children's product simply because a child might pretend it is a magic flying stick. On the other hand, women's apparel, footwear, accessories and jewelry are intended to be worn by an adult woman. The principal perceived use is as an item to be worn or carried; the fact that a child might be attracted to and able to use ladies' apparel, accessories or jewelry does not turn adult items into children's items.

Cost. The Coalition agrees that there is no particular dividing line where a product can be deemed an adult or children's product based on price or cost. For some categories, like pens, low cost is an inherent feature of the product. Other products, such as collectibles or jewelry, may have very broad price ranges, from a few dollars to hundreds of dollars. The analysis must go well beyond cost in such cases and relate to the particular category. Evaluating how cost applies to a category, whether it is collectible teddy bears, holiday decorations or snow globes, requires an analysis of the range of cost of items in the category.

Children's Interaction with the product. The reference to foreseeable use and misuse of a product by children creates significant concern since, as noted above; Congress rejected the notion that children's products should be defined as those whose use by children was reasonably foreseeable. Collectibles, like ceramic or glass figures, including figures that represent animals, birds, characters, might be handled by children. Yet due to their marketing and somewhat fragile nature, would seldom be a children's product although they may well appeal to children and children might foreseeably play with them. There are many categories of products which children may have the physical or motor skills to use, but that does not make the items a children's product.

4. Age Determination Guidelines. The proposed rule indicates that the Guidelines were meant to answer two critical questions regarding children's interactions with consumer products: (1) whether the product appeals to children; and (2) whether children properly use the product. Neither appeal to children nor the ability of children to physically use the product is determinative. A ceramic Halloween witch or pumpkin figurine may not be terribly expensive. Children might be attracted to these items. Children might be able to handle them. But they are not a children's product.

The suggestion that the Commission will apply the Age Determination Guidelines to evaluate whether children of certain ages can successfully perform specific tasks, "even if the

*specific product or type of product is not specifically mentioned by the Guidelines*⁵ would expand the guidelines beyond their natural limits. These Guidelines are intended to evaluate the play value of toys, which are products that are principally designed for use by a child when the child plays.

Industry Examples

The proposed interpretive rule includes discussion of specific categories of products. The Coalition recommends that the Commission consult closely with various industry sectors to obtain more specific input on how to distinguish children's products from other products within a particular category, but offers some general comments below.

We agree with the comment in the discussion of furnishings and fixtures that decorative items, such as holiday decorations and household seasonal items intended for display are not generally children's products. As noted above, a decorative pumpkin ceramic container or witch figurine is not primarily designed or intended for children although these items will appeal to children and they could foreseeably interact with the products. A pumpkin or witch costume in a child's size, or a plastic pumpkin container sold for use trick-or-treating are each examples of a children's product. It is not simply a matter of whether a child might interact with the item, but whether the primary intended user is an adult.

In the discussion about features that may convert a general use product, such as a pen, into a children's product, the proposed interpretive rule references embellishments that appeal to children, suggesting that the staff would further evaluate whether a child would physically interact with the pen and how such interaction would occur. Physical interaction by children or foreseeable use by them is only part of the story. The Coalition agrees that children's products are products that are mainly for children's use. If adults or teens are as or more likely to use the product, it should not be deemed a children's products. This is based on the explicit statutory language that to be a children's product, the consumer product must be designed and intended primarily for children, not merely that such an item might be attractive to and thus foreseeably used by a child.

Similarly, in the separate discussions of collectibles and jewelry, the proposed interpretive rule appears to give undue weight to a product's appeal to children, physical ability to use an item and cost, rather than the manufacturer's design and intent. Not all adult-directed collectibles feature "high costs" or "limited production," and the jewelry category also features a range of prices. Each product category needs to be assessed individually, in keeping with the Commission's comment, with which we agree, that there is no bright line price point that distinguishes adult from children's products.

The Coalition disagrees with the implication that to avoid being considered a children's product, a collectible must cost hundreds of dollars or be marked with a unique number. Collectible beer steins featuring cartoon characters like Spiderman, Superman, and the like are certainly not, by their nature, children's products. This is so regardless of the appeal of these items to children, relative low cost, and ability, at least by older children, to physically use them to drink from. The nature of a beer stein is self-evidently not for children, but with other collectibles, like glass or ceramic animals, or other figurines, the line may be less clear. These sorts of collectibles, featuring themes attractive to children, could certainly be used by children, but this does not make them intended for children. Labeling products as "Not a toy" or "Not for

⁵ See 75 Fed. Reg. at 20536.

use by children 12 and under” would be important elements in identifying such products as intended for adults, reflecting the manufacturer’s intent, along with how it is displayed, advertised and promoted.

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In sum, the task of identifying when a product is a children’s product can be challenging and complex. A manufacturer’s intent may be reflected in design drawings, brand or marketing plans, labeling, packaging, advertising, the mode of distribution, category and sales venues. The totality of factors must be considered before categorizing a product as a “children’s product.” Principles of statutory construction make clear that the Commission may not alter express statutory language that requires a focus on a manufacturer’s design and intent by turning the analysis into one that relies on foreseeable use. The undersigned organizations appreciate the opportunity to submit these comments and asks the Commission to further clarify the interpretive rule as suggested here.

Alliance for Children's Product Safety
American Apparel & Footwear Association
Coalition for Safe and Affordable Childrenswear
Craft & Hobby Association
Fashion Jewelry and Accessories Trade Association
Halloween Industry Association
International Association of Amusement Parks and Attractions
International Sleep Products Association
Juvenile Product Manufacturers Association
National Association of Manufacturers
National Retail Federation
Promotional Products Association International
Society of Glass & Ceramic Decorated Products
SGIA, Specialty Graphic Imaging Association
Toy Industry Association