

CPSC Interprets “Children’s Product” Definition

On October 14, 2010, the Consumer Product Safety Commission (CPSC) published in the Federal Register a final interpretive rule¹ defining the term “children’s product,” a key term under the Consumer Product Safety Improvement Act of 2008 (CPSIA). “Children’s products” are subject to strict requirements under the CPSIA—lead content limits, certification by the importer or domestic manufacturer based upon safety testing by a third-party laboratory, and tracking labels. Therefore, companies have been grappling with and seeking clarification about what is and is not a “children’s product” under the law since the CPSIA became law on August 14, 2008. Whether the interpretive rule provides the necessary guidance is open to question even among the CPSC commissioners. Chairman Inez Tenenbaum and commissioners Robert Adler and Thomas Moore voted to adopt the rule, while the two Republican commissioners, Nancy Nord and Anne Northup, voted against the rule, claiming that it fails to provide necessary clarification and, in some cases, goes too far in what will be deemed to be a children’s product.

This advisory summarizes the interpretive rule, and provides examples from the rule of items likely to be considered “children’s products” or “general use products.”

“Children’s Product”

The CPSIA defines a “children’s product” as a “consumer product designed or intended primarily for children 12 years of age or younger.” 15 U.S.C. § 2052(a)(2). In the new rule, CPSC has indicated that it will interpret the statutory phrase “designed or intended primarily for children 12 years of age or younger” to apply to products “mainly” for children 12 or younger. 16 CFR § 1200.2(a). Four statutory factors (discussed below) must be considered “together as a whole” to determine whether a product is primarily intended for a child 12 years or younger. *Id.* § 1200.2(c). These factors focus on whether a product is “for use” by children 12 years of younger, i.e. whether children will physically interact with the product, based on the “reasonably foreseeable use” of the product. *Id.* § 1200.2(a). Products used by children 12 years or younger “that have a declining appeal for teenagers” are “likely to be considered children’s products.” *Id.* § 1200.2(b).

¹ The published final rule is available at <http://www.cpsc.gov/businfo/frnotices/fr11/childprod.pdf>.

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“General Use Product”

In contrast, CPSC has defined “general use product” as a consumer product “designed or intended primarily for consumers older than age 12.” *Id.* § 1200.2(b). General use products may include those with which a “child would not likely interact” or those with which “consumers older than 12 would be as likely, or more likely to interact.” *Id.*

In the proposed rule, CPSC had indicated that products oriented toward infants and very young children who lack the motor skills necessary to physically interact with such products (e.g., a lamp with a nursery theme or CDs/DVDs created and marketed for viewing by young children) would be considered general use products even if they have childish themes. However, at the Commission meeting to vote on the final rule, Commissioner Adler asserted that there was no support in the statute for creating such an exception and treating all such products as general use products. And, in the final rule, CPSC reversed course, stating that “[t]he ability or inability of a young child to turn a lamp (or other product) on or off would not determine whether or not it is a children’s product.” Instead, products with themes oriented toward very young children may be considered children’s products based on a case by case evaluation of the four statutory factors.

Statutory Factors

The CPSIA provides four factors that CPSC must consider in determining whether a product meets the statutory definition of a “children’s product.” 15 U.S.C. § 2052(a)(2). Under the final rule, CPSC will interpret the statutory factors as follows:

- **A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable:** A manufacturer’s label about the age of intended users of the product will be considered if it is “reasonably consistent with the expected use patterns for a product.” 16 CFR § 1200.2(c)(1). However, the manufacturer’s label is not determinative “in and of itself.”
- **Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger:**
 - (i) CPSC will consider express or implied representations “in packaging, text, illustrations and/or photographs depicting consumers using the product, instructions, assembly manuals, or advertising media.” 16 CFR § 1200.2(c)(2)(i).
 - (ii) CPSC will consider, but not view as determinative, a product’s physical location near, or visual association with, children’s products, such as in the children’s toy section of a store. However, if that same product were also sold in department stores and marketed for general use, further evaluation would be necessary. 16 CFR § 1200.2(c)(2)(ii).
 - (iii) The product’s association or marketing in conjunction with general use products “may not be determinative as to whether the product is a children’s product. For example, packaging and selling a stuffed animal with a candle would not preclude a determination that the stuffed animal is a children’s product since stuffed animals are commonly recognized as being primarily intended for children.” 16 CFR § 1200.2(c)(2)(iii).
- **Whether the product is commonly recognized by consumers as being intended for use by children 12 years of age or younger:** CPSC will evaluate consumer perception of the product’s use by children, including its reasonably foreseeable use. (Contrary to the proposed rule, this factor does not include an evaluation of a product’s “reasonably foreseeable misuse.”) Sales data, market analyses, focus group testing, and other marketing studies may help support an analysis regarding this factor.
 - (i) *Features and characteristics:* Features and characteristics, such as the following, may help distinguish children’s products from general use products:
 - “(A) Small sizes that would not be comfortable for the average adult;
 - (B) Exaggerated features (large buttons, bright indicators) that simplify the product’s use;
 - (C) Safety features that are not found on similar

products intended for adults;

- (D) Colors commonly associated with childhood (pinks, blues, bright primary colors);
- (E) Decorative motifs commonly associated with childhood (such as animals, insects, small vehicles, alphabets, dolls, clowns, and puppets);
- (F) Features that do not enhance the product’s utility, (such as cartoons), but contribute to its attractiveness to children 12 years of age or younger; and
- (G) Play value, i.e., features primarily attractive to children 12 years of age or younger that promote interactive exploration and imagination for fanciful purposes (whimsical activities lacking utility for accomplishing mundane tasks; actions performed for entertainment and amusement).” 16 CFR § 1200.2(c)(3)(i).

(ii) *Principal use*: The principal uses of a product take precedence over other potential uses (e.g., a child

pretending that a broom is a horse does not convert a broom, which is primarily used for sweeping, into a children’s product). 16 CFR § 1200.2(c)(3)(ii).

- (iii) *Cost*: The cost of a product may influence the determination of the age of intended users. 16 CFR § 1200.2(c)(3)(iii).
- (iv) *Children’s interactions, if any, with the product*: Products for use in a child’s environment by the caregiver but not for use by the child would not be considered to be primarily intended for a child 12 years of age or younger. 16 CFR § 1200.2(c)(3)(iv).

■ **The Age Determination Guidelines issued by the Consumer Product Safety Commission staff in September 2002, and any successor to such guidelines:**

CPSC may consider a product’s appeal to different age groups and the capabilities of those age groups, as set forth in the Guidelines, when making a determination about the appropriate user group for the product. 16 CFR § 1200.2(c)(4).

Examples

The rule and its preamble provide examples, listed below, to help define the boundaries of what is and is not a children’s product under the CPSIA. However, any particular product must be evaluated individually using the four statutory factors.

| Examples of “General Use Products” | Examples of Products that Are or May Be “Children’s Products” |
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| <p>Art materials and tools, crafting kits, supplies, and raw materials (such as modeling clay, paint, and paint brushes) if they are not marketed specifically to, or packaged or labeled as designed or intended for, children 12 years of age or younger; distribution to schools or camps, standing alone, would not necessarily convert art materials to children’s products</p> | <p>Art materials sized, packaged, labeled, and/or marketed to children 12 years of age or younger, such as crayons, finger paints, and modeling dough</p> |
| <p>Books and magazines primarily intended for audiences over 12 years of age, including some “children’s” books with wide appeal that are not designed, packaged, marketed, and sold primarily for or to children 12 years of age and under</p> | <p>Books and magazines with themes, vocabularies, illustrations, and covers matching the interests and cognitive capabilities of children 12 years or younger—age guidelines provided by librarians, education professionals, and publishers may be dispositive for determining the intended audience</p> |

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| <p>Collectibles with themes inappropriate for children 12 years or younger, with features that preclude use by children during play, such as high cost, limited production, fragile features, display features (such as hooks or pedestals), and which are not marketed alongside children's products</p> | <p>Collectibles with lower cost and simple accessories that can be handled without fear of damage to the product</p> |
| <p>Decorative items, such as holiday decorations and household seasonal items intended only for display and with which children are not likely to interact</p> | <p>Halloween costumes intended primarily for use by children 12 or younger</p> |
| <p>Diaper bags</p> | <p>Diapers</p> |
| <p>Drugs and other substances that must be contained in child-resistant packaging</p> | |
| <p>Electronic media players, such as CD and DVD devices, game consoles, book readers, digital media players, cell phones, digital assistant communication devices, and accessories to such devices, absent decorations, size or marketing indicating that they are intended primarily for children 12 years of age or younger</p> | <p>Electronic media players that are embellished or decorated with childish themes that are intended to attract children 12 years or younger, are sized for children, or are marketed to appeal primarily to children, if children 12 years or younger likely would be the primary users of such devices</p> |
| <p>Electronic media, such as CDs, DVDs, and video games, whose content is not intended for and marketed to children 12 years or younger</p> | <p>Electronic media, such as CDs and DVDs, with content intended for and marketed to children 12 years or younger (such as children's movies, games, or educational software), even if the discs are intended for children who are too young to be able to insert them into the player</p> |
| <p>Furnishings and fixtures (such as rocking chairs, shelving units, window curtains, tissue boxes, ceiling fans, humidifiers, air purifiers, window curtains, tissue boxes, rugs, carpets, lamps, clothing hooks, and racks), if they are not designed or intended for use primarily by children 12 years or younger</p> | <p>Furnishings and fixtures in homes or schools if "they are decorated or embellished with a childish theme and invite use by a child 12 years of age or younger, are sized for a child, or are marketed to appeal primarily to children" (such as infant tubs, bath seats, small bean bag chairs with childish decorations, beds with children's themes, child-sized desks, and child-sized chairs).</p> |
| | <p>Furniture in "youth" or "juvenile" collections, if sized for children or are embellished with childish themes, even though the item may convert for use by the child as s/he ages past 12 and be used until a child leaves home.</p> |
| | <p>Jewelry that is sized, themed, and marketed to children, based on characteristics including small size; very low cost; play value; childish themes; packaging with children's toys, clothes, books, party favors, cereal, or snacks; sale in a children's store or a vending machine; marketing to children; and low dexterity requirements for wearing.</p> |
| <p>Model railways and trains made for hobbyists</p> | <p>Train sets with childish decorative motifs, designed to be easy for a child to assemble and use</p> |
| <p>Musical instruments, including electronically-aided instruments, suited for an adult musician; distribution to schools or camps, standing alone, would not necessarily convert an instrument to a children's product</p> | <p>Musical instruments sized for children 12 or younger or decorated with childish features; products that produce music or sounds in a manner that simplifies the process so that children can pretend to play an instrument</p> |

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| <p>Recreational equipment, such as in-line skates, skateboards, bicycles, camping gear, and fitness equipment, unless they are sized to fit children 12 years of age or younger and/or are decorated with childish features by the manufacturer</p> | <p>Recreational equipment sized to fit children 12 or younger or decorated with childish features</p> |
| <p>Science equipment, such as microscopes and telescopes, that would be used by an adult as well as children, and products mainly intended for use by an instructor; distribution to schools or camps, standing alone, would not necessarily convert science equipment to a children's product</p> | <p>Science equipment that is specifically sized for children, has childish themes or decorations that invite use by a child 12 years or younger, or is marketed primarily for children 12 years or younger; toy versions of science equipment, such as a toy microscope</p> |
| <p>Sporting goods intended primarily for consumers older than 12 years; sporting equipment sized for adults, even though some children 12 or younger will use them</p> | <p>Sporting equipment specifically marketed to children 12 years or younger, with features making such items more suitable for children 12 or younger than adults, or in sizes too small for or inappropriate for older children</p> |

Those seeking certainty from CPSC on what constitutes a “children’s product” may well be dissatisfied by the case by case approach that remains under the final rule. The majority evidently felt constrained by the CPSIA’s requirement that such decisions be based upon an evaluation of the four statutory factors, and ultimately erred on the side of retaining flexibility to address products individually rather than making categorical determinations in the rule. While the final rule is an important chapter in defining the term “children’s product,” this remains an evolving standard.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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