U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING
September 29, 2010

Chairman Inez M. Tenenbaum convened the September 29, 2010, meeting of the U. S. Consumer Product Safety Commission at 10:00 a.m. in open session. Commissioners Thomas H. Moore, Nancy A. Nord, Anne M. Northup and Robert S. Adler were also in attendance.

Final Interpretative Rule: Interpretation of Children's Product

The Commission considered the issuance of a *Federal Regis*ter ("*FR*") notice on a final interpretative rule providing guidance on the factors that must be considered when evaluating what is a children's product. Dr. Jonathan Midgett, Engineering Psychologist, Division of Human Factors, and Hyun Kim, General Attorney, Office of General Counsel, were present to respond to any questions. (Ref: staff briefing package dated August 25, 2010.)

Commissioner Adler moved to substitute an amended *FR* notice for the original staff draft that was called "Interpretation of Children's Product" listed at docket number CPSC-2010-0029 and which will eventually be inserted at 16 C.F.R. Part 1200. Commissioner Adler reviewed some of the major substantive changes. Commissioner Moore seconded the motion. The Chairman called for any discussion on the motion. There being no discussion, the Chairman called the question on the motion pending. The Commission voted unanimously (5-0) to approve the motion.

Commissioner Northup moved to amend the Effective Date section to read: "This rule is effective as of February 15, 2011." Commissioner Northup explained her motion. The Commission discussed delaying the effective date of the interpretative rule.

During the discussion, Commissioner Adler made a motion to close the meeting to the public to consult with the Commission's General Counsel Cheryl Falvey. Commissioner Moore seconded the motion. The Commission discussed whether the meeting should go into closed session. The Chairman called for a vote on the matter. The Commission voted (4-1) to take the meeting into Executive Session and close the meeting to the public. Chairman Tenenbaum and Commissioners Moore, Northup and Adler voted to go into Executive Session. Commissioner Nord voted to have the meeting remain open to the public. At 10:30 a.m. the meeting was closed to the public and went into Executive Session.

At 10:50 a.m. the Chairman reconvened the meeting open to the public and called for any further discussion on Commissioner Northup's motion to delay the effective date of the interpretative rule. After a discussion on the matter, the Chairman called for the vote. The Commission voted (3-2) to not adopt the motion. Chairman Tenenbaum and Commissioners

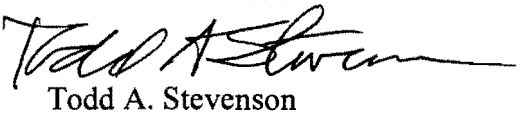
Moore and Adler voted to not adopt the motion. Commissioners Nord and Northup voted to adopt the motion.

The Chairman called for any other motions. Commissioner Adler moved that the Commission approve the publication of the draft notice for the *FR* as amended on the Final Interpretative Rule: Interpretation of "Children's Product." Commissioner Moore seconded the motion. After the Commission discussed and commented on the final interpretative rule, the Chairman called the question. The Commission voted (3-2) to approve the motion for the publication of the amended draft *FR* notice. Chairman Tenenbaum and Commissioners Moore and Adler voted to approve the motion. Commissioners Nord and Northup voted to oppose the motion. Chairman Tenenbaum and Commissioner Moore made closing statements about the matter.

Chairman Tenenbaum and Commissioners Moore, Nord, Adler and Northup issued the attached statements regarding this matter.

There being no further business, Chairman Tenenbaum adjourned the meeting at 11:25 a.m.

For the Commission:



Todd A. Stevenson
Secretary to the Commission

Attachments: Statement of Chairman Tenenbaum
Statement of Commissioner Moore
Statement of Commissioner Nord
Statement of Commissioner Northup
Statement of Commissioner Adler

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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September 29, 2010

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE FINAL INTERPRETATIVE RULE PROVIDING GUIDANCE ON THE DEFINITION OF A "CHILDREN'S PRODUCT"

I am pleased to vote today to approve a final interpretative rule providing guidance on the factors to be considered in determining when a consumer product is a "children's product," as defined by the Consumer Product Safety Improvement Act of 2008 (CPSIA). The guidance we approved today represents a measured, consistent, and logical basis for the Commission and interested parties to move forward under the CPSIA.

Keeping consistency and logic in mind, instead of, as urged by some, shrinking the scope of this interpretation until it fades from the realm of responsible statutory interpretation, I have voted to support a rule that imparts common sense to the meaning of the term "children's product." At the same time, this interpretation remains true to the purpose and intent of the statute and the legal bounds of the definition and four factors[1] that bind the Commission. As an agency charged with enforcing and implementing the law this is our mandate – and nothing less.

Unfortunately, before and during the issuance of this final interpretative rule, an abundance of hyperbole has been used to describe the allegedly expanded scope of the final rule. The fact is that the Commission rested on common sense, rather than an outcome based rationale, to remove an artificial age distinction between infants and older children that affected a small number of products in the proposed rule. Other than this *one* change, the final interpretative rule does not expand the scope of the products considered to be children's products and, in fact, narrows the scope of those products in many ways from the interpretation that we originally proposed by a unanimous vote of the Commission.

It is disappointing that this fact has been lost amid a campaign aimed to stoke the fears of the regulated community. Any claim that the final rule greatly expands the scope of products covered by the proposed rule not only is untrue, but also ignores the reality that the final rule narrows the products considered children's products by removing misuse of a product as a consideration, stating that childish embellishments alone do not necessarily convert a general use product into a children's product, excluding products intended for hobbyists, and clarifying that the marketing of general use products to schools will not automatically convert those products into children's products.

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[1] Those factors are: 1) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable; 2) whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger; 3) whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; and 4) the Age Determination Guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

Some have complained that the final rule fails to establish bright line rules for particular classes of products. It is important to remember that Congress provided a four factor test to determine whether a product is a children's product and the marketplace is filled with millions of different products, each with thousands of variations under the four factors the agency must consider. Therefore, it is understandably very difficult for the Commission to establish bright line rules or create a one-size-fits-all approach to the definition of a children's product. Most items will fit squarely within or outside the definition, while many others will require a more careful fact-based analysis. Today's decision arises from a collaborative effort between the Commission and its stakeholders, and our staff who have worked tirelessly, over many weeks, to develop guidance designed to provide our stakeholders with as much consistency and predictability as we could in a marketplace so rich and diverse in consumer products.

Considerable attention has surrounded particular products requesting bright line or blanket exemptions. One such example is the science kit containing ordinary general use items, such as paper clips. Whether or not the general use items included in a science kit become components of a children's product will depend on an evaluation of the full product based on all of the four statutory factors. Some of the science kits presented to me over the last year I would not necessarily consider children's products based on their distribution, marketing, packaging, and primary use as instructional aides. On the other hand, many of the science kits on the shelves of popular retail stores and sold over the internet I would consider children's products when evaluating the ways in which they are sold, marketed, and used. These kinds of distinctions, based largely on factors difficult to account for in every circumstance, demonstrates why establishing a bright line approach to blanket an entire product category would prove very difficult and, more than likely, inaccurate in many cases. The truth of the matter is that much of the determination of whether an item like a science kit is a children's product lies in the decisions made by a manufacturer at the manufacturing and marketing stages, meaning manufacturers, and not the Commission, have the most say in whether or not a particular item is a children's product.

The Commission was not required by the CPSIA to create an interpretive rule to provide further guidance to aid stakeholders in understanding how the Commission will approach this issue. The Commission, however, heard and responded to requests for additional guidance beyond what the statute already provided, and I believe the rule offered today provides much of the clarification that our stakeholders sought in how the Commission approaches these determinations. To the extent, however, that our stakeholders may still need further guidance on whether certain products fit within the definition of a children's product, I believe that our new Office of Education, Global Outreach, and Small Business Ombudsman will play an important role in facilitating the exchange of such information and strengthening our future education and outreach initiatives. When operational, this office will make the agency more accessible to stakeholders and will play a vital role in helping the CPSC fulfill its mission. In particular, the Small Business Ombudsman will serve as a dedicated resource to facilitate better understanding and compliance with applicable safety and testing standards and other regulatory requirements.

Finally, the important implications of this final rule reflect the fact that Congress has created a new paradigm for children's products. Under the CPSIA, when a manufacturer creates a children's product, that manufacturer must ensure that the product meets mandatory safety requirements before it is sold. The item must be tested for compliance, must be accompanied by a certificate of compliance, must not contain excessive levels of lead, and must contain tracking information so that it can be more effectively recalled should it ever prove hazardous to children. We should not forget that passage of the CPSIA followed a time during which consumers experienced record numbers of recalled toys and other children's products due to excessive levels of lead and other hazards. The new law sought to restore public confidence in the safety of the children's products found on stores shelves and in homes around the country.

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STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE FINAL INTERPRETATIVE RULE ON THE TERM "CHILDREN'S PRODUCT"

October 4, 2010

I voted to approve the interpretive rule to provide guidance as to how the Commission determines whether a product *in question* is a children's product as defined in section 3(a)(2) of the Consumer Product Safety Act, as amended by the Consumer Product Safety Improvement Act of 2008 (CPSIA). That section requires the Commission to consider four factors, not for the purpose of "uncovering" the intent of the product manufacturer in designing or making a product, but rather so that the Commission can determine from its own perspective whether that product is primarily intended for children 12 years of age or younger. A manufacturer's statement of intended use is certainly part of our analysis, but while the intention of the manufacturer and our ultimate determination about the product may very well lead to the same conclusion, this will not necessarily or always be the case.

The four statutory factors are not new to this Commission; they are the ones our staff has always applied and our staff has been analyzing children's products for decades. Most manufacturers know whether or not they are making a children's product and most products do not present a question about their primary intended user. This rule is intended to provide guidance on what the Commission will consider when making a determination on questionable products. Therefore, as the rule points out, determinations of whether some products meet the definition of a children's product will be factually dependent and factual information that may be unique to certain products will be considered on a case-by-case basis.

We should not be confused about the goal of this interpretive rule. Some people want to introduce the concept of risk into a children's product determination. The hazards or risks presented by any particular children's product are not part of the statutorily mandated analysis, therefore, risk is not an appropriate consideration. Categorizing products based on the degree of risk they present, as opposed to the determination required by the Act, results in distinctions among products that defy rationalization. The consequences that may flow from a product being deemed a children's product have been determined by Congress in other sections of our statute. Our only task in this rule is to explain how we interpret the Act's definition of a "children's product."

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STATEMENT OF COMMISSIONER NANCY NORD ON THE FINAL INTERPRETIVE RULE ON THE INTERPRETATION OF A CHILDREN'S PRODUCT

September 29, 2010

The children's product rule is an interpretive rule and as such it is to provide guidance to the manufacturing community and the public about how the agency staff will apply the statute in assessing whether a product is a "children's product" as that term is used in the CPSIA. In my view, this final rule lacks useful guidance for the staff and even less clarity for the regulated community. Therefore I cannot support it.

We decided to issue this optional rule because we wanted to be helpful and provide clarity, not because we are required to do so by the CPSIA. Unfortunately, the rule is neither helpful nor clear.

Agreed Upon Improvements

The rule before us is different from the version that was proposed this past spring and also quite different from that which came up from staff at the end of August after public comments were analyzed. We have worked very hard to try to improve what was before us and we were able to accomplish the following improvements, among others:

- Product Misuse: The earlier versions of the rule stated that manufacturers would somehow have to divine how a product would be not only used, but also misused, as it attempted to determine whether the product was intended primarily for use by children. The concept of "misuse" has been removed. Such a concept may have a place in analyzing hazards but has no place in defining children's products.
- Childish Decorations: The rule makes clear in several places that embellishment of a product with childish themes, such as cartoons, is not enough, standing alone, to support a children's product determination.
- Art Materials: The rule clarifies the intersection between the Labeling of Hazardous Art Materials Act (LHAMA) and the CPSIA. Art materials do not need third party testing (beyond testing of children's art materials imposed by CPSIA) or certification to show compliance with the provisions of LHAMA. We hope that this clarification will address the reports of duplicative testing that we have received.
- School Marketing Programs: We have tried to make clear that marketing general use products, such as office supplies or scientific and musical instruments, to schools will not turn those products into children's products.

These improvements came after weeks of time-consuming discussion and heated debate among the commissioners and their staffs. What started out as an exercise to be helpful devolved into a regulatory quagmire. Although it is improved, I cannot support this final rule because it does not provide the clarity that business needs. It is another lost opportunity to provide a common sense approach to implementing the CPSIA.

Problems Remaining

I do not believe that the rule has given proper weight to the manufacturer's intent in the analysis of whether a product is designed or intended primarily for children. I believe that the correct reading of the definition of children's product in Section 3 of the CPSA is that a product is not a children's product unless the manufacturer designs and intends for such a result. The four factors listed set out the considerations the manufacturer should use in forming and communicating that intent and the agency should apply in determining whether that intent is reasonable. Instead the four factors have taken on a life of their own independent of any consideration of how they inform the question of manufacturer's intent.

This is a critical consideration since the statute is premised on manufacturers determining at the design and manufacturing stage whether the products they are making and selling are children's product. The manufacturer must determine up front whether a tracking label will be needed and whether third party testing will need to be done. The rule gives little comfort that those decisions will not be second-guessed downstream and at a point where penalty liability can be imposed (for labeling and testing violations) even though there is no indication that the product was unsafe. I believe that this result distorts the meaning of the statute in a way that is unreasonable, unfair and, most of all, not driven by safety considerations.

Safety is not advanced by the rule adopted today. We need to be spending our resources addressing products that can harm consumers especially children, not constructing a 'truth or consequences' guessing game for product sellers where the consequences of a wrong guess are pretty severe.

During our discussions about this rule, over and over again, five commissioners, steeped in the details of the statute and knowledgeable about the operations of the agency, could not reach agreement on whether or not particular products were children's products. Instead, over and over again, the rule merely states that the Commission will apply the four factors, rather than saying how the factors will be applied in particular situations. Given that reasonable people have differences of opinion on what is a children's product, how is a manufacturer to have any confidence that a decision made in good faith at the beginning of the manufacturing process will not be overturned down the road by the supposedly crystal clear 20/20 hindsight of the agency.

What we are left with is a rule that leads to nonsensical results. A small lamp decorated with a teddy bear in a child's room may or may not be a children's product – hard to know from the rule – and therefore subject to testing for lead but a brass lamp used in that same room is deemed an adult product and not required to be tested for lead even though we all know that lead is present in brass above the limits in the statute. The fact that neither pose a health risk is of no importance to us and irrelevant to our analysis. As another example of a nonsensical result, apparently a "Dora the Explorer" DVD must be tested for lead but an "Animal Planet" DVD presumably does not. Since electronic media is widely available in libraries, they may have a challenge dealing with this result. It would have been helpful if we had applied some common sense to these issues but that was not to be.

Finally, the rule goes into effect immediately. This means that those products out there which arguably may have morphed into children's products because of this rule must have tracking labels, must have a certification based on third party testing for any product safety rules for which we have now accredited labs and must prepare to meet the lead standards when the stay of enforcement is lifted. Given that the requirements in the rule have changed since it was proposed, this may impose new obligations on some who relied on the direction we gave in the NPR issued last spring. It is unfortunate that more lead time

could not have been provided. But lack of lead time is only one of the shortcomings of this rule. It does not accomplish its objective of giving clarity and should not have been adopted.

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STATEMENT OF THE
THE HONORABLE ROBERT S. ADLER
REGARDING THE CHILDREN'S PRODUCT RULE
September 29, 2010

I am pleased that today we voted to publish an interpretive rule in the Federal Register regarding the definition of children's products under the Consumer Product Safety Improvement Act (CPSIA). The changes that we have made from the proposed rule to this final rule, I believe, are thoughtful and respond, as carefully as we can, to the many comments we received from the public. I believe the changes we have made reflect an improved interpretation of the language and the intent of Congress in the CPSIA.

THE FOUR FACTORS AND THE MANUFACTURER'S STATEMENT

By including a statutory definition of a "children's product" Congress provided us with four factors that we must consider when determining whether a consumer product is primarily intended for a child 12 years of age or younger.[1] Thus, at a minimum, we must consider all four of these factors to try to determine whether a given product is primarily intended for a child 12 years of age or younger, unless a given factor obviously does not apply to a specific product. A plain language reading of the statute indicates that Congress was concerned that no product be allowed to avoid consideration as a children's product simply because a manufacturer slapped a label on the product claiming that it was not intended for children 12 years of age or younger. Congress, wisely in my view, took care to direct us to look to a variety of factors, including but not limited to, statements by a manufacturer about the intended use of a product. Additionally we will look to factors such as the marketing, packaging, promotion or advertising of the product, the common understanding of who is an intended user of the product, and then have our own Human Factors experts examine the product based on their professional expertise. In other words, we will look at products in context, and we hope that manufacturers and retailers, (and consumers for that matter) will do the same.

[1] Those factors are: A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable; whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger; whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; the Age Determination Guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

To those that would argue that the Commission has supplanted manufacturers' discretion as to whether their products will be considered children's products the answer is "no." Congress appropriately recognized that manufacturers have a lot of control as to whether their products are children's products. The CPSIA requires that children's products bear tracking labels that identify the location, date of production, and other individualized information that can be most easily established at the point of manufacture. Accordingly, the statute lists the manufacturer's statement of intended use first – but it lists other factors that may be within the manufacturer's control as well. I believe this is appropriate. If a manufacturer consciously chooses to decorate an otherwise general use item with a childish theme or to label a product with a specific age grade on it (such as "8 +") this specific choice of the manufacturer as to how to market its product will be taken into consideration. In other words, what a manufacturer says should be the starting point of our analysis – but it is not the finish line.

RISK

In writing the CPSIA, Congress decided that any product that is designed or intended primarily for children 12 years of age or younger is a "children's product" – regardless of the risk profile of such a product. This is a vital point because while much of the discussion surrounding this rule has centered on third-party testing, the rule itself is not about third-party testing. This particular rule is only about whether a product meets Congress's definition of a "children's product," regardless of whether that product presents a significant risk. I recognize that once a product is defined as a children's product it will generally be subject to new requirements under the CPSIA, including third party testing. From hindsight, one can certainly express some concern about this fact not because of the broad definition of children's product, but because I believe that the Commission should have been given discretion as to which types of children's products should be subject to requirements under the CPSIA, including third party testing. I have little doubt that the language in the CPSIA reflected Congress' intent to be over-inclusive in its understandable and commendable desire to protect children, and I must live with what Congress enacted, not what I wish they had passed.

Put another way, today we announced how we will decide which products meet the definition of a children's product. There may be instances where this will mean that manufacturers who never thought they made a children's product will now fall under our umbrella. I believe such instances will be few and far between because I believe that most manufacturers know preproduction whether they are designing a product mainly for children 12 years of age or younger. On the other hand, most manufacturers who wish clarity and predictability will now have a better, but not a perfect, understanding of whether their products will be considered children's products. I fully recognize that for some manufacturers this will be somewhat burdensome. However, I believe that on balance for consumers and the long term societal safety interest, this rule is a continued step in the right direction of recognizing that products intended for one of our most vulnerable populations, children, must be held to the highest standards.

FUTURE GUIDANCE

I am pleased that the rule, in the interest of providing future guidance, explains the Commission will be posting on our website a list of some products that have been determined to be either children's products or general use products. It is this type of information that will go beyond the examples provided in the rule. I hope this will be useful to our stakeholders as they navigate the ins and outs of the law.

CONCLUSION

I believe that the law has required us to cast a wider net than we might otherwise choose to cast. I also realize that there will be a few areas that will always require a case-by-case analysis as to whether a given product category – or a product within a category – will be considered a children's product. Yet, this is always this case when we draw lines – there is rarely a place to make a cut that will be pleasing to everyone. However, on the whole, I believe we have done the best we could with the law we were given, and will continue to do so in the future.

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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE FINAL INTERPRETATIVE RULE: INTERPRETATION OF CHILDREN'S PRODUCT

September 29, 2010

I had hoped that the Children's Product Final Interpretative Rule would accomplish two things: first, reduce the number of products that must unnecessarily bear the burdens imposed by the Consumer Product Safety Improvement Act of 2008 ("CPSIA"); and second, provide clarity to manufacturers. There really was no other reason to issue this interpretive rule. The law certainly did not require it. Unfortunately, the Rule approved today by a 3-2 Commission vote does a poor job by both measures.

Building a Fence

The CPSIA is a regulatory morass of third-party testing, certification, tracking labels, limits on lead content in the substrate and—most recently—extra testing for children's products to all of the agency's pre-existing consumer product safety rules. To better understand the action taken by the Commission today, think of the definition of a children's product as constructing a fence around all those products that are trapped in this morass and must comply with these new regulatory requirements. The statute lays out for the agency certain things to consider in determining what belongs inside the fence, but Congress fortunately provided the agency flexibility when it defined a children's product as "a consumer product designed or intended ***primarily*** for children 12 years of age or younger."[1] By issuing this interpretive rule, the Commission has made a policy choice to construe the word "primarily" and various statutory factors quite narrowly. As a result, I believe the Commission has built far too large a fence that corrals too many products that pose too little risk.

Products caught inside the fence built around children's products face tremendous re-engineering and mandatory regulatory compliance costs. For that reason, the definition we adopt should be narrower than the definition we would adopt if regulating hazards. In the latter case, we would seek to entrap as many products as possible to prevent harm. But here, where a broad definition threatens to capture many products in an arbitrary statutory regime that pose no risk, the fence should not encompass more than what is absolutely required. After all, where substantial risk remains, the agency may still reach beyond the fence to regulate it.

In fact, Members of Congress on both sides of the aisle who supported this legislation have repeatedly called on the Commission to temper the harsh unintended consequences of this law through judicious use of our regulatory flexibility in interpreting the statute. Frankly, the statute does not always contain as much play in the joints as the Commission needs in order to regulate with common sense; in this case, however, the term 'primarily' provides plenty of flexibility to permit reasonable decisions to exclude far more products that do not pose a risk.

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[1] CPSIA § 235(a); 15 U.S.C. § 2052(a)(2) (emphasis added).

In deciding what belongs within the "fence," unless the statute absolutely requires that a product be included, I believe we should consider whether the product poses a risk such that putting it inside the fence better protects children. If the statute requires a product to be treated as a children's product, then that settles the matter. So cribs, toddler toys, and baby clothes are in. But where the statute is ambiguous, I believe risk should decide what belongs inside the fence.[2] If a product poses a genuine risk to children and can be reasonably construed as a children's product under the statute, then we should include it. On the other hand, if a product poses little or no risk to children and can be reasonably construed *not* to be a children's product under the statute, then we should exclude it. Although the CPSIA itself ignored consideration of risk—in setting arbitrary lead content limits, for example—nothing in the statute forbids the agency from taking risk into consideration in using our discretion to make policy choices.

What Goes Inside the Fence

By not explicitly considering risk, the Commission's Final Interpretative Rule captures more products than it should and fails to provide clarity to manufacturers. First, our children's product definition captures many products that the statute does not necessarily cover and which a majority of Congress surely did not have in mind. The fault for this lies entirely with the Commission, and such overreaching is misguided. Congress gave us the flexibility on this point, and we declined to take full advantage of it. We also did not do all we could to bring the problem to Congress's attention.

Incredibly, the definition actually has gotten worse in many respects in its final form than it was in the Proposed Interpretative Rule ("PIR").[3] The Commission voted 5-0 to support the PIR, and I initially thought that document did a reasonable job of flexibly defining the term. However, as I reviewed the comments, which were overwhelmingly in favor of "fencing in" fewer products rather than more, I realized that the draft rule had a number of problems that needed to be fixed.

Strangely, the draft that came up to the Commission from the professional staff moved the definition in the opposite direction from the weight of the comments. Such a result undermines the entire point of notice and comment procedures in administrative law. I have spent the past several weeks trying to persuade the majority of the Commission to restore the definition at least back to how it was in the draft proposal.

Although the substitute version offered today more closely resembles the PIR in key respects than did the staff's final draft, it still falls well short of excluding products that the statute does not require us to cover (*e.g.*, school lockers/desks/chairs, science kits, home furnishings, and CDs/DVDs). The Commission did not even find enough flexibility to push off the effective date of this rule. Despite the detrimental reliance that our unanimous PIR vote no doubt created for some products, the Commission did not even stay enforcement for those "children's products" on which the Commission has done an about face since April.

Not only does the children's product definition capture too many products, but it also fails to provide clarity. The main reason to adopt such a voluntary interpretive rule is to provide clarity to the regulated community regarding their compliance obligations. Clarity permits conscientious, law-abiding manufacturers to arrange their conduct in advance in order to avoid violating the law. Unfortunately, this final interpretive rule provides precious little clarity to manufacturers that make products for age groups

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[2] Congress already adopted 12 instead of 7 as the age cutoff for this law, allowing for an extra margin of safety. We do not then need to add an additional margin by strictly policing the line between 12 and 13 year olds.

[3] Federal Register, Vol. 75, No. 75, pp. 20533-20541 (April 20, 2010).

around the edges of the definition—and in some respects it even misleads them. Instead, this rule is chock-full of open questions, endless equivocation, and vague guidance implying that each case is different and that there are few obvious answers in advance of the Commission staff's consideration of a particular case. It leaves the impression that "you should have asked" will be the Commission's rejoinder to any manufacturer who thinks theirs is not a children's product when the Commission believes it is.

To achieve clarity, we should provide more useful subfactors to manufacturers when construing the statutory factors. To the greatest extent possible, we should draw bright lines that allow producers to know early in the product development cycle whether a particular product will be considered a children's product so they can ensure it will comply with all of the extra legal requirements for such products. The regulation should speak with more specificity than the statute and avoid creating a system whereby the only way to obtain certainty is to get pre-clearance from the agency for a product. We do not have the resources to do that, nor do manufacturers. A free country operating under the rule of law does not require its citizens to obtain advance government approval before producing goods anyway—especially ones that pose no risk.

Some of my colleagues would ask the regulated community to "trust us," but this rule does not inspire confidence in the agency's discretion. We let brass instruments (handled daily, loaded with lead) escape while forcing lamps (seldom touched, much less played with) to run the testing gauntlet without justification. Yet a child would handle a brass musical instrument far more often and interact with it more directly than he would a child-themed brass lamp for the bedside. The reality is neither of these items poses much risk and they should both be outside the fence if possible. But only musical instruments made the cut. Children's lamps will have to be tested. In addition, we have gone out of our way to avoid considering most art materials to be children's products, yet we have ensnared most science kits and child-sized sporting goods. Such conflicting decisions also make no sense from a risk perspective, and they breed confusion.

Even if our compliance office ultimately applies the children's product definition reasonably to exclude, say, a child-themed humidifier whose principal use has nothing to do with entertaining a child and everything to do with humidifying whatever room it happens to be in (often a child's room at night when its appearance does not matter), this definition does not provide manufacturers enough guidance to ensure that they will avoid needless testing costs for such products. Nor is this a hypothetical concern. We hear stories from companies every week explaining that retailers and understandably cautious corporate compliance counsel insist on over-testing due to our lack of clarity.

A Bid for Greater Clarity

To further illustrate my points, consider some of the following bright lines we could have drawn, flexibility we could have exercised, and clarifying factors we could have adopted. Although the interpretive rule passed today did not incorporate these ideas for a variety of reasons, perhaps detailing them here will provide clarity to the regulatory community that is missing from the rule itself:

- *Tell the regulated community that we will respect the manufacturer's statement about the age group for which the product was primarily intended and will weight that factor most heavily.* In practice, the manufacturer's statement will be determinative as long as it is reasonable. But we should say as much. Of course if a product is primarily used by children despite a manufacturer's intentions, we could still regulate it. In such cases we would regulate it on a going forward basis and not penalize the failure to treat it as a children's product originally. We should say that too.

- *Exclude all CDs/DVDs by considering them general use storage media regardless of their content.* While discs may have encoded content that is child-oriented, the discs themselves are fragile, easily scratched, and not primarily intended for use by children when out of the player. They differ considerably from the kind of sturdier cartridges that come with children's devices. The child-themed content cannot be accessed without putting the disc into a player, at which point the disc itself is not accessible. We already exempt DVDs from the small parts rule, which means we have considered them not for use by children under three. We also consider almost all disc players to be general use products. Younger children will not be permitted to handle discs at all. Many parents may permit an older child to insert a disc into the player (regardless of its content). However, such limited physical interaction does not convert those general use discs into children's products any more than parents' allowing their older children to set the table with sharp knives and breakable glasses converts those items into children's products. The Commission's reversal on this point from the PIR is particularly frustrating. Although a number of convincing comments came in criticizing the PIR's exclusion of CDs/DVDs for infants and toddlers (because only adults handle them), the overwhelming thrust of those comments was to exempt CDs/DVDs altogether—not to ensnare all of them. Our decision not to exclude discs will force stores and libraries to remove these harmless "children's products" from their shelves without notice.

- *Exclude home furnishings and décor.* Like holiday decorations, much of what goes into a child's room (*e.g.*, carpet, wallpaper, draperies) is not selected according to the child's taste, nor even necessarily intended primarily for the child's use. Anyone who goes into the room uses the carpeting and it may be identical to the carpet in the hallway. Wallpaper with teddy bears on it poses no more risk than plain striped wallpaper, so forcing one to be tested just raises costs, reduces choice, and causes substitution to cheaper adult designs with no risk reduction.

- *Clarify that the presence of a matching crib in a collection does not necessarily condemn every other piece in the collection to treatment as a children's product.* Also, we could have clarified that some furniture (*e.g.*, a desk, mirror, or vanity) tends to be used primarily by children 13 and older and thus would not be considered a children's product. The furniture industry makes a compelling case that their broad collections of furniture may simultaneously target several markets, including nursery, teen/dorm, guest room, starter house, and vacation home. Although such collections may make a matching crib available, many other pieces in such a collection would not necessarily be designed or intended primarily for children 12 years of age or younger. Because the crib may be made on one assembly line and all the other furniture on multiple other assembly lines, it becomes inordinately expensive and logistically impracticable to track every nut, screw, bolt, glue, and up to fourteen layers of coatings. Domestic manufacturers claim that even though every single component they have tested complies with the law (under lead limits, no phthalates, *etc.*), having to track that each piece has been third-party tested and certified correctly creates a compliance nightmare. The Commission could have provided more certain relief.

- *Exclude items that require adult supervision.* In reality, some products are for children, some are for adults, and some are to be used together and pose little risk under adult supervision. We need not think of the last category as products primarily intended for children—especially if many teenagers or adult hobbyists would use them unsupervised (*e.g.*, certain model kits). This rule creates an incentive to market such products only to teenagers and sell them without adult supervision warnings to avoid being considered children's products. Perversely, that could

actually increase the risk they pose to younger consumers. And, of course, we once again exclude fireworks that are used primarily by children, such as sparklers, from being considered children's products—even though they pose a known hazard.

- *General use items remain general use items even when packaged with children's products.* This idea would resolve the now infamous paper clip problem in the science kit. We have said that a stuffed animal packaged with a candle in a product intended for an adult on Valentine's Day remains a children's product. But if a children's product remains so when co-packaged, then a general use product should also remain a general use product when co-packaged with a children's product. So too, assembling a bunch of general use products together in a kit marketed as a science kit for children should not automatically transmute every one of those general use items into children's products that have to be separately third-party tested, certified and labeled so that the cohort of respective tests can be traced. The argument that adopting such a rule would also convert the button on a doll's dress into an exempt general use product is wholly specious. There is a tangible difference between a paper clip in a kit (or a general use baseball packaged with a child's mitt), and a button on a doll (or a general purpose screw in a children's crib), and we could have policed that line readily.

- *Exclude science kits.* If the "adult supervision" and "general use remains general use" concepts would not suffice, we also could have excluded many science kits outright. Congress spoke directly to this question in the FHSA, where it excluded properly labeled chemistry sets from the FHSA's definition of a "banned hazardous substance."[4] The CPSIA's general provisions do not impliedly supersede such a direct statement in the FHSA. Indeed, the CPSIA does not even conflict with the FHSA, as it specifically directs the CPSC to treat products containing lead over the limit as a banned hazardous substance, which by definition entails excluding chemistry sets. The FHSA exclusion alone might not free science kits from all third-party testing, but it should free them from testing for lead in the substrate of a paper clip. The FHSA exclusion should also make us far more willing to exclude such kits from the definition of a children's product—if for no other reason than the agency might well lose in court if it tried to enforce CPSIA § 101(a)(1) against some science kits. To instead say that the CPSIA does not ban science kits, or that this definition should not be conflated with testing costs, misses the point. When the cost of testing such a kit—with which the definition of a children's product is inextricably bound—exceeds the profit margin in producing it, the Commission effectively eliminates that product from the market by classifying it as a children's product even if the statute does not explicitly ban it.

- *Explain the interaction of the children's product definition with the ASTM F963 toy safety standard.* The agency received a specific comment seeking clarity on the interaction of the children's product definition with F963, because the commenter worried about the seeming

[4] "*Provided*, That the Commission, by regulation, (i) shall exempt from clause (A) of this paragraph articles, such as chemical sets, which by reason of their functional purpose require the inclusion of the hazardous substance involved, or necessarily present an electrical, mechanical, or thermal hazard, and which bear labeling giving adequate directions and warning for safe use and are intended for use by children who have attained sufficient maturity, and may reasonably be expected, to read and heed such directions and warnings ..." 15 U.S.C. § 1261(q)(1). Our regulations extend this language, *inter alia*, to "other science education sets intended primarily for juveniles" as well as "[e]ducational materials such as art materials, preserved biological specimens, laboratory chemicals, and other articles intended and used for educational purposes." 16 CFR § 1500.85(a)(1) and (a)(4). Reliance on the FHSA as a rationale for excluding science kits would also help justify the Commission's position on fireworks, because the statutory definition of a banned hazardous substance also excludes certain fireworks.

inconsistency in how our statutes treat certain products. The confusion stems from the fact that the children's product definition affects products designed or intended primarily for children 12 years of age or younger whereas F963 requirements apply to products used by consumers under 14 years of age. The interpretive rule responds to the comment without addressing it. The short answer is that a toy designed for the 13+ market (or even for the 9+ market if primarily used by consumers over 12) would have to comply with ASTM F963, but such a toy would not have to comply with third-party testing and other requirements that apply exclusively to children's products because it would not be designed or intended primarily for children 12 years of age or younger. Section 102(a)(2) of CPSIA requires third-party testing of "any ***children's product*** that is subject to a children's product safety rule," so only toys designed or intended primarily for children 12 years of age or younger have to comply with the CPSIA's third-party testing and certification requirements (*e.g.*, to the ASTM F963 standard), its lead and phthalate content limits, and its tracking label mandate.

Conclusion

By failing to limit the Children's Product Definition Final Interpretative Rule to only those items that are clearly required to be captured by the law or those items that actually pose risk, the Commission has created a hodge-podge of ifs, ands, buts and maybes that are completely inconsistent and unpredictable. Of course the implicit admission that we make by excluding musical instruments—that they do not pose a risk—is revealing. Our decision making here is more than a little bit arbitrary and capricious. If we are willing to exclude musical instruments with high lead levels even when they are marketed deliberately and predictably to children, then we ought to be equally willing to exclude many other categories of products that also pose little or no risk.

Some supporters of the CPSIA and today's interpretive rule want to believe that business will find a way to persevere despite all of the regulatory fetters we attach. But we know that this law is already driving companies out of business, reducing choice in the marketplace, eroding the American manufacturing base, and killing jobs. And what are American families getting? Fewer choices of products they want, higher prices at the cash register, and the tax bill to pay for all the new employees we are hiring to enforce these needless new regulations.

As the federal government talks about helping small businesses and stimulating job creation in today's dismal economy, we Commissioners cannot be oblivious to the burden that new regulations from our agency put on industry. Because the CPSIA is so broad-sweeping and impacts so many products which pose no risk to children at all, the lack of clarity in this final interpretive rule—and the agency's failure to take every opportunity to limit its scope—will add new, unnecessary burdens on thousands of manufacturers and force them to spend scarce resources deciphering our compliance rules and re-engineering products instead of hiring new workers.

This Commission's voluntary policy choice to enlarge the children's product definition fence will set traps for unwary companies and cause the CPSIA to have an even harsher impact on the economy and jobs going forward. Rather than reverse course from the PIR, we should hew more closely to what the statute absolutely requires, stick as much as possible to those products that pose risk, and develop subfactors that promote clarity. Then we need to return to our core mission of product safety and let American business get back to work.