

Statement of Policy: Interpretation and Enforcement Of Section 103(a) of the Consumer Product Safety Improvement Act

A. Background

On August 14, 2008, the Consumer Product Safety Improvement Act (CPSIA) was enacted. It made a number of amendments to the Consumer Product Safety Act (CPSA). Section 103 of the CPSIA, entitled “Tracking Labels for Children’s Products,” mandates, in pertinent part, “distinguishing marks” on all children’s products and their packaging to enable the manufacturer and the ultimate purchaser to “ascertain” certain source and production information.¹ These markings are to enable the manufacturer, retailers and the ultimate consumer to ascertain the manufacturer or private labeler, location and date of production of the product, and cohort information (batch, run number, or other identifying characteristic).² These new requirements become effective August 14, 2009.

To gather comments and information about implementation of this program, the Commission published a Notice of Inquiry in the Federal Register on February 26, 2009, 74 Fed. Reg. 8781, and held a public forum on May 12, 2009. Comments in response to the Notice and discussions in the forum demonstrate that many questions exist about the tracking label requirement. Through this policy guidance the Commission intends to clarify its interpretation of the statutory requirements and provide guidance on how it intends to enforce Section 103 of the CPSIA. This document does not impose any additional requirements beyond those in the CPSIA, but informs the public of the Commission’s interpretation of the provision.

B. Section 103(a), Generally

1. Purpose

The purpose of Section 103(a) is to establish a means for identifying the source of children’s products in order to improve the safety of such products. Discussing Section 103, the Report from the House Energy and Commerce Committee noted that it intended the Section to “aid in determining the origin of the product and the cause of recall” to address the difficulty some manufacturers of children’s products had determining the

¹ Section 103 of the CPSIA is codified at 15 U.S.C. § 2063(a)(5).

² The CPSIA provides that the marks are to “enable:

- (A) the manufacturer to ascertain the location and date of production, cohort information (including the batch, run number, or other identifying characteristic), and any other information determined by the manufacturer to facilitate ascertaining the specific source of the product by reference to those marks; and
- (B) the ultimate purchaser to ascertain the manufacturer or private labeler, location and date of production of the product, and cohort information (including the batch, run number, or other identifying characteristic).”

location of products that were recalled during the summer of 2007. H.R. Rep. No. 501, 110th Cong., 1st Sess. 32 (2007). If a manufacturer can identify the location, date of production, and such individualized information as the batch or run number, it can more readily isolate products that it or others may discover present a safety concern. Similarly, if a consumer can identify the manufacturer (or private labeler), location and date the product was made, and any more specific identifying information, he can more easily determine whether a product in the home is the subject of a safety recall.

The Commission believes that the purpose of Section 103(a) is not to impose significant additional burdens on manufacturers who already make available the required information for their products, but to bring those who do not up to a higher standard. In the event of a recall, the information mandated by Section 103(a) would enhance the specificity of the product identification and lead to better awareness by the consumer. Greater specificity identifying the product will help the manufacturer narrow the scope of a recall if one is ever needed and help retailers more readily identify products that need to be removed from inventory. This greater specificity helps the manufacturer as well as the consumer.

The statutory provision does not require a uniform one-size-fits-all system. Section 103 requires permanent distinguishing marks, but does not specify what those marks are to look like. At this point, the Commission is not imposing any such uniform requirements, but expects that manufacturers will use their best judgment to develop markings that best suit their business and product. These may change as technology improves. Over time, and as technology develops, the Commission may consider the need for, and appropriateness of, a more uniform system and has solicited comment on these issues from our global trading partners. If the Commission were to implement such a system in the future it would do so through notice and comment rulemaking and provide a prospective effective date.

2. Compliance and Enforcement

As with any new requirement, the Commission anticipates that there will be a period of education when Section 103(a) first takes effect. The Commission will require compliance with this provision in the context of recalls of products and will exercise its discretion with regard to penalizing manufacturers for noncompliance. In the first instance, given good faith efforts by manufacturers to educate themselves on the requirements of Section 103(a) and to consider ways to apply it to their business, the Commission will not likely seek penalties if required information was inadvertently omitted.

3. The Effective Date

Section 103(a) applies to children's products made on or after August 14, 2009. It does not apply retroactively to such products made before that date. As such, there will be a period of time beginning on August 14, 2009, when there will be products available for

sale that are in compliance with this Section because they meet the new requirements and products that are in compliance because they were manufactured before August 14, 2009.

4. Who is responsible for compliance?

The “manufacturer” of the product, as defined in the CPSA, 15 U.S.C. § 2052(a), is responsible for compliance with Section 103(a). The term manufacturer is defined in the CPSA to include both the manufacturer and importer. Importers should work with their foreign manufacturing sources to ensure compliance as both manufacturers and importers must comply with the Act.

5. Covered Products

Section 103(a) applies only to children’s products and their packaging. A children’s product is defined in Section 235(a) of the CPSIA as a “consumer product designed or intended primarily for children 12 years of age or younger.”

C. Format and Content of the “Tracking Label”

1. What is a “tracking label”?

While the title of Section 103 references “tracking labels,” the focus of the statutory text is “distinguishing marks.” As such, manufacturers should look at the totality of the information permanently marked on the product and packaging and not interpret “label” to mean a singular collection of information in one discrete location.

The Commission believes that required information already permanently marked either to brand the product or otherwise to comply with other Commission or federal regulations, such as those promulgated under the Textile, Wool and Fur Acts or country of origin labeling rules, could be considered part of the “distinguishing marks” called for by Section 103(a). Any such marking would have to be permanent as required by Section 103(a).

2. What marks are required and what does it mean for information to be ascertainable?

Section 103(a) mandates distinguishing marks such that (1) the location of production (2) the date of production and (3) cohort information for that product is ascertainable. Any such marks should be visible and legible. Overall, the information should allow the manufacturer to determine the specific source of each product. The Commission expects a manufacturer to depart from these requirements only for considered and definable reasons. Each manufacturer is ultimately responsible for making a reasonable judgment about what information can be marked on their product and packaging, given the character and type of their product and packaging, and what required information can be ascertainable, given the character and type of their business. When considering the reasonableness of a manufacturer’s decision regarding what information to include in its

markings, the Commission intends to look at the individual manufacturer's situation along with the practices of peer manufacturers.

The question of what should be ascertainable is a different question than whether that specific information can be marked on the product or packaging. While there are foreseeable limitations of what a manufacturer might reasonably be able to mark on a product or packaging, the Commission expects the basic information referred to in Section 103(a) to be ultimately ascertainable by the manufacturer and the consumer.

Section 103(a) does not require codes, formats or numbering systems. A manufacturer may choose to employ a code or numbering system provided the required information remains ascertainable by the consumer. The manufacturer can also rely on code systems already provided through compliance with other federal regulations, again, provided the required information underlying that code is ascertainable by consumers.

3. What is a "permanent" mark?

The Commission considers a "permanent" mark on a product to be a mark that can reasonably be expected to remain on the product during the useful life of the product.

A mark on disposable packaging need only be permanent to the extent it is durable enough to reach the consumer. As such, an adhesive label on a piece of disposable packaging might be sufficient for a packaging mark. Further, if a mark is visible on the product through disposable packaging, there is no need for the mark to be on the packaging.

The Commission is aware that some voluntary standards, for example the ASTM standard for cribs, have provisions concerning the permanency of labels. Such standards may provide some guidance to manufacturers when determining whether a marking is permanent.

4. When can only the packaging be marked and not the product?

The Commission believes that Section 103(a) sets forth the expectation that, in most instances, both the packaging and the product will be marked. The statute recognizes, however, that this might not always be practicable. Some circumstances where the Commission considers that marking the product itself might not be practicable include:

- (1) If a product is too small to be marked. Legislative history recognizes that a product's size is a primary consideration in determining if marking only the packaging is feasible. See H.R. Rep. No. 501, 110th Cong., 1st Sess. 32 (2007).
- (2) If a toy is meant to be stored in a box or other packaging, such as games with boards and small game pieces. There, the board and the box should be marked, but the individual game pieces do not need to be. This is another example recognized in the legislative history. See H.R. Rep. No. 501, 110th Cong., 1st Sess. 32 (2007). The Commission believes that this principle would similarly apply to arts and crafts kits for

children. Again, only the storage box and one integral part of the kit needs to be marked and not every item in the crafting kit. Where a number of small products such as marbles, buttons, beads, etc. are packaged together, the Commission believes that marking the package would be sufficient. For products that are meant to stay with or be contained in their original packaging, the packaging would be considered part of the “product.”

(3) If a product is sold through a bulk vending machine, the item does not need to be individually marked but the package or carton in which such products are shipped to the retailer should be marked. The Conference Report recognized that marking each individual product in such circumstances may not be practical. See H.R. Rep. No. 787, 110th Cong., 2d Sess. 67 (2008).

(4) If a physical mark would weaken or damage the product or impair its utility.

(5) If a product surface would be impossible to mark permanently such as those made of elastics, beads, small pieces of fabric (such as jewelry, hair ornaments, etc.), or craft items like pipe stems, or natural rocks.

(6) If the aesthetics of the product would be ruined by a mark and a mark cannot be placed in an accessible but inconspicuous location.

5. Where should marks be placed for items sold in sets?

The Commission believes that for items meant to be sold as sets or pairs and that function only as sets or pairs, only one item of the pair, or an integral part of the set would need to be marked. Shoes are an example. This situation is similar to the circumstance recognized in legislative history of a game with small pieces not needing marking on all the small pieces. The Commission expects that items which can be separated and sold separately would need to be separately marked.

6. What entity is to be marked or ascertainable?

Section 103(a) requires that the name of the manufacturer or the name of the private labeler be ascertainable from the marking.

7. What is the location of production to be marked or ascertainable?

The Commission believes that the name of the country and the city and state (or administrative region, as appropriate) where the product was manufactured would be sufficient to provide the location of production. However, the manufacturer would be responsible for identifying the specific source of the product in the event of a compliance inquiry or other Commission action.

8. What date of production is to be marked or ascertainable?

The Commission recognizes that products may not always be started and completed in a single day. The Commission anticipates that the date of production could be a date range if the product is made over a period of time.

When the product is a group of disparate components or items assembled together or gathered into one package, the Commission interprets the date of manufacture to mean the date of assembly or placement into one package.

9. What cohort information is to be marked or ascertainable? Do small volume manufacturers or crafters need to create a system that includes batch, run or other numbers?

Although Section 103(a) does not require manufacturers that do not use lot, batch or run numbers to create such a system, the Commission believes that compliance with this Section generally will require that manufacturers have in place a reasonable means to ascertain detailed production information, including the means to distinguish products made from different factories, made with different components, at different times or have other material differences that make the product non-identical from previous products. The business and recordkeeping practices of peer manufacturers should be considered.

Small volume manufacturers and crafters may be unlikely to use lot, batch or run numbers, and, again, the Commission does not interpret Section 103(a) to require them to create such a system. Nevertheless, reasonable practices should be in place by such manufacturers to keep records of components used in their products.

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