

## CPSC Issues Final Interpretive Rule Defining 'Children's Product' – Well, Sort of...

### ***Product Liability Advisory***

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On October 14, 2010, the Consumer Product Safety Commission (CPSC) issued its final interpretive rule defining the term "children's product" pursuant to the Consumer Product Safety Improvement Act of 2008 (CPSIA). Although the CPSIA made sweeping changes to the way all consumer products are regulated ([overview of changes](#)), the most stringent new requirements apply to "children's products," which include lower lead content limits, phthalate ban, product testing by CPSC certified independent laboratories, certification by importers and domestic manufacturers based upon strict testing procedures and tracking labels. Thus, the proper classification of a product – "children's product" or "general use product" – is crucial, and CPSC has received scores of requests for clarification about what is and is not a "children's product" since the statute was enacted on August 14, 2008.

The final interpretive rule was narrowly adopted by the commission along party lines (3 to 2) and remains controversial. As a practical matter, it does not provide bright-line guidance but does emphasize that a determination must be made on a case-by-case basis, applying the statutory definition. The final interpretive rule further provides a number of examples, which may be of help but there is no short cut to a case-by-case approach.

CPSIA defines a "children's product" as a "consumer product designed or intended primarily for children 12 years of age or younger." The statute provides four factors that must be considered together to determine whether a given product is primarily intended for a child 12 years or younger. These 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 CPSC staff in September 2002.

The statutory factors focus on whether a product is "for use" by children 12 years of younger. Specifically, the important point is *whether children will physically interact with the product, based on the "reasonably foreseeable use" of the product.*

In contrast, the CPSIA is silent as to the definition of a general use product, or a product that is not a "children's product." In the final interpretive rule, CPSC filled the void by defining "general use product" as "a product designed or intended primarily for consumers older than age 12." 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." The final interpretive rule's definition of a general use product is remarkably different from the approach taken in June 2009 by the Republican-led commission when it approved a finding that pens sold in back-to-school packages were general use products, not children's products, because the pens in the package were the same as the ones sold to the public, and were not "primarily" intended for children younger than 12. The change in the CPSC's view of a "children's product" is also apparent in the CPSC's September 29, 2010 denial of a request for an exemption for school science kits from the children's product rule on the ground that "paper clips" included in kits, (to demonstrate how magnets work) were children's products, even though the paper clips were the same ones sold for general use in office supply stores. In sum, the final interpretive guidance backs away from the previous "test" that a children's product must be **primarily intended** for children, and now appears to include in the children's product category products that are used by all ages if the product will **foreseeably be used** by children. As a practical matter, general use products that are commonly used by the entire family may be swept into the "children's product" category, unless in the application of the statutory factors in specific cases make a clear and convincing case that the product should not be a "children's product."

More than two years after the CPSIA was enacted, the regulated public is still without a simple and certain method to determine when a product is a children's product and when it is a general use product. Although the final interpretive rule provides "guidance," companies are it likely to find it difficult to apply and of little practical value. This will likely send businesses scrambling to lawyers and CPSC specialists for assistance in classifying their products – adding more cost and risk to product development. One thing is certain: the present commission's final interpretive rule errs on the side of including more items as children's products than categorizing products as general use.

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