

## Antitrust, Franchise & Consumer Law Client Service Group

To: Our Clients and Friends

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### CPSC Passes Final Interpretive Rule on Definition of “Children’s Products”

After lengthy debate the Consumer Product Safety Commission (CPSC) approved a Final Interpretive Rule on applying the term “children’s product” used in the Consumer Product Safety Improvement Act (CPSIA). The rule is designed to provide manufacturers, importers and other interested parties a “better understanding” of how the Agency evaluates whether an item is a children’s product and, therefore, subject to special requirements under the CPSIA.

Under Section 235 of the CPSIA, a children’s product is a consumer product intended for use primarily by children 12 years of age or younger. A product will generally be considered “for use” by children ages 12 and under if it is “reasonably foreseeable,” or expected, that they will physically interact with the product. The law requires the following four factors be considered, as a whole, in deciding whether a product is “for use” by children:

- A statement from the manufacturer on the intended use of the product;
- The product’s packaging, display, promotion or advertising;
- Whether the product is commonly recognized as an item for children’s use;
- The CPSC’s Age Determination guidelines published in 2002.

The CPSC has emphasized that whether, under these factors, an item meets the definition of “children’s product” will be determined on a case-by-case basis, as individual products may present unique considerations. The Interpretive Rule, however, provides some guidance on how the Commission will assess each statutory factor, as follows.

#### **Statement from the Manufacturer on the Intended Use of the Product**

The Commission will evaluate whether a manufacturer’s description about the use of a product, on a label or elsewhere on the product, is reasonably consistent with the consumer’s expected use of the

product. A product may still be classified as primarily for children despite the manufacturer's statement if its primary appeal is for children age 12 and under. Some examples of what will help assess appeal are whether the product: 1) has decorations or embellishments that encourage a child to use the product; 2) is sized for a child; or 3) is marketed to appeal primarily to children. No one factor by itself, however, determines whether a product will be classified as for children.

### **The Product's Packaging, Display, Promotion or Advertising**

Under this criteria, the Commission will consider a manufacturer's representation of the product through aspects such as packaging, text, illustrations, or photographs depicting consumers' use of the product, instructions, assembly manuals or advertising media. Whether a product is sold in or near a children's section in a retail store will also help determine whether it is intended for children, even if the manufacturer exercises no influence over where the product is sold in retail. For this reason the CPSC will not consider this criteria controlling without taking into account other factors.

The CPSC also noted that in some instances a product may still be classified as "for use" by children even if it is sold with products intended for adults. For example, a candle which is packaged with a stuffed animal would not be considered a children's product, as items such as candles or fireworks are not intended for children. The stuffed animal, however, would likely be considered a children's product because children typically play with stuffed animals.

### **Whether a Product is Commonly Recognized as an Item for Children's Use**

The CPSC will assess whether consumers perceive the product as intended "for use" by children. A consideration within this assessment is the reasonably foreseeable use of the product. The CPSC may evaluate marketing studies on a product, such as sales data or focus group testing, to determine the product's appropriate age group use. Other factors that may be considered include the following aspects of the product:

- *"Features or Characteristics"* - Whether it is made in small sizes that are more suitable for children, if there are safety features not normally found on adult products, or if the product would be used for play.
- *"Principal Use"* - Whether it usually functions as a children's product. For example, a child may use a broom as a play horse, but a broom is a cleaning item.
- *"Cost"* - For example, a less expensive product may indicate that it is for children to use freely.
- *"Children's Interactions"* with the product - Whether a product in a child's environment is intended for children. For example, diaper bags, bottle warmers and baby monitors are commonly around babies, but they would not be classified as children's products because they are intended for use by an adult while *caring* for a child.

Additionally, the CPSC will apply its 2002 *"Age Determination Guidelines,"* available on its website at <http://www.cpsc.gov/businfo/adg.pdf> , to assess factors such as whether a product appeals to children and if a particular age group of child is capable of using the product. The guidelines primarily address the characteristics, age suitability, and regulations for toys and appropriate children's play, and can be

useful for manufacturers considering the proper age range classification for a product. The CPSC will also consider any updates to the guidelines that may be made in the future.

## **Examples of Children’s or “General Use” Products**

In the Final Rule the Commission also evaluated whether several items are classified as children’s or “general use” products. Products designed or intended primarily for consumers older than age 12 are general use products. Overall, under which category a product falls will depend on for whom it is designed.

### *General Use*

Home furnishings and fixtures such as rocking chairs, lamps, rugs, ceiling fans, and clothing hooks and racks usually found in children’s bedrooms or classrooms ordinarily will be considered “general use” products unless they are designed to appeal to children. Examples of such products meant for children are child-sized desks and chairs, or infant tubs or bath seats.

Some other products the CPSC has labeled “general use” are adult collectibles, which have characteristics such as themes inappropriate for children 12 years of age or younger, are expensive, fragile, and not marketed for children; sporting goods; and musical instruments. These products, however, can be classified as “for use” by children when they are intentionally designed for children ages 12 and under.

### *Children’s Products*

The CPSC has classified as children’s products items such as jewelry, art materials, DVDs, video games and computer products that are sized, intended, designed, or marketed for children.

## **Consumer Product Safety Improvement Act (CPSIA)**

The Final Interpretive Rule on Children’s Products is part of the sweeping guidance on items for ages 12 and under that has been published since the CPSIA was amended in 2008. Under the Act, children’s products must comply with a number of unique testing requirements for potential hazards such as excessive lead and phthalate content. Children’s products are subject to additional standards based on factors such as size, including special requirements for products for children under 3 years old to avoid choking hazards.

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