

## Client Alert.

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October 7, 2010

# Not Mere Child's Play: New Rule Refining the Definition of "Children's Product"

By Linda Lane and Ellen Nudelman Adler

When the Consumer Product Safety Improvement Act of 2008 ("CPSIA") passed, many of its provisions, such as lead limits, phthalate bans, third party testing, and tracking labels, applied to a seemingly ubiquitous category of products called "children's products." The CPSIA defined a "children's product," in part, as "a consumer product designed or intended primarily for children 12 years of age or younger." The CPSIA further defined "children's product" by identifying four factors to consider in determining whether a consumer product is primarily intended for a child 12 years of age or younger:

- (A) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.
- (B) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.
- (C) Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger.
- (D) The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.

Even with this lengthy, multi-factored definition, it has been a continuing struggle for manufacturers, importers, distributors, and retailers to determine the boundaries of what constitutes a children's product for purposes of the new regulatory scheme. The stakes will be high to get the definition right, as the CPSIA grants the Consumer Product Safety Commission ("CPSC") the authority to penalize manufacturers for noncompliance with CPSIA requirements, including penalties of up to \$100,000 for each "knowing" violation of the Consumer Product Safety Act ("CPSA").

The CPSC itself has had a hard time clarifying what constitutes a "children's product." On March 31, 2010, the CPSC approved a proposed interpretive rule regarding the definition of "children's product," and invited public comments. On August 25, 2010, after an outpouring of comments from consumers, manufacturers, and trade associations, the CPSC issued a 62-page revised interpretive rule, including specific responses to public comments. On September 29, 2010, the CPSC voted 3-2 to publish, with changes, the final interpretive rule in the Federal Register as 16 C.F.R. Part 1200, "Definition of Children's Product Under the Consumer Product Safety Act." The new rule is effective immediately.

The new definition of children's product provides both broad and specific guidance regarding what type of product constitutes a children's product. The term "for use" by children 12 years of age or younger means that children will physically interact with such product based on reasonably foreseeable use (but not misuse) of such product. In contrast, products intended for "general use," are those consumer products with which consumers older than 12 would be "as likely,

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or more likely to interact.” Also, other products that are specifically not intended for use by children aged 12 and under, such as products that incorporate performance requirements for child resistance, will not be considered children’s products.

The most useful aspects of the new rule, however, are its detailed examples of specific products that are considered by the CPSC to be children’s products. Take a lamp. Most lamps are not considered children’s products because they are sold to the general public. Just because lamps (and other home furnishings) may be used by children does not make them children’s products. As the CPSC notes, “[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.” Furthermore, childish embellishments on a lamp would not automatically render it a children’s product, either. However, when a general use product, such as a lamp, is embellished with features or characteristics that incorporate elements of play value (a toy train on a lamp) for an older child, such lamp would be evaluated to ascertain the appropriate age group for whom the product was intended using the typical four-factor analysis.

The new rule will prove particularly helpful when addressing questions regarding lamps and other specific products analyzed by the CPSC. However, the detailed and fact-intensive nature of the CPSC’s analysis of these exemplar products may not easily transfer to other products. The new rule falls short of providing a clear or simple defining line between children’s and adults’ products.

The rule’s guidance is organized by the four original statutory factors used in determining whether a product is a “children’s product.”

### MANUFACTURER’S STATEMENT—A LITMUS TEST OF REASONABLENESS

The new rule clarifies that a manufacturer’s statement regarding the product’s intended use, including the product’s label, “should be reasonably consistent with the expected use patterns for a product.” Thus, manufacturers are cautioned to conduct a thoughtful, multi-faceted analysis of their products rather than rely on blanket disclaimers such as “For Adult Use Only” or “Not Intended For Children 12 and Under.” On the other hand, a label indicating that a product is for ages 9 and up does not necessarily make it a children’s product if it is a general use product. In short, the manufacturer’s label, “in and of itself, is not considered determinative.”

### PRODUCT PRESENTATION MATTERS—EXPRESS AND IMPLIED MESSAGES IN PACKAGING, DISPLAY AND ADVERTISING

A product’s packaging, display, promotion, or advertising can expressly or impliedly represent a product’s suitability for children. Thus, even if the product is not found in the juvenile section of a store, if it is advertised as being used by a toddler, the manufacturer is on notice that the CPSIA may apply. However, even if the product is in the children’s section of a store, that is also not dispositive—for example, an electronic media device, such as a video game console, will be considered a general use product rather than a children’s product if it is sold in both toy stores and electronics stores or department stores, and marketed to adults and children over 12. The final rule explicitly recognizes that manufacturers do not necessarily control where a product will be placed in a retail establishment and such lack of control will be considered.

The new rule also addresses a commonplace issue of classifying a (typical) children’s product that is packaged with an adult product, such as a stuffed animal packaged with a candle. The stuffed animal (but not the candle) is still considered a children’s product and must meet the requirements of the CPSIA, as it is likely that the adult will give the stuffed animal

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to a child. As adult retailers such as Victoria's Secret have learned the hard way before the passage of this rule, stuffed animals intended to hold cosmetics and sold at an adult store are still subject to choking hazard rules applied to children's products and CPSC recalls.

## COMMONLY RECOGNIZED BY CONSUMERS—QUERY FEATURES, USES, COSTS, AND PRODUCT INTERACTIONS

The new rule encourages manufacturers to evaluate the actual use and reasonably foreseeable uses of a product to determine how the product will be perceived and used by consumers of that product. Explicitly condoned is reliance on market analyses, focus groups, or other marketing studies for their analyses of the likely ages of consumers of a product.

For manufacturers that choose not to conduct such third party analysis, further guidance is provided on how the CPSC and consumers evaluate age appropriateness. The rule provides features and characteristics of children's products, including small sizes, exaggerated features, safety features, childish colors or motifs, and any play value that the product might have.

If a product does not clearly fall into the children's or adult category after checking for these features and characteristics, the manufacturer is advised to analyze the product's reasonably foreseeable uses. However, even if some uses may be appealing to children (such as using a broom as an imagined toy horse), it is the "principal uses" of the product that take precedence in classifying a product (and thus not converting nearly every household item, like a broom, into a children's product).

Although the new rule does not provide a "price point" delineating children's and adults' products, it does advise that within a product category, products intended for adults tend to cost more than products intended for children. An example of using cost to price a product out of the children's arena is an adult collectible stuffed animal. In addition to other attributes of adult (versus child) collectibles that preclude use by children—such as limited production, fragile features, display features like hooks or pedestals, and marketing outside the children's market—an adult collectible stuffed animal is often times more expensive than a typical children's stuffed animal.

## AGE DETERMINATION GUIDELINES

The Age Determination Guidelines, issued by the CPSC in 2002, can also help determine a child's likely interaction with a particular product. The guidelines describe the typical capabilities, skills, and interests of children in various age groups. With respect to a product's appeal to certain children, the guidelines remind manufacturers that toddlers tend to explore the world by mouthing objects, enjoy bright colors, and pay little mind to high levels of detail. In contrast, middle childhood children are more interested in role-playing, enjoy more realistic colors, and like realistic details. With respect to the capabilities of certain age groups, the guidelines set forth the physical, social, and cognitive milestones that contribute to a child's ability to play with various types of products. This final factor may be helpful, but like the other three factors, does not lend itself to bright-line categorization, and may raise just as many questions as it answers.

## TAKE-AWAY LESSONS FOR THE MANUFACTURER OF (POTENTIAL) CHILDREN'S PRODUCTS

Manufacturers of (potential) children's products will find some additional guidance and many examples in the full text of the new rule. The final rule, and the CPSC's responses to comments regarding the prior versions of the rule, provide specific examples for a wide range of products, including furnishings and fixtures, collectibles, jewelry, DVDs, video

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games, computers, art materials, books, science equipment, sporting goods, recreational equipment, and musical instruments.

Unfortunately, the rule will not result in a straightforward classification of each product on the market. As CPSC Chairman Inez Tenenbaum, who voted for the rule, summarized, “Most items will fit squarely within or outside the definition, while many others will require a more careful fact-based analysis.” However, as CPSC Commissioner Nancy Nord revealed, the “many others” category can be quite challenging to classify, as “during [the CPSC’s] 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.”

Still, the new rule provides some added clarity for manufacturers (as well as importers, distributors, and retailers) to accurately identify their products, at least from the CPSC’s perspective, as for children or adults. The CPSC also promises to provide further guidance by posting on its website some determinations of whether a product falls within the definition of a “children’s product.” And, Chairman Tenenbaum suggests that in the future, manufacturers may be able to consult with the new Small Business Ombudsman regarding where this line is drawn.

If a product is not intended for children, manufacturers can consider factors in their control, such as labeling the product for adults only, pricing the product higher, targeting advertising towards adults, and advertising in adult media, to increase the likelihood of that intent being properly understood by the public and the CPSC. Likewise, if the new guidance leaves a cloud of uncertainty over the classification of a particular product, a manufacturer is well-advised to either seek counsel’s advice or comply in full with the CPSIA requirements.

Morrison & Foerster LLP has closely followed the Consumer Product Safety Improvement Act as it evolved in Congress and was ultimately signed into law in 2008. We have since advised a variety of clients on its implementation and helped them keep abreast of developments emanating from the CPSC. In addition, we regularly represent children’s and consumer product companies and trade associations and assist them with a variety of legislative, regulatory, administrative enforcement, and litigation matters.

### Contact:

**Robert Falk**  
(415) 268-6294  
[rfalk@mofo.com](mailto:rfalk@mofo.com)

**Linda Lane**  
(858) 720-7989  
[llane@mofo.com](mailto:llane@mofo.com)

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