

Consumer Product Safety Alert

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CPSC Issues Final Interpretative Rule on Definition of “Children’s Product”

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On September 29, 2010, the U.S. Consumer Product Safety Commission (CPSC) approved a final interpretative rule on the meaning of “children’s product” as used in the Consumer Product Safety Improvement Act of 2008 (CPSIA). Understanding the difference between a “children’s product” and a “general use product” is critical, since the CPSIA subjects children’s products to stringent lead limits, the tracking label mandate, and third-party testing and requirements, among other requirements. The issuance of the interpretative rule comes at a time when the safety of children’s products is receiving more scrutiny from the federal government and the CPSC is assessing record penalties for violations of federal product safety laws. [Click here for the full text of the rule.](#)

The final rule represents a notable shift by the CPSC away from factors that demonstrate the manufacturer’s intended customer base for a particular product (by looking at factors such as how the product is labeled, advertised, and sold) to a greater focus on the nature of the product itself, that is, whether due to its size, decoration, functionality, etc., it is more likely to appeal to children under 13 than to older consumers. Thus, manufacturers, importers, and retailers of consumer products should reanalyze their products in light of the new interpretative rule and, based on the new rule, should develop a reasonable rationale for how they classify their products.

Factors Used to Identify a “Children’s Product”

The CPSIA defines a “children’s product” as “a consumer product designed or intended primarily for children 12 years of age or younger.” The CPSIA also identifies four factors that should help determine whether a product is “intended primarily for children,” specifically: (1) a manufacturer’s (or importer’s) label/statement about the product’s intended use; (2) the product’s marketing and packaging; (3) the common understanding of the intended use of the product; and (4) the CPSC Age Determination Guidelines.

The final rule elaborates on and attempts to explain these factors. While neither the CPSIA nor the final interpretative rule provide very many bright line determinations as to what is considered a children’s product, if an item contains the following characteristics, the likelihood increases that the CPSC will view the items as a “children’s product”:

- “Childish” Characteristics: Small sizes; exaggerated features that help simplify the product’s use (e.g., large buttons and indicator lights); safety features not found on similar products for adults; bright colors and decorative motifs; and features and embellishments that increase product attractiveness for children (such as cartoon characters, etc.) are all likely to increase the likelihood that the CPSC will classify a product as being a children’s product.

- **Principal Use of the Product:** Consumers' perception of the "reasonably foreseeable use" of the product is also considered. Just because a product (kitchen pots and pans, for example) may be appealing to children and have "play value," does not mean they are children's products.
- **Location of the Product:** A product sold in a toy or other children's section of a store will be more likely to be considered a "children's product." However, the Commission recognizes that manufacturers do not always control where a product will be placed in a retail store, and the extent of the manufacturer's knowledge of, or control over, placement will be considered by CPSC staff.
- **Cost of the Product:** Generally, within a given product category, the products intended for adults cost more than the products intended for children.
- **Marketing/Labeling:** Manufacturers must convey a consistent message through the packaging, labeling, and advertising of their products. For example, simply stating "Not Intended for Children Under 13" does not render it a general use product if, in fact, it is intrinsically a children's product and being marketed primarily to children. Similarly, how a product is marketed alone is not determinative as to how the product is classified.

Specific Product Categories

The final rule clarifies how the following product groups will generally be categorized:

- **Collectibles:** Model railways and trains, antique toys and dolls, model cars and similar products with a relatively high price and level of sophistication will typically be classified as general use, not children's products.
- **Jewelry and Related Accessories:** Since jewelry sold to children is often very similar to that sold to older consumers, the Commission will focus on how the products are marketed and priced. For example, if sold in vending machines or in stores catering primarily to girls under 13, such jewelry typically will be categorized as a children's product.
- **DVDs/CDs:** DVDs and CDs with childish-themed content intended primarily for children under 13 are categorized as children's products.
- **Art Materials, Scientific Equipment, and Musical Instruments:** Marketing such products to schools, camps, etc., for children under 13 will not necessarily render them children's products. Thus, standard-sized musical instruments are not children's products, even if sold exclusively to elementary schools, but child-sized or "toy" instruments are likely children's products, regardless of how they're marketed.
- **Home Furnishings:** General home furnishings will usually be categorized as general use products, although children's-sized and possibly "childishly" decorated furniture will be considered to be children's products.
- **Sports Equipment:** Standard/regulation-sized sports equipment are general use products, but toy-sized sports equipment will likely be considered to be children's products.

How Can You Ensure that You are Complying with the New Rule?

Mintz Levin can assist your company to:

- Evaluate products and product lines for CPSC compliance and classification, including

whether they are likely to be considered “children’s products,” “toys,” or “child care articles,” and thereby become subject to existing regulations for children’s products.

- Assess your current product testing practices and policies and how to bring them into compliance with all CPSC requirements. A correct testing plan can actually save a company money by eliminating unnecessary testing.
- Advise your company on the many other CPSC regulations, guidance documents, and enforcement policies, including those dealing with the lead paint and substrate limits; limits on phthalates in certain children’s products; whistleblower protection for employees of product makers and sellers; new restrictions on the exportation of potentially violative products; a new CPSC public database of consumer complaints; new durable nursery product standards; and the transformation of voluntary into mandatory standards by the CPSC.
- Advocate for your company or industry group before the CPSC and the Commission (and, if necessary, Congress) to ensure that your interests and rights under the law are fully protected.

As part of the Antitrust and Federal Regulation Section, Mintz Levin has assembled a team that is devoted exclusively to CPSC-administered laws and regulations. We stand ready to advise and assist clients to anticipate and respond to compliance issues arising under the CPSIA and federal product safety law. Chuck Samuels has represented clients in the product safety arena for almost 30 years and was a leader in the industry group that worked on the legislation. Quin Dodd, as Chief of Staff at the CPSC, led the team that negotiated the provisions of the Act on behalf of the agency. We are presently advising trade associations, manufacturers, retailers, importers, and testing labs on the new law, not only to prevent problems from arising, but also to help them capitalize on new opportunities the CPSIA may present. Please contact either Quin (qdodd@mintz.com) or Chuck (casamuels@mintz.com) to find out more about how we can help you both comply with and thrive under the new product safety environment.

[Click here to view Mintz Levin’s Consumer Product Safety attorneys.](#)

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