

**Notice of Availability of Draft Guidance Regarding Which Children's Products are
Subject to the Requirements of CPSIA Section 108 (continued)
Part 3 – Comments 70 thru 87**

March 25, 2009

Gordon Meyer
Business Development Analyst-Polymers
Applied Technical Services
1049 Triad Court
Marietta, GA 30062

"Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information"
Filed by e-mail to section108definitions@cpsc.gov.*

Enclosed please find our comments for *"Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information"*.

I. General Approach

- a. The document provides guidance but leaves some areas undefined. Attempting to classify subjective terms such as "playability" allows for exceptions. Create more scientific definitions...."if a child is engaged by contacting the toy, device, product, or material for more than 30 minutes of activity, it has to be tested".
- b. See above.
- B. An approach that is more decisive in its scope works better. Limit definitions that are open for interpretation. Make the requirements with minimal exemptions.
- C. Unknown at this time.
- D. The results will be issue of more and more exemptions, requirements to expand on the definitions, and allow for may stays to accommodate the implemented changes.

II. Children's Toys and Child Care Articles

- A. Yes, ASTM F963 serves as to provide good guidance and basis for clarification. It is well known and widely accepted.
- B. This should be managed from an aspect of who the target market is. Once an electronic device or toy is decorated in a manner to appeal to children, it should be required to meet compliance.
- C. Excluding arts and crafts materials does not reduce risk to children. Children place markers, pencils, crayons, etc. into their mouths when these items are in use. Often times the very outer coatings on pencils are chewed, removed, and swallowed by the child via an oral means.
- D. This items need to be included based on again on the target market, toys such as tricycles, small bicycles, and three wheelers are designed for children within a specific age group and should be tested.
- E. ATV and motorized vehicles with lead acid batteries, volatile and flammable fuels, metal components and alloys designed for safety should be exempt. Their use requires adult supervision.

F. Distinguishing between primary and secondary child care articles may only create additional confusion and issue with multiple classifications (i.e. games designed for wide age groups).

G-M. Yes. All should be considered to be required for compliance. The reason for limiting this class of compounds is based on the hazard phthalates present to a developing child and the key to this legislation is limiting or avenues for exposure to children. Are we to create a means to define and classify the materials for testing based on our own convenience or ease of enforcement?

N. Pools present as their primary hazards those unrelated to phthalates. The dilution rate of a filled pool and the use of halogenated compounds to act as antibacterial and antifungal agents present a means to alter the chemistry of the phthalates.

Summary: Please see additional comments related to the above...

With regards to the intended use as a "... product is for play", signifies only those products that are intended for playtime needs to be examined beyond this basic scope. Offering exclusions based on "playability" suggests a classification not based on a very critical factor; time for exposure. This is particularly true when examining the exclusion to sports equipment. A child engaged in a sports activity will have constant contact with some items (i.e. the handle on a hockey stick, tennis racket, etc.) and under these conditions will maintain an elevated heart rate, moist levels in those areas with contact of the item in question, and maintain that exposure route for lengthy and extended periods of time. These parameters allow for the most optimal conditions for uptake of hazardous compounds within the body, compound this with the fact that as a group, children have higher metabolic rates (i.e. mercury and lead absorption through dermal means).

Again, the routes of absorbance seems limited to only that of an oral nature and only to those items that can completely fit into a child's mouth. Does this adequately cover all routes of exposure? What about hand to mouth transfer, albeit not absorbed at the same concentrations as oral routes, it still provides a means by which to expose the child to the chemicals in question. And dermal transfer through the skin is complicated by the very nature, and varies based on the child ethnicity, but it still allows for organic compounds to be absorbed into the body.

O. Comments on the CPSC's test protocol (CPSC-CH-C1001-09 *Standard Operating Procedure for Determination of Phthalates*).

Some introductory statements need to be made before examination of the method as written:

- This procedure is designed to quantify the levels of six phthalates to be below a limit of 1,000 ppm of those polymeric materials within consumer products.
- This is the intent to establish whether the product contains an established safe level of the compounds of interest.
- Are phthalates found in metals? Woods? Uncoated or any treated paper?
- The level of these compounds in use as plasticizers are often in the percentage range, up to 20% by weight! If they are in use, they are incorporated at levels well above the limits set by the current legislation.

- Their chemistry makes them available for migration, as they do not remain bound to polymeric networks. This makes them readily available to be extracted.

To the method described:

- The main concern is the sample preparation utilizing a cryogenic mill. A PVC material at the sample size designated would dissolve in THF after 30 minutes without the need to milling.
- The method states it best...phthalates are a common contaminant, and the use of a cryogenic mill would increase the risk of cross contamination if proper cleaning is not administered. How is the cleaning to be handled? How many washes will remove residual amounts? This need sto be defined.
- Can real homogeneous samples be obtained in some mixed component samples? Metal alooys combined with heavily plasticized plastics present real challenges.
- How will this affect the cost to clients? Already standard fees begin at \$300/sample, and clienst are object to paying those fees. Adding labor costs (a chemist/technician's time) and the cost of material (i.e.cryogenic gases) will significantly increase the total cost for analysis and may ultimately prevent compliance.
- Can alternative method be considered, for instance an extraction method? Is it necessary to completely dissolve the polymer, or would a thorough extraction be sufficient? We are afterall looking to determine whether the sample passes a limit of 1,000 ppm.
- The use of THF will not work for all polymeric materials.
- Alternative means to dissociate the polymeric network may prove more efficient and still eb able to quantify the phthalates required. The methods for GPC/SEC would give good guidance for some alternative solvents and means for polymeric dissociation.
- Absolute requirement for interlaboratory examination, and a need to identify a standard polymer for method qualification.
- The use of splitless injection lends itself to analyzing for very low concentrations which is not the requirement needed.
- The SIM may not be appropriate at all times since we have seen issues with terephthalates, adipates, trimellitates eluting or co-eluting in the areas of interest complicating identification and ultimately quantitation.
- Not allowing a component based testing program wherein individual components could be identified as non-compliant and alternative material substitutions made to regain compliance.
- And to that issue, what happens to those individual high concentration phthalate containing parts removed or torn piece from the original toy (because we are referring to heavily plasticized polymers) that a child places in his/her mouth? The overall total concentration for the whole "toy" is deemed to be compliant, while one component could non-compliant but accessible. For example a toy that has small vinyl parts adhered to a larger rigid polycarbonate base. The vinyl adornment is adhered with a small amount of adhesive, but not adequate to totally adhered the vinyl component. The vinyl "tag" was easily peeled off and removed to provide a small enough piece to placed into a child's mouth. Soft vinyl parts can easily be folded, rolled, and compressed to be placed inside a child's mouth well beyond the dimensional size requirement of 5 cm. this vinyl "tag" is high in phthalates, to a concentration at least 10 times the allowable limit of 1,000 ppm. The problem is that the total concentration of the toy item was well below the allowable limits.

Stevenson, Todd

From: Gordon Meyer [gmeyer@atslab.com]
Sent: Thursday, March 26, 2009 8:14 AM
To: Section 108 Definitions
Subject: FW: Comments on Draft Subject to the Requirements of CPSIA Section 108
Attachments: Notice of Availability of Draft Guidance Regarding Section 108.doc

Importance: High
Sensitivity: Confidential

From: Gordon Meyer
Sent: Wednesday, March 25, 2009 6:21 PM
To: 'section108definitions@cpsc.gov.*'
Subject: Comments on Draft Subject to the Requirements of CPSIA Section 108
Importance: High
Sensitivity: Confidential

To Whom It May Concern,

Here are our comments as required.

Thank you for your consideration,

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Section 108 Guidance on Applicability of Children's Products Subject to the Phthalate Requirement

Bureau Veritas thanks the Commission staff for the opportunity to provide our comments to the following questions on Section 108 of the CPSIA, Prohibition on sale of certain products containing specified phthalates. Questions related to our responses should be directed to Elizabeth Hausler, Sr. Director of Technical Services, Americas at 716-505-3582 or elizabeth.hausler@us.bureauveritas.com.

1. General Approach

A. Provide comments on staff's approach to determining which products are subject to the requirements of CPSIA section 108. Explain.

a. Does it result in clear guidance? Why?

Response: Need clarity regarding crib mattresses, covers, etc. The guidance states that these items may or may not facilitate sleep. This leaves the interpretation open to the individual which will result in inconsistencies in compliance. The rationale behind why a bib is included is not clear as to why this item facilitates feeding. It focuses on proximity, yet proximity doesn't seem to weigh heavily in the case of cribs and mattresses. Clearer guidance is required for in these situations.

b. Do you have suggested changes to the approach? Why?

B. Is there an alternative approach that should be used? Please describe.

Response: It is understood that CPSIA differs from the EU directive. However, it would be advantageous to the industry to align with the current EU guidance document regarding applicability of testing as much as possible.

C. Is there any additional guidance on products that are subject to section 108 that would be useful to manufacturers? Describe.

D. What are the foreseeable consequences of the staff's approach?

Response: A lack of clear guidance, such as with mattress pads, to the industry will result in inconsistencies in compliance.

2. Please comment on our phthalate method.

Response: The following comments are provided based on the appropriate sections in the CPSC method CPSC-CH-C1001-09

Sample Preparation

- Milling of an entire product, depending on the size, would be very time consuming and costly. There is also a potential for contamination using the mill.
- Metal components cannot be separated from the non-metals components in electronics. Including the weight of the metal components could dilute the phthalate concentration.
- Many coatings contain phthalates above the 0.1% regulatory limit. In order to obtain an accurate result, the coating on the entire product would need to be



carefully removed and weighed. This practice would be very costly and time consuming.

Phthalate Extraction Method

- Method states to perform in triplicate, however, it is unclear if this is for a single extract or if multiple extractions on the same sample are required.
- It is also unclear if the triplicate results are averaged as well or how well the results should agree with one another.
- It is suggested to use an increased sample weight if the sample is not uniform but does not provide any additional guidance.
- Suggest to include a method for sonication as an alternative to shaking.
- The use of hexane to precipitate the polymer is not effective on certain polymers such as olefins.

GC-MS Operating Procedures

- GC-MS operating conditions listed are geared toward research and may not be scalable for high volume production analysis for third party labs.
- Method does not account for interferences from other phthalate esters such as DIOP
- Identification and quantification of DINP and DIDP can be difficult in certain instances. It is suggested to include an option to use an alternate instrument such as HPLC-DAD-MS. It is understood that there is no published method for determining phthalates using this instrument, therefore, the responsibility of validating an alternative method to the CPSC method would be on the user.

Calculation and Results

- The calculation provided does not include the total weight of the product but rather is based on the sample weight for the extraction.
- An example of a toxicological assessment by one of our chemists is provided below to show the potential effect

DEHP is used as the study model (due to its severity effect among the 6 phthalates), the risk assessment is as follows:



DEHP is a reproductive toxic substance (Category 2) under the classification of European Directive 67/548/EEC (one of the SVHCs), and is believed to be a hormone disruptor. The major health effect of DEHP is found on the development of the male sexual organ (testis). According to the US EPA Integrated Risk Information System, the LOAEL (i.e. lowest observable adverse effect level) is found to be 19 mg/kg bw/day. By consideration the interspecies and intraspecies variations, and assuming the item is used by a child of less than 3 years of age with a body weight of about 8 kg, the 'Tolerable Daily Intake' (TDI) of DEHP on the child is thus estimated to be equal to 1.52 mg.

If an individual component is contaminated with DEHP at 0.1% (w/w), the child would reach his/her daily tolerable level if he/she consumed 1.52 gram of this component resulting in adverse health effects to the child. The scenario would be even worse if DEHP is intentionally added to the component. For example, a child of less than 3 years of age (~ 8 kg) may reach the daily tolerable level when only 0.0152gram of surface coating material on toy/childcare article with DEHP at 10% was consumed.

In general, for a hand held toy like a rattle, the weight would be less than 150gram and thus the concentration of DEHP evaluated based on the cases in the above paragraph by using per whole product basis would be about 0.001%, which results in the product complying with the requirement of CPSIA 2008 Section 108 but still have adverse health effects on the child.

Stevenson, Todd

From: lisa.clerici@us.bureauveritas.com
Sent: Wednesday, March 25, 2009 5:22 PM
To: Section 108 Definitions
Subject: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108
Attachments: CPSC Phthalate comment letter v2.doc

Please find comments submitted by Bureau Veritas attached.

(See attached file: CPSC Phthalate comment letter v2.doc)

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INTERNATIONAL
SLEEP
PRODUCTS
ASSOCIATION

72

March 25, 2009

Consumer Product Safety Commission
Office of the Secretary
Room 502
4330 East West Highway
Bethesda, Maryland 20814

Re: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108

The International Sleep Products Association (ISPA) submits the following comments to the Consumer Product Safety Commission (CPSC) on behalf of the mattress manufacturing industry in response to several questions that CPSC staff have posed regarding the interpretation of the term "child care article" as defined by section 108 of the Consumer Product Safety Improvement Act (CPSIA) as published in the Federal Register (74 FR 8059).

Response to Staff Questions

I. General Approach

ISPA agrees with the approach proposed by CPSC staff.

II. Children's Toys and Child Care Articles

ISPA provides comments on Questions F, G, I and J, which are the only questions in this section that are relevant to mattresses.

F. Is the staff's approach to distinguishing between primary and secondary child care articles technically sound? Explain.

ISPA agrees with staff's distinction between and definition of "primary" and "secondary" child care articles. ISPA agrees that primary child care articles are those that come in direct contact with the child, while secondary child care articles do not necessarily come in direct contact with the child. ISPA also supports staff's recommendation that the requirements of section 108 apply only to primary products. This approach is practical and reflects Congress's intent that the CPSC regulate those products that pose a safety threat to children.

G. Does the staff's approach focus on products for which there is the most potential for exposure to children age 3 years and under?

Yes. By focusing regulation under section 108 on primary child care articles, CPSC's proposed guidance has adequately factored in exposure risk in determining the scope of section 108. The Commission must use discretion in considering which products meet the proposed determinations.

The Commission should focus primarily on the risk of mouthing a product since this behavior presents the greatest likelihood of exposure. As staff have proposed for secondary products, thought should be given to the exposure through direct contact to determine whether a product should be subject to regulation. Those products that rarely, if ever, come in contact with a child or are unlikely to be mouthed should be considered little to no risk and should not be subject to the section 108 requirements.

I. Are there any classes of articles or particular articles that should be excluded from the section 108 definition of child care article? Why or why not?

See response below.

J. Should the following articles be regarded as subject to the requirements of section 108? Why or why not? Should they be classified as toys, child care articles, or not included?

...

c. Crib or toddler mattress

...

ISPA believes that crib and toddler mattresses for these purposes are “secondary products” and should not be subject to the requirements of section 108.

Section 108 of the CPSIA defines a “child care article” as “a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger.” CPSC staff have proposed defining the term “facilitate” to mean “to make easier.” Staff further proposes, based on the above distinction between primary and secondary child care articles, that secondary products not be subject to the requirements of section 108. Staff states that in categorizing a product as a primary or secondary child care article, the CPSC will consider whether that product (a) can be placed directly in a child’s mouth or have direct contact with the child (primary) or (b) is not necessarily in direct physical contact with the child, but is in close proximity to it (secondary).

ISPA proposes, based on the nature of crib and toddler mattresses, consumer behavior, patterns of use and scientific findings, that mattresses, including crib and toddler mattresses, be considered as secondary child care articles, and thus not subject to section 108 for the following reasons:

1. Unlike pacifiers, teethers and chew toys – products that are deliberately designed for a child to mouth – mattresses are neither intended nor designed for mouthing by a small child. The large rectangular shape and size of a mattress makes it difficult and awkward for a child to mouth.
2. Scientific research shows that many children do not mouth products, but those that do spend the vast majority of their time mouthing pacifiers, teethers and other products designed for them to mouth.¹
3. Given a young child’s propensity to bed wetting, he or she usually sleeps on a mattress that has either a water repellant or resistant mattress cover or protector placed over the mattress sleep surface itself. This outer mattress cover or protector further reduces the likelihood of the

¹ See “Chronic Hazard Advisory Panel on Diisononyl Phthalate (DINP),” CPSC Directorate for Health Sciences (June 2001) at pp. 17-23, <http://www.cpsc.gov/LIBRARY/FOIA/Foia01/os/dinp.pdf>, for a summary of this scientific research. Furthermore, mouthing behavior tends to decrease as the child becomes older further minimizing this exposure risk. For example, one study showed that mouthing behavior increased up to the age of 12 months, and then rapidly diminished.

child mouthing or accessing the mattress itself.

4. Mattresses are seldom if ever used without sheets and other bed linens. In the unlikely event that a child were to mouth his or her sleep surface, these bedding products would further prevent the child from accessing the mattress itself.

Moreover, a reasonable interpretation of the statute itself supports this position. At numerous points in the CPSIA, when Congress intended to focus on particular categories of products on which children sleep, it did so by specifically naming those products. Examples include CPSIA sections 102(a)(3) (cribs), 104(c) (cribs), 104(f) (cribs), and 107(B) (cribs and mattresses). By contrast, in defining "child care article" in section 108(e)(1)(C), Congress made no specific references to these types of products. Thus, by identifying cribs and/or mattresses where it clearly intended to make these products subject to new requirements, while at the same time making no reference in section 108 to cribs, mattresses or other products on which a child would sleep, but instead directed the provision to apply to products that "facilitate sleep," Congress reflected its intent that cribs and toddler mattresses not be subject to section 108.

Furthermore, looking at the statutory definition from a functional perspective, a mattress is a passive, non-mechanical, non-motorized product that is designed and intended to be used for sleeping or resting upon. Other products are intended to "facilitate" (or "make easier") a person's ability to fall asleep or to rest, so that he or she may then sleep or rest on a mattress or other surface. In the case of children under the age of three, those other products might include a pacifier, teether, chew toy, rocker, swing, music player, and other products that helps soothe, calm and relax the child so that he or she can achieve sleep or rest. For these reasons, crib and toddler mattresses should not be subject to section 108.

Implementation Timing

ISPA notes that the ban on phthalates is already in effect. While we recognize the constraints placed on the Commission by the strict timelines set by Congress in the CPSIA, industry needs clear guidance as soon as possible from the Commission in order to meet the requirements of the CPSIA. We urge the Commission to finalize guidance on the section 108 as soon as possible to avoid further confusion within the industry and at retail.

Summary

ISPA supports the CPSC staff's proposal for implementing the section 108 requirements of the CPSIA. The proposed distinction between "primary" and "secondary" products is helpful in determining whether section 108 applies to certain classes of products. Applying these criteria to toddler and crib mattresses intended for children under three, ISPA urges the CPSC to conclude that these are secondary child care articles and thus not subject to the phthalates regulations under section 108.

Thank you for the opportunity to share our remarks. You may contact me at chudgins@sleepproducts.org or 703-683-8371 with any questions.

Sincerely,



Christopher Hudgins
Vice President, Government Relations & Policy

Stevenson, Todd

From: Chris Hudgins [CHudgins@sleepproducts.org]
Sent: Wednesday, March 25, 2009 1:32 PM
To: Section 108 Definitions
Subject: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108
Attachments: ISPA Comments on Section 108 Phthalates Guidance.pdf

Please see attached comments from the International Sleep Products Association regarding section 108 draft guidance.

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March 25, 2009

Via e-mail
Todd A. Stevenson, Secretary
Office of the Secretary
Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108: Comments on Coverage – Children's Sleepwear Should Be Exempt

Dear Mr. Stevenson:

The following comments submitted with respect to Section 108 of the Consumer Product Safety Improvement Act of 2008 concern the question raised by Commission staff in the Federal Register notice of February 23, 2009, as to whether pajamas appropriately fall within the definition of "child care article". We thank you for the opportunity to express comments on the Commission staff proposals.

Section 108 of the Consumer Product Safety Improvement Act ("CPSIA") permanently prohibits the sale of any "children's toy or child care article" that containing more than 0.1 percent of three specified phthalates, di-(2-ethylhexyl)phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP). Section 108 also prohibits on an interim basis "toys

that can be placed in a child's mouth" or "child care articles" containing more than 0.1 percent of three additional phthalates, diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DnOP. Section 108 of CPSIA contains definitions of the terms "children's toy," "toy that can be placed in a child's mouth," and "child care article", which definitions apply only with respect to enforcement of the Section 108 phthalates ban.

Section 108 of the CPSIA defines a "child care article" as "a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething." In the February 23rd Federal Register notice, Commission staff, utilizing the Webster's Dictionary definition of "facilitate" as meaning "to make easier," requests comments on an approach that distinguishes those products that directly "facilitate" feeding, sleeping, sucking, or teething for the child from other products that "facilitate" those processes indirectly, through parental action. Any determination as to whether a particular product is a "child care article" as defined in section 108 of the CPSIA will be made after consideration of the following factors:

- A. Whether the intended use of the product is to facilitate sleeping, feeding, sucking, or teething, including a label on the product if such statement is reasonable.
- B. Whether the product is intended for use by children age 3 or younger.
- C. Whether the product is a primary or secondary facilitator of sleeping, feeding, sucking, or teething. In other words, does it facilitate the process for the child directly or indirectly through the parent/caregiver.
- D. Whether the product is commonly recognized by consumers as being intended to facilitate sleeping, feeding, sucking, or teething.

We believe that the staff approach of distinguishing primary products that have the likelihood of going directly into the child's mouth, such as teething rings and pacifiers, from other products is a sound methodology, but that primary products should not include products that may have direct contact with the child other than through the mouth, particularly with respect to those three phthalates subject to the mouthability standard for toys. The intent of Congress was to protect the child from the dangers of mouthing products containing those phthalates is found in the toy definitions, and the "child care product" definition, which applies up to age 3, likewise should incorporate the mouthability of the product, since the product coverage is of articles that the child may have access to and opportunity for chewing. Accordingly, children's sleepwear should not be subject to the ban where the component that appears to be the only component in question is the unreachable foot.

Accordingly, the proposed establishment of an alternate primary class of products resulting from direct contact, other than contact involving the mouth, is not supported by the language of Section 108. We disagree with the proposal's comments that bibs would become primary objects because they contact the skin rather than because they are accessible to the child's mouth during the feeding process. The Commission rightly notes that because of the bib's close proximity to the infant's mouth and because infants explore their environment through mouthing, bibs can be expected to be chewed, sucked, and licked by infants, so they warrant consideration as primary products subject to the regulation. That should be the rationale for coverage, at least with respect to the three phthalates subject to enforcement in the case of mouthable toys.

The Commission staff requested comments on the status of pajamas. Children's pajamas should be totally exempt from the phthalates ban because they are not articles that facilitate sleep; moreover, the component potentially containing phthalates, the plastic feet, is not accessible to the mouth in the ordinary course. We recognize that the Commission has adopted flammability regulations that apply especially to children's sleepwear. Such regulation does not support a position that particular clothing facilitates a child's sleeping pattern; rather, it is the bedroom location and parental interaction with the child, or, in other circumstances, the creation of patterns of motion or sound, that "facilitates" the act of falling asleep. The children's flammability regulations reflect the analysis that children's products sold as sleepwear are more likely to be worn by the child while the child is in the bedroom and potentially more vulnerable in that situation to a fire outbreak, and this warrants the use of non-flammable clothing that might provide greater protection in such a situation.

The staff notes that consumers commonly report that products such as bouncers, swings and some strollers these products help their child to fall asleep. The CPSC staff considers bouncers, swings, and some strollers to be secondary products, which may become primary products subject to the ban where manufacturers advertise their products as facilitating sleep. This accords with our comments on clothing sold as sleepwear as not being a product that facilitates sleep.

Sleepwear should not be considered a child care article for purposes of section 108.

Todd A. Stevenson, Secretary
Consumer Products Safety Commission
March 25, 2009
Page 5 of 5

Thank you for your consideration.

Sincerely,

TOMPKINS & DAVIDSON, LLP

Robert T. Stack (e-signature)

Robert T. Stack, Esq.

Stevenson, Todd

From: Robert Stack [rstack@tdllp.com]
Sent: Wednesday, March 25, 2009 1:41 PM
To: Section 108 Definitions
Subject: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108
Attachments: e on Availability of Draft Guidance Regarding Which Children's Products Are Subject to the Requirements of CPSIA Section 108.pdf

Dear Mr. Stevenson:

Please see attached comments on children's sleepwear and CPSIA Section 108.

Sincerely,

Robert T. Stack, Esq,

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From: Jerry Kritzman [jerry@sendmaui.com]
Sent: Wednesday, March 25, 2009 1:43 PM
To: Section 108 Definitions
Subject: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information"

Our products are designed for an adult customer. If they are purchased by a child 12 years of age or younger do we expose ourselves to any liability as we are not able to dictate to our customers who the product should be sold to?

Thank you,

Jerry Kritzman

GCI



March 25, 2009

Comments on: "Notice of Availability of Draft guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108."

The Specialty Graphic Imaging Association (SGIA), representing the interests of those facilities engaged in the production of children's products through screen printing and digital imaging technologies, including the associated supplier base, offers the following comments on the Commission's Draft Guidance.

I. General Approach

The general definition offered by the CPSC staff regarding the definition of a children's toy is extremely broad, and at this time does not offer sufficient guidance to those providing children's products into the marketplace. While at first blush, the term "play" may seem straightforward, products such as pennants, flags, foam fingers, are used by children. It could be argued that these products are not marketed solely to children, however, retailers, in our experience, will take the most conservative position and require testing of all products. This is a very costly exercise for a small business.

Further, during the March 12, 2009, public hearing on this issue, CPSC staff indicated that items that were considered exempt under ASTM F963 may also include items that the Commission would not consider exempt from the requirements of Section 108. This too will cause great confusion within the marketplace.

To be useful for manufacturers, the CPSC staff will need to develop a definitive listing of all products that would be subject to the requirements of Section 108. Without a comprehensive listing, the current guidance as proposed will be meaningless and cause needless testing expenses for products that should not be covered by this section of the legislation. The need for clear, comprehensive guidance would alleviate the confusion that currently exists in the marketplace. Even with the stay of enforcement in place, small businesses are being required to test, report, and track apparel and other products. Additionally, these testing requirements are being required for products that are not even covered by requirements contained in Section 108. Without clear guidance from the Commission, this situation will continue, and possibly force many small businesses to close. SGIA recommends that the Commission clearly state that adult, child and youth apparel items are not included, and therefore, not subject to Section 108 of the CPSIA.

II. Children's Toys and Child Care Articles

SGIA believes that all exemptions listed in ASTM F963 should be exempted from the requirements of Section 108. In adopting the CPSIA, Congress incorporated the ASTM Toy Standard in its entirety, including the exemptions. SGIA believes that the Commission should not reinterpret the provisions of the ASTM standard.

As previously state above, in order to provide clear guidance regarding which child care articles are not considered to be subject to Section 108, the Commission should provide a listing of items. While there may be agreement that pajamas facilitate sleep, children often sleep in other items that may not be immediately connected to facilitation of sleep, such as other types of infant clothing. SGIA strongly recommends that the Commission specifically exempt regular clothing from the definition of child care articles that facilitate eating or sleeping. Including this exemption in the final guidance document will eliminate confusion within the marketplace. Due to the far reaching ramifications of this legislation, it is imperative that the Commission designate which items are not subject to the stringent testing and certification requirements of Section 108. Confusion regarding applicability of this section currently exists in the marketplace, and strong guidance on this issue will provide the needed clarity.

III. Phthalate Test Method

At this time, members of the SGIA are experiencing problems with CPSC-approved labs that are testing for the presence of the six restricted phthalates using the Test Method: CPSC-CH-C1001-09, Standard Operating Procedure for Determination of Phthalates, February 9, 2009. SGIA members have indicated that there are significant and recurring issues with the analytical laboratories' ability to accurately detect the restricted phthalates as listed in Section 108 of the CPSIA.

The CPSC-approved laboratories are not accurately distinguishing between the various restricted and non-restricted phthalates found in the products undergoing testing. SGIA members are receiving results indicating that a product has "failed" because of the presence of restricted phthalates when the chemical manufacturer has certified that the sample does not contain any restricted phthalates. The approved CPSC-labs acknowledge that the analytical technique can result in elevated levels of restricted phthalates and have stated that this is due to the detection and inclusion of "non target compounds, some of which are other non regulated phthalates".

It is our belief that the approved labs are over-reporting restricted phthalates. We believe that the GC-MS technique used is not accurate for at least three reasons. First, the GC-MS technique does not fully differentiate between spectral peaks that seem to have "shoulders." The GC-MS collects and analyzes the shoulders on either side of the peaks of a plasticizer and incorrectly reports them together, when in fact these shoulders represent different phthalates, or phthalate isomers, that may or may not be regulated.

Second, some isomers of same-length carbon chains tend to have similar retention times. This can 'fool' the GC-MS. For example, it has been observed that DIOP (a non-regulated C-8 phthalate) contains di-C8 ester isomers, some of which have the same GC retention times as DEHP. Likewise, DEHP and DIOP have the same nominal empirical formula (same molecular weight); so a mass spectrometer (which shows the molecular weight of a component in a mixture) may not accurately distinguish between DEHP and DIOP. Our members have reported similar problems with C-10 phthalates - DIDP and DPHP (a non-regulated phthalate) for example.

And third, the 0.1% threshold in the standard for each individual restricted phthalate leaves no allowance for any margin of error. Unless a lab is scrupulous, the GC-MS analytical technique used is prone to contamination. The smallest amount of contamination coupled with inaccurate detection only exacerbates the problems being reported.

In discussions with major suppliers of plasticizers to our industry sector, they maintain that no restricted phthalates are contained in some of the products that the labs are failing. Through their own analysis, they have confirmed these findings and point to the problem being with the analytical techniques.

At the March 12th public meeting, other issues associated with the testing protocol were mentioned that are not included in the testing methodology issued on Feb. 9, 2009. One issue concerned the use of qualitative as well as quantitative data. This concept was not fully explored by CPSC staff at the hearing. SGIA requests that further information regarding this element be provided by the CPSC staff for review and comment. Specifically, how this type of data would be integrated into the test method.

Another issue raised by CPSC staff at the public meeting concerned the definition of DINP and DIDP, to include any branched 9 carbon chain or any branched 10 carbon chain respectively. Inclusion of this broad family within these two phthalates goes beyond the legislative intent of Section 108 and incorrectly sweeps in other non-regulated phthalates. As noted above, not all C-8, C-9 or C-10 carbon chain phthalates, for example, are DEHP, DINP or DIDP. Note DIOP (C-8) and DPHP (C-10) as just two examples of non-regulated phthalates that would be incorrectly characterized.

At this time, SGIA requests that the CPSC staff fully vet the test method for phthalates that includes all policy discussions. The average cost to test one product is approximately \$250.00. Failures are occurring due to a lack of proper guidance from the Commission to the CPSC approved labs. This is a serious issue and is generating serious problems within our industry sector.

We look forward to working with the Commission as it moves to further clarify the issues of testing and certification for products under Section 108 of the CPSIA. If you have any questions regarding our comments, I can be reached at 703-359-1313 or by email at marcik@sgia.org

Sincerely,

A handwritten signature in black ink that reads "Marcia Y. Kinter". The signature is written in a cursive, flowing style.

Marcia Y. Kinter
Vice President – Government & Business Information

Stevenson, Todd

From: Marci Kinter [marcik@sgia.org]
Sent: Wednesday, March 25, 2009 2:23 PM
To: Section 108 Definitions
Subject: Comments on Notice of Availability of Draft Guidance for CPSIA Section 108
Attachments: Notice of Availability of Draft Guidance for CPSIA Section 108 Comments.doc

Please find attached our comments on the Notice of Availability of Draft Guidance Regarding Which Children's Products are subject to the Requirements of CPSIA Section 108.

If you have any questions regarding the comments, I can be reached directly at 703-359-1313 or by email at marcik@sgia.org.

Marci Kinter
SGIA

Marcia Y. Kinter
Vice President - Government and Business
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Stevenson, Todd

From: Maria Klesney [momnmiaquilts@yahoo.com]
Sent: Wednesday, March 25, 2009 2:52 PM
To: Section 108 Definitions
Subject: Response/Comments re Federal Register: February 23, 2009 (Volume 74, Number 34)

Under the current CPSIA, all products that aid in the feeding, sleeping or care of a child under the age of 3 must be tested for phthalates (including all of the items I currently make for sale to help support my family - bibs, blankets, bedding). Phthalates are only found in plastics and inks and have NEVER been found in uncoated materials such as fabrics, yarns, wood and the like.

Phthalate testing is extremely expensive, if you can even find a lab willing to do it for a small-change operation like mine, and will be driving me and hundreds of thousands of other handmade artisans out of business...

The CPSIA needs to be amended to incorporate LOGIC and reasonable standards for the American business-people who are going to be grossly affected by it. If testing is to be required, it should be done on the supplier end (i.e., fabric manufacturers, etc and not limited to items marketed strictly to children) and the burden should not be passed on to craftspersons and general american consumers who are in no way able to affect the content or chemical make up of the products they are selling.

I am a mother to 2 young children, and their health and welfare are my highest priorities. The flux of unreliable and unsafe products being sold on store shelves in recent years (which by the way are mostly imported and made from plastics) is yet one of many reasons I began making my own items and offering them for sale to other moms like me. Thanks to the current requirements of the CPSIA, soon Americans will have no options to buy anything but imported items. While that may seem a far-fetched statement, it is completely true. Moms like me will never be able to afford to comply with testing requirements for fabrics and other natural materials we use to create our products, resulting in closures of businesses, loss of income and loss of choice. So much for Buy American.

Maria Klesney

Mom N Mia Quilts

"Handmade with Love . . . One Stitch at a Time"

Custom quilts, baby gifts and more

Email: momnmiaquilts@yahoo.com



Travel Goods Association
 5 Vaughn Drive, Suite 105 | Princeton, NJ 08540
 Tel: 609-720-1200 | Fax: 609-720-0620 | www.travel-goods.org

March 25, 2009

Consumer Product Safety Commission (CPSC)
 4330 East West Highway
 Room 523
 Bethesda, MD 20814
 Fax: 301-504-0403
 E-mail: section108definitions@cpsc.gov

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments; FR Notice Volume 74, Number 34, Pages 8058-8061, February 23, 2009

To Whom It May Concern:

On behalf of the Travel Goods Association (TGA) – the national association of the manufacturers, distributors and retailers of backpacks, luggage, leather goods, business and travel accessories, business and computer cases, handbags and other products for people who travel – I am writing to request that the CPSC formally exclude children's travel goods, including food and beverage containers, from the provisions under Section 108 of the *Consumer Product Safety Improvement Act (CPSIA)* - the so-called phthalate ban.

According to Section 108 of the CPSIA, a “children’s toy” is defined as a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays. Section 108 also applies to “child care articles.” As stated in a March 12, 2009 letter from CPSC General Counsel Cheryl A. Falvey to TGA, “Items such as iPod covers and travel goods do not appear to fall within those definitions.” The letter from Ms. Falvey is attached.

Therefore, TGA, on behalf of the U.S. travel goods industry, hereby requests that the CPSC exclude children’s backpacks, luggage, computer cases, cell phone cases, iPod cases, and other travel goods designed for use by children (as described in Heading 4202 of the *Harmonized Tariff Schedule of the United States (HTSUS)*) from the definitions of “children’s toys” and “child care articles” under Section 108 of the CPSIA when the CPSC moves forward on developing its interpretive rule for Section 108.

This interpretation should extend to travel goods regardless of the design on the bag (like a cartoon character) or the shape of the bag (for example if the bag is shaped like an animal). In defining a children’s product, the CPSIA considers the intent of the manufacturer, how the product is marketed and how the public recognizes the product. These considerations are extended further in the CPSIA’s definition of a children’s toy as a “consumer product designed or intended by the manufacturer for a child 12 years or younger *for use when the child plays* [emphasis added]” While a manufacturer may design a product to be enticing to a child, this should not automatically characterize the product as a child’s toy.

Further, the industry agrees most food carriers (such as lunch boxes) and beverage carriers (such as a thermos) designed for children three and under also should be exempt from the phthalate ban because they do not fall under the new law's definition of a "child care article." A child care article is defined as a product designed for a child three and under that facilitates sleeping or feeding. While food carriers contain food and beverage carriers contain beverages, they do not facilitate the feeding of a child. In fact, once the food is out of the carrier and the beverage is out of the beverage carrier, the carrier is no longer involved in the eating or drinking process (which, for children of this age, is likely to be done under strict adult supervision). This means it is unlikely phthalates will be ingested by the child. Therefore, given the definition of "child care article," on top of the risk factors for exposure, TGA believes that food and beverage carriers should be exempt from the phthalate ban.

As such, TGA supports a possible approach that CPSC staff discussed at the March 12, 2009 CPSC public meeting on phthalates, particularly in the presentation by Celestine Kiss, from the CPSC's Division of Human Factors, and in the ensuing Q&A period. Ms. Kiss discussed the idea that certain products that "facilitate sleeping or feeding" actually facilitate the parent or child care provider in the feeding of a child or getting the child to sleep, and have little or no contact with the child (which Ms. Kiss termed "secondary" products), while other products are used directly in the mouth by the child to facilitate sleeping or feeding (which Ms. Kiss called "primary" products).

TGA believes that so-called "secondary" products should not be covered by Section 108 of the CPSIA. As in the case of food and beverage carriers, the carriers are for the most part handled by the parent or child care provider on behalf of the child to transport the food or beverages and rarely come into contact with the child. Further, the child is in direct contact with the food or beverages ONLY after they are physically removed from the carrier. The carriers themselves do NOT directly facilitate the feeding of the child.

In conclusion, TGA urges the CPSC to formally exclude children's travel goods (as defined above) from its pending rulemaking on product coverage under Section 108 of the CPSIA because they are not "children's toys" as defined under the law. Further, TGA urges the CPSC to take under consideration the concept of "primary" and "secondary" products as it attempts to define product coverage under the "child care article" definition in Section 108. TGA believes the CPSC should formally exclude food and beverage carriers from coverage under Section 108 of the CPSIA because such carriers are "secondary" products.

Thank you for your time and consideration in this matter. Please contact Nate Herman on my staff at 703-797-9062 or nate@travel-goods.org if you have any questions or would like additional information.

Sincerely,



Michele Marini Pittenger
President

Attachment – March 12, 2009 letter from CPSC General Counsel Falvey to TGA



Fax to Nate Herman
703-522-6741

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

OFFICE OF THE GENERAL COUNSEL

Cheryl A. Falvey
General Counsel
Tel. 301-504-7628
E-Mail: cfalvey@cpsc.gov

March 12, 2009

Ms. Michele Marini Pittenger
President
Travel Goods Association
5 Vaughn Drive, Suite 105
Princeton, NJ 08540

Re: Requested Travel Goods Exemption

Dear Ms. Pittenger:

We have received your December 19, 2008 letter requesting an opinion exempting travel goods from the ban on phthalates in section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). Although you have requested an advisory opinion, your questions will be answered by interpretative rule to be issued by the Commission in the future.

Section 108 of the CPSIA applies unambiguously to children's toys and child care articles as defined in that section. Items such as I pod covers and travel goods do not appear to fall within those definitions. Therefore, an exemption is not necessary if those products fall outside the statutory definitions in section 108. However, your specific question about lunch boxes addresses a gray area about the definition of the term "facilitates feeding" in section 108 which will be addressed by the Commission in an upcoming interpretative rule.

We are working diligently on our interpretative rule and invite your comments by e-mail at section108definitions@cpsc.gov. The comment period closes on March 25, 2009.

Sincerely,

Cheryl A. Falvey
General Counsel



Travel Goods Association
5 Vaughn Drive, Suite 105 | Princeton, NJ 08540
Tel: 609-720-1200 | Fax: 609-720-0620 | www.travelgoods.org

December 19, 2008

Ms. Cheryl A. Falvey
General Counsel
Consumer Product Safety Commission (CPSC)
4330 East West Highway
Room 523
Bethesda, MD 20814
Fax: 301-504-0403
E-mail: cfalvey@cpsc.gov

RE: Request for Travel Goods Exemption from Phthalate Ban under CPSIA

Dear Ms. Falvey,

On behalf of the Travel Goods Association (TGA) – the national association of the manufacturers, distributors and retailers of backpacks, luggage, leather goods, business and travel accessories, business and computer cases, handbags and other products for people who travel – I am writing to request an immediate formal written opinion be issued which would explicitly exclude children’s travel goods from the provisions under Section 108 of the *Consumer Product Safety Improvement Act (CPSIA)* - the so-called phthalate ban.

According to Section 108 of the CPSIA, a “children’s toy” is defined as a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays. It is the understanding of the U.S. travel goods industry that children’s backpacks, luggage, computer cases, cell phone cases, I-pod cases, and other travel goods designed for use by children (as described in Heading 4202 of the *Harmonized Tariff Schedule of the United States (HTSUS)*) do not fall within the definition of “children’s toy” and, therefore, should be exempt from the phthalate ban.

Further, the industry agrees most food carriers (such as lunch boxes) designed for children also should be exempt from the phthalate ban because they do not fall under the new law’s definition of a “child care article.” A child care article is defined as a product designed for a child 3 and under that facilitates sleeping or feeding. While food carriers contain food, they do not facilitate the feeding of a child. In fact, once the food is out of the carrier, the carrier is no longer involved in the eating process (which, for children of this age, is likely to be done under strict adult supervision). The product is therefore as likely to be mouthed by a child 3 and under as any other product that the child comes into contact with. This means it is unlikely phthalates will be ingested by the child. Therefore, given the definition of “child care article,” on top of the risk factors, a food carrier should be exempt from the phthalate ban.

However, retailers are apparently concerned over the lack of clear guidance from the CPSC. As a result, several travel goods firms have received letters from retailers (such as the one attached) stating that they will no longer accept **any** children's products with phthalates. We believe such a ban goes well beyond the scope and intention of the CPSIA. The financial consequences to our members of having to remanufacture products – products that our members felt confident were CPSIA compliant based upon the information available from the CPSC to date – would be significant.

In light of the financial challenges already being faced by the industry due to the current economic crisis, our members, many of whom are small manufacturers, need clear guidance from the CPSC stating that the phthalate ban simply does not apply to children's travel goods. It is important for the CPSC to show consistency in order to prevent a significant disruption of business. The CPSC has already recognized the importance of providing clarity to businesses when it issued opinions clarifying the application of the phthalate ban with reference to children's apparel and footwear. We applaud that move.

Therefore, I am requesting a formal opinion to be issued by the CPSC reflecting the intent of the law as well as the advisory opinions issued on similar products, that children's travel goods are excluded from the phthalate ban. Because manufacturer decisions on product design and composition are made many months before the product actually appears on retail shelves, it is important that this opinion be published as soon as possible.

Thank you for your time and consideration in this matter. Please contact Nate Herman on my staff at 703-797-9062 or nate@travel-goods.org if you have any questions or would like additional information.

Sincerely,

A handwritten signature in black ink that reads "Michele Marini Pittenger". The signature is written in a cursive, flowing style.

Michele Marini Pittenger
President

Stevenson, Todd

From: Nate Herman [nherman@apparelandfootwear.org]
Sent: Wednesday, March 25, 2009 3:16 PM
To: Section 108 Definitions
Cc: MMPtga@aol.com; Rob Holmes
Subject: TGA Comments on Interpretation of Section 108 of CPSIA
Attachments: tgacpscphthlatesltr090325.pdf

To Whom It May Concern:

Please find attached comments submitted on behalf of Michele Marini Pittenger, President of the Travel Goods Association (TGA) regarding the CPSC's "Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments"; FR Notice Volume 74, Number 34, Pages 8058-8061, February 23, 2009.

Thank you for your time and consideration in this matter. Please contact me if you have any questions or would like additional information.

Sincerely,

Nate Herman
Director of Government Relations
Travel Goods Association (TGA)
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**Request for Comments and Information:
Notice of Availability of Draft Guidance Regarding Which Children's Products are
Subject to the Requirements of CPSIA Section 108**

The CPSC has requested public comments on their draft approach for determining which products constitute a "children's toy or child care article" and are therefore subject to the requirements of section 108 of the CPSIA. In particular, the request for comments asks about whether playground equipment should be excluded from the definition of "toy" and, if so, what types of equipment should be excluded.

In response to this request, Rainbow Play Systems, Inc.* wants to provide the following comments:

1. Rainbow believes that the CPSC staff's approach of excluding playground equipment from the jurisdiction of ASTM F963-07 is correct and carries out Congressional intent.
2. Congress provided in the CPSIA that ASTM F963-07 become a mandatory CPSC standard on February 10, 2009. Congress was aware of the provisions of ASTM F963, including the exclusion for playground equipment, and could have specified that this exclusion not apply. By not doing so, it is Rainbow's view that Congress intended the playground equipment exclusion in ASTM F963-07 to continue to apply.
3. Playground equipment is a "children's product" as defined in the CPSA and accordingly, playground equipment must be manufactured to comply with the lead limits in paint and surface coating materials. In addition, the ASTM standard for

* Rainbow Play Systems, Inc. is one of America's leading manufacturers of home playground equipment. See <http://www.rainbowplay.com/index.php/swing-sets/> for photographs of swing set designs.

home playground equipment, ASTM F1148 - Standard Consumer Safety Performance Specification for Home Playground Equipment, incorporates by reference a number of CPSC's mandatory standards such as the small parts regulations in 16 CFR Part 1501.

4. While Rainbow agrees that home playground equipment could be considered a "children's toy" as defined in CPSIA, it is not a "toy that can be placed in a child's mouth" and as such, is not the type of product we believe Congress intended to include in the section 108 prohibitions.
5. Generally, home playground equipment is not manipulated or played with as a toy would be. The activity and interaction of the child with playground equipment is comprised of active movement such as climbing, sliding, crawling, creeping, running, swinging, rocking, spinning, jumping, bouncing or any combination thereof. Such equipment is structural in nature and much larger than what is generally conceived of as toys that are the primary focus of section 108 and ASTM F963. In pertinent part, section 1.2 of ASTM F1148 says:

Home playground equipment is defined as any product in which the support structure remains stationary while the activity is taking place and is intended for a child to perform any of the following activities: climbing, swinging, sliding, rocking, spinning, crawling, or creeping, or combination thereof.

6. A child's normal interaction with home playground equipment does not include any mouthing activities, like bringing equipment into the mouth, which is the typical method of transfer associated with the proposed hazards with phthalates.
7. Rainbow is not aware of any history of medical health-related issues linked to materials used on home playground equipment.
8. During the public meeting on Phthalates, CPSC staff mentioned using the definition of 'play' from the Webster's dictionary to determine the scope of section 108. We believe that definition is far too broad when applied to this legislation. This definition encompasses toys, sports and literally any object that can amuse. It also can be applied to a much broader age range than children 12 years or younger. We would suggest the staff use Webster's definition of 'toy' which is the term the statute uses. This term is generally thought of in relation to the age range of children which is the focus of the statute, and it gives a more definitive direction for applying this

legislation. And a toy is something for a child to play with, not play on. Home playground equipment is structural and large and children play on it, not with it. We believe this definition can help provide the staff guidance to determine which products constitute a "children's toy."

9. Rainbow believes that all home playground equipment where it is extremely unlikely for young children to mouth the equipment, should continue to be excluded. Rainbow recognizes that there is some very small home playground equipment made almost entirely of molded plastic and intended for use by toddlers, which arguably could be mouthed. The determining criteria should include the location of the plastic and the ability of the child to place any part of the plastic into its mouth.

Rainbow appreciates the opportunity to provide these comments. Please let us know if the staff has any questions.

Sincerely,

A handwritten signature in black ink that reads "Kenneth Ross". The signature is written in a cursive, slightly slanted style.

Kenneth Ross
Counsel for Rainbow Play Systems, Inc.

Stevenson, Todd

From: Kenneth Ross [kenrossesq@comcast.net]
Sent: Wednesday, March 25, 2009 3:39 PM
To: Section 108 Definitions
Subject: Comments on Section 108 definitions
Attachments: Rainbow comments on section 108 exclusions.pdf

Kenneth Ross
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Contact:
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Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108: Request for Comments and Information and Comment of the Sporting Goods Manufacturers Association

Preamble

On behalf of the members of the Sporting Goods Manufacturers Association (SGMA) we appreciate the opportunity to comment on the Consumer Product Safety Commission's (CPSC) staff approach for determining which products are subject to the requirements of §108 of the CPSIA, and to provide additional information regarding the exemption of sporting goods and fitness products from the phthalate requirements. We respectfully urge the CPSC to grant an exemption to performance sporting goods used in legitimate sports activities with respect to §108 of the CPSIA.

Action by the Commission is urgently needed in light of the February 5, 2009 court decision in *NRDC vs. CPSC* regarding the retroactive application of §108 as well as the passing of the effective date of this section on February 10, 2009. Issuance of a final rule is particularly critical since the statute's deadlines do not mesh with other deadlines and requirements. An example of this confusion and inconsistency is represented by ASTM F963, the Children's Toy Standard, which also becomes mandatory on February 10, 2009. In other words, the CPSIA specifies that a pending rulemaking will not delay implementation of the effective dates for such limits, but does not adequately provide for an orderly implementation of a comprehensive rule that clarifies definitions to a sufficient degree so that manufacturers can deal with inventory as well as the distribution of new products in commerce.

As a result the Sporting Goods Manufacturers Association (SGMA) submits this comment in response to the CPSC's request for comments regarding CPSIA §108. The SGMA, the trade association of leading industry sports and fitness brands, enhances industry vitality and fosters sports and fitness participation through research, thought leadership, product promotion and public policy. SGMA produces the industry leading National Health-through-Fitness Day on Capitol Hill as well as representing the industry on trade and consumer issues.

The membership of the Association is extremely concerned about the classification of performance sporting goods used for legitimate sports activities under §108 of the Act. Subsection 108(e) defines "children's toy" as "a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays." A "child care article" is defined as "a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething." A toy is considered a "toy that can be placed in a child's mouth"... "if any part of the toy can actually be brought to the mouth and kept in the mouth by a child so that it can be sucked and chewed. If the children's product can only be licked, it is not regarded as able to be placed in the mouth. If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth."

The SGMA takes the position that legitimate performance sporting goods are not "children's toys" as defined in §108. Legitimate performance sporting goods are those products that are designed and primarily intended to teach skill sets to younger participants in order to increase interest and participation in athletics, and to promote physical activity to reduce the risk of childhood obesity. Whether the product is made for pee-wee sports, youth sports, or adult sports should not be the determining factor. As long as the sporting good is intended to develop a child's interest and

skill set in a legitimate sports activity, then that product should not be classified as a “toy” for purposes of §108. For instance, the mere fact that a sporting good is used by children under the age of 13 does not make it a toy. That is true of footballs, basketballs, soccer balls, helmets, lacrosse sticks, bats, swim goggles, fins, and so on. These products and many others are made with the intent of promoting youth to engage in truly legitimate sports activities.

The SGMA lauds the CPSC in the subject request for comment for its recognition and analysis of sporting goods and athletic equipment in the context of ASTM F963-07 which became mandatory on February 10, 2009. The toy standard excludes sporting goods and athletic equipment from the definition of “toy”. The SGMA agrees with the CPSC staff analysis that even if legitimate sporting goods and athletic equipment are designed and primarily intended for children 12 years of age or younger then those articles should be exempted from the CPSIA §108 requirements. The SGMA also agrees that toy versions of sporting goods and athletic equipment should be considered “toys” and subject to §108.

I. General Approach

For the reasons stated above, the SGMA agrees with the general approach of the CPSC in that legitimate sporting goods and athletic equipment whether designed primarily intended for adults, teens or children 12 years of age or younger are not “toys” and, therefore, are exempt from the provisions of §108 of the CPSIA. On the other hand, a toy version of sporting goods or athletic equipment are “toys” and must comply with §108 of the CPSIA. Reliance on the ASTM F963 exclusion of sporting goods is appropriate and the SGMA generally agrees with the CPSC’s following statement:

“...Generally, regulation-size baseballs, basketballs, footballs, and soccer balls are athletic equipment and, therefore, are excluded by ASTM F963. Accordingly, even if they [sporting goods] are designed or sized for use by children, the staff’s proposed approach would exclude them from CPSIA section 108 requirements. In contrast, the staff regarded general purpose balls as toys and therefore, subject to the requirements of the CPSIA section 108. A toy version of the actual athletic equipment, such as a toy baseball glove with a foam ball would be considered by the staff to be a toy for the purpose of the CPSIA...”

This guidance is clear and is generally consistent with the understanding that sporting goods manufacturers and fitness equipment manufacturers have been working with for years. Simply said products designed and intended to introduce children to and help them learn particular skill sets to eventually participate in legitimate sports activities are sporting goods and should be exempted from §108. Only “toy” versions such as a foam ball or a small 13” plastic bat should be required to meet the phthalate section.

Concerning foreseeable consequences, if the Commission staff takes a different approach than stated in this request for comments manufacturers will have little guidance to determine gray areas. As a result tens of millions of dollars of inventory may be deemed non-compliant when in fact the CPSC might not believe that to be so. Further, the ability of manufacturers to move product into the stream of commerce would be inhibited as there would be no meaningful, understandable bright lines to judge compliance from non-compliance.

In conclusion, the SGMA believes that it is critical for the CPSC to once and for all formally adopt the proposed position stated in this request and to grant an exemption for all legitimate sporting goods from the phthalate provision of the CPSIA. Thank you.

Stevenson, Todd

From: Lauren Wallace [LWallace@sgma.com]
Sent: Wednesday, March 25, 2009 3:41 PM
To: Section 108 Definitions
Cc: Tom Cove; Bill Sells
Subject: SGMA Comments on Phthalates Ban & CPSIA
Attachments: SGMA Comment.DOC

Attached please see SGMA Comments.

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This March keep an eye out for SGMA's soon to be released research reports: 2009 Sports and Fitness Participation, Manufacturer Sales By Category Report 2009, & State of the Industry Report 2009.

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March 25, 2009

Todd A. Stevenson
Secretary
Consumer Product Safety Commission
4330 East-West Highway
Room 502
Bethesda, MD 20814

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108

Dear Mr. Stevenson:

The following comments are submitted on behalf of the National Retail Federation (NRF) in response to the Consumer Product Safety Commission's Request for Comments on Section 108 of the Consumer Product Safety Improvement Act (CPSIA) – Prohibition on Sale of Certain Products Containing Specified Phthalates.

By way of background, NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 24 million employees - about one in five American workers - and 2008 sales of \$4.6 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

NRF appreciates the opportunity to provide feedback on the CPSC's Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108. Overall we support the approach that the CPSC has outlined in the Draft Guidance. We will address the specific issues raised in the *Federal Register* notice below.

I. General Approach

A. Comments on the staff's approach to determining which products are subject to the requirements of CPSIA Section 108.

NRF supports the CPSC staffs approach for determining which products are subject to CPSIA Section 108. We believe that the differentiation between

primary and secondary child care articles is extremely helpful. The issue of direct physical contact must also be considered, along with the actual use of the product. One thing that the CPSC needs to consider and provide guidance on as well is the issue of inaccessible parts with phthalates and what component of a product needs to be tested.

Under the description of "child care article" in the FR notice, the CPSC staff uses the example of a high chair as a primary product, an article that facilitates feeding. The CPSC staff needs to define what portion of the high chair needs to be tested. Is it just the tray that the child will have access to potentially suck on or are the legs, footrests and the back of the seat of the high chair covered as well? NRF believes that the most common sense approach is to make those components or parts of an article where there is a potential for exposure subject to Section 108 requirements. Those components that are inaccessible while the child is properly seated in the high chair and pose no risk to the child should not be subject to Section 108 requirements.

NRF would suggest and encourage the CPSC to clarify that only the plasticized components of a covered product need to be tested. As it has done with lead, the CPSC needs to exempt certain materials from testing requirements for phthalates. Since phthalates are used as softeners for plastics, the testing requirements should only be limited to those components of covered parts which contain a plastic.

D. What are the foreseeable consequences to the staff's approach?

NRF agrees with the CPSC that bouncers, swings and strollers are secondary products and not primarily intended to facilitate sleep. The CPSC should make a clear determination on what articles are covered by Section 108 and what articles are not covered. This determination should not be dependent upon how the product is advertised by a manufacturer. Such an approach would only create uncertainty and confusion. One manufacturer could advertise a product in such a way as to result in a determination that the product is covered by Section 108 while another manufacturer of a similar product may advertise that product in a completely different manner resulting in the item not being covered by Section 108. Manufacturers, importers, retailers and consumers need an approach that is consistent and predictable.

II. Children's Toys and Child Care Articles

A. Should the Commission follow the exclusions listed in ASTM F963?

NRF strongly believes that the CPSC should follow the exclusions listed in ASTM F963. Congress established ASTM F963 as a consumer product safety standard in Section 106 of the CPSIA. The CPSC should maintain the exclusions already incorporated into ASTM F963.

B. Should some electronic devices (such as cellular phones) be considered toys that are subject to the phthalate requirements under Section 108?

NRF does not believe that these types of electronic devices should be subject to the phthalate requirements of Section 108. The CPSC needs to look at the primary function of the device in question. For a cellular phone, the primary purpose is not to play a game, but as a means of communication. The device is neither a toy nor a child care article. Therefore it should not be subject to the requirements of Section 108.

C. Are there particular art materials, model kits or hobby items that should be regarded as toys subject to Section 108?

No. As noted in the ASTM standard and recognized by CPSC, these items are already covered by the Labeling of Hazardous Art Materials Act. Further, under ASTM sections 1.3 and 1.4, the exclusion from “toy” is already limited. Art materials, model kits, and hobby items are excluded from the definition of “toy” only if the finished item is “not primarily of play value.” Selectively including some art materials, model kits and hobby items as “toys” would be redundant, confusing, and potentially conflict with the ASTM. If the finished craft, art, or hobby item has primary play value, then it already is considered a “toy.”

F. Is the staff's approach to distinguishing between primary and secondary child care articles technically sound?

While we believe that the approach CPSC staff has taken is technically sound, we encourage the staff to limit the definition of “facilitate” and “play” as intended by Congress. Using the staff's example, it is doubtful that any parent buys a breast pump and thinks the pump will “make it easier” to feed the child. They buy the pump to extract the breast milk to feed the child, because they choose breast milk over formula. Similarly, they buy the bottle warmer to warm milk or formula. As intended by Congress, when making the distinction between primary and secondary products, the CPSC staff should focus solely on how the article makes it easier for the child to eat, sleep or teeth. Using this limited definition, then the breast pump and the bottle warmer would not even enter into the discussion.

G. Does the staff's approach focus on products for which there is the most potential for exposure to children age 3 and under?

Again, while we believe the approach does focus on the products for which there is the most potential exposure, we request that the Commission continue to focus on the definitions set by Congress and solely focus on products that “facilitate,” or make it easier for sleeping, feeding or teething. As discussed above, this does

not mean every product used in connection with the care of a child is used to facilitate feeding, sleeping or teething.

H. Should cribs be considered child care articles? Should the entire crib be subject to the requirements or only specific parts such as the teething rail?

NRF does not believe that the entire crib should be subject to the requirements of Section 108. The requirements should be limited to the specific component, part or area of a product where the child has the most potential for exposure, i.e. the teething rail. Other areas of the crib are not accessible to the child and should not be covered.

J. Should the following articles be regarded as subject to the requirements of Section 108?

- a. *Bib*** – NRF believes that a bib should be considered as a primary child care article. However, we believe that there are many different types of bibs that are used when feeding a child. We do not believe that all bibs should be covered by the requirements of Section 108. The requirement should be limited to where there are specific plasticized parts on the bib that help with teething. Bibs that do not contain plastic parts or which are made completely of fabric should not be subject to the requirements. The requirements should be limited to where there is an actual risk of the child mouthing the bib.
- b. *Pajamas*** – While pajamas are used when a child sleeps, they do not actually facilitate, or make sleeping easier. Pajamas are used to dress the child when sleeping, not to facilitate sleep. The European Union has excluded pajamas from their phthalate directive. As such, we believe that pajamas should be considered as sleepwear and should not be considered as subject to the requirements of Section 108.
- c. *Crib or toddler mattress*** – We do not believe that a crib or toddler mattress should be subject to the requirements of Section 108. The mattress does not come into direct contact with the child as it is usually covered with a mattress pad and sheets. In addition, the mattress does not “facilitate” sleeping as defined by Congress in the CPSIA.
- d. *Mattress cover*** – We do not believe that mattress covers should be covered by Section 108 of the CPSIA as the primary purpose of the mattress cover is not to “facilitate” sleeping, but to protect the mattress itself.
- e. *Crib Sheets*** – We do not believe that crib sheets should be covered by Section 108 of the CPSIA as the primary purpose of the sheets is not to “facilitate” sleeping.
- h. *Baby swing*** – A baby swing can be used for play and to facilitate sleep. However, we question what portion of a baby swing should be covered by Section 108. When in the swing, the amount of potential

contact and exposure for potential mouthing of the product is limited. Requirements should be limited to the specific component, part or area of the product where there is potential exposure. The requirements should not be applied to the entire product.

- i. **Decorated swimming goggles*** – We do not believe that these items should be subject to the requirements of Section 108. They are not a toy, and they are not used to facilitate feeding, sleeping, sucking or teething. They are a safety device used to aid in swimming, which is a form of physical exercise, or sport. They are analogous to a tennis racket, golf club, and other sporting equipment. As such, they should be excluded from the requirements of Section 108.
- j. **Water wings*** – We do not believe that these items should be subject to the requirements of Section 108. They are not a toy, and they are not used to facilitate feeding, sleeping, sucking or teething. They are a safety device used to aid in swimming, which is a form of physical exercise, or sport.
- k. **Shampoo bottle in animal or cartoon character*** – We do not believe that these items should be subject to the requirements of Section 108. A shampoo bottle is not a toy, and is not used to facilitate feeding, sleeping, sucking or teething. While the design might be attractive to a child, the primary purpose of the product is not a toy or a child care article.
- l. **Costumes and masks*** – We believe that costumes and masks should be classified as a toy and should be covered by Section 108 of the CPSIA. These products are used when a child plays.
- m. **Baby walker*** – We do not believe that these items should be subject to the requirements of Section 108. A baby walker is not a toy, and is not used to facilitate feeding, sleeping, sucking or teething. The walker is intended to help the child to learn how to walk and to move around.

K. Should all bouncers, swings or strollers be subject to Section 108 or only those advertised with a manufacturer's statement that the intended use is to facilitate sleeping, feeding, sucking or teething?

We do not believe that these products should be covered by Section 108 of the CPSIA. Again, the primary purpose of these products is not to facilitate sleeping, feeding, sucking or teething.

O. Please comment on our phthalates test method.

NRF believes that the test method as published by the CPSC is sensible and consistent with the CPSIA. We strongly support that the percentage limit for each phthalate should be based on the weight of the product, not the component. CPSC need to specifically clarify this as there seem to be some labs who are conducting testing based on the total weight of the component.

Conclusion

NRF welcomes the opportunity to share our thoughts on the CPSC's Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108. If you have any questions, please contact Jonathan Gold (goldj@nrf.com), NRF's Vice President, Supply Chain and Customs Policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Pfister". The signature is written in a cursive, flowing style.

Steve Pfister
Senior Vice President
Government Relations

Stevenson, Todd

From: Gold, Jon [GoldJ@NRF.com]
Sent: Wednesday, March 25, 2009 4:26 PM
To: Section 108 Definitions
Subject: NRF Comments on Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108
Attachments: NRF Comments on Section 108 Phthalates - Final 032509.pdf

Attached please find a copy of comments from the National Retail Federation. Please let me know if you have any questions or need additional information.

<<NRF Comments on Section 108 Phthalates - Final 032509.pdf>>

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81



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March 25, 2009

VIA E-MAIL

section108definitions@cpsc.gov

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products Are Subject to the Requirements of CPSIA Section 108, 74 Fed. Reg. 8058 (Feb. 23, 2009)

Dear Sir or Madam:

We are writing in response to the February 23, 2009, request for comments on CPSC's phthalate test method and on CPSC staff's draft approach for determining which products are subject to the requirements of section 108 of the Consumer Product Safety Improvement Act ("CPSIA") (Pub. L. No. 110-314 (2008)).

Like the CPSIA, California law bans the use of six phthalates in toys and childcare articles. Because California's A.B. 1108 (Cal. Health & Saf. Code § 108935 et seq.) and the CPSIA use nearly identical language to ban the same six phthalates in toys and child care articles and both derive from the European Union's pre-existing phthalate ban, we anticipate that interpretations of both federal and California law can be harmonized.¹ To the extent that CPSC's interpretations of CPSIA section 108 would support the purposes of A.B. 1108, we expect to enforce the requirements of A.B. 1108 consistent with CPSC's interpretations of the CPSIA.

¹ For example, while A.B. 1108 does not specify an age range for "children" as used in that statute, we do not see any reason for California to depart from CPSIA section 108's age range of "12 years of age or younger."

Definition of toy – ASTM exclusions

CPSC requests comments on whether “toys” covered by CPSIA section 108 should include the same products as “toys” covered by ASTM F963-07. 74 Fed. Reg. 8058, 8060 § II.A (Feb. 23, 2009). The exclusions found in ASTM F963-07 may be too broad for the purposes of applying CPSIA section 108. Those exclusions may be based in part on whether other voluntary safety standards exist for a given product, not on whether such product is commonly considered to be a toy. Because CPSIA section 108 applies to all “toys,” the fact that ASTM F963-07 does not apply to an item does not seem to be a basis to exclude that item from coverage of CPSIA section 108.

We suggest that CPSC consider more narrow exclusions, or tailor the exclusions to specific materials or parts of products that inherently do not contain phthalates. For instance, bicycles are excluded from ASTM F963-07. Bicycles are mostly made of metal alloys, which do not contain phthalates, but plastic parts of bicycles or decorations and accessories sold with them could contain phthalates to which children could be exposed. Also, the distinction between a “tricycle” and other ride-on toys for young children may be difficult to make in practice, and many such products for young children have significant plastic components. Many remote controlled toys excluded by ASTM F963-07 as “powered models” also are used by children when they play and could cause exposure if phthalates are present in those products. In determining what is a “toy” under CPSIA section 108, CPSC should analyze the specific ways in which a product is used and marketed instead of simply adopting the categorical exclusions of ASTM F963-07, much as it plans to do when determining what is a “child care article.”

Regulation of products with multiple functions

CPSC requested comments on whether all bouncers, swings, or strollers should be subject to CPSIA section 108, or only those that are “advertised” as facilitating sleeping, feeding, sucking, or teething. 74 Fed. Reg. 8058, 8060 § II.K. How a product is advertised does not, of course, determine how the child will actually physically interact with the product and whether it will in fact be used for, say, sleeping. While the way a product is advertised should be one consideration in determining whether the product is a “child care article,” we suggest that it be considered along with the other factors outlined by CPSC – intended use, age grading, the primary/secondary facilitation concept, and consumer understanding. We also note that it appears that the European Union considers car seats, strollers, and baby carriers to be child care articles to which its phthalate ban applies.²

² European Comm’n, Enterprise & Indus. Directorate-General, *Guidance Document on the interpretation of the concept “which can be placed in the mouth” as laid down in the Annex to the 22nd amendment of Council Directive 76/769/EEC, available at <http://ec.europa.eu/enterprise/toys/documents/gd008.pdf>.*

Test method

We do not believe that the sample preparation method described in CPSC's March 3, 2009, "Standard Operating Procedure for Determination of Phthalates" (CPSC-CH-C1001-09.1) is consistent with the language or the purposes of the phthalate bans in CPSIA section 108 or, for that matter, in California's A.B. 1108.³ CPSC's proposed method is more than simply a test protocol. Its practical effect is to establish what parts of a product must comply with the CPSIA section 108 prohibition of phthalate concentrations greater than 0.1 percent. By considering the entire product to be the relevant point of compliance instead of each component to which a child could be exposed, CPSC's proposed method undermines the purpose of the CPSIA phthalate ban. It creates a loophole through which materials with far higher phthalate content than Congress intended can continue to be used in toys and child care articles.

To avoid this result, we intend to enforce California's A.B. 1108 phthalate ban against toys and child care articles with *individual parts or materials* that contain greater than 0.1 percent phthalate concentration. We urge CPSC to adopt the same interpretation for the CPSIA.⁴

CPSC's proposed method considers the "sample" to be analyzed as the entire product. Thus, the total concentration of phthalates in an entire product would be measured for purposes of determining whether the 0.1-percent regulatory threshold has been met. This would allow high-phthalate components to be "diluted" by components that do not contain phthalates, with the result that CPSC could consider products with high levels of phthalates in some materials but not others to be in compliance with CPSIA section 108.

The sample preparation method CPSC has proposed leads to results that are plainly contrary to Congress's intent. Consider, for example, a baby swing with an attached teething ring that contains phthalates. Under CPSC's proposed method, the manufacturer would not need to ensure that the teething ring meets the 0.1-percent threshold. Rather, CPSC would determine compliance of the product only after including all parts of the swing – fabric seat, metal springs, internal mechanical components – even though it may be impossible for the child to get those

³ We are not expressing a preference on technical aspects of CPSC proposed Standard Operating Procedure, such as methods of extraction or sample analysis.

⁴ We also note that following CPSC's proposed method would not necessarily help determine compliance with California's Proposition 65 (Health & Saf. Code § 25249.6). The duty to warn under Proposition 65 is triggered by an exposure to certain phthalates, not by any particular phthalate concentration. Because a person can be exposed to phthalates from a single part of a product with high phthalate levels, determining the overall phthalate concentration for a heterogeneous product is unlikely to provide sufficient information to determine whether a Proposition 65 warning is required. As we said in our December 3, 2008, letter to CPSC General Counsel Cheryl Falvey, however, we expect that in most cases products made from materials with less than 0.1 percent of the regulated phthalates would not require a Proposition 65 warning for those phthalates.

parts into its mouth and those parts may have no phthalates whatsoever.⁵ Congress did not intend to permit companies to sell toys and child care articles with mouthable plastic parts that contain high phthalate levels, so long as the mouthable parts are part of a larger product whose non-phthalate, non-mouthable mass dilutes the overall phthalate concentration to less than 0.1 percent.

Allowing companies to use phthalate-rich materials that are part of a larger product is contrary to the plain language of the statute. The CPSIA prohibits the manufacture, sale, and distribution of “any children’s toy or child care article that contains *concentrations* of more than 0.1 percent” of the regulated phthalates.⁶ But CPSC’s proposed test method looks for a single concentration of each regulated phthalate within a product, not for concentrations, as the statute mandates. Even if Congress intended to treat the concentration of each of the six phthalates separately, which we understand is CPSC’s view, Congress would not have made “concentration” plural unless it contemplated more than one concentration of each phthalate within a product. Otherwise, Congress would have prohibited products with a “concentration” of “more than 0.1 percent of [DEHP, DBP] or [BBP],” for instance. The only reasonable way to construe the plain language of the statute is that the ban on phthalate *concentrations* greater than 0.1 percent contemplates that there may be more than one concentration of each phthalate within a single product.

We recognize that, arguably, differences between language Congress used in section 101 (banning lead) and section 108 could support CPSC’s view that the compliance point for the phthalate ban is the entire product. Congress specified that the CPSIA section 101 lead standards apply to “total lead content by weight for any part of the product,” and further specified that inaccessible parts need not meet those lead standards, but the section 108 phthalate ban applies without specific reference to parts or accessibility. Therefore, the argument goes, Congress must not have intended that separate parts of children’s toys and child care articles be free of phthalates. *See, e.g., Russello v. U.S.*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) This interpretation is not required by the language of the CPSIA and is not a reasonable interpretation of Congress’s intent.

The tiered lead standards in CPSIA section 101 need not constrain CPSC’s interpretation of the very different phthalate ban in section 108. As discussed above, we believe the language is clear. To the extent there is ambiguity, CPSC has the authority to make reasonable

⁵ Similarly, CPSC requests comments on whether a crib is a child care article that must meet the 0.1-percent limits, or must only the teething rail meet that limit. 74 Fed. Reg. at p. 8060 § II.A. Regardless of whether the “child care article” is defined as the entire crib or merely the teething rail (i.e., the specific part designed to facilitate teething), it is important that the portion of any product subject to CPSIA section 108 meet the 0.1-percent threshold. Children are unlikely to chew on the underside of a crib, so it is illogical to average the mass of the wood and metal parts of that piece of furniture into the calculation of how much phthalate is in the teething rail.

⁶ CPSIA § 108(a) & (b) (emphasis added).

interpretations of what Congress intended in enacting the CPSIA's phthalate ban. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Any reasonable interpretation of the CPSIA section 108 phthalate ban must take account of the fact that Congress did not craft it in parallel with the section 101 lead restrictions. It imported the phthalate ban from preexisting bans in the European Union and California. Congress made some modifications, but the structure of the phthalate ban remained the same. By contrast, Congress developed the lead restrictions on its own. Moreover, the section 108 phthalate ban has a very different structure from the section 101 provisions setting lead levels. Because of the difference in the history and structure of the lead and phthalate provisions of the CPSIA, CPSC should not interpret the use of certain words and phrases only in section 101 to mean that Congress intentionally excluded such concepts from section 108. *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 435-436 (2002) ("The *Russello* presumption that the presence of a phrase in one provision and its absence in another reveals Congress' design-grows weaker with each difference in the formulation of the provisions under inspection.")

As stated, the phthalate ban in CPSIA section 108 originated with the pre-existing California and European Union phthalate bans. The current European Union phthalate ban was issued in 2005. In July 2006 San Francisco banned the same six phthalates in certain children's products. California's A.B. 1108, which passed the Legislature on September 4, 2007, was intended to impose the San Francisco ban statewide.⁷ Eight weeks later, on October 31, 2007, Senator Diane Feinstein of California introduced a bill in the U.S. Senate to apply the same phthalate ban nationwide.⁸

But the CPSIA lead prohibitions had their origins primarily in CPSC reform bills introduced into the U.S. House of Representatives and U.S. Senate in the fall of 2007. The bill that would become the CPSIA – H.R. 4040 – was introduced in the House by Representative Bobby Rush on November 1, 2007, the day after Senator Feinstein's introduced the phthalate bill. On December 19, 2007, the House passed H.R. 4040. The bill did not mention phthalates at all. H.R. 4040 as passed by the House contained almost exactly the same language limiting lead in children's products as does the CPSIA, and both set the numerical lead concentration limits based on "total lead content by weight for any part of the product."⁹ In other words, the lead limits applied to each part, not to the product as a whole. Both as introduced and as initially passed by the House, H.R. 4040's lead prohibitions did not apply to parts that were not accessible to a child.

⁷ Cal. S. Rules Comm., Analysis of Assemb. Bill No. 1108, 2007-2008 Sess., at 3-5 (July 12, 2007) (explaining that the European Union ban applied to the same phthalates as the San Francisco ordinance and that that ordinance itself "mirrors" A.B. 1108).

⁸ S. 2275, 110th Cong. (2007); 153 Cong. Rec. S13628-29(daily ed. Oct. 31, 2007) (statement of Sen. Feinstein explaining that S. 2275 is "modeled" on the European Union ban; "I urge my colleagues to support this legislation, and to provide all American children with the same safe toys available in Europe and California.")

⁹ Compare H.R. 4040 § 101(a)(2)(A), (B) & (C) (as passed by House), 153 Cong. Rec. H16874 (daily ed. Dec. 19, 2007), with CPSIA § 101(a)(2)(A), (B) & (C).

The principal Senate bill, S. 2045, was introduced by Senator Mark Pryor on September 12, 2007, and proposed to regulate lead content of “any part of the [children’s] product” that contained lead above a certain percentage “by weight of the total weight of such part.”¹⁰ Thus, the Senate bill also regulated lead on a part-by-part basis. This Senate language remained unchanged as the text of S. 2045 was amended and inserted into S. 2663¹¹ on February 25, 2008, and remained unchanged as the Senate passed its version of H.R. 4040 on March 7, 2008¹². The Senate lead limitations also applied only to accessible parts of a children’s product. Ultimately, the House’s original “total lead content by weight for any part of the product” construction – introduced on November 1, 2007 – became the final compliance point for lead under CPSIA section 101.¹³

Returning to the phthalate provisions, they did not enter into the CPSC reform bills until March 4, 2008, when Senator Feinstein offered an amendment to S. 2663 that contained a phthalate ban that was nearly identical to the separate phthalate bill she had earlier introduced. This amendment was explicitly based on the California A.B. 1108 ban and the European Union ban and was intended to mirror those bans.¹⁴ Three days after the phthalate amendment was introduced, the Senate passed its version of H.R. 4040 (which replaced the House-passed version with the language of S. 2663) with that phthalate ban. The compromise between the House and Senate bills that became the CPSIA included a modified phthalate ban. The legislative history shows that at the time it passed the CPSIA, Congress was aware that the federal phthalate ban was based on the California and European Union phthalate bans.¹⁵ In fact, in the final version of

¹⁰ S. 2045 § 23(b) (as introduced), 153 Cong. Rec. S11504 (daily ed. Sept. 12, 2007).

¹¹ S. 2663 § 22(b) (Feb. 25, 2008, version), 154 Cong. Rec. S1134 (daily ed. Feb. 25, 2008).

¹² H.R. 4040 § 22 (passed by Senate as amended), 154 Cong. Rec. S1775 (daily ed. Mar. 7, 2008).

¹³ Conference Report on H.R. 4040, Consumer Product Safety Improvement Act Of 2008, H.R. Rep. No. 110-787, 154 Cong. Rec. H7194 (daily ed. Jul. 29, 2008).

¹⁴ Senator Feinstein’s comments introducing the phthalate amendment include the following:

The amendment would replicate what will be California law in 2008 and ban the use of the chemical phthalates in toys as California has done I think it is time for the rest of the country to follow the lead of California, the European Union, and other nations because without action the United States risks becoming a dumping ground for phthalate-laden toys that cannot legally be sold elsewhere. . . . This amendment follows the same standards already set by the European Union and California.

154 Cong. Rec. S1511 (daily ed. Mar. 4, 2008).

¹⁵ See 154 Cong. Rec. S7874 (daily ed. Jul. 31, 2008) (statement of Sen. Boxer):

The United States is often behind the rest of the world when it comes to chemical policy. The same has been true for phthalates. These chemicals have been restricted in at least 31 nations, including European Union It took action from three States—California, Washington and Vermont—before we have reached this point. . . . With the passage of this legislation, parents throughout this country will have the same assurances as parents in the E.U., in Argentina, in Japan, and all of these other counties.

the bill Congress borrowed language for the definition of “toy that can be placed in a child’s mouth” nearly verbatim from a European Union guidance document on the same subject.¹⁶

The European Union, California’s A.B. 1108, and the CPSIA also have created the same two-tiered structure for the phthalate ban. In all three laws, three phthalates (DEHP, DBP, BBP) are banned in all toys and child care articles, regardless of whether those products can be placed in the mouth by children. In the European Union and California bans, the other three phthalates (DINP, DIDP, DNOP) are banned only in toys and child care articles that can be placed in the mouth, and they are banned under the CPSIA for toys that can be placed in the mouth and all child care articles. The European Commission justified this two-tiered approach based on the greater evidence of toxicity of the first three phthalates, whereas “the restrictions for DINP, DIDP and DNOP should be less severe than the ones proposed for DEHP, DBP and BBP for reasons of proportionality.”¹⁷

The record thus establishes that the phthalate ban in section 108 and the lead ban in section 101 have different origins. An additional reason not to construe the two provisions in relation to each other is that Congress used different words in each section to describe the same concept, apparently without any scientific reason for doing so. The European Union, California’s A.B. 1108, and the CPSIA all regulate the “concentrations” of certain phthalates.¹⁸ By contrast, section 101 (and the bills leading up to it) regulate “total lead content by weight,” and express lead limits in parts per million, not as a percentage. But whether expressed as a

See also 154 Cong. Rec. H7582 (daily ed. Jul. 30, 2008) (statement of Rep. Barton, Ranking Member of House Energy and Commerce Committee):

Some States have begun to ban these products. The European Union has banned certain of these phthalates and, as a result, in the other body, the Senate bill had a prohibition based on a California standard on a large number of these particular compounds.

¹⁶ Compare European Comm’n, Enterprise & Indus. Directorate-General, *Guidance Document on the interpretation of the concept “which can be placed in the mouth” as laid down in the Annex to the 22nd amendment of Council Directive 76/769/EEC*, available at <http://ec.europa.eu/enterprise/toys/documents/gd008.pdf>, with CPSIA § 108(e)(2)(b). We also note that this European Commission guidance says that the phthalate ban only applies to “accessible” parts of some child care articles.

¹⁷ Parliament and Council Directive 2005/84/EC, 2005 O.J. (L 344/40), at ¶¶ 10-12, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:344:0040:0043:EN:PDF>.

¹⁸ Compare Parliament and Council Directive 2005/84/EC, 2005 O.J. (L 344/40), Annex (stating that specified phthalates “Shall not be used as substances or as constituents of preparations, at concentrations of greater than 0,1 % by mass of the plasticized material, in toys and childcare articles”) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:344:0040:0043:EN:PDF>, with Cal. Health & Saf. Code § 108937(a) & (b) (“A.B. 1108”) (banning toys and child care articles that contain the phthalates “in concentrations exceeding 0.1 percent”) with CPSIA § 108(a) & (b)(1) (banning any toy or child care article “that contains concentrations of more than 0.1 percent of” the phthalates).

March 25, 2009

Page 8

concentration or as content by weight, both mean the same thing: the proportion of the regulated chemical within the mix of chemicals that make up the material being tested. It would make no sense to assume that, because Congress used different words to describe the same concept, Congress meant for the proportion to be calculated differently in sections 101 and 108. Rather, the different words Congress used to express the same concept in each section again show that CPSIA sections 101 and 108 do not have common legislative origins. They should not be treated as if they do.

In short, the history and structure of the CPSIA lead and phthalate provisions demonstrate that they developed completely independently from each other and should not be construed in conjunction with each other. The phthalate ban in section 108 is modeled on the European Union and California phthalate bans, and was not developed alongside the lead prohibition. There is no evidence in the legislative history that Congress attempted to reconcile the lead and phthalate compliance schemes. Based on this history, there is no reason to think that Congress intended the two provisions to be read such that concepts included in one were excluded in the other. *See City of Columbus*, 536 U.S. at 435-436. Thus, instead of presuming that, because Congress mandated part-based compliance for lead and excluded inaccessible parts, it intended *not* to do so for phthalates, CPSC should make a reasonable interpretation of CPSIA section 108 in light of its origins and Congress's intent.

By including section 108 in the CPSIA, Congress intended to reduce children's exposures to high phthalate concentrations in toys and in child care articles. That intent cannot be effected by setting the phthalate ban compliance point as the whole product, as CPSC's proposed Standard Operating Procedure would do. Instead, CPSC should modify the sample preparation method to measure phthalate concentrations in individual parts of toys and child care articles to which a child might be exposed.

Thank you for the opportunity to comment on CPSC's proposals. Please contact me at the number or e-mail above, or Harrison Pollak at (510) 622-2183, harrison.pollak@doj.ca.gov, if you would like to discuss these comments further with somebody in our office.

Sincerely,

Tim Sullivan by 

TIMOTHY E. SULLIVAN
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

Stevenson, Todd

From: Harrison Pollak [Harrison.Pollak@doj.ca.gov]
Sent: Wednesday, March 25, 2009 4:30 PM
To: Section 108 Definitions
Cc: Ed Weil; Timothy Sullivan
Subject: California AG's Section 108 Comments
Attachments: Cal. AG Phthalate Letter 25Mar09.pdf

Attached please find the California Attorney General's comments on the Notice of Availability of Draft Guidance Regarding Which Children's Products Are Subject to the Requirements of CPSIA Section 108.

Thank you.

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**PRINTING
INDUSTRIES
OF AMERICA**

Advancing Graphic Communications

82

March 25, 2009

Todd A. Stevenson
Office of the Secretary
Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

via Email: section108definitions@cpsc.gov

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108

Dear Mr. Stevenson,

The Printing Industries of America appreciates the opportunity to comment on the Consumer Product Safety Commission's (CPSC, or the Commission) *Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108*. In reviewing the notice, there are several issues that require clarification with respect to the application of the requirements to books and other printed matter.

As background, the Printing Industries of America is the world's largest graphic arts trade association, representing an industry with approximately one million employees. It serves the interests of more than 10,000 member companies.

The Printing Industries of America strongly supports the Commission in its recognition that "ordinary books, including books for small children, are generally not regarded as toys" and that further guidance is necessary to determine which consumer products are or are not subject to the phthalate requirements of Section 108 of the CPSIA. In addition, the Commission should also take this opportunity to revise its phthalate testing method to provide a higher degree of accuracy in detecting the six phthalates regulated by the CPSIA.

With respect to these issues, the Printing Industries of America offers the following comments on the questions raised in the Notice regarding children's toys:

1. *II.E Are there any other classes of products that should be excluded from the section 108 definition of toy? Why?*

CPSC staff is considering excluding certain types of articles from the definition of "children's toy" based on the ASTM International F963-07 toy safety standard, including, but not limited to bicycles, tricycles, sling shots and sharp-pointed darts, playground equipment, certain art materials and hobby items, athletic equipment, musical instruments, and ordinary books.

The Printing Industries of America supports the staff's determination to exclude ordinary books from the definition of 'children's toy' and the phthalate requirements of Section 108. The testing evidence submitted by the Association of American Publishers (AAP) and the Printing Industries

of America overwhelmingly supports the CPSC staff's determination. The CPSC staff's draft guidance, however, does not define what constitutes an 'ordinary book'. In its February 6, 2009 *Statement of Enforcement Policy on Section 101 Lead Limits* the Commission defines the term "ordinary book" as one that is "published on cardboard or paper printed by conventional means and intended to be read. It excludes children's books that have plastic, metal, or electronic components." This definition implies that CPSC staff considers books and other graphic arts products with coil binding, staples, speakers, or plastic hard covers to potentially be a children's toy subject to the phthalate requirements of Section 108.

The graphic arts industry produces a large number of children's products that contain coil binding, staples, speakers, hard covers, and other plastic, metal, and electronic components: learning materials. These primary and secondary children's products provide an irreplaceable educational benefit to children whether a child uses them in a structured education setting or during a self-education process. This class of products would include, but is not limited to: textbooks, planners, rulers, posters, flashcards, laminated fact sheets, stickers, and other supplemental educational materials. Unless CPSC staff excludes this class of products from definition of children's toy countless learning materials will be negatively affected by section 108 of the CPSIA.

Section 108 defines a children's toy as a "consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays." In its March 12, 2009 presentation, CPSC staff examined several dictionary definitions of the word "play," including:

- To occupy oneself in amusement, sport, or other recreation: children playing with toys;
- Recreational activity, especially: the spontaneous activity of children;
- Exercise or activity for amusement or recreation.

The recurrence of the words recreation, activity, and spontaneous in each of these definitions provides a clear indication that learning materials are not meant to be used by a child when the child plays. Children's toys are objects that are meant to be used, abused, worn, torn, and otherwise dilapidated over the course of its lifetime. Children's toys are not meant to be covered in brown paper bags, used during a history or geography lesson, and usually returned at the end of a class, activity, or school year.

The CPSC needs to exclude "learning materials" as a class of products from the phthalate requirements of the CPSIA in order to prevent disruption of the timely and cost-effective supply of children's learning materials.

2. II.J (From March 12, 2009 Staff Presentation) Should Novelty Books that involve interaction more than reading be covered by the CPSIA phthalates ban?

The Printing Industries of America does not support including "novelty" books or other printed matter in the Section 108 requirements. The primary one being a lack of clarity as to what is a "novelty" book and other printed matter and which products would or would not be subject to the requirements.

- Since there is not formal definition for a “novelty” book or other printed material, there exists the very real possibility that a large subclass of printed products would be covered by the requirements based exclusively on the concept of interactivity. Simply opening a book could be considered interactive as the child is touching the product.

Therefore, the first step is to define what are “novelty” books and other printed products. Printing Industries of America proposes the following definition for this term:

“A book or other commercially produced graphic arts product with special built-in features such as foldout pages, liftable flaps, or electronic commands that a child must physically engage with in order to use the built-in feature.”

This definition is based on the one found on Bookjobs.com, which is affiliated with the AAP. It has been modified so that it clearly limits “novelty” books and other printed product to only those books that result in increased interaction with the product when compared to ordinary books and other printed products that just involves reading of words and viewing images.

Under this definition, a magazine that contains features that automatically pop-up by turning a page would not be considered a “novelty” item because the child has not physically engaged the built-in feature (i.e., the pop-up). A book in which the child must physically lift the flap, however, would be considered a “novelty” product because the child has physically engaged with it by lifting the flap and increased their interaction with the product when compared to the traditional pop-up book. Similarly, a folder that contains built-in fur or a greeting card that contains a button the child has to press to hear an animal sound would also be considered “novelty” items because the child must physically engage with the fur and the button.

- There needs to be a distinction between “novelty” items and children’s toys with respect to books and other printed matter. The CPSC’s approach seems to indicate that if a product is not an ordinary book and other printed matter, then it must be by default a “novelty” item. It is also important to note that merely because a book contains “novelty” features and might be classified as a “novelty book”, it is not necessarily a toy. For example, a printed atlas that is coil bound can contain textured topographic features to indicate mountains and other geographic features. Although a child may engage the features, the overall the intent of the atlas is not for it to be used in a spontaneous sport, recreation, or exercise activity (i.e. it is not a toy).

In distinguishing between the inherent interactive value of “novelty” items and toys, the CPSC should bear in mind that products that contain features designed to enhance learning, understanding or appreciation of a book’s contents are not toys and should not be so considered. They should thus be excluded from the Section 108 requirements. In addition, products that provide limited interactive value, such as greeting cards, single application stickers, decals, or coloring books (not the crayons themselves), items that snap or Velcro together may well be “novelty products”, but they are not toys.

- The raw material and finished product testing data collected by the AAP and the Printing Industries of America revealed either a non-detect or a phthalate concentration less than 0.01% in the material or product.

The Printing Industries of America recommends that the CPSC find that Section 108 of the CPSIA does not apply to “novelty” paper-based books and other printed matter. The CPSC has already indicated that ordinary paper based books and other printed matter is not subject to enforcement of the lead standards, but has yet to act on the formal request from the AAP. It is anticipated that the CPSC will grant the request and therefore, the same considerations regarding Section 108 should apply.

To avoid confusion, CPSC needs to clearly indicate which products would be considered “novelty” items subject to Section 108 and which one would be excluded. There are many paper-based graphic arts products that could qualify as a “novelty” item under the current guidance, including, but not limited to paper doll books, puppet books, sticker books, greeting cards, trading cards, flashcards, game components, etc. and should be exempt.

The body of evidence supports the conclusion that ‘ordinary’ paper-based novelty items do not pose a phthalate hazard to children and should therefore be excluded from enforcement under section 108 just as the Commission excluded ordinary books printed after 1985 from enforcement under section 101 of the CPSIA.

Therefore, Section 108 requirements should only apply to “novelty” items that are toys and meet the following criteria:

1. The item is a non-paper based product.
2. The item contains a built-in feature that requires the child to physically engage the feature for its use.
3. The built-in feature does not have intent to enhance learning or understanding of an educational topic.
4. The built-in feature provides repetitive interaction during spontaneous sport, recreational or amusement activity.

3. II.O Please Comment on our phthalates test method.

The CPSC has acknowledged that the six regulated phthalates are complex chemicals that share similarities with non-regulated phthalates. Adding to this complexity is the fact that CPSC staff considers diisononyl phthalate (DINP) to be any isomer or mixture of isomers of di-esters of phthalic acid with branched 9-carbon alcohol; similarly, CPSC staff considers diisodecyl phthalate (DIDP) any isomer or mixture of isomers of di-esters of phthalic acid with any branched 10-carbon alcohol. This definition is not acceptable as the CPSIA clearly limits the concentrations of DINP and DIDP only and not an entire class of chemicals based on similar structures. The CPSC needs to clarify its definition of DINP and DIDP so that it only focuses on those two compounds in order to ensure other safe phthalate alternatives are not eliminated from use based on the use of a broad definition.

In addition, the proposed testing procedures do not clearly emphasize the need to analyze the quantitative ions for DINP and DIDP. A testing facility that is not thoroughly familiar with

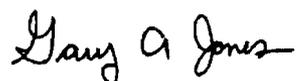
phthalate testing procedures may only analyze the total ion current for each stage of testing, and not integrate the individual ions tested in stage 3. This could result in an overestimate of the DINP or DIDP concentration in a product. The CPSC needs to revise the phthalate test method to emphasize the potential for overstating the concentration for DINP and DIDP if only the total ion current is analyzed for stage 3 testing of phthalates.

Summary and Conclusion

The Printing Industries of America would like to express our appreciation for the opportunity to review and provide comments on the Commission's *Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108*. Overall, we support and commend the CPSC in their efforts to implement the CPSIA to date and in their recognition that ordinary books do not pose a health hazard to children. It is hoped that these comments provide additional insight into the differences between ordinary books and novelty books, definition of a children's toy, and application of section 108 of the CPSIA to novelty books and that our suggestions help establish a mutually beneficial set of conditions that are both technically and economically feasible.

The Printing Industries of America would be willing to meet with representatives from the CPSC to discuss our concerns with the staff's current approach to applying the phthalate provisions of the CPSIA to graphic arts products. Please feel free to contact me at 412-259-1794 or gjones@printing.org with any questions you may have or to arrange a meeting time that is convenient for you and the appropriate staff involved in the development of the regulation.

Sincerely,



Gary Jones
Director, Environmental, Health, and Safety Affairs
Printing Industries of America

Stevenson, Todd

From: Jones, Gary [GJones@printing.org]
Sent: Wednesday, March 25, 2009 4:43 PM
To: Section 108 Definitions
Subject: Notice of Availability of Draft Guidance Regarding Which Products are Subject to the Requirements of CPSIA Section 108
Attachments: PhthalatesGuidanceComments.pdf

Please see attached

Gary Jones
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Via Electronic Mail

March 26, 2009

Mr. Todd Stevenson
Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Notice of Availability of Draft Guidance Regarding
Which Children's Products are Subject to the
Requirements of CPSIA Section 108

Dear Mr. Stevenson:

These comments are submitted on behalf of the United States Association of Importers of Textiles and Apparel ("USA-ITA") in response to the request for comments regarding which children's products are subject to the requirements of Section 108 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), 74 *Federal Register* 8058 (February 23, 2009).

USA-ITA is a voluntary association of some 200 importers and retailers of textile products and wearing apparel as well as related service industries such as international transportation concerns. The importer and retailer members of USA-ITA import textile and apparel products with a first cost in excess of \$60 billion.

The draft guidance lists certain children's products and asks whether these should be subject to the requirements of Section 108 as child care articles. Pajamas are included among the products potentially included. Presumably, children's pajamas are included because they might be products which "facilitate" sleep. USA-ITA does not believe that pajamas "facilitate" sleep.

In what sense does sleepwear "facilitate" sleeping? With a few exceptions, such as footed garments and gowns with drawstring bottom, the physical difference between

ordinary apparel and sleepwear are not very significant. There is nothing particular about sleepwear, footed or not, that makes wearing sleepwear an inducement to sleep. It is not unusual for children to wear pajamas and other sleepwear during times of the day where sleeping is not their primary activity. Conversely, it is not unusual for children to wear regular apparel, including socks, to bed. That being the case, it is hard to understand how sleepwear can be considered to “facilitate” sleeping.

The Commission should not include pajamas or other sleepwear as within the class of childcare products.

The draft guidance also asks whether the presence of cartoon characters and electronic devices suggests that these devices may be considered toys. USA-ITA strongly believes that the mere presence of a cartoon character on an article does not mean that a product is a toy because the characters are attractive to children.

Children’s apparel often includes cartoon characters. This does not mean that apparel is a toy. Section 108 (e)(1)(B) defines a toy as a “product designed or intended by the manufacturer for a child [] for use by the child when the child plays.” Apparel is not designed or intended for use as a play thing.

Many products depict cartoon characters, from furniture to bedding to T-shirts; but these products are not toys. If an electronic product has secondary play value (a cell phone with a game function) it may be reasonable to view it as a toy – if it is expressly intended or designed for children 12 years old and under. The presence or absence of cartoon characters, however, does not alter the function and should not determine the characterization of the cell phone as a toy.

Further, cartoon characters appeal to adults and children older than 12 years. Some cartoon characters appeal only to adults. The determination of whether a particular cartoon character appeals to children 12 years of age or younger is highly subjective; it is also not the standard established under the law.

The Commission should make it clear that the presence of cartoon characters on apparel does not convert apparel into toys.

USA-ITA appreciates the opportunity to comment on this important matter and urges that its views be adopted.

Sincerely,



Laura E. Jones
Executive Director

Of counsel:

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USA-ITA Customs Counsel

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USA-ITA Washington Trade Counsel

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Stevenson, Todd

From: Pellegrini, John B. [jpellegrini@mcguirewoods.com]
Sent: Thursday, March 26, 2009 10:18 AM
To: Section 108 Definitions
Attachments: 8112624 CPSIA Toy Guidance Section 108 .pdf

Dear Mr. Stevenson:

Please accept the attached comments.

Regards,

John B. Pellegrini

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Deborah M. Fanning, CAE, Executive Vice President
Deborah S. Gustafson, Associate Director

March 27, 2009

Office of the Secretary
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: Notice of Availability of Draft Guidance Regarding Which Children's Products Are Subject to the Requirements of CPSIA Section 108

Dear Sir:

These comments are being submitted by The Art and Creative Materials Institute, Inc. (ACMI). We have reviewed the Consumer Product Safety Commission's (CPSC) Request for Comments and Information on Section 108 of the Consumer Product Safety Improvement Act (CPSIA) regarding the ban of certain phthalates. These comments necessarily focus on the application of Section 108 to art materials, since art materials are the issue of expertise by ACMI and its member manufacturers, as well as our consulting toxicologists at Duke University who provide toxicological and testing services. ACMI's certification program ensures the products of its member companies comply with ASTM D 4236, the Labeling of Hazardous Art Materials Act (LHAMA) and other portions of the Federal Hazardous Substances Act (FHSA) for both acute and chronic hazards and FHSA's labeling requirements.

I. General Approach

While CPSIA Section 108 contains definitions of children's toys and child care articles applicable only to this Section, we applaud CPSC's draft guidance because it helps manufacturers and testing laboratories to understand the scope of these definitions. We feel it is very important to the success of this section that manufacturers and testing laboratories have as clear a statement as possible of which products are subject to the Section 108 ban. The draft guidance published by the agency on February 23, 2009 accomplishes this goal. When ACMI and other associations and consumer organizations urged Congress to pass LHAMA, we pointed out at that time the importance of the law being national in scope of the products covered so that consumers, retailers and distributors of art materials could rely on the fact that art materials had undergone a reasonably consistent evaluation and labeling system. We appreciated CPSC's action in issuing a reasonable and inclusive definition of art material in that law at the beginning of LHAMA's administration and subsequently.

LOOK FOR THESE SEALS.....



Office of the Secretary
Consumer Product Safety Commission

March 27, 2009

We approve of CPSC's general approach in harmonizing the various definitions of children's products, child care articles and toys in CPSIA with those terms and definitions that appear in other laws that CPSC administers. We feel that having separate and disparate definitions of covered products in CPSIA will only lead to mass confusion among manufacturers, testing laboratories, and especially consumers. Uniform definitions are very necessary. It seems that the only reason these definitions should differ would be for age-related matters, such as small parts, or for any exclusions granted by CPSC. We would recommend that CPSC consider a way to make the definition of children's toy in the permanent ban consistent with that term in the interim ban i.e., children's toy that can be placed in a child's mouth and child care articles for children three or younger. The more serious risk of exposure is with a toy or child care article that can be placed in the mouths of children three or younger vs. a children's toy meant for children 12 or younger. We do not feel that Congress intended to require inconsistent protection of children afforded by CPSIA.

We believe that the consequences to CPSC's general approach are positive, not negative, as they help to make compliance and enforcement more consistent across the board.

II. Children's Toys and Child Care Articles

Regarding products to be excluded from Section 108, we recommend again the approach of having consistent definitions of children's toys and child care articles throughout CPSIA and other consumer product laws and regulations. Children's art materials have never been considered toys by the Commission. Indeed there is a history of excluding children's art materials from various regulations on children's products in recognition of their educational value, see 16 CFR 1303, 16 CFR 1500.19 and 16 CFR 1500.85. Therefore, we feel that the exemption for art materials should be retained in Section 108 as it is in ASTM F 963.

That said, we do think that there are particular art materials that should be regarded as toys and therefore be subject to Section 108. These are art materials that are of play value themselves or create items of play value. The ACMI program has always considered such art materials to be toys and would recommend that the Commission do so as well. In the case of model kits or hobby items, regulations developed by CPSC in 1995 for LHAMA require that only art materials within such kits need to comply with LHAMA. Manufacturers of these items may very well already consider these kits to be toys or craft items that do not produce a work of art and thus are not art materials.

Even more important, the vast majority of art materials, whether or not they are toys, are evaluated in ACMI's certification program. ACMI banned the use of the six phthalates named in CPSIA, as well as one other, in children's art materials in November 2007 for regulatory, not toxicological, reasons. We would urge CPSC to consider whether exclusions to Section 108 could be granted products based on risk assessments and sound science, rather than the arbitrary selection of 0.1% in a legislative process where the authors of the legislation are not scientific experts. Our consulting toxicologist developed a list of alternatives, which we are providing to CPSC under separate cover. Children's art materials manufactured since November 2007 do not contain these phthalates. A major laboratory used by many members of ACMI has adopted the CPSC test method for phthalates.

Office of the Secretary
Consumer Product Safety Commission

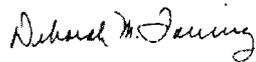
March 27, 2009

As art material manufacturers rarely, if ever, produce child care articles, we do not feel we have the expertise to offer comments on Section II, items D-O in the draft guidelines with one exception. Regarding Item L, we recommend that the same definition of toy as found in ASTM F-963 and its exclusions be applied to promotional items for consistency sake.

In conclusion, we believe that, given the outstanding record of LHAMA and ACMI's certification program, art materials are achieving the protection and other goals of CPSIA and should not be considered toys, unless they are of play value themselves or produce items of play value.

We appreciate the opportunity to submit these comments on this very important issue.

Respectfully yours,



Deborah M. Fanning, CAE
Executive Vice President
The Art and Creative Materials Institute, Inc.

Of Counsel
Martin J. Neville, Esq.
Mary Martha McNamara, Esq.

Stevenson, Todd

From: Debbie Fanning [debbief@acminet.org]
Sent: Friday, March 27, 2009 4:31 PM
To: Section 108 Definitions
Subject: CPSIA Section 108 Coments RE: Definitions
Attachments: ACMI Comments on CPSIA Section108_Final Submitted.pdf

Please find attached comments submitted by The Art & Creative Materials Institute regarding which children's products are subject to the requirements of CPSIA Section 108. Earlier this week, Dr. Babich granted an extension to us for filing these comments due to a death in my family. I greatly appreciate this extension!

Sincerely,

Deborah M. Fanning, CAE
Executive Vice President
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<mailto:debbief@acminet.org>
<http://www.acminet.org>

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Moodoo Productions Inc.
579 W. Loma Alta Drive, Altadena CA 91001
phone 626-296-6956 fax 309-417-4424

March 17, 2009

Michael A. Babich, PhD
Director for Health Sciences
U.S. Consumer Product Safety Commission
4330 East-West Highway, Suite 600
Bethesda, MD 20814

Dr. Michael A. Babich,

Thank you for your email response to my inquiry about clarification on "plush toys" in regard to CPSIA Section 108. Per your request, I am sending my comments to this address.

I wrote: "On page 8058 of the Federal Register, published Monday, Feb. 23, 2009, I noticed that "dolls" are subject to the requirements of CPSIA section 108. However, it is unclear whether stuffed animals / plush toys are included in the doll category, since they often do not contain plastic components. Is it reasonable to assume that only the plastic components of plush toys would be subject to the requirements of CPSIA section 108? Or must all components be tested? I am a small business owner committed to making safe toys in compliance with the requirements of CPSIA and ASTM-F963. Thank you in advance. I appreciate your help in clarifying this matter."

You wrote: "The staff proposed that plush toys are toys and, therefore, subject to the requirements of section 108. It has been suggested that some materials should be exempted from testing. However, we have not yet made any such proposal. Please send your comments to the address listed in the notice. You might also want to consider whether there are any materials, such as plastic eyes, that should be tested for phthalates."

In my opinion, it is reasonable to require phthalates testing for external plastic components, such as plastic eyes, since they can be mouthed by children. Also, internal plastic components, such as polyethylene plastic pellets (found in "beanie toys") and plastic stiffeners (used for support, for example to prop up a bunny's ears) may be subject to the testing requirements. There may be times when a child loves a toy so much they wear out the toy, or a toy is passed from generation to generation and it eventually falls to pieces. Phthalates testing of internal plastic components would help to preserve child safety in conjunction with ASTM-F963 physical and mechanical testing.

U.S. Manufacturers will benefit from a list of exempted components, such as non-plastic components which commonly do not contain phthalates, including: plush, fur, velboa, knit, polyester fiber (stuffing), thread, embroidery thread, polyurethane foam, etc. As you may be aware, phthalates testing is the single-most expensive toy safety test. Small manufacturers are put at a disadvantage under current CPSIA Section 108 legislation, which requires all components to be tested in each instance of usage. Many jobs will be saved and many livelihoods supported by clarifying which components must be tested and which components are exempted from testing requirements of CPSIA Section 108.

Thank you for receiving my comments. I appreciate your important work in making toys safe for children.

Best regards,

A handwritten signature in cursive script that reads "Michael Dowell".

Michael Dowell
President
Moodoo Productions, Inc.

1 April 2009

Mr. Richard O'Brien
Director
Office of International Programs and Intergovernmental Affairs
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD20814
U.S.A.

Dear Rich,

Consumer Product Safety Improvement Act of 2008 (CPSIA)

Representatives of the Toys Manufacturers' Association of Hong Kong Ltd., whom you have met at the lunch hosted by the Director-General of Trade and Industry while in Hong Kong last January recently contacted our Trade and Industry Department colleagues again on the CPSIA. One of them has encountered problem in California with the phthalate content of one of his products. Although it was sold and shipped in 2007, the retailer is still selling it and as manufacturer he is also caught. They expressed grave concerns over the retrospective application of the phthalates limit and the overall implementation of the CPSIA.

As requested by the trade, I am attaching a summary of their concerns and requests for your consideration.

Please feel free to approach me if you need any further information.



(Maurice Loo)
Deputy Director-General

c.c.
Director-General of Trade and Industry (Attn.: Ms Sabina Ho)

Consumer Product Safety Improvement Act of 2008 (CPSIA)

Concerns raised by the toys industry in Hong Kong

- unrealistic CPSIA deadlines are causing huge disruptions to the industries, particularly the small companies and shops;
- the retroactive application of new requirements to unsold inventory have severe economic consequences for all the parties in the supply chain;
- conflicting compliance rules adopted by the California State are causing confusion to the industry;
- the industry needs a transitional period to cope with the new requirements; and
- manufacturers do not have a clear direction because of the lack of implementation details for reference from the Consumer Product Safety Commission (CPSC).

Suggestions

- a delay of the CPSIA enforcement date;
- relaxation of the CPSIA rules or modification of the CPSIA to provide for more flexibility in implementation; and
- provision of a transitional period for manufacturers to review and adjust their setups and manufacturing processes as appropriate.

March 2009



April 7, 2009

Office of the Secretary
 Consumer Product Safety Commission
 Room 502
 4330 East West Highway
 Bethesda, Maryland, 20814

Dear Mr. Todd Stevenson:

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association of the apparel and footwear industries and their suppliers – I am writing in response to the Consumer Product Safety Commission's (CPSC) request for comments on the draft guidance regarding which children's products are considered "children's toys" and "child care articles" and therefore subject to requirements of the Consumer Product Safety Improvement Act's (CPSIA) Phthalate Standard.

We are in receipt of the letter (see Attachment A) dated *October 17, 2008* which states that footwear is not covered by the definition of "children's toy" or "child care articles," and therefore not subject to the CPSIA phthalate ban. As we have noted several times previously, we agree wholeheartedly with this opinion and would encourage the CPSC to enshrine the letter further in regulations it issues governing application of the phthalate ban.

We are also in receipt of the CPSC letter (see Attachment B) dated *November 25, 2008*, which exempts most apparel items from the definitions of "children's toy" or "child care articles" and therefore from the phthalate ban. As we stated in previous comments, we agree with much of what is stated in the letter though we feel it incorrectly characterizes children's sleepwear and bibs as childcare articles. The letter states, "children's sleepwear or bibs, while not considered to be toys, would be considered childcare articles as defined under Section 108, and, therefore, subject to the ban on phthalates." As we explained in previous comments dated *January 12, 2009* (see Attachment C), we find no information to support such a conclusion and, in fact, believe there is substantial information to the contrary. Accordingly, we believe that children's pajamas and bibs do not fall under the definition of "child care articles" and therefore *all apparel items* should be exempt from the phthalate ban as well.

We are also in receipt of the letter dated *March 12, 2009* (see Attachment D) to the Travel Goods Association articulating that travel goods are not covered by the ban. We agree with this assessment, further elaborated by the recent submission of the Travel Goods Association (TGA) (See Attachment E).

Section 108 defines "child care article" as a "consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething." Accordingly, while bibs and pajamas are *used when* a child is feeding and sleeping (respectively), they do not *facilitate* either action (we elaborated more on this in our *January 12, 2009* comments, Attachment C). The CPSC's determination of which products are subject to the requirements of the phthalate standard should fall within the parameters outlined in those comments.

We believe this distinction between "facilitating sleeping and feeding" versus "used while sleeping and feeding" is significant, and strongly urge the CPSC to consider this distinction as it addresses risk factors as well. We will address each in turn.

Sleepwear

It is clear from the intent of Section 108 that Congress has constructed a very narrow definition of childcare articles to focus on sustained oral activities for children aged 3 and under. The legislation identifies a number of such oral activities – such as feeding or sucking – since the principal risk associated with phthalates has to do with mouthing components of articles that contain phthalates. It would seem, particularly given the very intense debate that occurred over phthalates as Congress drafted this provision, that the authors intended to create a targeted provision to address a specific risk – namely that associated with mouthing.

It is with this in mind that the reference to “facilitating sleeping” must be understood. The mouthing activities associated with sleep are those related to a small child sucking on something – such as a pacifier or a bottle – to help fall and stay asleep. Congress was not looking to cover all articles that are related to sleep or nighttime activities. Rather, it was focused specifically on those related to mouthing to help an infant or small child fall and stay asleep.

Indeed, as we mentioned in previous comments, this was specifically noted in guidance issued by the European Union as it applied a ban on verbatim that is widely viewed as a precursor to the CPSIA phthalate ban. The European Union’s Phthalate Directive applies to “child care articles” though the European Commission issued guidance stating “The main purpose of pyjamas is to dress children when sleeping and **not to facilitate sleep** [emphasis added]. Pyjamas should therefore be regarded as textiles and, like other textiles, do not fall under the scope of the Directive.”¹

Moreover, with respect to sleepwear, the CPSC has most often cited the plasticized non-skid footies in pajamas as the source of concern in this particular garment. On this point, we would make several observations. First, while pajamas are worn *when sleeping*, a child is not likely to suck on the footie of a pajama when it is sleeping or when he is falling asleep. Incidental, random, and non-sustained mouthing of the footie, while awake, might occur just as it could occur with any article that may be within a child’s grasp – be it a dog toy or another household item. In addition, the footie is explicitly a component of the pajama designed not to facilitate sleeping, but rather to facilitate walking. Given the narrow Congressional focus on the mouthing activities associated with the facilitation of sleep, we believe it entirely inappropriate to include in the definition of child care article sleepwear just because that garment is used during sleeping and sometimes contains a component that facilitates walking.

Bibs

Bibs on the other hand, are not products “*designed or intended by the manufacturer*” to either facilitate feeding or to be mouthed by the child while feeding. Other products that *facilitate* feeding are designed with some sort of mouthing function (such as baby bottles). Again, Congress carefully crafted a phthalate ban that would limit phthalates in articles that are associated with sustained mouthing. Bibs may be mouthed occasionally but do not meet this narrow definition.

Moreover, bibs are “*designed or intended by the manufacturer*” to facilitate keeping a child’s clothing clean. In this role, they should be seen as something that facilitates an adult’s activity, not a child’s. Like a high chair or a placemat that is placed under a child’s plate to prevent a stain on a table, a bib is an article that is primarily used by the parent when the child is being fed, rather than as an article that helps the child consume the food.

It is our strong recommendation, therefore, that bibs not be classified as child care articles for purposes of the CPSIA.

As the CPSC understands, the range of the new phthalate ban, including the last minute retroactive application of the ban, has created considerable disruption. We welcome the actions of the CPSC to articulate clear guidance and definitions, and urge that they be published at the earliest possible moment.

¹ http://ec.europa.eu/enterprise/chemicals/legislation/markrestr/guidance_document_final.pdf

Thank you for your time and consideration in this matter. If you have any questions, please contact Rebecca Mond with my staff at 703-797-9038 or at rmond@apparelandfootwear.org.

Sincerely,

A handwritten signature in black ink that reads "Kevin M. Burke". The signature is written in a cursive style with a large, stylized 'K' and 'B'.

Kevin M. Burke
President and CEO

87- Attachment A



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Cheryl A. Falvey
General Counsel
Office of the General Counsel

Tel: 301.504.7642
Fax: 301.504.0403
Email: cfalvey@cpsc.gov

October 17, 2008

Mr. Kevin M. Burke
President and CEO
American Apparel & Footwear Association
1601 North Kent Street
Suite 1200
Arlington, VA 22209

Dear Mr. Burke:

I write in response to your letter of October 14, 2008. You are correct that I have discussed in several of our public meetings the definitions of children's toys that were provided under section 108 of the Consumer Product Safety Improvement Act ("CPSIA"). The slides I used at the most recent presentation (and which are publicly available on our website) are attached to this letter and contain the different definitions of toys subject to the interim and permanent bans on phthalates in section 108. While those definitions are worded broadly, I have stated that my interpretation is that shoes are not toys because they are not intended to be played with by a child. This is reflected on the last slide where we indicate that a shoe intended for a child would be a children's product for purposes of the lead provisions of the CPSIA but not a toy within the meaning of section 108's limits on phthalates unless it has some play value, e.g., a shoe made for a doll.

The views expressed in this letter are my own and have not been reviewed or approved by the Commission. They are based on the best available information at the time they were written. They may be superseded at any time by the General Counsel, by the Commission, or by operation of law.

Sincerely,

A handwritten signature in black ink that reads "Cheryl A. Falvey". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.
Cheryl A. Falvey

Phthalates Definitions and Testing

Permanently Banned Phthalates

- **Children's Toy** – consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays
- **Child Care Article** – consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething

This presentation has not been reviewed or approved by the Commission and may not reflect its views.

Phthalates Definitions and Testing

Interim Ban

- “. . . any children’s toy that can be placed in a child’s mouth or child care article . . .”
- “For purposes of this section a toy can be placed in a child’s mouth if any part of the toy can be brought to the mouth and kept in the mouth by a child so that it can be sucked or chewed. If the children’s product can only be licked, it is not regarded as able to be placed in the mouth. If a toy or a part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth.”

This presentation has not been reviewed or approved by the Commission and may not reflect its views.

Children's Product vs. Children's Toy for Phthalates Certification

| | Children's Product | Children's Toy |
|-----------------------------|--------------------|--------------------------------|
| Decorative Room Accessories | Yes | No, unless item has play value |
| Shoes | Yes | No, unless item has play value |
| Children's Jewelry | Yes | Maybe |
| Sporting Goods | Yes | Maybe |

This presentation has not been reviewed or approved by the Commission and may not reflect its views.



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Cheryl A. Falvey
General Counsel
Office of the General Counsel

Tel: 301.504.7642
Fax: 301.504.0403
Email: cfalvey@cpsc.gov

November 25, 2008

Mr. Kevin M. Burke
President and CEO
American Apparel & Footwear Association
1601 North Kent Street
Suite 1200
Arlington, VA 22209

Re: Interpretation of the CPSIA

Dear Mr. Burke:

I write in response to your letter of October 17, 2009 asking for a formal written opinion that wearing apparel is not covered by the phthalates ban under section 108 of the Consumer Product Safety Improvement Act ("CPSIA"). "Wearing apparel" includes any costume or article of clothing worn or intended to be worn by an individual, except for hats, gloves and footwear. Without the specific facts as to each of these products, including how and of what they are made as well as how they are marketed, I can only provide general guidance on what children's wearing apparel might be considered products covered by Section 108. I provide below, however, examples of what might or might not fall within those definitions which should prove useful to your members in determining the scope and applicability of Section 108 to those products.

Section 108 permanently bans three specific types of phthalates and bans a different group of another three phthalates on an interim basis. The types of products covered by the permanent ban are different than the products covered by the interim ban. The permanent ban covers:

1. "Children's Toys" which is defined as a "consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays;" and
2. "Child Care Articles" which is defined as a "consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething."

87- Attachment B

CPSIA (b)(1) CLEARED FOR PUBLIC

NO MFRS/PRVT LBRS OR
PRODUCTS IDENTIFIED

EXCEPTED BY: PETITION
RULEMAKING ADMIN. PROCDS

WITH PORTIONS REMOVED: _____

11/25/08
#321

The interim ban covers a more narrow group of products and includes child care articles but only children's toys that can be "... placed in a child's mouth." The Act states what is considered capable of being placed in a child's mouth:

"For purposes of this section a toy can be placed in a child's mouth if any part of the toy can be brought to the mouth and kept in the mouth by a child so that it can be sucked or chewed. If the children's product can only be licked, it is not regarded as able to be placed in the mouth. If a toy or a part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth."

While those definitions are worded broadly by Congress, children's wearing apparel generally is not considered a toy because it is not intended to be played with by a child. Costumes are generally considered to be "wearing apparel" under the Flammable Fabrics Act ("FFA"). Historically, the Commission has regulated Halloween costumes as wearing apparel under the FFA. Prior general counsel's opinions on the regulations applicable to Halloween costumes can be found on our website at http://www.cpsc.gov/LIBRARY/FOIA/advisory_opinions_144_and_313. A costume designed or intended for a child 12 or younger for use in a theatrical production would not be covered by the definition of children's toy in section 108. Dress or play costumes sold as part of a toy set and intended to be worn during play could be considered a toy under section 108. Other costumes may be considered toys depending on how those products are marketed and assuming that such apparel has play value. These types of determinations would be made by the Commission staff, including our legal, compliance and human factors personnel, on a case-by-case basis.

In addition, children's apparel such as children's sleepwear or bibs while not considered to be toys, would be considered child care articles as defined under section 108 and, therefore, subject to the ban on phthalates. Children's sleepwear presumably is "designed or intended to facilitate sleep," and could possibly contain phthalates, for example on the bottom of the foot of footed pajamas. While children's sleepwear sized from 0 to 9 months is exempt from the Commission's regulations on flammability and that exemption remains in place, the flammability exemption is not relevant to the applicability of the phthalates limit to sleepwear. The definition used in Section 108 of the CPSIA includes all products that would facilitate sleep for a child 3 or younger. So all sleepwear for children 3 and younger must comply with the phthalates limits in the CPSIA. Likewise, a bib presumably is "designed or intended to facilitate feeding" and would also be considered a child care article under section 108 of the CPSIA. These are two obvious examples but there may be other examples of children's wearing apparel that would also fall within the definition.

An example of children's wearing apparel that would not be covered by the Act as written by Congress would be children's rainwear made of vinyl or other plastic or plastic-like material. Generally, rainwear is not considered a toy because it is not intended to be played with by a child and it does not "facilitate sleep or the feeding of children age 3 and

Mr. Kevin M. Burke
Page 3

younger, or to help such children with sucking or teething” and, therefore, would not be considered a child care article covered under the Act.

With regard to adult wearing apparel, Congress did not extend the phthalates limits in the CPSIA to adult wearing apparel. For this reason, adult wearing apparel does not need to be certified to those standards when they take effect.

The views expressed in this letter are provided pursuant to my authority described in 16 C.F.R. 1000.7 and have not been reviewed or approved by the Commission. They are based on the best available information at the time they were written. They may be superseded at any time by the Commission, or by operation of law.

Sincerely,

/s/

Cheryl A. Falvey



October 17, 2008

Ms. Charyl Falvey
Office of the General Counsel
4330 East West Highway
Room 523
Bethesda, MD 20814

Dear Ms. Falvey:

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association of the apparel and footwear industries and their suppliers – I am writing to request an immediate formal written opinion to be issued which would explicitly exclude children's apparel from the phthalate ban.

At the past two public conferences on the Consumer Product Safety Improvement Act (CPSIA), CPSC staff members have publicly announced that the definition for "children's toys" as described in the phthalate provision (section 108) in the CPSIA does not include children's apparel. In fact, on the slide titled "Children's Products vs. Children's Toy for Phthalate Certification" in the "Mandatory Third Party Testing for Children's Products" power point presentation (October 2 conference), children's shoes were listed as children's products but not as children's toys. We believe apparel should be treated similarly. This is consistent with a plain reading of the statute which provides that the term "children's toy" means a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays. Based on the prior public statements of the CPSC staff members, as well as the plain language of the statute, many of our apparel manufacturers concluded that children's apparel does not fall within the definition of children's toy and therefore is exempt from the phthalate ban.

However, retailers are apparently concerned over the lack of clear guidance from the CPSC. As a result, several of our members have received letters from retailers (such as the one attached) stating that they will no longer accept **any** children's products with phthalates. This goes well beyond the scope and intention of the CPSIA.

The financial consequences to our members of having to remanufacture products – products that our members felt confident were CPSIA compliant based upon prior public comments by the CPSC – would be significant. In light of the financial challenges already being faced by the industry due to the current economic crises, our members, many of whom are small manufacturers, need clear guidance from the CPSC stating that the phthalate ban simply does not apply to children's apparel. It is important for the CPSC to show consistency in order to prevent a significant disruption of business. Therefore, I am requesting a formal opinion to be issued by the CPSC reiterating what has already been said publicly by CPSC staff, that children's apparel is excluded from the phthalate ban. Because manufacture decisions on product design and composition are made many months before the product actually appears on retail shelves, it is important that this opinion be published as soon as possible and not wait for the December 4 phthalate conference.

Thank you for your time and consideration in this matter. If you have any questions, please contact Rebecca Mond with my staff at 703-797-9038 or at rmond@apparelandfootwear.org.

Sincerely,

A handwritten signature in black ink that reads "Kevin M. Burke". The signature is written in a cursive style with a vertical line to the left of the name.

Kevin M. Burke
President and CEO

FAMILY DOLLAR

October 13, 2008

Dear Family Dollar Services, Inc. Vendor Partner:

In response to the Consumer Product Safety Improvement Act of 2008 H.R. 4040, Family Dollar has updated our requirements for all products intended to be used by children aged 12 and under.

- The existing level of lead at 600 PPM will be reduced to 90 PPM for all Children's products. This new lead limit does not apply to Inaccessible Parts.
- Phthalates must be < .1% for DEHP, DBP, BBP, DINP, DIDP and DNOP for all Toys and any Child care article.

The law creates the requirement for product certification and mandatory third party testing showing that a child's product complies with all rules, bans, standards, or regulations applicable to the product under this Act or any other Act enforced by the Commission.

- A Certificate of Compliance (COC) is now required for these products. Please refer to the attached document. Certificates must accompany the product or shipment starting 11/12/08.
- Labeling requirements-Place permanent, distinguishing marks on the product and its packaging that will enable 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 the ultimate purchaser to ascertain the manufacturer or private labeler, location and date of production of the product, and cohort information.

For Durable Nursery Products, additional requirements are as follows:

- Provide consumers with a postage paid registration form with each product intended to be used by children under the age of 5.
- Maintain a record of the names, addresses, email and other information for each consumer who registers (records must be maintained for 6 years)
- Permanently place the manufacturer name, contact information, model name and number and date of manufacture on each product.

As our vendor partner, you will be responsible for meeting these new requirements starting October 20th, 2008 and held liable for any penalties incurred for non-compliance. These new Federal standards are subject to change. Please partner with a FDS approved 3rd party testing agency to keep abreast of policy changes and to clearly define the requirements needed for your product.

Family Dollar Services has always been committed to conducting our business consistent with the highest standards. We will continue to provide our vendors with the necessary support to effectively meet corporate quality and safety expectations. Our philosophy has been and continues to be one of partnership, responsibility and accountability. Our vendors own the ultimate responsibility for producing a quality product. Together we will demonstrate our shared commitment to providing the highest quality product possible for our customers.

Thank you in advance for your partnership.

Sincerely,

Robert George
EVP/CMO
Family Dollar Stores, Inc.

If you have any questions about these new standards, please contact Elizabeth Fortunato, Technical Services Director at efortunato@familydollar.com.



January 12, 2009

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland, 20814

Dear Mr. Todd Stevenson:

RE: Comments to Consumer Product Safety Commission in response related to Phthalates and CPSIA

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association of the apparel and footwear industries and their suppliers – I am writing in response to the Consumer Product Safety Commission's (CPSC) request for comments on Section 108 of the Consumer Product Safety Improvement Act (CPSIA), "Prohibition on Sale of Certain Products Containing Specified Phthalates."

We are in receipt of the letter dated October 17, 2008 which states that footwear is not covered by the definition of "children's toy" or "child care articles," and therefore not covered by the CPSIA phthalate ban. We agree wholeheartedly with this opinion and would encourage the CPSC to enshrine the letter further in regulations it issues governing application of the phthalate ban.

We are also in receipt of the CPSC letter dated November 25, 2008, which exempts most apparel items from the definitions of "children's toy" or "child care articles" and therefore from the phthalate ban. While we agree with much of what is stated in the letter, we feel it incorrectly characterizes children's sleepwear and bibs as childcare articles. The letter states, "children's sleepwear or bibs, while not considered to be toys, would be considered childcare articles as defined under Section 108, and, therefore, subject to the ban on phthalates." As we will explain further, we find no information to support such a conclusion and, in fact, believe there is substantial information to the contrary. Accordingly, we believe that children's pajamas and bibs do not fall under the definition of "child care articles" and should therefore be exempt from the phthalate ban as well.

The definition of "child care article" in the CPSIA is a "consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething." Merriam-Webster defines pajamas as, "a loose usually two-piece lightweight suit designed especially for sleeping or lounging."¹ Pajamas are **not** designed to "facilitate" sleep (facilitate being defined as "to make easier: help bring about"²), they are simply worn when sleeping. Including pajamas under this definition applies the term "child care article" too broadly.

Many sources recommend ways for parents to facilitate sleep for babies. These techniques include dimming the lights, creating a bedtime routine, avoiding stimulation, rocking and cuddling, but no mention of putting a baby in pajamas. Furthermore, newborn babies may sleep up to 16 hours a day often for only 3-4 hour stretches at a time and cannot distinguish between night and day.³ It is therefore just as likely that a baby will fall asleep wearing pajamas as wearing normal day time clothing.

It is also important to consider the origins of the CPSIA phthalate ban. Section 108 was copied from California's phthalate law which comes directly from the European Union's Directive on phthalates in toys and child care articles. Like the CPSIA, the European Union's phthalate Directive applies to "child care articles" defined as, "any product intended to facilitate sleep, relaxation, hygiene, the feeding of children or sucking on the part of

¹ <http://www.merriam-webster.com/dictionary/pajamas>

² <http://www.merriam-webster.com/dictionary/facilitate>

³ <http://kidshealth.org/parent/growth/sleep/sleepnewborn.html>

children.”⁴ Immediately after its passage, the European Commission issued a guidance defining child care articles and children’s toys. This guidance states: “The main purpose of pyjamas is to dress children when sleeping and not to facilitate sleep. Pyjamas should therefore be regarded as textiles and, like other textiles, do not fall under the scope of the Directive.”⁵

A similar argument to bibs can be made. The definition of bib in Merriam-Webster is, “a cloth or plastic shield tied under the chin to protect the clothes.”⁶ That a child happens to wear a bib while eating does not mean the bib plays a part in facilitating the feeding process. The bib may facilitate laundry by keeping the clothes clean, but not facilitate eating.

The apparel and footwear industry has historically never had a problem with phthalates in children’s products as these products are not designed to be mouthed and therefore do not present a risk of phthalate ingestion. Further, the language in other phthalate initiatives has never applied bans to children’s clothing and shoes. Thus, the CPSC’s opinion is tantamount to informing the industry on November 25 that phthalate rules will begin to apply to certain kinds of apparel two months later – a regulation the apparel industry has never operated under prior to your opinion.

Thank you for your time and consideration in this matter. If you have any questions, please contact Rebecca Mond with my staff at 703-797-9038 or at rmond@apparelandfootwear.org.

Sincerely,



Kevin M. Burke
President and CEO

⁴ http://ec.europa.eu/enterprise/chemicals/legislation/markrestr/guidance_document_final.pdf

⁵ http://ec.europa.eu/enterprise/chemicals/legislation/markrestr/guidance_document_final.pdf

⁶ <http://www.merriam-webster.com/dictionary/bib%5B2%5D>

87 - Attachment D



Fax to Nate Herman
703-522-6741

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

OFFICE OF THE GENERAL COUNSEL

Cheryl A. Falvey
General Counsel
Tel: 301-504-7628
E-Mail: cfalvey@cpsc.gov

March 12, 2009

Ms. Michele Marini Pittenger
President
Travel Goods Association
5 Vaughn Drive, Suite 105
Princeton, NJ 08540

Re: Requested Travel Goods Exemption

Dear Ms. Pittenger:

We have received your December 19, 2008 letter requesting an opinion exempting travel goods from the ban on phthalates in section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). Although you have requested an advisory opinion, your questions will be answered by interpretative rule to be issued by the Commission in the future.

Section 108 of the CPSIA applies unambiguously to children's toys and child care articles as defined in that section. Items such as I pod covers and travel goods do not appear to fall within those definitions. Therefore, an exemption is not necessary if those products fall outside the statutory definitions in section 108. However, your specific question about lunch boxes addresses a gray area about the definition of the term "facilitates feeding" in section 108 which will be addressed by the Commission in an upcoming interpretative rule.

We are working diligently on our interpretative rule and invite your comments by e-mail at section108definitions@cpsc.gov. The comment period closes on March 25, 2009.

Sincerely,

Cheryl A. Falvey
General Counsel

87 - Attachment E



Travel Goods Association
5 Vaughtn Drive, Suite 105 | Princeton, NJ 08540
P: 609-720-1200 | F: 609-720-0620 | www.travel-goods.org

December 19, 2008

Ms. Cheryl A. Falvey
General Counsel
Consumer Product Safety Commission (CPSC)
4330 East West Highway
Room 523
Bethesda, MD 20814
Fax: 301-504-0403
E-mail: cfalvey@cpsc.gov

RE: Request for Travel Goods Exemption from Phthalate Ban under CPSIA

Dear Ms. Falvey,

On behalf of the Travel Goods Association (TGA) – the national association of the manufacturers, distributors and retailers of backpacks, luggage, leather goods, business and travel accessories, business and computer cases, handbags and other products for people who travel – I am writing to request an immediate formal written opinion be issued which would explicitly exclude children’s travel goods from the provisions under Section 108 of the *Consumer Product Safety Improvement Act (CPSIA)* - the so-called phthalate ban.

According to Section 108 of the CPSIA, a “children’s toy” is defined as a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays. It is the understanding of the U.S. travel goods industry that children’s backpacks, luggage, computer cases, cell phone cases, I-pod cases, and other travel goods designed for use by children (as described in Heading 4202 of the *Harmonized Tariff Schedule of the United States (HTSUS)*) do not fall within the definition of “children’s toy” and, therefore, should be exempt from the phthalate ban.

Further, the industry agrees most food carriers (such as lunch boxes) designed for children also should be exempt from the phthalate ban because they do not fall under the new law’s definition of a “child care article.” A child care article is defined as a product designed for a child 3 and under that facilitates sleeping or feeding. While food carriers contain food, they do not facilitate the feeding of a child. In fact, once the food is out of the carrier, the carrier is no longer involved in the eating process (which, for children of this age, is likely to be done under strict adult supervision). The product is therefore as likely to be mouthed by a child 3 and under as any other product that the child comes into contact with. This means it is unlikely phthalates will be ingested by the child. Therefore, given the definition of “child care article,” on top of the risk factors, a food carrier should be exempt from the phthalate ban.

However, retailers are apparently concerned over the lack of clear guidance from the CPSC. As a result, several travel goods firms have received letters from retailers (such as the one attached) stating that they will no longer accept **any** children's products with phthalates. We believe such a ban goes well beyond the scope and intention of the CPSIA. The financial consequences to our members of having to remanufacture products – products that our members felt confident were CPSIA compliant based upon the information available from the CPSC to date – would be significant.

In light of the financial challenges already being faced by the industry due to the current economic crisis, our members, many of whom are small manufacturers, need clear guidance from the CPSC stating that the phthalate ban simply does not apply to children's travel goods. It is important for the CPSC to show consistency in order to prevent a significant disruption of business. The CPSC has already recognized the importance of providing clarity to businesses when it issued opinions clarifying the application of the phthalate ban with reference to children's apparel and footwear. We applaud that move.

Therefore, I am requesting a formal opinion to be issued by the CPSC reflecting the intent of the law as well as the advisory opinions issued on similar products, that children's travel goods are excluded from the phthalate ban. Because manufacturer decisions on product design and composition are made many months before the product actually appears on retail shelves, it is important that this opinion be published as soon as possible.

Thank you for your time and consideration in this matter. Please contact Nate Herman on my staff at 703-797-9062 or nate@travel-goods.org if you have any questions or would like additional information.

Sincerely,

A handwritten signature in black ink that reads "Michele Marini Pittenger". The signature is written in a cursive, flowing style.

Michele Marini Pittenger
President



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March 25, 2009

Consumer Product Safety Commission (CPSC)
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Room 523
Bethesda, MD 20814
Fax: 301-504-0403
E-mail: section108definitions@cpsc.gov

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments; FR Notice Volume 74, Number 34, Pages 8058-8061, February 23, 2009

To Whom It May Concern:

On behalf of the Travel Goods Association (TGA) – the national association of the manufacturers, distributors and retailers of backpacks, luggage, leather goods, business and travel accessories, business and computer cases, handbags and other products for people who travel – I am writing to request that the CPSC formally exclude children’s travel goods, including food and beverage containers, from the provisions under Section 108 of the *Consumer Product Safety Improvement Act (CPSIA)* - the so-called phthalate ban.

According to Section 108 of the CPSIA, a “children’s toy” is defined as a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays. Section 108 also applies to “child care articles.” As stated in a March 12, 2009 letter from CPSC General Counsel Cheryl A. Falvey to TGA, “Items such as iPod covers and travel goods do not appear to fall within those definitions.” The letter from Ms. Falvey is attached.

Therefore, TGA, on behalf of the U.S. travel goods industry, hereby requests that the CPSC exclude children’s backpacks, luggage, computer cases, cell phone cases, iPod cases, and other travel goods designed for use by children (as described in Heading 4202 of the *Harmonized Tariff Schedule of the United States (HTSUS)*) from the definitions of “children’s toys” and “child care articles” under Section 108 of the CPSIA when the CPSC moves forward on developing its interpretive rule for Section 108.

This interpretation should extend to travel goods regardless of the design on the bag (like a cartoon character) or the shape of the bag (for example if the bag is shaped like an animal). In defining a children’s product, the CPSIA considers the intent of the manufacturer, how the product is marketed and how the public recognizes the product. These considerations are extended further in the CPSIA’s definition of a children’s toy as a “consumer product designed or intended by the manufacturer for a child 12 years or younger *for use when the child plays* [emphasis added]” While a manufacturer may design a product to be enticing to a child, this should not automatically characterize the product as a child’s toy.

Further, the industry agrees most food carriers (such as lunch boxes) and beverage carriers (such as a thermos) designed for children three and under also should be exempt from the phthalate ban because they do not fall under the new law's definition of a "child care article." A child care article is defined as a product designed for a child three and under that facilitates sleeping or feeding. While food carriers contain food and beverage carriers contain beverages, they do not facilitate the feeding of a child. In fact, once the food is out of the carrier and the beverage is out of the beverage carrier, the carrier is no longer involved in the eating or drinking process (which, for children of this age, is likely to be done under strict adult supervision). This means it is unlikely phthalates will be ingested by the child. Therefore, given the definition of "child care article," on top of the risk factors for exposure, TGA believes that food and beverage carriers should be exempt from the phthalate ban.

As such, TGA supports a possible approach that CPSC staff discussed at the March 12, 2009 CPSC public meeting on phthalates, particularly in the presentation by Celestine Kiss, from the CPSC's Division of Human Factors, and in the ensuing Q&A period. Ms. Kiss discussed the idea that certain products that "facilitate sleeping or feeding" actually facilitate the parent or child care provider in the feeding of a child or getting the child to sleep, and have little or no contact with the child (which Ms. Kiss termed "secondary" products), while other products are used directly in the mouth by the child to facilitate sleeping or feeding (which Ms. Kiss called "primary" products).

TGA believes that so-called "secondary" products should not be covered by Section 108 of the CPSIA. As in the case of food and beverage carriers, the carriers are for the most part handled by the parent or child care provider on behalf of the child to transport the food or beverages and rarely come into contact with the child. Further, the child is in direct contact with the food or beverages ONLY after they are physically removed from the carrier. The carriers themselves do NOT directly facilitate the feeding of the child.

In conclusion, TGA urges the CPSC to formally exclude children's travel goods (as defined above) from its pending rulemaking on product coverage under Section 108 of the CPSIA because they are not "children's toys" as defined under the law. Further, TGA urges the CPSC to take under consideration the concept of "primary" and "secondary" products as it attempts to define product coverage under the "child care article" definition in Section 108. TGA believes the CPSC should formally exclude food and beverage carriers from coverage under Section 108 of the CPSIA because such carriers are "secondary" products.

Thank you for your time and consideration in this matter. Please contact Nate Herman on my staff at 703-797-9062 or nate@travel-goods.org if you have any questions or would like additional information.

Sincerely,



Michele Marini Pittenger
President

Attachment – March 12, 2009 letter from CPSC General Counsel Falvey to TGA



Fax to Nate Herman
703-522-6741

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

OFFICE OF THE GENERAL COUNSEL

Cheryl A. Falvey
General Counsel
Tel. 301-504-7628
E-Mail: cfalvey@cpsc.gov

March 12, 2009

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Sincerely,

A handwritten signature in black ink that reads "Michele Marini Pittenger". The signature is written in a cursive, flowing style.

Michele Marini Pittenger
President

Stevenson, Todd

From: Rebecca Mond [rmond@apparelandfootwear.org]
Sent: Wednesday, April 08, 2009 4:59 PM
To: Stevenson, Todd
Cc: Steve Lamar; Falvey, Cheryl; Toro, Mary
Subject: Comments on Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108
Attachments: Phthalate comments.pdf; Attachment A.pdf; Attachment B.pdf; Attachment C.pdf; Attachment D.pdf; Attachment E.pdf
Importance: High

Please see attached AAFA's phthalate comments.

Thanks and regards,

Rebecca Mond
Government Relations Representative
American Apparel & Footwear Association
1601 North Kent Street
Suite 1200
Arlington, VA 22209
www.apparelandfootwear.org
RMond@apparelandfootwear.org
703-797-9038