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October 20, 2008

Office of the Secretary
U.S. Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD

Re: Labeling Requirement for Toy and Game Advertisements

Dear Secretary:

Please accept the following comments from the Retail Industry Leaders Association (RILA) on behalf of its members in response to the Consumer Product Safety Commission's ("Commission") September 23, 2008, Notice of Proposed Rulemaking; Labeling Requirement for Toy and Game Advertisements.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry--retailers, product manufacturers, and service suppliers--which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Section 24(a) of the Federal Hazardous Substances Act (FHSA) prescribes cautionary labeling requirements for toys or games that contain small parts and are intended for use by children from 3 to 6 years old. The cautionary statement warns potential purchasers that these products are not for children under 3 years old due to choking hazards. Section 24(b) of the FHSA prescribes similar requirements for balloons, small balls, and marbles intended for children 3 years and older, or any toy or game which contains such a balloon, small ball, or marble.

Section 105 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA") amends section 24 of the FHSA to require that, when a product's packaging requires a cautionary statement, advertising for the product that provides a direct means for purchase or order of the product must bear the same cautionary statement.

Print Advertisements

Circulars Not a Means for Direct Purchase – The Act requires cautionary statements on advertisements, which may be on websites, in catalogues, or other printed materials, only if those advertisements provide a “direct means for the purchase or order of a product.” CPSIA § 105;

FHSA § 249(c). RILA recommends that the cautionary statement only be required if the flyer or free-standing insert specifically directs the customer to a specific phone number for order or if the flyer includes an order form. The addition of a website alone should not be considered a direct means for purchase. A customer directed to a website will see the cautionary statements on the website prior to purchase. Therefore, requiring cautionary statements on a flyer that includes a website would be duplicative and unnecessary. Finally, RILA does not believe inclusion of store locations, or a general information phone number to find store locations, provides a “direct means” for purchase, but rather represents indirect messaging.

Furthermore, RILA respectfully requests the Commission to clarify that the requirement for cautionary labeling only applies to FHSA’s Section 24 choking hazard warning and not to other warnings that may be required by other Acts or regulations administered by the Commission.

Grace Period Should be Granted – RILA believes the Commission should grant the 180 day grace period afforded by the CPSIA in order to allow retailers sufficient time to comply with the new advertising provisions. According to one retailer, the estimated cost to reprint, ship and mail new catalogues if a grace period is not granted ranges from \$2.6 million to \$3.7 million, depending on which catalogues need to be reprinted and the number of new catalogues ordered.

Business-to-Business Advertising Should be Exempted – The advertising requirements should not apply to catalogues, internet or other advertising that targets business-to-business sales. Besides the business-to-business catalogues that the Commission referenced in its October 20th public conference call, another example of this business-to-business market includes retailers’ liquidation programs that sell surplus or returned merchandise to “jobbers.” A jobber is a liquidator or salvage buyer to which retailers sell surplus/returned merchandise. As an example, for one retailer, the number of toys and games sold business-to-business through its liquidation efforts represents less than one half of one percent of the total amount of merchandise (toys and non-toys) it processes for sale to jobbers. Since toys and games represent a *de minimis* percentage of the total inventory the retailer sells to jobbers, and those items are combined with other categories of merchandise to be sold as a single lot, there is no systemic way to identify at the lot level those toys and games with choking hazards (due to merchandise being combined). To develop a systemic method to identify the relevant products within these lots would create a significant and expensive burden for the retailer. Because of such challenges, one retailer estimates their cost would be at least \$250,000 if the regulations were to apply to business-to-business advertising. Meanwhile, the business that ultimately sells the product to the consumer would also need to ensure the appropriate warnings are posted, making the business-to-business requirement redundant.

Complexities of Advertising Require Flexibility – Space restrictions and other complexities in print advertising should be recognized by the Commission. The Commission should provide flexibility in how it requires the cautionary statements to be placed in the advertising, given there are various effective ways to inform the consumer about the choking hazard in a manner that would be more user-friendly, yet equally informative, than the way proposed by the Commission. Exhibit 1 shows how a catalogue page might look if cautionary statements had to be included for each item in copy, even if an abbreviation was used. Note that the copy takes up much more space under Exhibit 1. Exhibit 2 shows the cautionary statement added to art. In this

instance, the artwork has to be reduced and as a result, the page is more cluttered. Exhibit 3 shows an alternative to Exhibit 1 and Exhibit 2, which is more user-friendly yet equally informative. Exhibit 3 shows an abbreviated warning next to the artwork and the full warning is incorporated into the normal footline font, which takes up much less space. The retailer would still use the icon of the triangle and exclamation point to capture the customer's attention. We suggest Exhibit 3 as a method the Commission should approve as being compliant with the new requirements.

In addition, since multiple full warnings may be required on any given 2 page spread, the full warning should not have to be "on each page – or extending across two facing pages." It should be sufficient that the full warnings are located somewhere on the two pages or prominently displayed elsewhere in the catalogue such as inside the front cover or adjacent to ordering information, as discussed on the Commission's October 20th public conference call.

Internet Advertisements

The goal of the legislation is to warn the purchaser before they make the purchase. This warning can be achieved in a wide variety of ways. Our members understand the need for consistency of the warning and its placement, but flexibility is critical when applying warnings designed specifically for packaging to this new communication media, especially to the ever-evolving internet, where innovative technology can employ "pop ups" or "balloons," or other alternatives that have not yet been created.

Combined Warning – The law requires internet retailers to place an appropriate warning on the webpage where a product requiring the warning is displayed for sale. The law also requires a manufacturer, importer, distributor, or private labeler to inform retailers of any cautionary statements that are required for a particular product. If multiple warnings are required for the same product, RILA suggests that retailers have the flexibility to provide a simplified set of warnings. Specifically, our members propose as one acceptable methodology the ability to combine warnings for small parts, small balls, and marbles into one warning: "WARNING. CHOKING HAZARD--This toy is or contains a small part, small ball, or marble. Not for children under 3 yrs." Together with the warning for balloons (which cannot be readily combined with the warning for small parts, small balls and marbles as it applies to products for children under 8 years), this would bring the total number of possible warnings for internet postings down to two. Internet retailers can play an important role to depict the warning in a streamlined manner, thus avoiding the problem of over-labeling.

We also respectfully request the Commission to allow the use of abbreviated cautionary statements. In some instances, fully listing the cautionary statement would make the warning too lengthy and in many cases it would have to wrap to the next line, especially if the type size is 8 points or greater. In such instances, the statements would be confusing to the consumer, so the Commission could require that abbreviated statements be used to display the triangle icon or, at most, the word marble, small ball, etc. The "Not for children under 3 yrs." language will be at the bottom of the page in any event, so inclusion of that language in the abbreviated warning is redundant.

Warning Placement – The warning should not be required to appear above the scroll. Where the scroll appears on the screen depends upon the resolution and size of the viewing screen, both factors over which internet retailers have no control. In their memorandum of September 22, the Commission’s Human Factors Staff recommends “that the required cautionary statement be located at the beginning of the advertisement’s product-specific descriptive text.” RILA respectfully disagrees with this conclusion and views it as being too restrictive. If the Commission’s Human Factors Staff recommendation was accepted, it would disallow the use of warnings in close proximity to the descriptive text and would exclude the use of “pop ups” or “balloons” as innovative ways to inform the consumer. Similarly, RILA urges the Commission to recognize that Section 105 of the CPSIA would be met if an appropriate warning statement is provided for the product prior to checkout versus at each display of the product. The Commission should allow for the greatest amount of flexibility with respect to warning placements, recognizing that different formats are used within the industry and internet technology is constantly evolving.

Font Size – RILA is concerned that the recommended minimum 8 point type for the cautionary statement is larger than the minimum type-size requirements specified in 16 CFR 1500.121 for packaging. Catalogue and internet warnings should not have to be greater than that required by 16 CFR 1500.121 for packaging and should also be relative to the size of the advertisement.

If the Commission does not look favorably on this suggestion, we would urge the Commission to require the warnings to be posted in font the larger of 0.08 inches or the same size as the font used to describe the functions and features of the product, but not the size of the name of the product or the headings in the features and functions sections. Further, if the cautionary statement must be no less than 8 point type, this suggests that the signal word and hazard statement must be substantially greater. The warning will dwarf all other printed material in the advertisement, and in our opinion, would not be what Congress intended.

Conclusion

RILA members place the highest priority on ensuring the safety of their customers and the products they sell, and RILA appreciates this opportunity to comment on the Commission’s Notice of Proposed Rulemaking; Labeling Requirement for Toy and Game Advertisements. Should you have any questions about the comments as submitted, please don’t hesitate to contact me by phone at (703) 600-2046 or by email at stephanie.lester@rila.org.

Sincerely,



Stephanie Lester
Vice President, International Trade