RETAIL INDUSTRY LEADERS ASSOCIATION
Retail's Future…Educate, Innovate, Advocate

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December 4, 2008

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

Re: Section 108 Phthalate Restrictions

Dear Mr. Stevenson:

Please accept the following comments from the Retail Industry Leaders Association (RILA) on behalf of our members in response to the Consumer Product Safety Commission's ("Commission" or "CPSC") Request for Comments and Information; Prohibition on the Sale of Certain Products Containing Specified Phthalates; Section 108 of the Consumer Product Safety Improvement Act ("CPSIA" or "Act"). Our members have discovered over the last year that, of all of the new restrictions found in the CPSIA, the restrictions on phthalates have the greatest impact on cost of production. As you are aware, the new phthalate restrictions, take effect on February 10, 2009. Because cost of production must be fully understood before retailers can even commit to purchase an item or determine the quantity to be purchased, it is with a certain sense of urgency that we offer these comments and hope that they will enable the Commission to expeditiously provide clarity on the following issues related to implementation of the new phthalates standards.

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 108(a) of the Act provides that "it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy or child care article that contains concentrations of more than 0.1% of …DEHP, ….DBP, or …BBP."

Section 108(b)(1) of the Act provides that "it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy

that can be placed in the mouth or child care article that contains concentrations of more than 0.1% of …DINP, ….DIDP, or …DnOP."

Finally, Section 108(e)(2)(B) provides that "[i]n determining whether a children's toy can be placed in a child's mouth, a toy 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 a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth."

Existing Inventory

RILA welcomes and agrees with the CPSC's legal analysis that the phthalate standards in the CPSIA do not apply to existing inventory. Section 108(d) provides that "[s]ubsections (a) and (b)(1) and any rule promulgated under subsection (b)(3) shall be considered consumer product safety standards under the Consumer Product Safety Act..."

Section 9(g)(1) of the Consumer Product Safety Act provides that "[a] consumer product safety standard shall be applicable only to consumer products manufactured after the effective date." 15 USC §2058(g)(1).

By providing that it is unlawful to offer for sale any product containing more than 1000 ppm of the banned phthalates after the effective date (February 10, 2009), Section 108(a) & (b)(1) begs the question—which product? However, by specifying that Section 108(a) & (b)(1) are consumer product standards under the Consumer Product Safety Act, we have a clue to the answer. If we read Section 9(g)(1) of the Consumer Product Safety Act, we find the answer—"products manufactured after the effective date." The CPSC's analysis on lead rejected this argument when applied to the new lead limits, precisely because those limits are under the Federal Hazardous Substances Act and the FHSA does not contain a similar provision to that found in Section 9(g)(1) of the CPSA.

Section 9(g)(2) of the CPSA also prohibits stockpiling. A stockpiling provision is irrelevant and unnecessary unless the phthalate limits of Section 108, now part of the CPSA, only apply to products made after February 10, 2009. Otherwise, if the phthalate limits apply to all products on the shelf as of February 10, there would be no reason to stockpile those products since a retailer couldn't sell them anyway. Having specifically provided for the possibility of stockpiling, Congress understood that risk existed, a risk that only exists if Congress also intended for the phthalate limits to apply prospectively to product made after February 10.

Inflatable Toys

The fundamental difficulty we encounter when applying the restriction of Section 108(b)(1) to inflatable toys is whether to measure the toy in its inflated or deflated state. Most if not all inflatable toys will be less than 5 cm in at least one dimension in their deflated state and would therefore be considered "mouthable."

RILA urges the Commission to determine that toys sold inflated, which are not designed or intended to be deflated and re-inflated for storage or between uses, should be measured in their

inflated state. Likewise, toys that cannot be played with in a deflated state, and which when inflated do not easily deform or compress, should be measured in their inflated state. Just as the determination of whether a product is a toy at all depends in part upon its likely use, so should the determination of whether a toy is mouthable. The above-stated rule takes account of the fact that some inflatable toys are very unlikely to be mouthed in their deflated state. Section 108 does not speak directly to this issue. We can only conclude that this is precisely the sort of interpretive question left to the discretion of the Commission.

In the exercise of that discretion, we encourage the Commission to look kindly on the good work the European Commission's Enterprise and Industry Directorate General has undertaken to clarify the application of Europe's own phthalate restrictions. For example, the European Commission has said that large inflatable toys that are not easily compressed or deformed in their inflated state and that lose their play function when deflated should not be considered mouthable. It is noteworthy that the 5 cm rule found in Section 108(e)(2)(B) is borrowed directly from the European Commission's guidance, thus indicating the importance of this precedent on the Congressional deliberations that produced Section 108.

Aggregation

During the development of the CPSIA, there was significant discussion of whether the 1000 ppm limit on the banned phthalates would apply to each phthalate or to all of the regulated phthalates in the aggregate. For example, there was a difference of opinion about whether the effective limit on the six banned phthalates in a mouthable child care article would be 1000 ppm or 6000 ppm.

The final language of Section 108 seems to suggest that the limit is 1000 ppm for each of the banned phthalates. Hence, it seems that a mouthable toy or a child care article could legally contain as much as 6000 ppm of the 6 banned phthalates together, but no more than 1000 ppm of any one of those 6 banned phthalates. Likewise, non-mouthable toys could contain a total of 3000 ppm of the 3 banned phthalates. As a practical matter, the difference between 1000 ppm of the 6 banned phthalates and 6000 ppm in total of the 6 banned phthalates may have little impact on the functional characteristics of the product. Consequently, allowing 1000 ppm of each of the 6 banned phthalates will not promote intentional use of those 6 phthalates in a mouthable toy or child care article. However, this approach will permit the sale of those toys and child care articles that may contain as much as 1000 ppm of each of the banned phthalates.

Inaccessibility

Another point of confusion is whether the phthalate limits of Section 108 apply to inaccessible components. Inaccessible components by definition are not mouthable, and therefore, the interim ban on DINP, DIDP and DnOP in mouthable toys should not apply to their inaccessible components. Furthermore, the distinction between mouthable and non-mouthable toys indicates Congress's intent to take an exposure-based approach to regulation of phthalates. Since there is no risk of exposure to phthalates from inaccessible components, the phthalate limits of Section 108 should not apply to inaccessible components of any toys or child care articles.

Definitions

Toys - The definition of "children's toy" under Section 108(e)(1)(B) of the Act includes "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. However, Section 106 of the Act makes ASTM F-963 law wherein a toy is defined as "any object designed, manufactured, or marketed as a plaything for children under 14 years of age."

The inconsistency between the ASTM F963 and Section 108 age limits for toys, naturally leaves many wondering which age limit will control. The CPSC should apply the definition of "toy" under Section 108(e)(1)(B) of the Act to all requirements of the Act applicable to "toys," including the requirements of ASTM F963.

Section 101(c) of the Act provides that "[t]o the extent that any regulation promulgated by the Commission under this section (or any section of the Consumer Product Safety Act or any other Act enforced by the Commission, as such Act are affected by this section) is inconsistent with the ASTM F963 standard, such promulgated regulation shall supersede the ASTM F963 standard to the extent of the inconsistency." Hence, to the extent that the definition of "toy" in ASTM F963 is inconsistent with the definition of "children's toy" under Section 108(e)(1)(B) of the Act, the definition of "children's toy" under Section 108(e)(1)(B) controls.

Exemptions - Conversely, where the definitions and exemptions under ASTM F963 are not inconsistent with any regulation promulgated by the Commission, the Commission should consider the exemptions from the scope of "toys" covered by ASTM F963 as persuasive in its enforcement of the provisions of the Act applicable to "toys." For example, ASTM F963 specifically exempts sporting goods from its scope. If the same exemption is applied to other toy-related requirements of the Act, sporting goods will not be held to the phthalate limits of Section 108 of the Act.

The exemption of particular kinds of products from the scope of ASTM F963 reflects a refinement of the line between "toys" and "children's products" arrived at through the consensus standard development process. The consensus standard development process is critical to the private-public partnership upon which product safety depends. While the Commission will clearly take a stronger role in establishing standards for children's products, the Act itself in numerous instances presumes the continuation of the consensus standard development process. Unless clearly at odds with the will of Congress or the considered judgment of the Commission, the consensus standards that have been and will be developed for children's products should be credited in the Commissions enforcement policy.

To avoid having the exemptions swallow the rule, the Commission may consider more clearly defining the exemptions from the definition of "toys" under ASTM F963. For example, "sporting goods" might be defined as products designed and intended to be used in competitive recreation. As such, products such as basketballs, baseballs and baseball gloves, footballs, lawn games (horseshoes, bocce ball, badminton, or croquet), table games (foosball, air hockey, bumper pool, and shuffleboard tables), and sports protective equipment (helmets and protective pads) would be considered sporting goods, as opposed to toys, and would not be covered by the provisions of Sections 106 and 108 of the Act. However, they may nevertheless be considered

"children's products" otherwise subject to all other provisions of the Act (testing, certification, lead limits, etc.).

Component Testing

Phthalate testing is expensive and time-consuming and should only be required when relevant. As the Act is currently written, it is unclear whether each component of a finished product must be tested or whether each component can be individually tested before being assembled into a final product. If every component of every toy and child care article must be tested for phthalates to support a certificate of compliance, enormous unnecessary costs and delays will be introduced. Meanwhile, the universe of materials where phthalates might be found is relatively small. For example, phthalates are used in PVC, but they are not used in polycarbonate plastics. Therefore, it makes no sense to require polycarbonate plastic components to be tested for phthalates. Likewise, wood, metal and rubber components will not contain phthalates. Hence, testing components made of materials that we know will not contain phthalates adds nothing to the safety of the product or assurance of its safety, but could add substantially to the cost of the product and the time needed to bring it to market.

RILA urges the Commission to create a list of materials from which toy and child care articles are made that require phthalate testing. Until such a list can be created, the Commission should only require that certificates of compliance be supported by testing accessible PVC components of toys and child care articles for phthalates.

Enforcement

RILA members are concerned that when the Commission provides guidance short of rulemaking on any provisions of the Act, state attorneys general may ignore that guidance. While state attorneys general provide a critical multiplier of enforcement capability under the Act, inconsistent enforcement among state attorneys general and between them and the Commission could render the Commission's considered judgment irrelevant. To avoid this calamity, RILA urges the Commission to include state attorneys general, where possible, in the process of developing guidance on enforcement of the CPSIA. Furthermore, RILA hopes that when the Commission establishes enforcement discretion guidance, that guidance will be widely distributed among state attorneys general. The Commission should also consider providing support and training to state attorneys general as they seek to enforce the Act. Finally, the Commission should make clear its expectation that the district court, in any action by a state attorney general to enforce the provisions of the CPSIA, will defer to the Commission's determinations about how the CPSIA should be and should not be enforced.

Conclusion

RILA and our members will continue to stay engaged in the Commission's process to provide further guidance on implementation of the CPSIA and we will take advantage of the opportunity to offer further constructive comments. Again, on behalf of our members, we thank you for the work that you have undertaken and for the opportunity to offer insights on how to successfully and effectively implement the CPSIA. 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