

April 27, 2009

The Honorable Nancy A. Nord
Acting Chairwoman
U.S. Consumer Product Safety Commission
4330 East West Highway
Room 402
Bethesda, MD 20814

RE: Notice of inquiry, Implementation of Section 103 of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”), Tracking Labels for Children’s Products

Dear Chairman Nord,

The Consumer Product Safety Commission (“CPSC”) published a notice in the *Federal Register* on February 26, 2009 inviting comments and information on how the CPSC should implement the tracking label requirement of section 103 of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”).¹ The Office of Advocacy (“Advocacy”) applauds CPSC for using a Notice of Inquiry (“Inquiry”) to gather information about industry practice, options for implementing the labeling requirement, and the benefits, limitations and impacts that options will have on manufacturers of children’s products before issuing a proposed rule.

In 2007, several large toy manufacturers were forced to issue recalls of millions of Chinese-made toys due to safety risks of lead paint and small magnets.² Congress reacted to the massive recalls by passing the CPSIA, which was signed into law by President Bush on August 14, 2008. The CPSIA added many consumer safety provisions to the Consumer Product Safety Act³ (“Act”), including a requirement in Section 103, effective August 14, 2009, that manufacturers or importers of children’s products “place

¹ 74 Fed. Reg. 8781 (February 26, 2009)

² “Mattel Recalls 9M Chinese-made Toys in the U.S.” *USA Today*, Aug. 15, 2007. accessed online at http://www.usatoday.com/money/world/2007-08-13-china-products_N.htm on 4/15/09.

³ 15 U.S.C. § 2051 et seq.

permanent, distinguishing marks on the product and its packaging, to the extent practicable.”⁴ The labeling requirement is intended to give manufacturers and consumers the ability to ascertain the specific source of a children’s product (such as location and date of production, cohort information, manufacturer name) in instances of a consumer safety recall.

The Act defines a “children’s product” as a consumer product that is designed or intended for use by children 12 years old and under.⁵ Advocacy has been concerned about the regulatory effects of the CPSIA on small businesses, and that the overall impact of the CPSIA will impose a disproportionately high burden on small businesses. Ninety-nine percent of businesses manufacturing toys, dolls, and/or games are classified as small businesses.⁶ The Act’s broad definition of children’s products means any small businesses that produces a children’s product, not just toy manufacturers, will have to comply with Section 103 labeling requirements, including manufacturers and importers⁷ of clothing, textiles, toiletries, furniture, and the like.

Advocacy has heard the opinions of small businesses that create or import children’s products on the Section 103 labeling requirement. Advocacy urges CPSC to take care when issuing labeling requirements and compliance standards, and consider the practical effects of those regulations on small businesses before mandating a broad-based, one-size-fits all approach.

Office of Advocacy

Advocacy was established by Congress under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. Section 612 of the Regulatory Flexibility Act (RFA) also requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.⁸ Based on our discussions with small businesses that will likely be affected by this regulation and our authority under the RFA, Advocacy submits the following comments on this rulemaking.

⁴ 15 U.S.C. § 2063(a), as amended August 14, 2008.

⁵ 15 U.S.C. § 2052(a)(2).

⁶ Out of 776 US firms that manufacture dolls, toys, and/or games (NAICS Code 33993), 763 have fewer than 500 employees. *Employer Firms, & Employment by Employment Size of Firm by NAICS Codes, 2006*. http://www.sba.gov/advo/research/us06_n6.pdf.

⁷ “Manufacturer” is defined as any person who manufactures or imports a children’s product. 15 U.S.C. § 2052(a)(11).

⁸ Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

I. Advocacy urges CPSC to complete a regulatory analysis in order to assess the impacts any labeling regulation would have on small businesses and to tailor their regulations to minimize adverse effects on small businesses.

Given the large number of small businesses that this regulation will likely impact, Advocacy encourages the CPSC to comply with the regulatory impact analysis requirements of the RFA. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA, to assess the impact of the proposed rule on small businesses and consider less burdensome alternatives.⁹

Advocacy hopes that the information obtained from the CPSC's Inquiry will help the CPSC prepare an Initial Regulatory Flexibility Analysis ("IRFA"), as statutorily required by section 603 of the RFA. The IRFA, or a summary of it, must appear in the *Federal Register* at the same time the proposed rulemaking is published. The IRFA must describe the impact of the proposed rule on small entities and contain:

- a description of the reasons why the action by the agency is being considered;¹⁰
- a statement of the objectives of the proposed rule;¹¹
- a description and estimate of the number of small entities affected;¹²
- a description of all projected compliance requirements of proposed rule;¹³
- a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize the rule's impact on small entities;¹⁴ and
- a list of any duplicative, overlapping, and conflicting rules.¹⁵

Executive Order 13272 also requires the CPSC to notify Advocacy when the agency submits a draft proposed or final rule to the Office of Information and Regulatory Affairs or at a reasonable time prior to publication of the rule by the agency.¹⁶ Moreover, the earlier a copy of the IRFA is provided to Advocacy, the more opportunity exists for Advocacy to provide constructive involvement and feedback to the agency. This is especially important considering the short time-frame involved in issuing rules for Section 103.

⁹ 5 U.S.C. § 601 et seq.

¹⁰ *Id.* at § 603(b)(1).

¹¹ *Id.* at § 603(b)(2).

¹² *Id.* at § 603(b)(3).

¹³ *Id.* at § 601(3).

¹⁴ *Id.* at § 603(c).

¹⁵ *Id.* at § 603(b)(5).

¹⁶ Exec. Order No. 13,272 §3(b).

II. A mandatory, one-size-fits-all labeling requirement would be impractical, and would overly burden small business.

Advocacy has heard concerns from small businesses about the implementation of Section 103 labeling requirements. Detailed batch labeling may be economically efficient for some manufacturers, since it would allow manufacturers to limit losses in the event of a safety recall by allowing the manufacturer to identify and narrowly target those products subject to a recall. However, requiring *all* businesses to abide by the same labeling requirements, regardless of their size or methods of production, would burden the smallest businesses with significant production costs while yielding little to no benefits to that small business in the event of a safety recall.

Many small businesses are not factory operations, therefore a mandate that they track cohort information (such as batch number or run number) would be irrelevant for them in the context of their business operations. Batch and run information are only meaningful when products are created and assembled in factory settings. In fact, some large manufacturers already have detailed information on labels imprinted or molded into their products. It may not be difficult for them to adapt to any labeling requirements with minimal additional costs.

Small business manufacturers would be burdened, however, with regulations that require a particular method of marking (laser etching versus adhesive label, for instance), and by regulations mandating inclusion of information with constantly changing values. Similarly, if CPSC mandates the use of more permanent labeling methods, such as laser-etching, the dramatic increase in production costs coupled with the inability to pass these costs onto consumers, could put many small business owners out of business.

Small-scale importers of children's products may also encounter problems if CPSC mandates a one-size-fits-all labeling requirement. It would be impossible for small-scale importers to track cohort information if the foreign manufacturer does not provide them with such information; and since a small-scale importer's bargaining power is limited due to its small size, it is unlikely that these foreign manufacturers would go to the added expense and trouble to do so.

III. The CPSC should allow businesses to have flexibility in determining what is practical regarding the location, nomenclature, appearance and arrangement of information on labels.

Advocacy asks that the CPSC keep the different needs, constraints, character, and structure of small businesses in mind when drafting regulations. Advocacy asks that CPSC strive for flexibility when issuing rules regarding:

- *Cohort information.* Many small business manufacturers have a limited product range, so businesses should be allowed to decide whether or not cohort information should be included, and if so, what information to present and how to convey it.

- *Date & Location of production.* Allow small businesses to decide when a product is manufactured, and the format of the date (yearly, monthly, quarterly, weekly, etc.)
- *Nomenclature.* Allow businesses to determine whether to present some information via alphanumeric code or in English.

Small businesses that make custom-ordered children’s products should be exempt from any strict labeling requirements. These items are often one-of-a-kind items, crafted to the specifications of a buyer, and component information is meaningless in this situation. In many instances, a label identifying the company and the year of production would be sufficient.

Many products (i.e. dollhouse furniture, beads) are too small to bear a legible imprint or permanent label on each piece. The surface material of other products may make it impossible to put a label directly on the item, and in other products, a permanent label would detract from the aesthetics and purpose of the product itself. In these cases, CPSC should allow exemptions for the permanent labeling requirement in circumstances where the nature of the children’s product would make it impractical to require a permanent label.

In situations where a manufacturer makes a product consisting of component parts (such as blocks or craft kits), Advocacy believes that it would also be impractical to require every component part to bear a label. Advocacy urges CPSC to allow manufacturers to determine the location of the tracking label, and when feasible, only require a label on one component of the product set or on the container holding the component pieces.

IV. The CPSC should work with manufacturers in the implementation of the regulations to minimize economic losses.

Small businesses suggested to Advocacy that it would be impractical—and in some cases impossible—for many small businesses to comply with major regulatory mandates within the statutorily mandated enforcement date of August 14, 2009. To the extent that the CPSC has any flexibility in interpreting the CPSIA statute, small businesses request that the CPSC to consider the monetary costs and time needed to comply with regulations, and issue a stay of enforcement for at least a year in order to give businesses time to adapt to the final rule. To the extent that a stay of enforcement cannot be achieved, Advocacy refers the CPSC to Section 212 of the Small Business Regulatory Enforcement Fairness Act¹⁷ that requires, “that for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis under section 605(b) of title 5, United States Code, the agency shall publish one or more guides to assist small entities in complying with the rule and shall entitle such publications 'small entity compliance guides.’” Advocacy asks that CPSC issue these compliance guides to assist small businesses in their compliance efforts especially since the enforcement date of the rule is less than five months away.

¹⁷ Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

Conclusion

Advocacy thanks CPSC for the opportunity to provide suggestions on how the Agency should approach regulations for a labeling requirement under CPSIA. Advocacy hopes that the CPSC will take into account and analyze the costs and burdens any proposed rulemaking will have on small businesses and consider a broad range of regulatory alternatives that avoid imposing unfair burdens on small businesses. If you have any questions or concerns, please do not hesitate to contact me or Assistant Chief Counsel Linwood Rayford at (202) 401-6880, email at linwood.rayford@sba.gov.

Sincerely,

/s/

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/s/

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