



CPSA 8(b)(1) CLEARED for PUBLIC
X NO MFRS/PRVTLBLS OR PRODUCTS IDENTIFIED
EXCEPTED BY: PETITION #321
RULEMAKING ADMIN. PRCDG
WITH PORTIONS REMOVED: _____

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

Cheryl A. Falvey
General Counsel
Office of the General Counsel

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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."

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

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