



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
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OFFICE OF THE GENERAL COUNSEL

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September 5, 2012

Mr. Jeff Ruch  
Executive Director  
Public Employees for Environmental Responsibility (PEER)  
2000 P Street, NW, Suite 240  
Washington, DC 20036

Re: Advisory Opinion Request – Recycled Tire Products

Dear Mr. Ruch:

This letter responds to yours of July 12, 2012, requesting an advisory opinion from the CPSC's Office of General Counsel on whether certain products manufactured from recycled tires should be classified as "children's products" under Section 3(a)(2) of the Consumer Product Safety Act (CPSA). The products referenced in your letter are: (1) rubber mulch and rubber mats made from processed recycled tire rubber and used principally as surfacing under and around playground equipment; and (2) crumb rubber made from processed recycled tire rubber and used as fill material on synthetic turf athletic fields. As an initial matter we note that you have not asked about the synthetic turf fibers used to construct such fields. We commend the industry's voluntary standard which now requires turf fibers to comply with the 100 ppm lead limit for children's products.

As defined in the CPSA a "children's product" means "a consumer product designed or intended primarily for children 12 years of age or younger." The statute instructs that in determining whether a product is primarily intended for children 12 years of age or younger, the following must be considered: (1) the manufacturer's stated intent regarding the intended use of the product if such statement is reasonable<sup>1</sup>; (2) whether the product is presented in advertising, marketing, or promotion as being appropriate for use by children 12 years of age or younger; (3) whether the product is recognized commonly as being intended for children 12 years of age or younger; and (4) the Commission's Age

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<sup>1</sup> A manufacturer's statement that a product is not intended for children does not preclude a product from being considered a children's product if "the primary appeal of the product is to children 12 years of age or younger."



Determination Guidelines. In an interpretative rule, the Commission provided additional guidance on the meaning of the statutory term “children’s product.”<sup>2</sup> Those regulations explain that the term “for use” by children 12 years of age or younger “means that children will physically interact with such products based on the reasonably foreseeable use of such product.” 16 C.F.R. 1200.2(a)(2). The regulations point out that “products used by children 12 years of age or younger that have a declining appeal for teenagers are likely to be considered children’s products.” *Id.* 1200.2(b)(1). The term “general use product” is defined to mean “a consumer product that is not designed or intended primarily for use by children 12 years old or younger.” *Id.* In the Commission’s view, general use products are products “with which a child is not likely to interact, or products with which consumers older than 12 would be as likely, or more likely to interact.” *Id.*

As this discussion suggests, the decision as to whether a particular manufacturer’s product is a children’s product is a mixed question of fact and law and can vary depending on the specific factual information provided. You request an advisory opinion with regard to an entire product class without providing specific factual information. We provide some general thoughts on the various products below subject to the caveat that our final determination as to whether a particular’s manufacturer’s product is a children’s product would depend on the facts as to how the product was designed and marketed, the evidence of a manufacturer’s intent, what sales information suggests to be the primary uses of the product and any other relevant information, including what was known when regarding the installation of the product. Advisory opinions represent the legal opinions of the current General Counsel and may be changed or superseded by the Commission.

### **Rubber Mulch**

Based on a review of numerous websites that offer rubber mulch for sale it appears that this product is generally promoted for three specific uses: (1) as surfacing for playgrounds; (2) as an alternative to wood or bark mulch in landscaping applications; and (3) as horse footing in arenas or pens. Rubber mulch that is marketed, promoted, and advertised principally for use as surfacing in playgrounds would likely meet the above definition of a “children’s product,” because the majority of playgrounds are designed and intended to be used by children between the ages of 2 and 12. Although there are companies that manufacture playground equipment intended for middle school aged children, who are typically older than 12, it can be reasonably concluded that the majority of playground equipment is designed for use by children 12 years of age or younger.<sup>3</sup> It follows, then, that the majority of companies that make rubber mulch for use as playground surfacing intend that the product will be used by children 12 and under. It is our view that a company that principally advertises and promotes its rubber mulch as being intended for playground surfacing, and in fact, demonstrably sells the majority of

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<sup>2</sup> The preamble to the regulations specifically states that the regulation “does not impose any additional burdens beyond those in the CPSIA.” 75 *Fed. Reg.* 63067.

<sup>3</sup> Indeed, the CPSC’s Age Determination Guidelines at p. 181 note that children ages 9 to 12 “are very accomplished players around playground equipment [but are] outgrowing playground equipment and moving on to more organized sports.”



its product for this use, intends that its product will be used primarily by children ages 12 or under, such that the rubber mulch it sells would be considered a children's product.

On the other hand, we believe that a company that advertises and promotes its rubber mulch principally for landscaping applications or as horse footing, cannot be said to have intended primarily that the product be used by children 12 years of age and under, based on the application of the statutory factors. Initially, if the manufacturer were to state its intent that its rubber mulch is intended for landscaping and horse footing applications, *i.e.*, not primarily intended for use by children 12 years of age or younger, such a statement would seem reasonable in that the product effectively can be used for these purposes. Further, such a manufacturer would presumably be advertising and marketing its product for such non-playground use, and the existence of such alternate uses would support the conclusion that rubber mulch is not "commonly recognized" as being intended for children 12 years of age or younger. Under this scenario, the rubber mulch manufactured for landscaping and horse footing applications would not be considered a children's product.

Based on the above analysis, it is clear that a determination of whether rubber mulch is a children's product or a general use product will depend on the individual manufacturer's intended use of the product. If the manufacturer's stated intent is that its rubber mulch will be used as playground surfacing, and it promotes this use through advertising and marketing, commission staff would likely conclude that the rubber mulch is intended primarily for use by children 12 years of age and younger, and therefore, is a children's product subject to the lead content limits set forth at 15 U.S.C. 1262. However, if the manufacturer's stated intent is that its rubber mulch is to be used for landscaping and horse footing applications, and the marketing, advertising, and promotion of the product is consistent with this stated intent, then Commission staff likely would conclude that it is a general use product, not subject to the aforementioned lead content limits.

### **Crumb Rubber**

Crumb rubber is produced by grinding used tires. Steel and fiber tire components are removed during the process, which produces a finished product of rubber pellets that range in size from one-sixteenth to one-quarter inch in diameter. Based on a review of websites that offer for sale crumb rubber made from processed recycled tires, it appears that crumb rubber has a multitude of applications and uses. Crumb rubber is often mixed with traditional binder to make rubberized asphalt, which is used for highway paving. Crumb rubber is also used in the manufacture of welcome mats, rail road ties, acoustical underlay, portable speed bumps, and weightlifting plates, and as infill for synthetic turf athletic field surfaces.

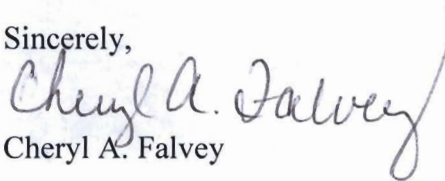
The only scenario under which children 12 and under would potentially use crumb rubber is if it is used as infill between the blades of artificial grass in synthetic turf athletic fields that are installed at elementary and/or grade schools. However, it is staff's view that crumb rubber would not be considered a children's product unless the

manufacturer produced the product principally for use as infill in elementary school synthetic turf fields. Considering the myriad of general uses promoted on the websites maintained by crumb rubber manufacturers, and the fact that synthetic turf fields are significantly more likely to be installed at middle schools, upper schools, general use public parks, and colleges and universities versus elementary schools, it is extremely unlikely that any crumb rubber manufacturer would intend that its product be used principally as infill for synthetic turf athletic fields, much less those installed only at elementary schools or other locations where they would be used primarily by children 12 years of age or younger. In light of the multitude of applications for which manufacturers promote, market, and advertise the use of crumb rubber products, it is evident that consumers older than 12 would be as likely, or more likely to interact with crumb rubber, such that it would most likely be considered to be a general use product, although such a determination would be fact dependent as discussed above.

### Conclusion

It is the opinion of the Office of the General Counsel that the determination of whether rubber mulch or crumb rubber is a children's product depends on whether the company manufacturing the product intends that it be used primarily by children 12 years of age or younger. Rubber mulch manufactured by a company that markets, advertises, and promotes its product as principally for use in surfacing playgrounds, in most instances, would be considered a children's product, while the same product manufactured principally for use as a landscaping application or for horse footing likely would be considered a general use product. With regard to crumb rubber, it is our view that the promotion, marketing and advertising of this product suggests that it is not primarily intended for children and will likely be considered a general use product, *i.e.*, a consumer product that is not designed or intended primarily for use by children 12 years old or younger, unless a particular manufacturer can be found to have marketed and advertised its crumb rubber for this specific use.

Sincerely,



Cheryl A. Falvey