



February 9, 2009

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

The Honorable Thomas Moore
Commissioner
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: Court Decision on Phthalate Restrictions Under CPSIA Section 108

Dear Acting Chairman Nord and Commissioner Moore:

On behalf of Toy Industry Association, Inc., (TIA) I am writing in response to the decision issued on February 5, 2009, by the United States District Court for the Southern District of New York “setting aside” the CPSC General Counsel’s opinion on the applicability of phthalates limits in Section 108 of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”) only to products manufactured after February 10, 2009. The effect of the decision was simply to set aside the CPSC Counsel’s opinion. We further note that the February 6, 2009, CPSC-issued press release entitled “*CPSC Issues Guidance for Complying with Phthalates Requirements in New Child Safety Law*” provided no substantive guidance on compliance and, by not referencing statutory delineated mouthing requirements, actually added to marketplace confusion and chaos. We did note that the release indicate that additional guidance will be forthcoming, but we are concerned that this will be too little too late.

It remains up to the Commission to set comprehensive rules or an interim rule for compliance or, in the interest of justice and given detrimental reliance upon such opinion, to stay enforcement to violations other than those based upon actual knowledge of a clear violation. As a practical matter it is impossible to test products to determine compliance on the eve of the effective date. In addition, equity demands that adequate redress be afforded in the discretion of the Commission. The Commission is not restrained from issuing interim enforcement guidelines adjusted for the circumstances or from granting equitable relief within its own authority as an independent regulatory agency. This authority is independent of and superior to actions undertaken by Counsel.

Therefore, TIA requests the Commission to immediately issue clear interim guidance that permits reliance upon manufacturer or importer-of-record determinations as to application of the Section 108 limits for particular products involved. Manufacturers should be free to determine the applicability of the phthalate limits to their particular toy products and if a toy can be placed in a child’s mouth under CPSIA Section 108 (e)(2)(b) or if a child care article is a consumer product *designed or intended by the manufacturer to “facilitate”* sleep or the feeding of children age three (3) and younger, or to help such children with sucking or teething [Section 108(e)(1)(c), wherein we note Congress’s direction that the intention of the manufacturer governs]. This is similar to the discretion afforded in determining “accessibility” under the Enforcement Guidelines issued by CPSC on February 6, 2009. This would also be consistent with the Stay of Testing and Certification requirements applicable to the new phthalate requirements under such section [*Federal Register* / Vol. 74, No. 25 /P. 6396, Monday, February 9, 2009].

In addition, we request the Commission immediately appeal the decision of the New York District Court and request a Stay of the judge’s order, pending adjudication of the appeal.

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Please note that *Emergency Interim Action* is being requested given that, based upon the Commission's public release and the lack of clear guidance, retailers have been reacting to the decision and the Commissions' acquiescence.

TIA has learned that hundreds of manufacturers have been advised that an enormous range of products – including those made of materials that do not inherently contain the restricted phthalates and are not defined toys or childcare articles – will be pulled from retail shelves within the next 48 hours. The financial impact will be extreme should retailers act in this manner. Without additional action by the CPSC, this removal of product could cause many manufacturers to cease operations and lay off workers because they are unable to withstand the added liability and retailer-imposed costs.

TIA has previously provided extensive comments to the Commission regarding Section 108 of the CPSIA; we now request the Commission to expedite consideration of these and other filings by involved interested parties. Since there is simply no established and reliable assessment and testing protocol to enable anyone to reasonably determine whether a product contains restricted phthalates, the only alternative is to undertake the actions we have respectfully requested.

TIA and its members remain committed to the production of safe toys and other articles intended for use by children. But to fully implement the CPSIA, we require the Commission's clear direction until final implementing regulations are promulgated.

Thank you for your consideration of our urgent requests.

Sincerely,

Edward Desmond

Edward Desmond
Executive Vice President, External Affairs