

Consumer Electronics Retailers Coalition



Consumer Electronics Retailers Coalition - CPSC Comments on Catalog and Internet Advertising

October 17, 2008

Todd A. Stevenson
Secretary
Consumer Product Safety Commission
4330 East-West Highway
Room 502
Bethesda, Maryland 20814

RE: Section 105 Advertising Requirements:
Comments on Labeling Requirement for Toy and Game Advertisements

Dear Mr. Stevenson:

Please accept the following comments from the Consumer Electronics Retailers Coalition (CERC) in response to the Commissions September 23, 2008, Notice of Proposed Rulemaking; Labeling Requirement for Toy and Game Advertisements.

By way of background, the Consumer Electronics Retailers Coalition (CERC) is a public policy issue organization consisting of the major specialty retailers of consumer electronics products and retail associations. CERC members include Amazon.com, Best Buy, Circuit City, K-Mart, RadioShack, Sears, Target, Wal-Mart, and the leading retail industry trade associations – NRF, NARDA, and RILA.

Section 24(a) of the Federal Hazardous Substances Act (FHSA) prescribes cautionary labeling requirements for toys or games that contain small parts and are intended for use by children from 3 to 6 years old. The cautionary statement warns potential purchasers that these products are not for children under 3 years old due to choking hazards. Section 24(b) of the FHSA prescribes similar requirements for balloons, small balls, and marbles intended for children 3 years and older, or any toy or game which contains such a balloon, small ball, or marble.

Section 105 of the CPSIA amends section 24 of the FHSA to require that, when a product's packaging requires a cautionary statement, advertising for the product that provides a direct means for purchase or order of the product must bear the same cautionary statement.

The Act requires manufacturers, importers, distributors and private labelers to inform retailers if a product requires a label under Section 105. Being able to rely on the information provided by the manufacturers, importers, distributors and private labelers is a critically important provision in the statute. And, it is helpful that the Proposed Rule explicitly describes the cautionary statements required under Section 105 as those required under Section 24(a) of the Federal Hazardous Substances Act (FHSA) to warn potential purchasers that these products may contain to choking hazards.

CERC supports the goal of helping consumers make informed purchases and understands the need for consistency in the text and placement of the warnings. But, CERC also believes that flexibility is required when applying warnings originally designed for packaging to online and catalogue advertisements and asks for the Commission's guidance.

I. Economic Issues

A. **The Impact of the Advertising Requirements on Businesses is Significant.**

Although the NPRM doesn't seek input from retailers or other parties on the impact of the advertising requirements, CERC would like to respond to the CPSC's initial request for comments which did include such an inquiry. The impact of these provisions is significant on the retail business – the degree to which these provisions impact individual businesses will depend in part on the guidance provided by the CPSC in its regulations.

There are significant cost and logistical challenges attributable to the inclusion of the new cautionary statements in CERC members' print advertising (if so required) and on their websites. With regard to the former, CERC outlines below the challenges presented and respectfully requests that the CPSC to utilize its authority to provide flexibility, while maintaining the important public policy of informing the public of any hazards presented to small children by the sale of products with small parts, balloons, small balls or marbles, as defined by the FHSA, 15 U.S.C. § 1278 (2006). CERC also submits that the importance of the CPSC issuing the final regulations in a timely fashion cannot be overstated. Compliance with the Act and regulations under the tight timeframes created cannot occur without the clear communications of final regulations.

B. **The CPSC Should Offer a Grace Period for Catalogues and Other Printed Material; In addition, CPSC Should Consider whether Any Grace Period Might be Offered for the Internet.**

CERC members' lead time on printed materials for placement ranges from 90 to 120 days. For planning purposes, 120 days is not uncommon due to the layout design, approval

process, printing and the extensive distribution to thousands of households. Likewise, the time required for making template changes to a web page can be up to 60 days. In addition, the cost to change a web page template design is in the tens of thousand dollars.¹ Many retailers, including CERC members, also “lock down” their websites during the holiday season, meaning that as a rule, they do not make design or template changes to their websites in November and December to avoid any challenges that might disrupt consumer access during this busy retail period.

As noted in the NPRM, CPSIA specifically provides that the CPSC may grant a grace period of no more than 180 days with respect to catalogues and other printed materials. Labeling Requirement for Toy and Game Advertisements, 73 Fed. Reg. 58,063, 58,064 (proposed October 6, 2008) CERC supports the CPSC’s recommendation for such a grace period. If the CPSC fails to issue the final rule by November 12th, as required by the statute, the implementation will present challenges with the typical lead times presented above. In addition, if the CPSC decides to apply the labeling requirements to business-to-business catalogues and print material (see discussion below), this grace period will be particularly important since the implementation of these requirements had not been contemplated by retailers or manufacturers.

Without a statutorily-stated grace period for the Internet, CERC also notes that the implementation of CPSIA’s Internet advertising provisions is particularly challenging. In the NPRM, the CPSC suggests that the Commission may not issue final regulations on those provisions some time before the December 12, 2008 implementation date. In such event that the final regulations are not issued prior to December 12th, it is also essential that CPSC provide some form of grace period with regard to its enforcement of these provisions. In effect, due to the statutory deadline and the lack of final rule, retailers otherwise may otherwise find themselves faced with having to make costly changes to their websites *twice* – once to attempt compliance with the CPSIA by December 12th and again, once the final regulations are in place. As noted above, most retailers’ websites are in lock down during this period, so the impact of making these changes within these timeframes should not be underestimated.

C. Applying the Advertising Requirements to Business-to-Business Catalogues would be beyond the Intent of CPSIA.

Both the NPRM and the initial CPSC Staff request for comment seek information regarding the applicability of the advertising requirements to business-to-business catalogues. The CPSC Staff request specifically asked “whether the advertising requirements for catalogues and other printed materials should also apply to materials distributed solely between businesses and not to ultimate consumers, and, if so, how the Commission can distinguish catalogues distributed solely between businesses from those intended for final distribution to the ultimate

¹ It is important to note that there are differences between changing a website template and changing content on a website, with the former being more challenging. The CPSC staff’s recommendations regarding location and condition of the warning suggest a website template change.

consumers, which may include institutions such as schools and day care centers.” CPSC Staff Request for Comments and Information regarding Section 105 of the [CPSIA], September 4, 2008, <http://www.cpsc.gov/BUSINFO/advertrule.pdf>. If the Act’s intent in Section 105 was to inform consumers regarding possibility that a toy or game might contain a small part prior to purchase, we believe the application of the advertising requirements to business-to-business materials is beyond this intent.

If the CPSC decides to require the inclusion of the cautionary statements in this context, it is essential that the CPSC narrowly define the types of materials to which these provisions would apply – i.e., the requirements should only apply to the extent that the materials relate to the sale of product to consumers and then only for the purpose of ensuring consistent communications from manufacturers and distributors to retailers.² To the extent that a manufacturer, distributor or private labeler includes the cautionary statements in a catalogue or other printed material between it and a retailer, either voluntarily or if required by the CPSC, the CPSC should provide guidance that the inclusion of those statements are sufficient to satisfy the Notice to Inform provisions of section 105 of the Act. CPSIA, sec. 105(2), § 24, Pub. L. No. 110-314, 122 Stat. 3016 (August 14, 2008).

II. Advertising Size and Placement

A. Catalogues and Other Printed Material.

In its NPRM, the CPSC Staff makes recommendations pertaining to the size and placement of the cautionary statements. Prior to commenting on those recommendations, CERC takes this opportunity to seek clarification on whether the Act requires the inclusion of the cautionary statements in flyers. Many retailers, including CERC members, use flyers that are direct-mailed to consumers or included in newspapers. These flyers are primarily used for advertising purposes and not for direct purchase purposes, but sometimes they may offer a specific phone number or a website through which a product may be purchased.

The Act requires the cautionary statements on advertisements, which may be on websites, or in catalogues, or other printed materials, *only if* those advertisements provide a “*direct means for the purchase or order of a product.*” CPSIA § 105; FHSA § 249(c). CERC recommends that the CPSC’s regulations clarify that a flyer (or other free-standing insert) as described above is not required to include the cautionary statements under section 105. In the event that the CPSC disagrees, CERC recommends that the cautionary statement only be required if the flyer or free-standing insert directs the customer to a specific phone number for order. The addition of a website alone should not be considered a direct means for purchase. A customer directed to a website will have the benefit of seeing the cautionary statements on the site prior to purchase. Therefore, requiring cautionary statements on a flyer that includes a website would be

² Materials that are distributed between businesses, or only within a single business, solely for business or marketing purposes between the two businesses, and not for the purpose of selling a product, should not be required to include the cautionary statements.

duplicative and unnecessary. Finally, CERC does *not* believe inclusion of store locations, a general information phone number provides a “direct means” for purchase, but rather represents indirect messaging.

In the event that a flyer, catalogue, website, or other printed material is required to include the cautionary statement, CERC recommends that the CPSC provide flexibility in how those statements are displayed. The statute states that the cautionary statement be displayed in a manner consistent with part 1500 of title 16 of the Code of Federal Regulations and also states that the CPSC may implement regulations concerning size and placement of the cautionary statements “as appropriate relative to the size and placement of the advertisements in such catalogues and other printed material.” CPSIA § 105(1)-(2). It is consistent with current regulations and with statutory intent and legislative history for the CPSC to provide flexibility and alternatives in labeling with regard to advertising.³ Size and placement are critical issues since the creation of advertisements is a balance between managing visual clutter and communicating meaningful information to consumers. Space used in advertising is expensive due to the nature of distribution, appeal, and medium.

The NPRM recommends that the cautionary statements in catalogues and other printed materials “be the larger of (1) a certain minimum type size based on the size of the advertisement (but no smaller than 0.08 inches) or (2) the size of the largest text in the advertisement that describes the function, use, or characteristics of the toy or game being advertised, other than the product name.” Already, numerous required warnings and statements about battery requirements, age grading, and compatibility present spatial challenges in advertising.

CERC appreciates the CPSC Staff’s recommendation that abbreviated versions of the required warnings be permitted. In many cases, multiple products for which a cautionary statement is required appear on one advertising page. It would be unfeasible to require that a complete cautionary statement appear next to each product on all printed materials. The CPSC’s staff recommendation is consistent with the CPSC’s current flexibility on the labeling of small packaging and with the legislative history accompanying the CPSIA.⁴ This is also common advertising practice in other contexts. CERC believes, however, that retailers should have flexibility to determine the abbreviated version of the required warnings. For example, CERC believes the recommendation by the CPSC’s Human Factors Staff to use the less than and greater than symbols in referencing age applicability could lead to some confusion. CERC believes more than one option should be permitted. CERC recommends that retailers be able to use the

³ By example, the CPSC’s current regulations recognize the challenges presented by small packages and provide alternative size, placement and language options for small packages whereby the entire statement is not required to be included. *See* 16 C.F.R. 1500.19(f).

⁴ The House Energy and Commerce Committee Report states the Committee’s intention that the CPSC “consider the possibility of permitting a general warning to be printed at the top of as catalogue’s page (as opposed to specific warnings adjacent to individual product advertisements).” [Committee report cite.] CERC supports this statement, although it supports the CPSC’s recommendation that the location of the general warning may appear at the bottom or top of each of the pages.

equilateral triangle with such terms as “Warning: Small Parts”, “Warning: Balloon”, “Warning: Small Ball”, “Warning: Marble”, with the primary cautionary statement present at either the top or bottom of the advertising page.

As to text size, CERC interprets the CPSC’s recommendation to state that a cautionary statement, whether is full or abbreviated, located with the product in printed materials must comply with the larger of the two – minimum type size of the advertisement (no smaller than .08 inches) or the size of the largest text in the advertisement that describes the product. Since advertisements often use a range of text sizes for headings and product information the CPSC should make clear that the type size for the warnings should be no smaller than text describing the “function, use, or characteristics of the article being advertised.”

Additionally, CERC seeks guidance on what the permissible type size would be for a full cautionary statement that appears at the top or bottom of a printed material. Because the cautionary statement would not be appearing with a particular product in this instance, CERC believes it would be an appropriate interpretation to permit the statement to be the certain minimum type size based on the size of the advertisement page (but no smaller than .08 inches).

B. Internet Advertisements.

Placement

CERC supports the goal of warning customers about potential choking hazards and agrees with the suggestion by the Human Factor staff’s September 22d memorandum that the “cautionary statements be located at the beginning of the advertisement’s product-specific descriptive text.” However, CERC believes it would not be appropriate to require the warnings to appear above the page scroll in every instance.

Where the scroll appears on the screen depends upon the resolution and size of the viewing screen, both factors over which internet retailers have no control. The sizes of viewing screens vary widely among desktop and laptop computers, and the page configuration will also depend on options selected by the individual user (such as display resolution, font size, and the size of the browser window.) The problem is particularly acute for mobile phones and other portable devices with Internet access, which typically have a very small display screen relative to other devices. Our members urge the Commission to accept the Human Factors Staff’s recommendation and require the warning to “be located at the beginning of the advertisement’s product-specific descriptive text,” which will ensure that the cautionary statements are displayed in a location that consumers can easily access while giving retailers the flexibility to address the structure and design of individual websites.

Text size

The NPRM suggests that the minimum type size should be no smaller than .08 inches “or the size of the largest text in the advertisement that describes the function, use, or characteristics of the toy or game being advertised.” Many websites use a range of text sizes and CERC urges the Commission to require the text size of the cautionary statement to be the same size as the text used to describe the functions and features of the product.

Product Lists

Additionally, CERC seeks guidance on whether the cautionary statements are required on each website location where a product and a means for purchase is displayed. For example, on some websites, the consumer is presented with a list of applicable products when a category search is performed. These lists are not the primary product advertisements and do not include product descriptions or information. Typically, a consumer seeking information will click on the item in order to access a full description of product information and specifications, but products may be added to the purchase “cart” from these lists. Because these are simply lists of product names it is technically unfeasible for most CERC members to include the required cautionary statements for each of the applicable products listed. Due to the burdens imposed and the fact that the warnings will be displayed in the actual product advertisement, CERC recommends that the CPSC clarify that the cautionary statements are not required when a product appears on these product lists.

Combinations and Abbreviations

The CPSC Staff recommends against permitting abbreviated warnings on the Internet. CERC respectfully disagrees with the Staff’s first recommendation and urges the Commission to permit abbreviated warnings on the Internet if necessary, so long as complete cautionary statements are included by links or otherwise. Flexibility is needed to ensure that retailers can implement the requirements in the unreasonably short timeframe for compliance.

Alternatively, to avoid the problems associated with over-warning, another approach would be to combine the warnings for small parts, small balls, and marbles into one warning: “WARNING. CHOKING HAZARD--This toy is or contains a small part, small ball, or marble. Not for children under 3 yrs.” The warning for balloons, which cannot be readily combined with the warning for small parts, small balls and marbles as it applies to products for children under 8 years, would remain unchanged. Retailers would still request information from the manufacturer, importer, distributor or private labeler as to whether a cautionary statement is required, but would be free to display the combined alternative whenever one of the warnings related to small parts, small balls, or marbles applies. This would still ensure that consumers are warned about the products they are buying, while allowing retailers to streamline the compliance process under Section 105. This is particularly important because 16 CFR 1500.19(e) contemplates that applicable labeling statements may be combined on the product packaging. This could lead to a proliferation of slightly different warnings that would need to be displayable in Internet advertising. A CPSC-approved, consolidated warning for small parts, small balls and

marbles would greatly simplify the task of compliance for retailers while still supplying consumers with the warning information relevant to their purchasing decision.

Conclusion:

CERC strongly believes in protecting the safety of our customers and children. To do that, retailers need clarity, certainty, reasonableness and sufficient time to implement any new notice requirements.

Respectfully,

Christopher A. McLean
Executive Director
Consumer Electronics Retailers Coalition
317 Massachusetts Avenue, NE
Suite 200
Washington, DC 20002
(Tel.) 202.292.4600