

March 25, 2009

**Via Electronic Mail**

Todd A. Stevenson  
Director, Office of the Secretary  
U. S. Consumer Product Safety Commission  
4330 East-West Highway  
Room 502  
Bethesda, MD 20814


**Re: CTIA Comments on Draft Guidance Regarding  
Products Subject to CPSIA Section 108**

Dear Mr. Stevenson:

On behalf of CTIA -- The Wireless Association ("CTIA"), we appreciate this opportunity to submit these comments in response to the Consumer Product Safety Commission's (CPSC) Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information.<sup>1</sup> Specifically, the CPSC staff has requested comments on whether electronic devices such as cellular (or "wireless") phones should be considered "children's toys" that are subject to the phthalate requirements under section 108 of the CPSIA.<sup>2</sup>

For the reasons set forth in CTIA's Comments, CTIA respectfully submits that wireless phones, whose primary function and purpose is as a communication device, are not "children's toys" as defined by the CPSIA and fall outside the scope of Section 108. CTIA urges the Commission to make clear that wireless phones are not subject to the requirements of Section 108.

Sincerely,



Kerrie L. Campbell

cc: Michael F. Altschul, Sr. V.P. and General Counsel, CTIA – The Wireless Association

<sup>1</sup> See Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information, 74 Fed. Reg. 8058 (Feb. 23, 2009).74

<sup>2</sup> Fed. Reg. 8058, 8060 (Feb. 23, 2009).



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Notice of Availability of Draft Guidance )  
Regarding Which Children’s Products )  
Are Subject to the Requirements of )  
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Comments and Information )  
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**SECTION 108 PHTHALATES**

**COMMENTS OF CTIA – THE WIRELESS ASSOCIATION**

**I. INTRODUCTION**

CTIA - The Wireless Association is an international nonprofit membership organization founded in 1984, representing all sectors of wireless communications, including cellular, personal communication services and enhanced specialized mobile radio.

As an organization, CTIA represents over 300 service providers, manufacturers, wireless data and internet companies, as well as other contributors to the wireless universe.<sup>3</sup> They range from small regional service providers to large, publicly traded multi-national corporations. CTIA advocates on their behalf before the Executive Branch, the Federal Communications Commission, Congress, and state regulatory and legislative bodies. CTIA works to ensure that common sense public policy objectives relating to wireless communications are implemented in a consistent, uniform and cost-efficient manner.

CTIA also coordinates the industry’s voluntary efforts to bring consumers a wide variety of choices and information regarding their wireless service, and supports important industry initiatives such as Wireless AMBER Alerts, and the “When it comes to Wireless, Safety is Your Call” safe driving public service announcement campaign. CTIA operates the industry’s leading

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<sup>3</sup> A list of our current members is contained on our website. See [http://www.ctia.org/membership/ctia\\_members/](http://www.ctia.org/membership/ctia_members/).

trade shows, as well as equipment testing and certification programs to ensure a high standard of quality for consumers. CTIA's members consistently have been on the forefront of efforts to provide consumers, businesses and governments with safe and economical wireless service to facilitate communication.

## **II. RELEVANT SECTION 108 STATUTORY LANGUAGE**

Section 108 prohibits the sale, distribution or importation of any "toy" or "child care article" that "contains concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP)." Section 108(a). The terms "children's toy" and "child care article" are defined in Section 108, and these definitions apply only to this section of the Act. Section 108 defines "toy" 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." Section 108(e)(1)(B).

As noted in the staff's draft guidance and request for comment, the following factors are to be considered in determining whether a particular product is designed or intended for use by a child 12 years or age or younger during play:

- Whether the intended use of the product is for play, including a label on the product if such statement is reasonable.
- Whether the product is represented in its packaging, display, promotion or advertising as appropriate for use by the ages specified.
- Whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified.
- The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.

“Child care article” 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.” Section 108 (e)(1)(C).<sup>4</sup>

Section 108 imposes an “interim prohibition” on the sale, distribution or importation of any “children’s toy that can be placed in a child’s mouth or child care article that contains concentrations of more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).” 108(b)(1). For purposes of the Act, a “toy that can be placed in a child’s mouth” includes all toys containing any part which “can actually be brought to the mouth and kept in the mouth by a child so that it can be sucked and chewed.” Section 108 (e)(2)(B). It also includes all toys that contain at least one dimension that is smaller than 5 centimeters. *Id.*

As set forth below, cellular (or “wireless”) telephones are not a “children’s toy,” or a “toy that can be placed in a child’s mouth” as defined by the CPSIA, and therefore, are not subject to the phthalate requirements under Section 108.

### **III. COMMENTS ON DRAFT GUIDANCE REGARDING PRODUCTS THAT SHOULD NOT BE CONSIDERED “TOYS” SUBJECT TO SECTION 108**

#### **A. Wireless Telephones Are Communications Devices Subject To Comprehensive Regulatory Requirements Administered By The Federal Communications Commission**

Wireless telephones are communications devices that are subject to a comprehensive regulatory scheme promulgated and enforced by the Federal Communications Commission (“FCC”). The FCC requires all radio frequency (“RF”) devices, including all wireless telephones, to be certified, registered, and labeled as compliant with FCC safety and health

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<sup>4</sup> There has been no suggestion – nor should there be -- that wireless phones can be considered a “child care article” as defined under Section 108, nor has the staff requested any comment in this regard. For the record, CTIA comments that wireless phones plainly are not “child care articles” subject to the requirements of Section 108 of the CPSIA

regulations concerning radio frequency emissions and exposure. To ensure that wireless phones perform the proper communications function, they must meet all applicable FCC regulations before they can be marketed and sold. As one example, FCC regulations provide, in pertinent part:

**Marketing of radio frequency devices prior to equipment authorization.**

(a) Except as provided elsewhere in this section, no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless:

(1) In the case of a device subject to certification, such device has been authorized by the Commission in accordance with the rules in this chapter and is properly identified and labeled as required by § 2.925 and other relevant sections in this chapter . . . .<sup>5</sup>

Section 2.295, in fact, requires all wireless telephones to bear a nameplate with the FCC Identifier Number, as well as any other statements or labeling requirements provided for by the rules, indicating that the product meets federally mandated communications device standards.

**B. Wireless Telephones Are Not “Children’s Toys” Designed Or Intended For Children 12 Years Of Age Or Younger for Use When the Child Plays**

In order to qualify as a “children’s toy” under Section 108, a product must be both (1) designed or intended by the manufacturer for a child 12 years of age or younger, and (2) for use by the child when the child plays. Section 108(1)(B). Wireless telephones do not satisfy these criteria, and thus fall outside the scope of Section 108.

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<sup>5</sup> 47 C.F.R. § 2.803 (2008).

As noted above, the CPSIA specifies that, when determining whether a product is designed or intended for use by a child 12 years of age or younger, the following factors “shall” be considered:

- (i) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.
- (ii) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children of the ages specified.
- (iii) Whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified.
- (iv) The Age Determination guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

Section 108(e)(2)(A).

**1. Wireless Telephones Are Not Designed or Intended for Use by Children 12 Years of Age or Younger**

An evaluation of the relevant factors concerning the design and intended user of wireless telephones demonstrates that they do not meet the definition of a “children’s toy.”

- *Manufacturer’s Statement*

CTIA has no position as to the appropriate age for wireless telephone use, since parents must decide when their child is old enough to have a wireless phone. Accordingly, wireless telephones are primarily marketed to adults and, to a somewhat lesser degree, to teenagers. Certainly 12 years old would fall at the very bottom end of the spectrum, and wireless telephone use by children 12 years old and younger is the exception rather than the rule.

To the extent that wireless telephones are marketed beyond adults, they are marketed to families with teenagers who have recently obtained some degree of independence. As teenagers begin participating in extracurricular activities outside of school, such as sports, and begin

working part time jobs outside of the home, wireless telephones allow them to remain connected to – and in communication with – their families and others.

- ***Packaging, Advertising And Marketing***

Because a wireless telephone’s utility is derived from its ability to connect the user with other users, a user almost always purchases a service plan along with the wireless telephone. Wireless carriers offer customers a choice of both “prepaid” plans and monthly payment plans. Most wireless customers (approximately 80% of all subscribers) elect to make monthly payments to the wireless service provider pursuant to a contract, in exchange for a bundle of services that includes telephone service and a “bucket” of minutes that can be used by all members of a family, along with “call waiting,” voicemail and sometimes e-mail or text messaging service. In addition, wireless service providers typically offer a free or discounted telephone to subscribers who agree to purchase wireless service for a fixed period. Since post-paid wireless service is provided pursuant to contract (and not a tariff), a wireless customer must have reached the age of majority to lawfully contract for wireless service.<sup>6</sup> To qualify for these offers, wireless customers must fill out a detailed application and provide information such as income and employment history, and, typically allow the wireless service provider to run a credit check on the user. Only where the user is able to demonstrate an ability to consistently pay the monthly service fees will the service provider approve the service contract. Clearly, this is not a product marketed to children 12 and younger, who are not eligible to enter into such contractual agreements, lack reliable sources of income and have no credit histories.

Even “pre-paid” wireless service, which requires a user to purchase a telephone and then periodically purchase blocks of “minutes” in the form of coded phone cards, is predicated on a

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<sup>6</sup> The age of majority in most states is 18, except for two states with the age of 19 (Nebraska and Alabama) and one state with the age of 21 (Mississippi).

legally binding service agreement and the wireless service provider's expectation that the customer will generate consistent usage on the carrier's network. Although pre-paid users are not billed on a consistent monthly basis, they are required to periodically purchase additional phone cards in order to obtain service. While wireless service providers offer customers a range of service plans and choices, regardless of how a customer purchases wireless service, all users are required to engage in transactions and make regular payments to maintain their service, not the conduct that is either sought through marketing or exhibited by children 12 years and younger.

In response to the staff's question whether the incorporation of game, camera or music options in some wireless telephones makes them "toys," the answer is no, they do not. These options are ancillary to the wireless phone's primary function and use as a communication device. And while some wireless phones may be brightly colored, and an even smaller percentage may have cartoon characters on them, the primary function of all wireless phones remains to originate and terminate communications. Wireless telephones are competitively marketed based on their ability to provide clear, reliable telephone service on a wireless network.

- ***Consumer Perception***

Not surprisingly, the belief that children 12 years old and younger should not have wireless telephones is widely and deeply held by consumers. In fact, one poll found that only five percent of consumers believed that a child in fifth grade or younger should have a wireless telephone.<sup>7</sup> By contrast, 61 percent believed that high school or college was appropriate.<sup>8</sup>

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<sup>7</sup> See Parker, J. "How young is too young for kids to have cell phones?", available at <http://www.thesunnews.com/news/local/story/830198.html> (discussing 2007 poll by MSN/Zogby) (last viewed March 23, 2009).

<sup>8</sup> *Id.*

Clearly, wireless telephones are widely recognized as not appropriate -- let alone intended for or commonly used by -- children 12 and younger.

- ***CPSC Age Guidelines***

These widely held consumer beliefs are also reflected in the CPSC Age Guidelines. Indicating that wireless telephones are not designed or intended for children, the guidelines make no reference to actual wireless telephones. Instead, the Guidelines reference mock versions of wireless telephones, which are marketed as toys.<sup>9</sup> At 12 to 18 months, for example, “regardless of whether realistic detail is present, young toddlers hold toy telephones to their ear because they often see their elders do so. Soon they begin to imitate a phone conversation with babbling and later with words. They also like the cause-and-effect stimuli from pushing buttons and making sounds.”<sup>10</sup> Likewise, children are attracted to mock versions of other “adult” items, including “cash registers, medical kits, [and] kitchen/cooking sets.”<sup>11</sup> These toy versions are distinct from the adult items upon which they are modeled, something that the Guidelines implicitly recognize. In particular, wireless phones are not designed for a child’s play since the “play” activities of pushing buttons and making sounds on a wireless phone will originate a call on a wireless network, at a minimum tying up network resources and generating usage charges, and in the worst case, completing a 9-1-1 call to a Public Safety Answering Point.

- ***Practical Considerations***

Finally, in addition to the criteria set forth above, practical considerations indicate that wireless telephones are not primarily intended for use by children 12 years and under. As discussed above, wireless service entails the regular payment of money -- not the conduct of

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<sup>9</sup> CPSC, “AGE DETERMINATION GUIDELINES: Relating Children’s Ages To Toy Characteristics and Play Behavior” (Smith, T., ed.) (U.S. Consumer Product Safety Commission, Sept. 2002), at 117, *available at* <http://www.cpsc.gov/BUSINFO/adg.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 118.

children contemplated by the CPSIA. The wireless telephone itself requires responsible care and is not designed for the rough and often careless treatment that younger children accord their toys. Finally, because a wireless telephone is an electronic device, it is not intended to get wet – either by being placed in a child’s mouth or otherwise. Wireless telephones are intended for use by responsible individuals, capable of adhering to important instructions and warnings concerning safe and proper use. All of these factors and considerations demonstrate that wireless telephones are not primarily intended for children 12 and under, as contemplated by Section 108.

## 2. Wireless Telephones Are Not Playthings

Wireless phones plainly are not intended “for use by the child when the child plays” as specified by Section 108(e)(1)(B). The additional essential requirement is that the product is intended for “play.” The staff’s guidance posted on the CPSC’s website reiterates that “[t]he use of the product by the child for play is a fundamental aspect” of the determination of what constitutes a “children’s toy” under Section 108.<sup>12</sup>

As the CPSC has recognized, the CPSIA does not define “play.”<sup>13</sup> In the absence of a statutory definition, the staff has looked to the dictionary definition of “play,” ultimately articulating the following language:

- “To occupy oneself in amusement, sport, or other recreation: children playing with toys”
- “Recreational activity; *especially*: the spontaneous activity of children”
- “Exercise or activity for amusement or recreation”<sup>14</sup>

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<sup>12</sup> CPSC FAQ Regarding Section 108: Products Containing Certain Phthalates, “How do you determine whether a product is a children’s toy for purposes of compliance with the phthalate limits?” *available at* <http://www.cpsc.gov/about/cpsia/faq/108faq.html#108q8> (viewed on March 25, 2009).

<sup>13</sup> CPSC Phthalates Meeting, held March 12, 2009, *video available at* <http://www.cpsc.gov/vnr/asfroot/phthalates03122009.asx> (definition of “play” discussed beginning at 8:22) (*last viewed on* March 23, 2009).

Given the ordinary and reasonable meaning of these words, these definitions of “play” simply do not apply to wireless telephones – whose primary function is communication. To the contrary, these definitions and the word “play” indicate action, exercise, activity and physical exertion. As to the first definition, the terms “amusement” and “sport” are qualified by the phrase “or other recreation.” While wireless telephones are not used in sports, the term “amusement” refers to activity that may be characterized as “recreation.” A wireless telephone does not qualify as recreation.

This is also made clear by the standard set forth in ASTM F963, which Congress has incorporated by reference into the CPSIA. The Commission staff has indicated that it plans to use the definition of toy in the ASTM F963-07 toy standard for guidance.<sup>15</sup> That standard defines “toy” as “any object designed, manufactured, or marketed as a *plaything* for children under 14 years of age.”<sup>16</sup> As set forth above, wireless telephones are designed and marketed as communications devices – and not as “*playthings*.” Under ASTM F963, they are not “toys.”

### **3. Wireless Telephones Are Not “Toys That Can Be Placed In A Child’s Mouth”**

The CPSIA considers a toy to be a “toy that can be placed in a child’s mouth” if “any part of the toy can actually be brought to the mouth and kept in the mouth . . . so that it can be sucked and chewed.” In addition, if any part of a toy is less than 5 cm in any dimension, then it can be

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<sup>14</sup> *Id.*; see also “CPSIA and PHTHALATES, Scope of Section 108,” presentation slides prepared by Celestine Kiss, CPSC Engineering Psychologist, at page 3, available at <http://www.cpsc.gov/about/cpsia/phthalates-kiss.pdf> (last viewed March 22, 2009).

<sup>15</sup> See CPSC FAQ Regarding Preemption, available at <http://www.cpsc.gov/about/cpsia/faq/preemption.html> (last viewed on March 25, 2009) (“The provision mandating the voluntary toy safety standard ASTM F963-07 as a mandatory consumer product safety standard is also preemptive although there Congress has provided a mechanism to grandfather in certain existing state laws on toy safety.”)

<sup>16</sup> *Id.* at 9:05 (emphasis added) (discussing ASTM F963); see also “CPSIA and PHTHALATES, Scope of Section 108,” presentation slides prepared by Celestine Kiss, CPSC Engineering Psychologist, at page 4, available at <http://www.cpsc.gov/about/cpsia/phthalates-kiss.pdf> (last viewed March 22, 2009).

mouthed. If the manufacturer determines that an article is a “toy” under Section 108 of the CPSIA, then the manufacturer must determine whether the toy can be mouthed.

As detailed above, wireless phones do not meet the criteria for a “children’s toy” as defined under Section 108 in the first instance. They are sophisticated communication devices, with complex circuitry required to connect to a carrier’s network, and plainly are not “toys” that can be “mouthed” as contemplated by the statute.

**4. The Staff Has Publicly Indicated The View That Wireless Telephones Are Not “Children’s Toys” Under Section 108**

At the March 12, 2009 CPSC Public Meeting on Phthalates, the issue of whether a wireless telephone should be considered a “children’s toy” under Section 108 was raised and addressed by the staff. Specifically, during the question and answer period of the meeting, the CPSC staff was directly asked whether they considered wireless telephones to be “children’s toys.” The staff, in our view, correctly responded that wireless phones should not be considered a “children’s toy” for purposes of the phthalates requirements under Section 108:

**Question:** “What happens to a cell phone that has games in it? Would that be a toy, or is that covered here?”

**Response:** (Michael Babich, PhD, CPSC Chemical Hazards Program Coordinator) “Well, I think a cell phone is primarily a phone and not a – that happens to have games. If its primary purpose is a toy like a video game, then it’s a toy.”

**Response:** (Joel Recht, Director, CPSC Division of Chemistry): “There’s also the question ‘is it primarily intended for children 12 and under?’ Most cell phones are not primarily intended for children 12 and under.

We submit that even without having the benefit of the additional and specific information supplied in these comments, the staff’s indication that wireless phones are not a “children’s toy” as contemplated under Section 108, with or without ancillary camera, music or game functions,

was -- and is -- the reasonable and correct determination. This determination is consistent with both the purpose and content of the CPSIA.

#### **IV. CONCLUSION**

CTIA appreciates the opportunity to submit these comments on a matter of utmost concern to our members and looks forward to working with the CPSC staff to address any questions or concerns the staff may have. We submit that ancillary options and colors and decorations attractive to younger people or the young at heart do not change the primary communications function and purpose of the phone. In other words, the use of bright colors or even cartoon characters as options for the external appearance of the product simply does not transform the wireless phone from a communications device into a “toy” intended for use when a child “plays.” Such a determination, in our view, would be contrary to reason and inconsistent with the intent and purpose of Section 108 of the CPSIA. For all of the reasons stated, CTIA respectfully urges the staff to make clear that wireless phones are communications devices that are not “children’s toys” subject to the phthalates requirements of Section 108.

Respectfully submitted,



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