United States
CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

VOTE SHEET

DATE: July 20, 1998

TO : The Commission
Sadye E. Dunn, Secretary

FROM : Jeffrey S. Bromme, General Counsel
Stephen Lemberg, Asst. General Counsel
Harleigh Ewell, Attorney, GCRA (Ext. 2217) HC

SUBJECT: Regulating Child-Play Risks of Multi-Purpose Lighters Under the Consumer Product Safety Act.

The Office of the General Counsel concludes that the most appropriate statute for regulating risks associated with the fact that young children can operate multi-purpose lighters is the Consumer Product Safety Act ("CPSA"). Attached is a draft notice of proposed rulemaking ("NPR") that would propose the Commission's determination, pursuant to section 30(d) of the CPSA, that it is in the public interest to regulate this risk under the CPSA. 15 U.S.C. § 2079(d). Please indicate your vote on the following options.

I. ISSUE A NPR TO REGULATE MULTI-PURPOSE LIGHTERS UNDER THE CPSA. Please check the relevant option(s) below.

____ 1. APPROVE THE ATTACHED DRAFT FEDERAL REGISTER NOTICE WITHOUT CHANGE.

____ 2. PUBLISH THE DRAFT FEDERAL REGISTER NOTICE WITH CHANGES (please specify).

____ 3. OTHER (please specify).

_____ (Signature)

_____ (Date)

NOTE: This document has not been reviewed or accepted by the Commission.
Initial HC Date 7/20/98

CPSA 6 (b)(1) Cleared
7/20/98
No Mfrs/PrvtLblrs or Products Identified

II. TAKE OTHER ACTION (please specify).

_____ _____
(Signature) (Date)

Comments/Instructions:

DRAFT

Billing Code 6355-01P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1145

Rule to Regulate Under the Consumer Product Safety Act Risks of Injury Associated with Utility Lighters That Can Be Operated by Children

AGENCY: Consumer Product Safety Commission.

ACTION: Proposed rule.

SUMMARY: Elsewhere in this issue of the **FEDERAL REGISTER**, the Commission proposes a safety standard for utility lighters to reduce risks of injury that are associated with the lighters because they can be operated by young children. In this notice, the Commission proposes to determine by rule, under section 30(d) of the Consumer Product Safety Act, that it is in the public interest to issue the safety standard, or to take any other regulatory action to address risks of injury that are associated with utility lighters due to the fact that they can be operated by children, under the Consumer Product Safety Act, rather than under the Federal Hazardous Substances Act or the Poison Prevention Packaging Act.

DRAFT

DATE: Comments on the proposed rule should be received by [insert date that is 30 days after publication in the **FEDERAL REGISTER**].

ADDRESSES: Comments should be mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, or delivered to the Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East-West Highway, Bethesda, Maryland 20814-4408, telephone (301)504-0800. Comments may also be filed by telefacsimile to (301) 504-0127 or by email to cpsc-os@cpsc.gov. Comments should be captioned "Utility Lighters: CPSA 30(d) Rule."

FOR FURTHER INFORMATION CONTACT: Concerning legal aspects: Harleigh Ewell, Attorney, Office of the General Counsel, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301)504-0980, ext. 2217.

Concerning the proposed Safety Standard for Utility Lighters: Barbara Jacobson, Project Manager for Utility Lighters, Consumer Product Safety Commission, Washington, DC 20207; telephone (301)504-0477, ext. 1206; email bjacobson@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. INTRODUCTION

The Commission proposes to determine by rule that it will regulate those risks of death and injury that are associated with

4

utility lighters, and that are due to the fact that the lighters can be operated by young children, under the Consumer Product Safety Act ("CPSA"), 15 U.S.C. 2051-2084. Young children do not appreciate all of the consequences of using the product. Those consequences can include the ignition of clothing and other articles in the household, and may result in injury or death of the child operating the utility lighter, or other persons. These risks will be regulated under the CPSA, rather than under the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. 1261-1277, or the Poison Prevention Packaging Act ("PPPA"), 15 U.S.C. 1471-1476.

Section 30(d) of the CPSA, 15 U.S.C. 2079(d), provides that a risk of injury associated with a consumer product that could be eliminated or reduced to a sufficient extent by action under the FHSA or the PPPA may be regulated under the CPSA only if the Commission, by rule, finds that it is in the public interest to regulate such a risk of injury under the CPSA. Elsewhere in this issue of the **FEDERAL REGISTER**, the Commission is proposing a rule under the CPSA that will impose child-resistance requirements on utility lighters.

The Commission recognizes that it might be possible to adequately reduce those risks by action taken under the FHSA or the PPPA. Nevertheless, the Commission has determined that it is in the public interest to regulate those risks of injury under the CPSA rather than the FHSA or the PPPA because the authority

5

of the CPSA is more appropriate to address risks of injury associated with a mechanical, flame-producing device than are the authorities of the FHSA or the PPPA.

B. BACKGROUND

Utility lighters, also known as multi-purpose lighters, are defined as follows:

(b)(1) "Utility lighter," (also known as grill lighter, fireplace lighter, multi-purpose lighter, or gas match) means: a hand-held, self-igniting, flame-producing product that operates on fuel and is used by consumers to ignite items such as candles, fuel for fireplaces, charcoal or gas-fired grills, camp fires, camp stoves, lanterns, fuel-fired appliances or devices or pilot lights.

(2) The following products are not utility lighters:

(i) Devices intended primarily for igniting smoking materials that are within the definition of "lighter" in the safety standard for cigarette lighters (16 CFR 1210.2(c)).

(ii) Devices containing more than 10 oz. of fuel.

(iii) Devices intended, or marketed, primarily for activities such as soldering, brazing, or welding.

(iv) Matches.

In the FEDERAL REGISTER of January 16, 1997, the Commission published an advance notice of proposed rulemaking ("ANPR") to begin a proceeding for development of requirements for utility

6

lighters to address risks of injuries from fires started by children playing with utility lighters. 62 FR 2327.

The CPSC's staff has identified 158 fires occurring since January 1988 that were started by children under age 5 who were playing with utility lighters. These fires resulted in a total of 23 deaths and 58 injuries.

Of the statutes administered by the CPSC, the CPSA, the FHSA, and the PPPA provide authority for a child-resistance requirement for utility lighters. The possible regulatory options include issuing a consumer product safety standard under provisions of the CPSA, a banning rule under provisions of the FHSA, and a rule to establish requirements to make utility lighters "significantly difficult for children under five years of age" to operate under provisions of the PPPA.

C. STATUTORY AUTHORITY

1. *The Consumer Product Safety Act*. A utility lighter is a "consumer product" as that term is defined by section 3(a)(1) of the CPSA, 15 U.S.C. 2052(a)(1), because it is an article that is produced or distributed for sale to consumers for use in or around a household or school, in recreation, or otherwise. Sections 7 and 9 of the CPSA, 15 U.S.C. 2056, 2058, authorize the Commission to issue a consumer product safety standard consisting of labeling or performance requirements for a consumer product if those requirements are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with a consumer product."

Section 14(a) of the CPSA, 15 U.S.C. 2063(a), requires each manufacturer of a consumer product that is subject to a consumer product safety standard to issue a certificate of compliance stating that the product conforms to all applicable consumer product safety standards. Section 14(c) of the CPSA, 15 U.S.C. 2063(c), requires that the certificate of compliance must be based upon a test of each product or a "reasonable testing program." Section 14(b) of the CPSA, 15 U.S.C. 2063(b), also authorizes the Commission to issue rules to prescribe a reasonable testing program. Section 14(c) of the CPSA authorizes the Commission to issue rules requiring labels containing the date and place of manufacture and a suitable identification of the manufacturer, unless the product bears a private label. In that case, the label shall identify the private labeler and contain a code mark that will permit the seller of the product to identify the manufacturer upon the request of the purchaser.

Section 16(b) of the CPSA, 15 U.S.C. 2065(b), authorizes the Commission to issue rules requiring manufacturers to maintain records of the testing specified in any rule prescribing a reasonable testing program. Section 9(g)(2) of the CPSA, 15 U.S.C. 2058(g)(2), authorizes the Commission to issue rules prohibiting the stockpiling of products that are subject to a consumer product safety rule. Stockpiling means the manufacturing or importing of a product between the date of promulgation of the consumer product safety rule and its effective date at a rate

8

that is established by the rule and is significantly greater than the rate at which such product was produced or imported during a specified base period ending before the promulgation of the consumer product safety rule.

2. *The Federal Hazardous Substances Act*. Under the FHSA, in order to be a hazardous substance, a product must be toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or capable of generating pressure.[1] Butane or petroleum distillate fuel contained within a utility lighter meets the definition of "hazardous substance" given in section 2(f)1(A) of the FHSA, 15 U.S.C. 1261(f)1(A), because it is "flammable," and in some cases is "toxic" or "generates pressure," and may cause substantial personal injury or illness as a proximate result of customary or reasonably foreseeable use. Utility lighters that contain fuel when sold to consumers are subject to the labeling provisions of section 2(p) of the FHSA, 15 U.S.C. 1261(p), because they contain a hazardous substance that is intended or packaged in a form suitable for use in the household.

Section 3(b) of the FHSA, 15 U.S.C. 1262(b), authorizes the Commission to issue rules to prescribe special labeling requirements for hazardous substances intended for use in the

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[1]Additional hazards can be addressed for children's products. Utility lighters, however, are not intended for use by children within the meaning of the FHSA.

household, if the Commission determines that the labeling specified by section 2(p) of the FHSA is not adequate to protect the public health and safety in view of the special hazard presented by that substance.

Section 2(q)(1)(B) of the FHSA, 15 U.S.C. 1261(q)(1)(B), authorizes the Commission to issue a rule banning a hazardous substance intended for use in the household if the Commission determines that, notwithstanding any labeling which is or could be required by the FHSA, the degree or nature of the hazard is so great that protection of the public health and safety can be adequately served only by keeping the product out of channels of interstate commerce. A banning rule issued under section 2(q)(1)(B) of the FHSA could take the form of a conditional ban: that is, a rule banning all utility lighters that do not meet certain performance or design requirements specified in the rule.

3. *The Poison Prevention Packaging Act.* Sections 2, 3, and 5 of the PPPA, 15 U.S.C. 1471, 1472, and 1474, authorize the Commission to issue rules to require packaging that is "significantly difficult" for children younger than 5 years of age to open, or "obtain a toxic or harmful amount" from, any "hazardous substance" as that term is defined in the FHSA. To issue such a rule, the Commission must make and support findings that child-resistant packaging is required to protect children from serious personal injury or illness from "handling, using, or ingesting" the substance.

A utility lighter meets the definition of the term "package" set forth in section 2(3) of the PPPA, 15 U.S.C. 1471(3), because it is the "immediate container" of a hazardous substance. However, Section 4(a) of the PPPA, 15 U.S.C. 1473(a), provides that, for the purpose of making any substance that is subject to requirements for child-resistant packaging available to elderly or handicapped persons, the manufacturer may package that substance in conventional packaging in one size, provided that (1) the substance is also supplied in child-resistant packaging; and (2) the conventional packaging is labeled with the statement "This package for households without young children."

D. CHOICE OF STATUTE

The Commission has preliminarily determined that the CPSA is the most appropriate statute to address risks of injury associated with utility lighters that can be operated by children. Those risks of injury arise because utility lighters are mechanical devices intended to produce flame and can be operated by children.

The CPSA includes provisions authorizing the Commission to issue performance and labeling requirements applicable to utility lighters when such requirements are "reasonably necessary" to eliminate or reduce an unreasonable risk of injury associated with that product. This authority is suitable for issuing requirements to address hazards associated with young children starting fires with utility lighters.

The CPSA also authorizes the Commission to issue certification rules for products subject to a consumer product safety standard. Such rules may contain a prescribed testing program upon which the certificate of the manufacturer or private labeler is based. The effectiveness of the rule for utility lighters that is proposed elsewhere in this issue of the **FEDERAL REGISTER** depends in large part on the testing conducted by the manufacturer under the certification rule. It is possible that similar testing requirements could be promulgated under the authority of section 10(a) of the FHSA, 15 U.S.C. 1269(a), that the Commission may issue "regulations for the efficient enforcement" of the FHSA. However, the authority of the CPSA is explicit in this regard and, thus, is preferable.

The Commission has preliminarily determined that a stockpiling rule is in the public interest because it will help ensure the effectiveness of any standard for utility lighters. Neither the FHSA or the PPPA explicitly authorizes such a rule.

The FHSA includes provisions that authorize the Commission to require special labeling for, and in some circumstances to ban, a household product that contains or consists of a "hazardous substance." The FHSA authorizes the Commission to regulate utility lighters because they are containers of lighter fuel which is a "hazardous substance" as that term in defined in the FHSA. However, no provision of the FHSA expressly authorizes the Commission to address a hazard that is associated with the

12

mechanical operation of a utility lighter as a flame-producing device. The changes needed to reduce the risk of child-play fires also involve the mechanical characteristics of the lighter's operating mechanism. Thus, the CPSA is a more appropriate statute for regulating the mechanical risk of child resistance.

Under the PPPA, the Commission may issue a rule requiring the "package" -- that is, the utility lighter -- to be "significantly difficult" for children younger than 5 years of age "to open or obtain a toxic or harmful amount of the substance contained therein." However, the ability of young children "to open" the utility lighter or "obtain a toxic or harmful amount" of the fuel in the utility lighter is not the risk of injury associated with utility lighters that is under consideration by the Commission. Rather, it is the risk of death and injury from fires started by children with utility lighters. This risk arises from the mechanical operation of the utility lighter, and from the ability of young children to manipulate the utility lighter to produce a flame.

Additionally, the PPPA allows the manufacturer of a substance subject to special-packaging requirements to use packaging that is not child-resistant if (1) the substance is also distributed in child-resistant packages and (2) the packages that are not child resistant are labeled "This package for households without young children." This provision, by allowing the marketing of non-child-resistant utility lighters of the

types covered by the rule, could significantly impair the effectiveness of the rule to reduce the risk of injury.

Therefore, for the reasons given above, the Commission is proposing a rule that would determine that it is in the public interest to regulate under the CPSA any risks of injury associated with the fact that utility lighters can be operated by young children. If issued, this finding will be codified at 16 CFR 1145.17. The Commission proposes that any final rule shall become effective immediately upon its publication in the **FEDERAL REGISTER**. 5 U.S.C. 553(d)(3). (There is a proposed 1-year delayed effective date for the safety standard itself.)

Section 30(d) of the CPSA provides that the comment period cannot exceed 30 days for a rule finding that it is in the public interest to regulate under the CPSA rather than another act. 15 U.S.C. 2079(d). Accordingly, comments should be received by the Commission by [insert date that is 30 days after publication].

D. IMPACT ON SMALL ENTITIES

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 603, requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis of the impact of any proposed rule on small entities, including small businesses. A final regulatory analysis is required when a final rule is issued. 5 U.S.C. 604. The RFA further provides, however, that an agency is not required to prepare a regulatory flexibility analysis if the agency certifies that the rule will

not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). The regulation issued below does not by itself impose any legal or other obligation on any person or firm. The rule would simply express the Commission's determination that any action taken to eliminate or reduce risks of injury associated with utility lighters that can be operated by children will be taken under the authority of the CPSA rather than the FHSA or the PPPA. In issuing the safety standard for utility lighters, the Commission will follow all applicable provisions of the CPSA. The provisions of the RFA also apply to the safety standard, and the Commission has prepared an initial certification that the Safety Standard for Utility Lighters, if issued, will not have a significant economic impact on a substantial number of small entities. However, because a final rule under section 30(d) of the CPSA would impose no obligation on any person or firm, the Commission hereby certifies that the 30(d) rule, if issued, will not have a significant economic impact on a substantial number of small entities.

F. ENVIRONMENTAL CONSIDERATIONS

The rule proposed below falls within the categories of Commission action described in 16 CFR 1021.5(c) as having little or no potential for affecting the human environment, and the Commission has no information that would indicate otherwise. Therefore, neither an environmental assessment nor an environmental impact statement is required.

G. CONCLUSION

After consideration of the information discussed above, the Commission finds that if regulatory action is needed to address risks of injury associated with utility lighters due to the fact that they can be operated by children, it is in the public interest to regulate such risks under the CPSA rather than the FHSA or the PPPA. This determination does not affect other hazards associated with utility lighters, such as that some lighters are subject to FHSA labeling because the lighters contain fuel that is flammable or toxic or generates pressure. Provisions of the FHSA and the PPPA authorize the Commission to address risks of injury associated with the fuel contained within a utility lighter because the fuel is a "hazardous substance" as that term is defined by the FHSA. However, a utility lighter is more than a container or a package of a hazardous substance. It is a device that incorporates a mechanism for igniting the fuel and is intended to be operated to produce a flame. The Commission determines that the provisions of the CPSA are the most appropriate to address risks of injury associated with a mechanical device due to the fact that it can be operated by children to produce flame. The Commission also determines that it is in the public interest to regulate this risk associated with utility lighters under the CPSA because the certification and stockpiling provisions in the proposed rule are necessary to help

16

ensure the effectiveness of the rule. Such provisions are most appropriate, and only explicitly available, under the CPSA.

List of Subjects in 16 CFR Part 1145

Administrative practice and procedure, Consumer protection, Fire protection, Infants and children, Packaging and containers, Utility lighters.

For the reasons given above, the Commission amends Title 16, Chapter II, Subchapter B, of the Code of Federal Regulations as follows:

PART 1145--REGULATION OF PRODUCTS SUBJECT TO OTHER ACTS UNDER THE CONSUMER PRODUCT SAFETY ACT

1. The authority citation for Part 1145 is amended to read as follows: Authority: 15 U.S.C. 2079(d).
2. A new § 1145.17 is added to read as follows:

§ 1145.17 Utility lighters that can be operated by children; risks of death or injury.

(a) The Commission finds that it is in the public interest to regulate under the Consumer Product Safety Act any risks of injury associated with the fact that utility lighters can be operated by young children, rather than to regulate such risks

under the Federal Hazardous Substances Act or the Poison Prevention Packaging Act of 1970.

(b) Therefore, if the Commission finds regulation to be necessary, risks of death or injury that are associated with utility lighters because the lighters can be operated by young children shall be regulated under one or more provisions of the Consumer Product Safety Act. Other risks associated with such lighters, and that are based solely on the fact that the lighters contain a hazardous substance, shall continue to be regulated under the Federal Hazardous Substances Act.

Dated: _____, 1998.

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Sadye E. Dunn, Secretary,

Consumer Product Safety Commission