



UNITED STATES
 CONSUMER PRODUCT SAFETY COMMISSION
 4330 EAST WEST HIGHWAY
 BETHESDA, MD 20814

BALLOT VOTE SHEET

DATE: JUL 23 2009

TO: The Commission
 Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel *CAF*
 Jacqueline Elder, Acting Executive Director *je*

FROM: Philip Chao, Assistant General Counsel *PC*
 Hyun S. Kim, Attorney, OGC *ASK*

SUBJECT: Children's Products Containing Lead; Final Interpretative Rule Providing Guidance on Inaccessibility

Ballot Vote Due: JUL 30 2009

Attached are the following documents for Commission consideration: 1) draft *Federal Register* notice, "Children's Products Containing Lead; Interpretative Rule on Inaccessible Component Parts"; 2) staff memorandum "Consumer Product Safety Improvement Act of 2008 (CPSIA) Guidance for Evaluating Accessibility of Lead-Containing Component Parts"; and 3) staff memorandum "Response to Public Comments: Inaccessibility."

Please indicate your vote on the following options.

- I. Approve publication of the draft final interpretative rule on inaccessibility in the *Federal Register* without change.

 (Signature)

 (Date)

- II. Do not approve publication of the draft final interpretative rule on inaccessibility in the *Federal Register*.

 (Signature)

 (Date)

III. Publish the draft final interpretative rule on inaccessibility in the *Federal Register* with changes.
(Please specify.)

(Signature)

(Date)

IV. Take other action.
(Please specify.)

(Signature)

(Date)

Attachments:

Draft *Federal Register* notice - Children's Products Containing Lead; Interpretative Rule on Inaccessible Component Parts;
Staff Memorandum - *Consumer Product Safety Improvement Act of 2008 (CPSIA) Guidance for Evaluating Accessibility of Lead-Containing Component Parts*, Kristina M. Hatlelid, Ph.D., M.P.H., dated July, 2009;
Staff Memorandum – *Response to Public Comments: Inaccessibility*, Kristina M. Hatlelid, Ph.D., M.P.H., dated July, 2009.

Attachment 1

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

**Children's Products Containing Lead; Interpretative Rule on
Inaccessible Component Parts**

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission ("Commission") is issuing a final rule providing guidance as to what product components or classes of components will be considered to be "inaccessible." Section 101(b)(2) of the Consumer Product Safety Improvement Act ("CPSIA") provides that the lead limits will not apply to any component part of a children's product that is not accessible to a child through normal and reasonably foreseeable use and abuse. Section 101(b)(2)(B) of the CPSIA requires the Commission to issue, by August 14, 2009, a rule providing guidance with respect to what product components or classes of components will be considered to be inaccessible. This final rule satisfies the Commission's statutory obligation.

EFFECTIVE DATE: This interpretative rule is effective on August 14, 2009.

FOR FURTHER INFORMATION CONTACT: Kristina Hatlelid, Ph.D., M.P.H., Directorate for Health Sciences, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; e-mail khatlelid@cpsc.gov; telephone 301-504-7254.

SUPPLEMENTARY INFORMATION:

A. Background

The CPSIA establishes specific lead limits in children's products. Section 101(a) of the CPSIA provides that, as of February 10, 2009, products designed or intended primarily for children 12 and younger may not contain more than 600 parts per million (ppm) of lead. After August 14, 2009, products designed or intended primarily for children 12 and younger cannot contain more than 300 ppm of lead. On August 14, 2011, the limit may be further reduced to 100 ppm, unless the Commission determines that it is not technologically feasible to meet this lower limit. Section 3(a)(16) of the Consumer Product Safety Act, as amended by section 235(a) of the CPSIA, defines "children's product" as a "consumer product designed or intended primarily for children 12 years of age or younger."

B. Statutory Authority

Section 101(b)(2) of the CPSIA provides that the lead limits do not apply to component parts of a product that are not accessible to a child. This section specifies that a component part is not accessible if it is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product including swallowing, mouthing, breaking, or other children's activities, and the aging of the product, as determined by the Commission. Paint, coatings, or electroplating may not be considered to be a barrier that would render lead in the substrate to be inaccessible to a child under section 101(b)(3) of the CPSIA.

C. Notice of Proposed Rulemaking

In the FEDERAL REGISTER of January 15, 2009 (74 FR 2439), the Commission published a proposed interpretative rule providing guidance with respect to what product components or classes of components will be considered to be inaccessible. As stated in the preamble to the proposed interpretative rule (74 FR at 2440), the Commission preliminarily determined that:

- an accessible component part of a children's product is one that a child may touch;

- an inaccessible component part is one that is located inside the product and not capable of being touched or mouthed by child, whether or not such part is visible to a user of the product;
- an inaccessible part is one that may be enclosed in any type of material, e.g., hard or soft plastic, rubber or metal. However, the Commission requested comments specifically on the use of fabric as a barrier, and the impact of aging on a children's product;
- to assess whether a part is inaccessible, the accessibility probes defined in the Commission's existing regulations for evaluating accessibility of sharp points or sharp metal or glass edges (16 CFR 1500.48 and 1500.49) could be used. An accessible lead-containing component part would be defined as one that contacts any portion of the specified segment of the accessibility probe. An inaccessible lead-containing component part would be defined as one that cannot be contacted by any portion of the specified segment of the accessibility probe; and
- use and abuse tests are appropriate for evaluating whether lead-containing component parts of a product become accessible to a child during normal and

reasonably foreseeable use and abuse of the product by a child. The purpose of the tests is to simulate use and damage or abuse of a product by children and to expose potential hazards that might result from use and abuse. 16 CFR 1500.50-1500.53.

D. Discussion of Comments to the Proposed Rule and CPSC's Responses

The Commission received comments from trade associations, testing services, consumer groups, electronic products associations, youth recreational vehicle companies, and textile groups. In general, most comments, particularly those from consumer groups, agreed with most of the proposed interpretative rule, whereas other comments, particularly those from industry, sought a narrower or different interpretation of "accessibility."

1. Summary of the Law - Section 1500.87(a)

Proposed § 1500.87(a), in essence, summarized the lead limits in section 101 of the CPSIA and how, over time, the limits decrease from 600 ppm to 100 ppm by August 14, 2011 unless the Commission determines that it is not technologically feasible to meet this lower limit. Proposed § 1500.87(a) also stated that, "Paint, coatings or electroplating may not be considered a barrier that would

make the lead content of a product inaccessible to a child.”

We did not receive any comment on this provision. However, on our own initiative, we deleted the sentence regarding paint, coatings, and electroplating because the identical sentence appears in § 1500.87(b).

2. Physical Accessibility - Section 1500.87(b)

Proposed § 1500.87(b) explained that the lead limits do not apply to component parts of a product that are not accessible to a child. The proposal explained that a component part is not accessible if it is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product including swallowing, mouthing, breaking, or other children’s activities, and the aging of the product, as determined by the Commission. It added that paint, coatings, or electroplating may not be considered to be a barrier that would render lead in the substrate to be inaccessible to a child.

Some commenters agreed with the Commission’s determination that accessibility is defined in the statute as physical access and stressed that exposure to lead such as through leaching is not what was intended.

However, other commenters said the Commission should explore other inaccessibility scenarios, not just physical inaccessibility, including considering whether children using the product could be exposed to the lead that is present. Similarly, other commenters stated that the physical contact is only an example of accessibility and said that evaluations of accessibility focus on whether parts are ingestible or mouthable, or alternatively, consider whether a child will actually touch the part during foreseeable use or abuse of the product.

We decline to revise the rule as suggested by the comments. The statute refers to physical accessibility of component parts of products, and this reference is not simply an example of how accessibility might be defined. The proposed interpretive rule followed the statutory language for determining inaccessibility. Section 101(b)(2)(A) of the CPSIA provides that, “[a] component part is not accessible under this subparagraph *if such component part is not physically exposed* by reason of a sealed covering or casing *and does not become physically exposed* through reasonably foreseeable use and abuse of the product” (emphasis added). The statute goes on to state, “[r]easonably foreseeable use and abuse shall include to, [sic] swallowing, mouthing, breaking, or other children’s

activities, and the aging of the product.” *Id.* Swallowing and mouthing are examples of use and abuse actions to be considered, but the language of the statute does not limit consideration to ingestible or mouthable products. Courts have routinely found that use of the word “including” in a statute before a list of items demonstrates that the list is illustrative, and not meant to be exhaustive. See, e.g., *West v. Gibson*, 527 U.S. 212, 217 (1999) (holding that “including” in section 717(b) of Title VII of the Civil Rights Act which sets forth the EEOC’s authority to enforce the antidiscrimination standard “makes clear that the authorization is not limited to the specified remedies there mentioned...”); *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) (holding that “the term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.”); *Puerto Rico Maritime Shipping Auth. v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) (“It is hornbook law that the use of the word ‘including’ indicates that the specified list ... that follows is illustrative, not exclusive.” (internal citation omitted)).

Other children's activities" could reasonably include touching, grasping, and handling that can lead to physical exposure to the lead containing parts. Accordingly, the final rule construes accessibility to be physical contact with lead-containing component parts, and mouthing and swallowing, along with touching, among the children's activities that can result in contact with the lead-containing parts.

3. Testing and certification requirements for inaccessible components parts.

Some commenters recommended that the rule explicitly state that inaccessible component parts are relieved of the testing requirement of section 102 of the CPSIA. One commenter said that the rule should state clearly that no certificate is required when no provision of CPSIA or any other rule or standard applies. In addition, the commenters requested that the rule provide that third-party testing is not required to demonstrate compliance with section 101 of the CPSIA when the lead in the product is deemed to be inaccessible.

In general, inaccessible component parts do not have to comply with the lead content limits or be tested and certified as to lead content. The accessible portions of a

product, unless specifically excluded from lead content requirements or the testing requirements, would require testing and certification to the lead content limits.

Currently, third-party testing and certification is required for toys and children's products under the small parts regulations (16 CFR Part 1501 and 1500.50-53 and 16 CFR 1500(18)(a)(9)), as well as under the toy safety standard, ASTM-F963. Accordingly, some of the tests proposed for evaluating accessibility are already being conducted by manufacturers for small parts evaluations. In addition, toys and games that are or contain small parts that are intended for use by children from 3 to 6 years old are subject to the labeling requirements of 16 CFR 1500.19. With respect to other children's products that do not fall within the scope of the small parts regulations, but that contain inaccessible parts, the manufacturer currently is not required to provide third-party testing to demonstrate inaccessibility. The Commission intends to address certification requirements and the establishment of protocols and standards for ensuring that children's products are tested for compliance with applicable children's products safety rules in a separate rulemaking.

4. Rulemaking Authority - Section 1500.87(c)

Proposed § 1500.87(c) cited section 101(b)(2)(B) of the CPSIA as the legal authority to promulgate the interpretative rule and stated that the rulemaking is to be conducted by August 14, 2009.

We received no comments on this provision and have finalized it without change.

5. Use of accessibility probes - Section 1500.87(d).

Proposed § 1500.87(d) stated that:

The accessibility probes specified for sharp points or edges under the Commission's regulations at 16 CFR 1500.48-1500.49 will be used to assess the accessibility of lead-component parts of a children's product. A lead-containing component part would be considered accessible if it contacts any portion of the specified segment of the accessibility probe. A lead-containing component part would be considered inaccessible if it cannot be contacted by any portion of the specified segment of the accessibility probe.

In general, most commenters agree with the proposed approach of using accessibility probes to evaluate whether certain parts of a product might be accessible to a child. However, one commenter stated that probes should be unnecessary for products that are sealed and have no accessible cavities.

The Commission agrees that, for products that are effectively sealed so that there is no point of entry to any internal parts that contain lead, use of the probes would not be necessary to demonstrate that the parts are

not accessible. However, it would be necessary to test the material which encases or encloses the inaccessible lead-containing part, unless it is a material that the Commission has specifically determined falls under the lead content limits of the CPSIA. The Commission established procedures for a Commission determination that a specific material or product does not exceed the lead content limits specified under section 101(a) of the CPSIA (74 FR 10475 (March 11, 2009)). In addition, the Commission has issued a notice of proposed rulemaking regarding lead content limits on certain materials or products which have been preliminarily determined to fall below the lead content limits of the CPSIA (74 FR 2433 (January 15, 2009)).

Some commenters stated that accessibility probes could be used to evaluate products, but they questioned whether existing test fixtures are appropriate for the entire age range of children's products. The commenters argued that older children have developed their motor skills and have increased agility compared to younger children for which the probes were designed.

In considering reasonably foreseeable use and abuse, the Commission finds that the accessibility probes are appropriate for testing the wider range of products for

children through age twelve years. The probes are used to evaluate possible gaps or holes in a product through which a young child's might physically contact a lead-containing component part. Because older children's larger fingers generally would have more limited access to gaps that would be accessible to smaller children, the Commission believes that, in most cases, the probes will indicate whether access is possible.

Some commenters claimed that the use of accessibility probes for evaluating accessibility is inappropriate; these commenters said that the proper method for determining inaccessibility would evaluate mouthing and swallowing behaviors. The commenters argued that the possibility of simple physical contact with a lead-containing component part does not necessarily lead to mouthing or swallowing, or that the lead-containing component parts are not touched during normal and reasonably foreseeable use and abuse of the component part.

We disagree with the comments. The statute provides for inaccessibility of component parts based on physical exposure to the part. Therefore, the Commission must assess accessibility based on whether a child may touch a component part that contains lead above the lead limits,

not simply on whether a child might ingest or mouth a part of a product. In addition, we have deemed that, in the context of an exclusion request for all-terrain vehicles, the normal and reasonably foreseeable contact with lead-containing parts by children using motorized recreational vehicles would not be extensive but would occur. For example, in the regular use of the product, users will have to touch the brake and clutch levers and the throttle controls. It is reasonable to assume that children will not be washing their hands immediately after touching these parts. Average users (6 - 12 year olds) do not typically engage in hand-to-mouth behavior; however, it is not unreasonable to assume they may wipe their mouth or face with their hands while using or right after using the recreational vehicle. (See Human Factors Response to Request for Motorized Recreational Vehicles Group Request for Exclusion from Lead Limits under Section 101(b)(1) of the Consumer Product Safety Improvement Act dated April, 2009.) Accordingly, the Commission finds that the accessibility probes provide an objective means for evaluating accessibility based on such physical access.

Some commenters asked that we clarify that access to a component containing smaller components that may, themselves, contain lead-containing parts does not mean

that a lead-containing component is accessible if the lead is fully enclosed within the larger component which can be touched by an accessibility probe.

The Commission interprets a lead-containing component part to mean the material used to construct the part includes lead in its formulation, not that the part contains smaller parts that contain lead. For example, assume that the product is a sealed ball made of plastic and that the sealed ball has a lead content that complies with the CPSIA lead limits. Inside the sealed ball are metal beads that contain lead. In this example, the metal beads are lead-containing component parts, but the ball is not. If the sealed ball does not provide access to the beads inside it, through a hole or a crevice, or after being subject to use and abuse testing, then the lead-containing parts would be deemed inaccessible. The Commission also notes that, for certain electronic devices that contain accessible lead-containing parts, there is an interim final rule which provides exemptions for such parts for which it is not technologically feasible to comply with the lead content limits (74 FR 6990 (February 12, 2009)).

6. Use of use and abuse tests - section 1500.87(e) and (f).

Proposed § 1500.87(e) explained that the use and abuse tests at 16 CFR 1500.50–1500.53 (excluding the bite tests of 1500.51(c) and 1500.52(c)) will be used to evaluate accessibility of lead-containing component parts of a children’s product as a result of normal and reasonably foreseeable use and abuse of the product by children that are 18 months of age or less, over 18 months but not over 36 months of age, and over 36 months but not over 96 months of age.

Proposed § 1500.87(f) was similar to proposed § 1500.87(e), except that it referred to use and abuse tests at 16 CFR 1500.50–1500.53 (excluding the bite tests of 1500.51(c) and 1500.52(c)) intended for children aged 37–96 months being used to evaluate accessibility of lead-containing component parts of a children’s product as a result of normal and reasonably foreseeable use and abuse of the product by a child through 12 years of age.

In general, most commenters agreed with the proposed approach of using existing use and abuse tests to evaluate the normal use of toys and other articles intended for use by children as well as the reasonably foreseeable damage or abuse to which the articles may be subjected.

Some commenters agreed that the use and abuse tests are appropriate for evaluating whether ingestible or

mouthable parts might come loose from a product, but said that intentional disassembly or destruction by older children, including use of tools, should not be considered in evaluating accessibility. Other commenters questioned whether the tests are appropriate for older children given their increased strength and dexterity.

We acknowledge that older children have advanced motor skills compared to younger children. However, older children also have advanced cognitive skills and the ability to properly care for their belongings. For the purposes of evaluating product integrity, the Commission believes that the existing use and abuse tests are appropriate for revealing inherent characteristics or possible defects in products that could result in accessibility of components and will expose potential hazards that might result from use and abuse for most children's products.

The test methods in 16 CFR 1500.50-1500.53 are used to simulate the normal and reasonably foreseeable use, damage, or abuse of toys and other articles intended for children in three separate age groups. Accordingly, revised §§ 1500.87(e),(f), and (g) make clear that the use and abuse tests at 16 CFR 1500.50-1500.53 will be used to evaluate

accessibility of lead-containing component parts of a children's product for the specific age group the product is intended. In addition, § 1500.87(h) is revised to make clear that the test under § 1500.87(g) will apply to products intended for children that over 96 months through 12 years of age.

Accordingly, we have revised §§ 1500.87(e) through (h) to read as follows:

(e) For products intended for children that are 18 months of age or less, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.51 (excluding the bite test of 1500.51(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(f) For products intended for children that are over 18 months but not over 36 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.52 (excluding the bite test of 1500.52(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(g) For products intended for children that are over 36 months but not over 96 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.53 (excluding the bite test of 1500.53(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(h) For products intended for children over 96 months through 12 years of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.53 (excluding the bite test of 1500.53(c)) intended for children aged 37-96 months will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product by a child through 12 years of age.

7. The exclusion of the bite test from use and abuse testing.

Proposed § 1500.87(e) and (f) referred to the "bite tests of 1500.51(c) and 1500.52(c)."

Some commenters requested an explanation for the exclusion of the bite test. One commenter pointed out that the proposed rule excludes the bite test from 16 CFR

1500.51 and 1500.52, but not § 1500.53, and stated that the bite test from all three sections should be excluded.

Currently, the Commission does not use the bite test specified in the three CFR sections, as a result of a court case (*Clever Idea Co., Inc. v. Consumer Products Safety Commission*, 385 F. Supp. 688 (E.D. N.Y. 1974)) that questioned the appropriateness of this test. This requirement may be modified in a future proceeding.

Because the bite test currently is not applied as part of use and abuse testing in general, it will not be applied for the purposes of evaluating whether lead-containing component parts are accessible. Nevertheless, the exclusion of the bite test in 16 CFR 1500.53 was inadvertent in the proposed rule, and we have revised §§ 1500.87(g) and (h) to include a reference to 16 CFR 1500.53(c).

8. Fabric coverings used as barrier - section 1500.87(g).

Several commenters claimed that fabric coverings are appropriate barriers. Some commenters gave examples of a fabric-covered button or base of a zipper that would form a barrier to a lead-containing part, such as a metal button or zipper base, thus rendering it inaccessible to a child. The commenters said that such use of fabric must withstand

wear and tear and remain intact through the life of a garment. In addition, the commenters noted that fabrics in footwear applications must be durable and able to withstand abrasion and other abuse and must not wear out over the expected life of a shoe. They asserted that fabrics are barriers especially given that the use of tools is not to be considered in an accessibility evaluation. Another commenter said that fabric coverings surrounding the inner parts of mattresses and foundations are barriers for which there is no point of entry and which must withstand normal use of these products.

Conversely, other commenters stated that the Commission must evaluate the possibility that lead could leach from components that are fabric-covered and must evaluate the ability of fabric barriers to hold up to use and abuse.

Although test data was not submitted that specifically address the possibility of leaching of lead through fabric coverings, leaching involves a liquid dissolving a portion of a material or otherwise extracting a chemical from the material. Because fabrics, in general, cannot be considered to be impervious to liquids such as saliva and stomach acid, we believe that leaching of lead from an underlying material is possible. However, unlike other

children's products that have lead-containing components that are accessible, children will not touch the lead-containing component with the hands or fingers if the component is enclosed or encased in fabric. Thus, leaching of lead from such a product is not likely to occur except in the case of mouthing or swallowing an item that is completely encased or enclosed in fabric. Whether a fabric-covered product or a fabric-covered component part of a product can be mouthed or swallowed should be determined through appropriate testing.

The Commission has reviewed section 108 of the CPSIA, which addresses phthalate content of certain products, for a definition for toys that can be placed in a child's mouth. Section 108(e)(2)(B) of the CPSIA provides that "if a toy or part of toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth." Although the CPSIA provisions for lead apply to all children's products, not just toys, the definition in section 108 of the CPSIA is helpful in assessing whether a part of any children's product can be placed in a child's mouth. Accordingly, fabric-covered components that are used in children's products, including toys, should be evaluated for the potential to be placed in the mouth according to

this definition to assess whether the fabric-covered part is accessible.

The Commission believes that, in general, fabric coverings may be considered barriers to physical contact with underlying materials for products such as mattresses because they cannot be mouthed or swallowed. However, the appropriate use and abuse tests, such as for the integrity of seams, should be used to evaluate the coverings. Smaller items or small components of children's products should be evaluated for the potential for mouthing or swallowing using the small parts test. For fabric-covered children's products, an additional test to determine whether any part in one dimension is smaller than 5 centimeters should be performed to see if it can be placed in the mouth. If mouthing or swallowing of a component part could occur, the material beneath the fabric covering is considered to be accessible to a child. Therefore, the Commission has revised the final interpretative rule by adding a new § 1500.87(i) to explain that a children's product that is or contains a lead-containing part which is enclosed, encased, or covered by fabric and passes the appropriate use and abuse tests on such covers, is inaccessible to a child unless the product or part of the product in one dimension is smaller than 5 centimeters.

The Commission also has renumbered proposed § 1500.87(g), which pertained to the intentional disassembly or destruction of products by children, as § 1500.87(j).

9. Intentional disassembly and destruction - section 1500.87(i) (formerly section 1500.87(g))

Proposed § 1500.87(g) (now renumbered as § 1500.87(i)), explained that the intentional disassembly or destruction of products by children older than age 8 years by means or knowledge not generally available to younger children, including use of tools, will not be considered in evaluating products for accessibility of lead-containing components.

For the reasons stated in section D.6 of this preamble, we have retained the text for this provision without change, but have renumbered the provision as § 1500.87(i).

10. Miscellaneous Comments

Some commenters said that, if aging and wear and tear exposes lead-containing parts, the components should be considered accessible.

Conversely, other commenters said that, with respect to textile products, the necessary durability of such products already incorporates consideration of aging and wear and tear. Another commenter claimed that additional testing to

account for aging for their type of products does not need to be done, because the product lifespan of children's electronics is shorter than for other children's products, and aging leads to products becoming unusable.

Section 101(b)(2)(A) of the CPSIA provides that aging of the product may be considered in the evaluation of the accessibility of component parts. However, because of the wide range of products and product types subject to the lead content requirements of the CPSIA, the Commission believes that such evaluations are necessarily specific to individual products or product types and may not be generalized, on a one size fits all basis. Currently, the Commission does not have specific requirements on the effects of aging on children's products. Testing for aging on children's products is similar to normal use testing. Section 8.5 of ASTM-F963 provides that normal use testing would entail tests intended to simulate normal use conditions so as to ensure that hazards are not generated through normal wear and deterioration of the product. Such tests would be used to uncover hazards rather than to demonstrate the reliability of the toy. However, ASTM-F963 does not specify requirements because it would not be possible to define such requirements in view of the wide range of children's products in the marketplace. Since any

evaluation on the effects of aging on the integrity of product must be conducted on product by product basis, the Commission will continue to review the effects of aging of the integrity of the children's products and will issue further guidance on this issue in the future if it deems such guidance is necessary.

11. Compact disks and DVDs.

One commenter specifically requested that the final interpretive rule address compact disks and DVDs. These products are composed of acrylic polymer layers that encase the data part of the product. Because the law does not allow for coatings to be used as a barrier that would render lead in the substrate inaccessible to a child, this commenter asked that the rule state that the acrylic part of a disk is not a "coating." The commenter was concerned that if the acrylic polymer layer is not clearly determined to not be a coating, then manufacturers would have to test the layer of material within the polymer part of the product.

Acrylic polymer layers of a compact disk or DVD are not considered to be a coating. If the internal metallic layer of a disk is not accessible to a child, testing and certification would not be required. The Commission notes

that the issue of whether there is any lead in compact disks or DVDs has been raised in various proceedings. However, we have not received any test data or information regarding lead content in CDs or DVDs and would require further information before we can evaluate these products properly. Moreover, given the very large numbers of children's products in the market, an interpretative rule on accessibility is not the appropriate forum for the Commission to address such product-specific issues. Rather, the interpretative rule is intended to provide guidance to allow manufacturers of children's products to assess whether their own products or component parts of their products are inaccessible for purposes of section 101(b) (2) of the CPSIA. Product-specific requests should be made under the rule on procedures and requirements for a Commission determination or exclusion (74 FR 10475 (March 11, 2009)).

E. Effective Date

The CPSIA requires the Commission to promulgate a rule providing guidance on inaccessible component parts by August 14, 2009. Although interpretative rules do not require a particular effective date under the Administrative Procedure Act, 5 U.S.C. 553(d)(2), the Commission recognizes the need for providing the guidance

expeditiously. Accordingly, the interpretative rule will take effect on August 14, 2009.

List of Subjects in 16 CFR Part 1500

Consumer protection, Hazardous materials, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, and Toys.

F. Conclusion

For the reasons stated above, the Commission amends Title 16 of the Code of Federal Regulations as follows:

PART 1500 - HAZARDOUS SUBSTANCES AND ARTICLES:

ADMINISTRATION AND ENFORCEMENT REGULATIONS

1. The authority for part 1500 is amended to read as follows:

Authority: 15 U.S.C. 1261-1278, 122 Stat. 3016.

2. Add a new section 1500.87 to read as follows:

§ 1500.87 Children Products Containing Lead: Inaccessible Component Parts:

(a) The Consumer Product Safety Improvement Act (CPSIA) provides for specific lead limits in children's products. Section 101(a) of the CPSIA provides that by February 10, 2009, products designed or intended primarily for children 12 and younger may not contain more than 600 ppm of lead. After August 14, 2009, products designed or intended primarily for children 12 and younger cannot

contain more than 300 ppm of lead. On August 14, 2011, the limit may be further reduced to 100 ppm after three years, unless the Commission determines that it is not technologically feasible to have this lower limit.

(b) Section 101 (b)(2) of the CPSIA provides that the lead limits do not apply to component parts of a product that are not accessible to a child. This section specifies that a component part is not accessible if it is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product including swallowing, mouthing, breaking, or other children's activities, and the aging of the product, as determined by the Commission. Paint, coatings, or electroplating may not be considered to be a barrier that would render lead in the substrate to be inaccessible to a child.

(c) Section 101(b)(2)(B) of the CPSIA directs the Commission to promulgate by August 14, 2009, this interpretative rule to provide guidance with respect to what product components or classes of components will be considered to be inaccessible.

(d) The accessibility probes specified for sharp points or edges under the Commissions' regulations at 16 CFR 1500.48-1500.49 will be used to assess the

accessibility of lead-component parts of a children's product. A lead-containing component part would be considered accessible if it contacts any portion of the specified segment of the accessibility probe. A lead-containing component part would be considered inaccessible if it cannot be contacted by any portion of the specified segment of the accessibility probe.

(e) For products intended for children that are 18 months of age or less, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.51 (excluding the bite test of 1500.51(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(f) For products intended for children that are over 18 months but not over 36 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.52 (excluding the bite test of 1500.52(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(g) For products intended for children that are over 36 months but not over 96 months of age, the use and abuse

tests set forth under the Commission's regulations at 16 CFR 1500.53 (excluding the bite test of 1500.53(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(h) For products intended for children over 96 months through 12 years of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.53 (excluding the bite test of 1500.53(c)) intended for children aged 37-96 months will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(i) A children's product that is or contains a lead-containing part which is enclosed, encased, or covered by fabric and passes the appropriate use and abuse tests on such covers, is inaccessible to a child unless the product or part of the product in one dimension is smaller than 5 centimeters.

(j) The intentional disassembly or destruction of products by children older than age 8 years by means or knowledge not generally available to younger children, including use of tools, will not be considered in

evaluating products for accessibility of lead-containing components.

Dated: _____

Todd A. Stevenson, Secretary
Consumer Product Safety Commission

DRAFT

Attachment 2



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Memorandum

Date: **JUL 23 2009**

TO : The Commission
Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel *CAF*
Jacqueline Elder, Acting Executive Director *je*

FROM : Robert J. Howell, Assistant Executive Director, Office of Hazard Identification
and Reduction *RJH*
Kristina M. Hatfield, Ph.D., M.P.H., Toxicologist, Directorate for Health Sciences *KAA*

SUBJECT : Consumer Product Safety Improvement Act of 2008 (CPSIA) -- Guidance for
Evaluating Accessibility of Lead-Containing Component Parts

Introduction

CPSIA section 101(a) establishes limits for the lead content of any part of a children's product. Section 101(b)(2) states that the lead limits do not apply to component parts of a product that are not accessible to a child. This section specifies that a component part is not accessible if it is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product including swallowing, mouthing, breaking, or other children's activities, and the aging of the product.

Section 101(b)(2)(B) provides that the Commission must promulgate a rule providing guidance with respect to what product components or classes of components will be considered to be inaccessible. However, the Act places restrictions on the types of products or the characteristics of products that may result in a lead-containing component part being considered inaccessible. This is expressed in section 101(b)(3), which specifies that paint, coatings, or electroplating may not be considered to be a barrier that would render lead in the substrate to be inaccessible to a child.

On January 15, 2009, the Commission published in the Federal Register a notice of proposed rulemaking (74 FR 2439) containing a proposed framework for determining whether lead-containing components of children's products are inaccessible to children.

Proposed Accessibility Assessment

A component part of a product that contains lead at a level that exceeds the lead limits specified in the CPSIA may be excluded from compliance with the specified limits if the part is not accessible to a child. The Act specifies that accessibility is defined as physical contact with lead-containing component parts.

CPSIA 6(b)(1) CLEARED for PUBLIC

5/23/09
— NO MFRS PRVTLBLKS OR PRODUCTS IDENTIFIED
— EXCEPTED BY: PETITION RULEMAKING ADMIN. PRCDG

In its notice of proposed rulemaking, the Commission stated that an accessible component part of a children's product is one that a child may touch, and an inaccessible component part is one that is located inside the product, whether or not such part is visible to a user of the product, and cannot be touched by a child.

Since a lead-containing component part may be inside a product and not actually fully enclosed by another part of the product, children may have opportunities to contact lead-containing component parts; *e.g.*, they might touch a part with their fingers or tongues. The Commission's proposed approach to addressing section 101(b)(2) was to refer to accessibility tests already in use by the Commission for addressing sharp points and sharp metal or glass edges on toys or other articles intended for use by children under age eight years. Accordingly, 16 CFR §§1500.48-1500.49 provide specific technical requirements for determining accessibility of sharp points or edges through use of accessibility probes specified in the sections. The Commission further noted that both of these sections provide that a test of accessibility of sharp points or edges shall be applied both before and after use and abuse tests referencing 16 CFR §§1500.50 through 1500.53 (excluding the bite test—paragraph (c) of 16 CFR §§1500.51-1500.53). As defined in 16 CFR §§ 1500.48-1500.49, an accessible sharp point or edge is present in the product if the result of the test is that any part of the specified portion of the accessibility probe contacts the sharp part. Similarly, the proposed rule specified that an accessible component part of a children's product is one that could be contacted by any part of the specified portion of the accessibility probe.

Public Comments¹

As discussed in the accompanying memorandum, comments received from the public raised several significant issues concerning the meaning of accessibility, and the obligations of firms to test and certify products that may contain inaccessible lead-containing component parts.

One key point raised in two comments is that accessibility means that a component part is susceptible to mouthing and swallowing. The staff disagrees with this assertion, given the language of the statute that clearly refers to physical accessibility of component parts of products. Accordingly, the staff believes that an approach to evaluating accessibility that is based on whether children might touch component parts of a product, such as the use of existing accessibility and use and abuse tests, is appropriate.

Concerning whether testing is required, the staff believes that claims by firms as to accessibility of component parts should be based on appropriate testing. Further, the Commission will address certification requirements, and the establishment of protocols and standards for ensuring that children's products are tested for compliance with applicable children's product safety rules, as well as products that fall within an exemption, in an upcoming rulemaking.

CPSIA section 101(b)(2) also provides that the aging of the product is a factor to be considered in the evaluation of the accessibility of component parts. The staff believes that evaluations of accessibility should consider the effects of aging on the integrity of the product. However, there is no generalizable method for all product types, and evaluations must be done on a product-by-product basis.

¹ The staff's summary of the public comments and the staff's responses are located in the memorandum from Kristina M. Hatlelid, Ph.D., M.P.H., to Mary Ann Danello, Ph.D., Response to Public Comments: Determinations, May 2009.

The question as to whether fabric coverings are appropriate barriers was addressed by several commenters. The staff believes that, in general, fabric coverings may be considered barriers to physical contact with underlying materials for products such as mattresses. However, the appropriate use and abuse tests, such as for the integrity of seams, should be used to evaluate the coverings. Smaller items or small components of products should be evaluated for the potential for mouthing or swallowing using the appropriate tests. In the case that mouthing or swallowing may occur, the material beneath the fabric covering would be considered to be accessible to a child. Appropriate testing could include human factors evaluation and application of the definition of toys that can be placed in a child's mouth from CPSIA section 108. Although the CPSIA provisions for lead apply to all children's products, not just toys, the definition in CPSIA section 108 is also helpful in assessing whether a part of any children's product can be placed in a child's mouth.

One comment pointed out that the proposed rule excludes the bite test from 16 CFR § 1500.51 and § 1500.52, but not § 1500.53. The omission of 16 CFR §1500.53 from the proposed rule was an error that will be corrected in a final rule.

Two comments raised questions about specific types of products and requested that the final rule address these products. One comment concerned compact disks and DVDs, and the other concerned certain electronic components that are contained within other components. The staff does not believe that guidance for these products should be included in the final interpretive rule. While the staff recognizes that firms will have questions regarding whether various components of specific products will be accessible or inaccessible, given the very large number of products in the market, it is not possible for the Commission to address such product-specific issues in the interpretive rule for accessibility. Rather, the interpretative rule is intended to provide guidance to allow the manufacturers of children's products to assess whether their own products or component parts of their products are inaccessible for purposes of section 101(b) (2) of the CPSIA.

Conclusions and Recommendation

The staff recommends that the Commission issue a final rule that specifies, as previously proposed, the tests for determining accessibility based on the existing regulations for evaluating whether potentially hazardous sharp points or edges of children's products are accessible to a child, and the existing use and abuse testing, as described in current regulations.

Because of the public comments that indicated confusion about how the recommended tests should be applied, the staff recommends that the final rule should more explicitly state the criteria that must be met for component parts of a product to qualify for the inaccessibility exclusion provided by section 101(b)(2), including testing and certification requirements.

Further, evaluation of fabric-covered products should be addressed by referencing use and abuse testing and the definition of toys that can be placed in a child's mouth from CPSIA section 108.

Finally, the staff recommends that the guidance rule indicate that the bite test specified in 16 CFR § 1500.51 through § 1500.53 is to be excluded from use and abuse testing. The omission of 16 CFR § 1500.53 from the proposed rule was in error.

Attachment 3



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Memorandum

Date: **JUL 23 2009**

TO : Mary Ann Danello, Ph.D., Associate Executive Director, Directorate for Health Sciences

THROUGH: Lori E. Saltzman, M.S., Director, Division of Health Sciences, Directorate for Health Sciences *LS*

FROM : Kristina M. Hatlelid, Ph.D., M.P.H., Toxicologist, Directorate for Health Sciences *KA*

SUBJECT : Response to Public Comments: Inaccessibility of Lead-Containing Components of Children's Products*

Introduction

On January 15, 2009, the Commission published in the Federal Register a notice of proposed rulemaking (74 FR 2439) containing a proposed framework for determining whether lead-containing components of children's products are inaccessible to children. This memorandum summarizes the comments received from the public in response to this notice, and provides the staff's responses to the comments. The index of public comments is in Appendix A.

Comments were received from the International Sleep Products Association (comment no. 2); Wiz Chan, a representative of Modern Testing Services (3); several consumer groups, including Consumer Federation of America, Consumers Union, Kids in Danger, National Center for Women & Families, Public Citizen's Congress Watch, and the U.S. Public Interest Research Group (4); a group of electronic product associations, including the Consumer Electronics Association, Information Technology Industry Council, and the IPC – Association Connecting Electronics Industries (5); John O'Loughlin, a representative of several consumer product manufacturers (6); the American Apparel and Footwear Association and others (7); several motorized recreational vehicle firms, including Honda Motor Co. Inc., Arctic Cat Inc., Kawasaki Motors Corp., USA, Yamaha Motor Corp., USA, American Suzuki Motor Corporation, Bombardier Recreational Products Inc., and Polaris Industries Inc. (8); and the Footwear Distributors and Retailers of America (9). In their comments on another rulemaking, the United States Association of Importers of Textile and Apparel also addressed the proposed accessibility framework (see public comments regarding determinations of lead content in certain materials).

Another comment was received (Jason Simon; comment 1) that did not address issues related to the proposed accessibility guidance rule. Accordingly, this comment is not addressed here.

*These comments are those of the CPSC staff, have not been reviewed or approved by, and may not necessarily reflect the views of, the Commission.

CPSA 60010D CLEARED for PUBLIC
7/23/09
NO MEMS FROM CPSC OR PRODUCTS IDENTIFIED

Comment: Accessibility does not mean only physical contact.

The consumer groups' comment (4) agrees with the Commission's determination that accessibility is defined in the statute as physical access, and stresses that accessibility is not limited to exposure to lead through leaching from a material.

However, the American Apparel and Footwear Association *et al.* (7) recommend that the Commission explore other inaccessibility scenarios, not just physical inaccessibility, such as "whether children using the product could be exposed to the lead that is present."

Likewise, the motorized recreational vehicle firms (8) stated that the physical contact described in the law is only an example of accessibility. These commenters state that the Commission has ignored the words, swallowing and mouthing, that are used in the Act and request that evaluations of accessibility focus on whether parts are ingestible or mouthable, or alternatively consider whether a child will actually touch the part during foreseeable use or abuse of the product.

CPSC Staff Response:

Contrary to some commenters' claims, the staff believes that the language of the statute clearly encompasses any type of physical accessibility of component parts of products, and that this reference is not simply an example of how accessibility might be defined.

The Commission's proposed interpretive rule follows the statutory language for determining inaccessibility. The applicable section of the law provides that, "[a] component part is not accessible under this subparagraph if such component part is not physically exposed by reason of a sealed covering or casing *and does not become physically exposed through reasonably foreseeable use and abuse of the product.*" (emphasis added). The law goes on to state, "[r]easonably foreseeable use and abuse shall include to, [*sic*] swallowing, mouthing, breaking, or other children's activities, and the aging of the product." Swallowing and mouthing are examples of use and abuse actions to be considered, but the language of the statute does not limit consideration to ingestible or mouthable products. "Other children's activities" could reasonably include touching, grasping, and handling that can lead to physical exposure to the lead containing parts.

Comment: Testing and certification requirements for inaccessible components parts.

The electronic products associations' comments (5) recommend that the rule explicitly state that inaccessible component parts are relieved of the testing requirement of CPSIA section 102.

The comments from a group of consumer product manufacturers (6) request that the rule clearly state that no certificate is required when no provision of CPSIA or any other rule or standard applies. The commenters make a similar point about mandatory third party testing, and request that the rule state that third-party testing is not required to demonstrate CPSIA section 101 compliance based on the inaccessibility exemption.

CPSC Staff Response:

In general, inaccessible component parts are not required to comply with the lead content limits or to be tested and certified as to lead content. The accessible portions of a product, unless specifically excluded from lead content requirements or the testing requirements, would require testing and certification to the lead content limits.

Currently, third-party testing and certification are required for toys and children's products under the small parts regulations (16 C.F.R. Part 1501 and 1500.50-53 and 16 C.F.R. § 1500 (18)(a)(9)), as well as the toy safety standard, ASTM-F963. Accordingly, the tests proposed for evaluating accessibility are already being conducted by manufacturers for small parts evaluations.

With respect to other children's products that do not fall within the scope of the small parts regulations but that contain inaccessible parts, the manufacturer currently is not required to provide third-party testing and certification to demonstrate inaccessibility. The Commission will address certification requirements, and the establishment of protocols and standards for ensuring that children's products are tested for compliance with applicable children's products safety rules, as well as products that fall within an exemption, in an upcoming rulemaking.

Comment: Use of accessibility probes.

In general, commenters agree with the proposed approach of using accessibility probes to evaluate whether certain parts of a product might be accessible to a child. One commenter (International Sleep Products Association) (2) indicates that for products that are sealed and have no accessible cavities, the use of the probe is unnecessary.

The consumer groups' comments (4) state that accessibility probes could be used to evaluate products, but they recommend that the Commission undertake a study to confirm that the existing test fixtures are appropriate for the entire age range of children's products, arguing that older children have developed their motor skills and have increased agility compared to younger children for whom the probes were designed.

Because the motorized recreational vehicle firms (8) disagree that the law specifically refers to physical contact with lead-containing parts, they believe that the proposed use of accessibility probes for evaluating accessibility is inappropriate, and that the proper method would instead evaluate mouthing and swallowing. The motorized recreational vehicle firms argue that the possibility of simple physical contact with a lead-containing component part does not necessarily lead to mouthing or swallowing, or that physical contact actually occurs with some products. Specifically, they state that with respect to ATVs and off-road motorcycles there are "literally hundreds of different parts that conceivably could be touched but which a child will in fact *never* ingest, swallow, or contact during reasonably foreseeable use and abuse of the product" (emphasis added).

The electronic product associations' comment (5) requests that the guidance clarify that access to a component that contains smaller components that may contain lead-containing parts does not mean that the lead-containing component is accessible if the lead is fully enclosed in the larger component which can be touched by an accessibility probe.

CPSC Staff Response:

The staff agrees that for products that are effectively sealed, such that there is no point of entry to internal parts, use of the probe would not be necessary to demonstrate that the parts are not accessible.

The staff believes that in considering reasonably foreseeable use and abuse, the accessibility probes are appropriate for testing the wider range of products for children through age twelve years. The probes are used to evaluate possible gaps or holes in a product through which a young child might physically contact a lead-containing component part. Because older

children's larger fingers generally would have more limited access to gaps that would be accessible to smaller children, the staff believes that in most cases the probes will indicate whether access is possible.

As discussed above, the statute clearly refers to physical accessibility. Therefore, the staff maintains that accessibility should be determined based on whether a child may touch a component part that contains lead above the CPSIA lead limits, not simply on whether a child might ingest a part of a product, and that the accessibility probes provide an objective means for evaluating accessibility.

The staff agrees with the electronic product associations' comments that access to a component does not necessarily mean that a lead-containing part that is inside that component is accessible. Rather, a lead-containing component part means that the material used to construct the part includes lead in its formulation, not that it contains *inside of it* parts that contain lead. Consider a sealed ball made of plastic that has a lead content that complies with the CPSIA lead limits. Inside the sealed ball are metal beads that contain lead. In this example, the metal beads are lead-containing component parts, but the ball is not. If the sealed ball does not provide access to the beads inside it, through a hole or a crevice, or after being subject to use and abuse testing, then the lead-containing parts would be deemed inaccessible.

Comment: Use of use and abuse tests.

In general, commenters agreed with the proposed approach of using existing use and abuse tests to evaluate whether certain parts of a product might be accessible to a child.

The comment from the motorized recreational vehicle firms (8) agrees that the Commission's use and abuse tests are appropriate for evaluating whether ingestible or mouthable parts might come loose from a product. This comment, as well as the comment from the electronic product associations (5), also agrees that intentional disassembly or destruction by older children, including use of tools, should not be considered in evaluating accessibility.

On the other hand, the consumer groups (4) questioned whether the tests are appropriate for older children given their increased strength and dexterity.

CPSC Staff Response:

The staff agrees that older children have advanced motor skills compared to younger children. However, older children also have advanced cognitive skills and the ability to properly care for their belongings. For the purposes of evaluating product integrity, the staff believes that the existing use and abuse tests will appropriately reveal inherent characteristics or possible defects in products that could result in accessibility of components.

Comment: Explain why the bite test is excluded from use and abuse testing.

The comment from the consumer groups (4) includes a request for an explanation of the exclusion of the bite test.

Another commenter (Modern Testing Services, comment no. 3) points out that the proposed rule excludes the bite test from 16 CFR 1500.51 and 1500.52, but not 1500.53, and stated that the bite test from all three sections should be excluded.

CPSC Staff Response:

Currently, the Commission does not apply the bite test specified in the three CFR sections, including 16 CFR 1500.53, concerning use and abuse test procedures as a result of a court case that questioned the relevance of this test.¹ This requirement may be modified in a future proceeding.

Because the bite test currently is not applied as part of use and abuse testing in general, the staff recommends that it not be applied for the purposes of evaluating products for accessibility of lead-containing component parts. As noted above, the exclusion of the bite test in section 1500.53 was inadvertently omitted from the proposed rule, and the staff recommends that it be included in the final interpretative rule.

Comment: Fabric coverings can be used as a barrier to lead in underlying materials.

Several commenters claim that fabric coverings are appropriate barriers. One commenter (United States Association of Importers of Textile and Apparel, Determinations rulemaking comment) gave a fabric-covered button or base of a zipper as examples of use of fabrics that would make another material that might contain lead, such as a metal button or zipper base, inaccessible to a child. This commenter justifies the claim by stating that such use of fabric must withstand wear and tear and remain intact through the life of a garment. The comments by the Footwear Distributors and Retailers of America (9) make similar statements about fabrics in footwear applications, noting that fabrics for use in footwear must be durable and able to withstand abrasion and other abuse, and must not wear out over the expected life of a shoe. This commenter also specifically notes that it is especially true that fabrics are barriers if tools would not be considered in an evaluation.

A comment by the International Sleep Products Association (2) indicates that fabric coverings surrounding the inner parts of mattresses and foundations must withstand normal use of these products, as well.

Conversely, the consumer groups' comment (4) states that the Commission must evaluate the possibility that lead could leach from components that are fabric-covered, and must evaluate the ability of fabric barriers to hold up to use and abuse.

CPSC Staff Response:

To date, the staff is not aware of any data that address the possibility of leaching of lead through fabric coverings. Leaching involves a liquid dissolving a portion of a material or otherwise extracting a chemical from the material. Therefore, the staff believes that leaching of lead from a material is not likely to occur except in the case of mouthing or swallowing an item. Because fabrics, in general, cannot be considered to be impervious to liquids such as saliva and stomach acid, the staff believes that leaching of lead from an underlying material through a fabric covering is possible.

Consequently, the possibility of mouthing a fabric-covered product or a fabric-covered part of a product or ingesting a product should be evaluated through human factors analysis and appropriate testing. CPSIA Section 108, which addresses phthalate content of certain products,

¹ *Clever Idea Company, Inc. v. Consumer Products Safety Commission*. 385 F. Supp. 688 (E.D. N.Y. 1974).

includes a definition for toys that can be placed in a child's mouth that states, "if a toy or part of toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth."² Although the CPSIA provisions for lead apply to all children's products, not just toys, that definition is also helpful in assessing whether a part of any children's product can be placed in a child's mouth. Accordingly, the staff recommends that fabric-covered components that are used in children's products, including toys, be evaluated for the potential to be placed in the mouth according to this definition to assess whether the fabric-covered part is accessible.

The staff believes that, in general, fabric coverings may be considered barriers to physical contact with underlying materials for products such as mattresses. However, the appropriate use and abuse tests, such as for the integrity of seams, should be used to evaluate the coverings. Smaller items or small components of products should be evaluated for the potential for mouthing or swallowing using the appropriate tests. If mouthing or swallowing of a component part could occur, the material beneath the fabric covering would be considered to be accessible to a child.

Comment: Aging and wear and tear.

The consumer groups' comment (4) states that if aging and wear and tear exposes lead-containing parts, the components should be considered accessible.

As stated above, comments by the United States Association of Importers of Textile and Apparel, International Sleep Products Association (2), and the Footwear Distributors and Retailers of America (9) state that the necessary durability of their products already incorporates consideration of aging and wear and tear.

The electronic product associations (5) claim that additional testing to account for aging for their type of products does not need to be done, because the product lifespan of children's electronics is shorter than for other children's products, and aging leads to products becoming unusable.

CPSC Staff Response:

The staff agrees that the statute provides that aging of the product be considered in the evaluation of the accessibility of component parts. Currently, the Commission does not have specific requirements for testing the effects of aging on children's products. Because of the wide range of products and product types subject to the lead content requirements of the CPSIA, the staff believes that assessments of the effects of aging on the integrity of the children's products would necessarily be specific to individual products or product types and may not be easily generalizable. The staff will continue to evaluate this issue and to develop information that the Commission could use to issue further guidance in the future, if it deems necessary.

Comment: Compact disks and DVDs.

The group of consumer product manufacturers (6) raises an issue with a specific product, requesting that the interpretive rule address compact disks and DVDs, which are composed of acrylic polymer layers that encase the data part of the product.

Because the law does not allow for coatings to be used as a barrier that would render lead in the substrate inaccessible to a child, these commenters request that the rule state that the acrylic part of a disk is not a "coating." The commenter is concerned that if the acrylic polymer layer is not

² Definitions: Toy That Can Be Placed in a Child's Mouth. CPSIA Section 108(e)(2)(B).

clearly determined to not be a coating, then manufacturers would have to test the layer of material within the polymer part of the product.

CPSC Staff Response:

The staff does not consider the acrylic polymer layers of a compact disk or DVD to be a coating. If the internal metallic layer of a disk is not accessible to a child, testing and certification would not be required. Moreover, the issue of whether there is any significant lead content in compact disks or DVDs has been raised, and may be addressed in other Commission proceedings. However, the staff currently has not received any test data, or information regarding lead content in DVDs and would require further information from the industry before it can properly evaluate these products. The staff recognizes that firms will have questions regarding whether various components of specific products will be accessible or inaccessible. However, given the very large numbers of products in the market, it is not possible for the Commission to address such product-specific issues in the interpretive rule for accessibility. Rather, the interpretive rule is intended to provide guidance to allow the manufacturers of children's products to assess whether their own products or component parts of their products are inaccessible for purposes of section 101(b) (2) of the CPSIA.

APPENDIX A



UNITED STATES
 CONSUMER PRODUCT SAFETY COMMISSION
 4330 EAST WEST HIGHWAY
 BETHESDA, MARYLAND 20814

Memorandum

Date: February 24, 2009

TO : Office of the General Counsel
 Office of Hazard Identification and Reduction
 Office of Compliance and Field Operations

FROM : Todd A. Stevenson, Director, 
 Office of the Secretary

SUBJECT : **Children's Products Containing Lead; Interpretative Rule on Section 101
 Inaccessible Component Parts (CPSIA)**
 Published in the *Federal Register* January 15, 2009
 Comments due by February 17, 2009

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
1	1/09/09	Jason Simon	jasonsimon00@gmail.com
2	2/17/09	Christopher Hudgins Vice President Government Relations & Policy	International Sleep Products Association 501 Wythe Street Alexandria, VA 22314-1917
3	2/17/09	Wiz Chan Toy Testing Manager Toys and Children's Products Div.	Modern Testing Services wizchan@mts-global.com

Children's Products Containing Lead; Interpretative Rule on Section 101 Inaccessible Component Parts (CPSIA)

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
4	2/17/09	Rachel Weintraub Director of Product Safety and Senior Counsel	Consumer Federation of America
		Donald L. Mays Senior Director, Product Safety & Technical Public Policy	Consumers Union
		Janell Mayo Duncan Senior Counsel	Consumers Union
		Nancy A. Cowles Executive Director	Kids in Danger
		Diana Zuckerman President	National Center for Women & Families
		David Arkush Director	Public Citizen's Congress Watch
		Ed Mierzwinski Federal Consumer Program Director	U.S. Public Interest Research Group
		Elizabeth Hitchcock Public Health Advocate	U.S. Public Interest Research Group
5	2/17/09	Brian Markwalter Vice President Technology & Standards	Consumer Electronics Association
		Richard E. Goss Vice President Environment and Sustainability	Information Technology Industry Council 1250 Eye St., NW, Suite 200 Washington, DC 20005
		Fern Abrams Director Environmental Policy and Government Relations	IPC – Association Connecting Electronics Industries

Children's Products Containing Lead; Interpretative Rule on Section 101 Inaccessible Component Parts (CPSIA)

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
6	2/17/09	John O'Loughlin	Weil, Gotshal & Manges LLP 1300 Eye St., NW Suite 900 Washington, DC 20005
7	2/17/09	Steve Lamar & a coalition of 30 trade associations	American Apparel and Footwear Association
8	2/17/09	William Willen Counsel for American Honda Motor Co. Inc.	American Honda Motor Co. Inc. 1919 Torrence Boulevard MS: 5002C-10A Torrence, CA 90501-2746
		Annamarie Daley Counsel for Arctic Cat Inc.	Robins, Kaplan, Miller & Ciresi LLP 2800 LaSalle Plaza 800 LaSalle Avenue Minneapolis, MN 55402
		Michael A. Wiegard Counsel for Kawasaki Motors Corp., USA	Eckert Seamans Cherin & Mellot 1250 24 th Street, N.W. Suite 700 Washington, DC 20006
		David P. Murray Counsel for Yamaha Motor Corp., USA	Willkie Farr & Gallagher 1875 K Street, N.W. Washington, DC 20006
		John B. Walsh Counsel for American Suzuki Motor Corporation	American Suzuki Motor Corporation 3251 Imperial Highway Brea, CA 92821

Children's Products Containing Lead; Interpretative Rule on Section 101 Inaccessible Component Parts (CPSIA)

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
8 cont'd.	2/17/09	Yves St. Arnaud Counsel for Bombardier Recreational Products Inc.	Bombardier Recreational Products Inc. 726 Saint-Joseph Street Valcourt, Quebec, Canada J0E 2L0
		Mary McConnell Counsel for Polaris Industries Inc.	Polaris Industries Inc. 2100 Highway 55 Medina, MN 55340-9770
9	2/18/09	Peter T. Mangione President	Footwear Distributors and Retailers of America 1319 F Street, NW Suite 700 Washington, DC 20004