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

Memorandum

Date: February 19, 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; Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion**
Published in the *Federal Register* January 15, 2009
Comments due by February 17, 2009

COMMENT	DATE	SIGNED BY	AFFILIATION
1	1/20/09	Bill Seeley	Reactive Metal Studio, Inc. bill@reactivemetals.com
2	2/09/09	Brion McHale Director of Operations	FMF Racing
3	2/17/09	Kevin M. Burke President and CEO	American Apparel and Footwear Association 1601 North Kent Street Suite 1200 Arlington, VA 22209
4	2/17/09	Steve Lamar and a Coalition of 30 Trade Associations	American Apparel and Footwear Association

COMMENT	DATE	SIGNED BY	AFFILIATION
5	2/17/09	Donald L. Mays Senior Director, Product Safety & Technical Public Policy	Consumers Union
		Janell Mayo Duncan Senior Counsel	Consumers Union
		Rachel Weintraub Director of Product Safety and Senior Counsel	Consumer Federation of America
		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
6	2/17/09	Harrison M. Pollak Deputy Attorney General for Edmund G. Brown Jr. Attorney General	Department of Justice 1515 Clay Street, 20th Floor Oakland, CA 94612-0550
7	2/17/09	Sheila A. Millar on behalf of the Fashion Jewelry Trade Association	Keller and Heckman LLP 1001 G Street, Suite 500 Washington, DC 20001

COMMENT	DATE	SIGNED BY	AFFILIATION
8	2/17/09	William Willen **Counsel for**	**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
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		Yves St. Arnaud **Counsel for**	**Bombardier Recreational Products Inc.** 726 Saint-Joseph Street Valcourt, Quebec, Canada J0E 2L0
		Mary McConnell **Counsel for**	**Polaris Industries Inc.** 2100 Highway 55 Medina, MN 55340-9770

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Stevenson, Todd

From: Bill Seeley [bill@reactivemetals.com]
Sent: Tuesday, January 20, 2009 3:26 PM
To: Lead Exclusions
Subject: Exempting Precious Metals from Lead Testing

To whom it may concern, Titanium is being seen more and more as a hypoallergenic alternative to common precious metals. Lead is not a constituent of this metal in pure or alloy state. I would propose that titanium be added to this list.
Bill

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Stevenson, Todd

From: Brion McHale [bmchale@fmfracing.com]
Sent: Monday, February 09, 2009 8:23 PM
To: CPSC-OS
Subject: Section 101 Request for Exclusion of a Material or Product

I'll be as brief as possible.

Our Company

1. We manufacture aftermarket exhaust systems for off-road motorcycles and ATVs.
2. Manufacturers such as Honda, Yamaha, Kawasaki and Suzuki offer motorcycles and ATVs that are small in scale, commonly called a "minibike" or "playbike" which are motorized vehicles intended for children.
3. We manufacture exhaust products for these motorized vehicles intended for children.
4. The materials we use for exhaust products are metals and metal alloys; primarily titanium, stainless steel, carbon steel and aluminum.

Request for Exclusion. While the materials we use for manufacturing do not exceed the present 600ppm limit for lead, our products would qualify for an exclusion based on the criteria for an exclusion and on the exclusions for other consumer products.

1. "*Taking into account normal and reasonably foreseeable use and abuse…*" of our product, there is no possible absorption of lead into the human body or any adverse impact on public health and safety.
2. The Consumer Product Safety Act defines the term "consumer product" and what it does not include; section 3(a)(5)(C) motor vehicles and motor vehicle equipment (as defined by….sections 30102(a)(6) and (7) of title 49). However, title 49 defines motor vehicle as "*…for use on public streets, roads and highways*". Our products are for motor vehicles which are primarily used off-road but a motor vehicle by definition nonetheless.
3. 16CFR Part 1500.230(b)Hazard: *Young children are most commonly exposed to lead in consumer products from the direct mouthing of objects, or from handling such objects and subsequent hand-to-mouth activity.* The nature of our product, as a component of a motor vehicle, is not prone to this type of exposure.
4. 16CFR Part 1500.85: "*…and is intended for use by children who have attained sufficient maturity, and may be reasonably expected, to read and heed such directions and warnings.*" For a child to operate a motor vehicle, they would have to be of sufficient maturity.
5. Exemptions for Certain Electronic Devises (Briefing Package 2/5/09, OS no. 3998), 16CFR 1500.88(d)(2) *lead used as an alloying element in steel…3500ppm*, (d)(3) *Lead used in manufacture of aluminum…4000ppm* and (d)(4) *Lead used in copper-based alloys…40,000ppm.* If electronic devices are granted exclusions, other children's products are entitled to consideration for similar exclusions.

I look forward to your reply. Thank you for your time in reviewing my request for exclusion.

Brion McHale
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February 17, 2009

Mr. Todd Stevenson
Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East-West Highway,
Bethesda, Maryland, 20814

Via Email: Sec101Determinations@cpsc.gov; Sec101InaccessibleRule@cpsc.gov; Sec101Exclusions@cpsc.gov

REF: A. Section 101 Determinations of Certain Materials or Products NPR (74 FR 2433)

B. Section 101(b) Exclusions (74 FR 2428)

C. Section 101 Inaccessible Component Parts (74 FR 2439)

Dear Mr. Stevenson:

On behalf of the American Apparel & Footwear Association (AAFA), I am writing to provide comments on the above-captioned rule-makings in connection with implementation of the Consumer Product Safety Improvement Act (CPSIA).

At the outset, let me emphasize that our members want to ensure that only safe children's products are sold and that children's product safety rules, and in particular the testing requirements used to validate compliance with those rules, reflect the knowledge and experience of the industry. At the same time, we support implementation of consumer product safety standards that are effective and appropriately targeted so as not to involve burdensome requirements or extraordinary costs. This is important in any setting and is particularly important as companies are working to transition to and incorporate new regulatory requirements during a period of severe economic uncertainty.

1601 North Kent Street, Suite 1200, Arlington, VA 22209 www.apparelandfootwear.org p (703) 524-1864 (800) 520-2262 f (703) 522-6741

A. *Section 101 Determinations of Certain Materials or Products NPR (74 FR 2433)*

1. Exemptions for lead free materials

We strongly support a comprehensive and immediate exemption for materials that are inherently lead-free.

As an association, and as part of a coalition of industry trade groups, we have provided the Consumer Product Safety Commission (Commission) exhaustive information relating to the non-incidence of lead for many materials and components, including all textile materials, in apparel and footwear. Over the past twelve weeks, our association has submitted voluminous test data to the Commission covering thousands of garments and shoes. Included as Attachments A and B are two documents reflecting, and which are representative of, that data.

Our conclusion, supported by the large volume of submitted test data (see, e.g., the attached data summaries) and by additional information that was presented during a January 22 public meeting at the Commission, is that (1) all natural and manufactured textiles, regardless of the processing, are inherently lead free, and (2) many other components used in apparel and footwear are typically lead free or, if lead is present, contain lead at levels well below the limits set forth in the CPSIA. This conclusion is supported by the entire textile and apparel supply chain.

In a joint letter signed and filed today by AAFA and numerous trade associations, we specifically ask the Commission to amend this rule making to reflect the fact that textiles do not contain lead. In that joint letter, we urge that the proposal "children's products containing lead; proposed determinations regarding lead content limits on certain materials or products" which was published in the ***Federal Register*** Jan 15, 2009 , pp. 2433-2435 be modified in the following way.

Remove the references to textile materials in section 1500.91 (c) and include all textile references in a new 1500.91 (e) that would read:

(e) The following textile materials do not exceed the 600 ppm or 300 ppm lead content limits under section 101(a) of the CPSIA, regardless of whether such materials are dyed, processed, or otherwise finished or altered:

> *(1) Natural fibers, including, but not limited to, cotton, silk, wool, hemp, rubber, and flax (linen).*

(2) Manufactured/man-made fibers, including, but not limited to, polyester, nylon, acrylic, spandex, olefin (polypropylene), rayon, acetate, and lyocell.

(3) Products or components made exclusively from natural or manufactured/man-made fibers, or any blend thereof, including, but not limited to, yarns, fabrics, threads, trims, laces, elastic, ribbons, rope, string, legwear, footwear, garments, toys, travel goods, home furnishings and industrial fabrics.

We are pleased that the Commission has taken steps toward this conclusion by issuing enforcement guidance that recognizes that dyed and undyed textiles do not present a lead risk. However, we believe the Commission should move quickly to issue a permanent finding that makes clear that all textiles (such as trims, and not just the body fabric of an article) are exempt from lead testing requirements. We also urge the Commission to ensure that this finding extends as well to an entire article if that article is composed entirely of exempted materials.

2. Component Level Testing

On a related note, we urge that the Commission proceed quickly with its rule to permit component level testing in lieu of duplicative, ineffective and enormously costly after-the-fact end product testing. Such an approach would complement a series of common sense, fact-based exemptions. The objective should be to ensure that testing burdens and costs are imposed only where necessary, and at a point early in the process when problems can be identified and corrected and before production and distribution takes place. To underscore the importance of this issue, we hereby attach, as Attachment D, a copy of our previously-filed comments on this issue. Moreover, we have also attached, as Attachment C, a copy of a paper prepared by the Textile Clothing Technology Corporation (TC)2 describing the non incidence of lead in apparel processing.

3. Exemptions for Materials that Present Low Lead Risk

Finally, many materials, while not inherently lead free, present minimal risk of lead. For example, the metal and plastic accessories – such as zippers, buttons, snaps, and hooks – in many garments usually contain no lead. In other, very limited cases, trace readings of lead may register. Similarly, there are other materials such as PVC, glass, and crystal that may contain lead.

In all these cases, we believe such components present no risk or danger to public health. As noted, in most cases lead is simply not detected (as was the case in the test samples in Attachments A and B). We note that the wide incidence of non detection of lead in these components and materials occurred notwithstanding the fact that new lead substrate limits were not enacted until 6 months ago. Now

that the supply chain has had a chance to react to these new levels, detection rates for lead should become rarer still.

In other cases, only trace levels of lead was detected, or the lead was detected in only a subcomponent of the component. For example, out of an abundance of caution, companies have tested for and found lead at a subcomponent level – such as an individual tooth of a zipper – even though the entire component – in this case the zipper assembly – registered no lead. In other cases, the lead may be bonded to the material in such a manner that it cannot leach out of the material and, thus, become bioavailable to a human. We hope that the Commission could take steps to exempt such materials, as appropriate, before it lifts the stay on testing on February 10, 2010. For those materials that are not exempted, we urge formulation of a less burdensome testing and supplier certification regime as outlined in our attached comments on component level testing and certification.

B. Section 101(b) Exclusions (74 FR 2428)

We are also pleased that the Commission is moving forward with a proposal to address future petitions for exclusions. As noted above, many materials used in the production of apparel and footwear contain no or low levels of lead. Moreover, there are a number of instances where the amount of lead that may be present in a product is not absorbable. We hope that the process outlined by the Commission will provide opportunities to identify such materials that present low risk to public health because they contain no or trace lead levels, or because the lead that is contained in such components is not bioavailable. On that note, we would suggest that the lead test method be changed from a total lead content to an extractable lead test, thereby mimicking the true bioavailability of the lead.

In addition, we encourage the procedures to be amended to include specific timelines so there will be more predictability in the process. For example, how soon after a petition is filed with the Commission will there be a determination or a notice to the public that a petition is currently being considered? Similarly, we believe the Commission should articulate what information is will be disclosed to the public and guidelines for maintaining business confidential data. In this manner, there should be a common set of expectations by all stakeholders as to how this process will work.

C. Section 101 Inaccessible Component Parts (74 FR 2439)

With respect to inaccessibility, we are pleased that the Commission has restated that companies are able to make their own inaccessibility determinations based on their understanding of what is in the statute. However, we believe this to be only a temporary and limited solution and encourage the Commission to move quickly to articulate other scenarios in which a component can be deemed to be inaccessible.

Moreover, the Commission Federal Register notice solicits information on whether fabric should be deemed to be an impenetrable barrier. We strongly endorse such a finding and would urge the Commission to confirm that if a component is encased in fabric or otherwise shielded behind a seam or textile material that it should be deemed inaccessible.

We also urge that the Commission articulate how the lead-in-coating rules interact with the inaccessibility provisions. For example, if a child's shoe contains a painted component that is covered by a polyurethane casing, can the component as well as the painted coating of that component be deemed inaccessible because of the polyurethane casing?

We appreciate that Commission staff has been consumed with multiple CPSIA obligations and has not had time to give the AAFA data the careful scrutiny it warrants. To this end, and with the useful period of reflection provided by the limited stay that the Commission recently put in effect until February 10, 2010 with respect to testing and certification requirements, we stand ready to make test laboratory representatives and other industry technical personnel available again to meet with staff to discuss this data if such a meeting is still necessary. Likewise, if the staff informs us it would be helpful, we will be pleased to prepare additional data summaries such as that which we here provide with regard to one of the many sets of test data which we have submitted.

Thank you for your attention to this matter.

Sincerely,

Kevin M. Burke

Kevin M. Burke
President and CEO

Attachment A

Testing of Boys 5-Pocket Jeans
[An Example of An Apparel Test Data Summary Submitted by AAFA]

Methodology: Textile-based trims and fabrics – XRF Scanning using Thermo Niton Analyzer

Metal trim – wet chemistry testing for total digestion

Garments Tested: Boys "5-pocket jeans"

Quantity Tested	Size Range	Zippers	Rivets /Burrs	Center Front Metal fasteners (Snaps & Shanks)	Center Front 4-hole button	Other 4-hole Buttons
8	4-7	X	X	X		X
12	8-20	X	X	X		X
1	8-20	X	X	X	X	

Summary of results:

TEXTILES and TEXTILE-based TRIMS registered "NOT DETECTED" using the XRF technology.

- All external labels
- All paper patch labels
- All woven labels
- All internal labels
- All pocket lining
- All elastics
- All fabrics

METAL FASTENERS (provided by global suppliers only) were non-detect. (The "less-than" results are non-detects as well, with the numbers driven by detection limit and sample size.)

ZIPPERS: Out of 21 products tested, 4 products had lead values in parts of zippers of less than 130ppm. All the rest were "NOT DETECTED"

RIVET / BURRS: Out of 21 products tested, 4 products had lead values in parts of zippers of less than 130ppm. All the rest were "NOT DETECTED"

CENTER FRONT WAIST SNAPS (Sizes 4-7): Out of 7 products tested, all snaps were "NOT DETECTED" for lead value.

CENTER FRONT WAIST BUTTONS (Sizes 8-20 and Husky): Out of 9 products tested with a metal shank button, 4 products had lead values in parts of zippers of less than 130ppm. All the rest were "NOT DETECTED"

OTHER 4-HOLE BUTTONS (Sizes 4-20 and Husky): Out of 20 products tested with other plastic 4-hole buttons, all were "NOT DETECTED" for lead value.

Attachment B
Child's Shoe
[Sample Footwear Test Data Submitted by AAFA]

Test method: Hot plate method, with ref. to EPA 3050B, microwave assisted digestion, QMA 36-035-05 HKG

Item #	Component	Color	Details	lead in substrate	lead - surface coating
1	Coating	Dark Grey	Label on insole		<10
2	Coating	White	Label on insole		<10
3	Coating	Red	Graphic logo on upper - Dad		<10
4	Coating	Black	Graphic logo on upper - Dad		<10
5	Coating	White	Graphic logo on upper - Dad		<10
6	Coating	Red	print on foxing		<10
7	Coating	Lt. Brown	Coating on eyelet		<10
9	Foam	White	Interlining	Inacc.	
10	Foam	Cream	Interlining	Inacc.	
11	Foam	White	Interlining - pressed	Inacc.	
12	Metal	Silver	eyelet without coating	<10	
13	Plastic/Textile	White	Laces	<10	
14	Plastic/Textile	White	foxing	<11	
15	Plastic/Textile	Brown	Tape at heel	<10	
16	Plastic/Textile	Brown	Outsole -toe/heel cap	<10	
17	Plastic/Textile	Lt. Brown	Upper Material	<10	
18	Plastic/Textile	White	Upper Material - toe cap	<10	
19	Textile	Dark Brown	Upper Material	<10	
20	Textile	White	Interlining under insole	Inacc.	
21	Textile	White	thread	<10	
22	Textile	Brown	thread	<10	
23	Textile	Brown	insole lining	<10	

Inacc = inaccessible

Attachment C

APPAREL ASSEMBLY OPERATIONS AND THE POTENTIAL FOR RELEASE, TRANSFER, OR INCORPORATION OF LEAD INTO COMPLETED APPAREL PRODUCTS

Prepared by TC2

Background

On August 14, 2008, President Bush signed into law the Consumer Product Safety Improvement Act (CPSIA). Among other things, that legislation included a new ban on lead in children's products (no more than 600 parts per million (ppm) by weight of any part of the product). According to the CPSIA, the new lead requirements take effect beginning February 10, 2009. One year after enactment, the limit drops to 300ppm. Two years later, the limit could drop to 100ppm. In addition, per the CPSIA, the existing lead in paint restriction of 600ppm drops to 90 ppm on August 14, 2009.

The Consumer Product Safety Commission has requested comments regarding the manufacture of apparel items and the potential hazard posed by inclusion of lead into garment components.

Most apparel is comprised of a flexible shell conforming to the shape of the body, along with various components to facilitate use or to provide decoration. Examples of components other than textile materials are buttons, zippers, snaps, appliqués and other hardware items such as metal or plastic rings, hooks, fasteners of various types as well as thread or yarn used in joining the various components.

Testing for hazardous content after assembly of the apparel item may require destructive of the garment, and as component count increases, the number of garments from each production lot that must be destroyed to obtain a statistically sound sample population grows geometrically. An alternative is suggested, in which each component is certified by its original manufacturer to be free of lead, and is safe and suitable for use in apparel. The assembly of apparel from such certified components is not a potential point for introduction of lead when assembling finished apparel items. This paper provides a detailed review of manufacturing steps, and explains why traditional assembly methods do not introduce lead into apparel products.

Apparel Construction

Apparel may be constructed in a number of ways. The dominant method is known as "cut-and-sew", where a flexible fabric web is cut into individual components and is joined at defined seam locations by stitching with thread. Almost all commercial apparel is machine sewn, but a very small number of high end garments are sewn by hand. Additionally, some hand sewing operations may be employed to close seams or apply final touches.

Another means of garment manufacture is knitting. In this process, yarn made from fibers of a defined type is used to form loops which are interlocked with other similarly formed loops to form a planar fabric. Circular knitting machines produce a tubular fabric that is made in the same way, but must be slit to allow opening of the cylindrical fabric to a flat web, or the cylinder may be flattened, resulting in two plies of the knit fabric with a width defined by approximately one-half of the cylinder's circumference. The fabric thus produced is then cut into garment components and is joined by sewing, or in the case of larger gauge knit structures such as may be found in sweaters and heavier garments, may be linked together using yarn of the same type as was used in the creation of the knit fabric.

Finally, a relatively new manufacturing process employs a complex knitting machine, engineered to produce garments to net shape in three dimensions. Such 3D knitted garments often employ yarns of different types, including metallic, elastic, or other properties that enhance appearance or performance.

Stitchless garments are often assembled with adhesives and may be comprised of both woven and knitted fabric components, as well as vinyl, leather, and non-woven fabrics in almost any conceivable configuration.

This paper examines each process in detailed steps, and where potential for introduction of hazardous materials might occur, and where possible, offers steps to mitigate the hazard.

Cut and Sew Manufacturing

Fabric, in production quantities is most often supplied by textile mills or finishers in rolls on hollow cores of cardboard. A very small quantity of fabrics may be found in third-world countries on "bolts" in which full width fabric is folded one or more times along its length and wrapped on flat cores of cardboard. Rolls supplied from mills are often covered with a polyethylene or other types of plastic sleeve to prevent soiling in transit.

Fabric rolls are placed on devices to allow spreading onto flat tables or may be introduced into machines that cut component parts using sharpened dies in the shape of the component to be cut. This process is used most often in the cutting of knit tee shirts and fleece fabrics used in garments such as warm-up suits. The second type of cutting presents no entry point for introduction of lead.

After fabrics are spread onto flat tables, the component parts are cut from the web using sharp edged knives, or sharp edged dies may be employed to cut the shape desired. Hand guided knives may be used, or, increasingly, computer controlled knives, which provide a more accurate and repetitive result. Hand cutting presents no entry point for the introduction of lead. Computer controlled

cutting may employ plastic film overlaying the fabric as a means to hold the fabric tightly. The film is sacrificial, and is cut simultaneous to the fabric.

Fabric components must be transported from the cutting table or machine to the first point of use. This distance may be only a few feet, or may require travel by truck, ship or air. The transport means should provide no point for contamination, but as a measure to ensure safety, the manufacturer should certify that bags, boxes, carts, sleeves or other devices used to hold, organize, move, or collect components be free of lead.

On certain garments, preliminary steps must be taken to prepare components for assembly. Examples are: the introduction of adhesively attached interlinings for cuffs, collars and coat or shirt fronts, attachment of labels to pocketing fabrics or other components. These preliminary steps may involve adhesive attachment to fabric components. No potential for lead transfer is found in these operations.

Subsequent steps prior to sewing may involve attachment of hook and eye hardware, adjusting buckles for lingerie straps, and other unique hardware that would be difficult or impossible to add at a later stage. These attachments are usually done by machine, with crimp or friction fit between metal or plastic parts, or may be assembled by sliding buckles onto straps that are precut for assembly. No potential for lead inclusion would be found in these operations. Some hook and eye fasteners are preassembled onto fabric tabs that are subsequently sewn to components. These present no entry point for hazard introduction.

With preparation work performed on each component, assembly by sewing may commence. Machine sewing does not provide an entry point for lead introduction. The previously certified thread is passed through the eye of a needle which is usually a high grade of steel, and is caused to form stitches by interlocking with itself or another thread or multiple threads through the interaction of metallic sewing machine elements such as hook, looper or spreader. Sewing operations thus conducted do <u>not</u> present opportunity for the introduction of lead.

Certain apparel items are considered complete when the last sewing operation is performed. Examples are tee-shirts, briefs, fleece products and other casual wear that is not pressed before wearing. More formal garments such as skirts, dresses, suits and trousers may be pressed or steam treated to eliminate wrinkles and to provide a finished look. Machine pressing, or the use of hand irons with ironing tables do <u>not</u> provide an entry point for lead.

Occasionally, during handling or machine operations, garments may become soiled. Cleaning stations are used, along with solvents, or detergent and water to remove soils. <u>No</u> potential for lead inclusion occurs with manual garment cleaning.

After assembly by sewing, and if an item requiring pressing has been pressed, the garment is ready for final preparation before packing for shipment. If the item is to be "garment washed", it will not be pressed before washing, but will instead, be sent to a laundry for washing, or for the introduction of enzymes for obtaining a specific look, or softness, or some other characteristic that results in a physical change to the garment. These post-assembly operations are not known to introduce hazardous materials to the production stream. Lead in water, or pipes which may contain lead or have lead bearing joints may afford a minute[1] introduction point for lead into wash and rinse water, as well as water used in the production of steam.[2] This minimal risk can be abated through testing of water for lead content and new piping installations can be made.

Items that are "garment washed" may require labels to be attached by sewing prior to packing for shipment. In similar fashion to assembly operations, no lead is introduced at this stage of garment finalization.

Packaging for shipment may take many forms, but if care is taken to ensure that packaging is free of hazardous materials, there should be no opportunity for transfer to the garment.

Knitted Apparel

The assembly of knitted apparel should follow the same safety precautions as that produced by cut-and-sew manufacturing as outlined above. Not all steps described above will apply to knit wear, but any cautions above should be considered for knit apparel. Knitting machines are made of steel machine parts and may contain several hundred needles. The needles used in knitting are of special steel and provide no means for introduction of lead. The base yarns, once certified to be hazard free, are used to form the fabric by knitting, and are then cut and sewn using different types of sewing machine, but have in common that all utilize metallic machine parts which are not entry points for lead.

Knitted garments are often washed and/or dyed to color, or may be screen printed with graphic or text images. Washing and dyeing afford no greater entry point for hazardous materials than would a non-dyed assembly, but screen printing may incorporate plasticizers to reduce stiffness of the printed image. The supplier of the ink paste that is used for screen printing should certify that paste is lead free. Packaging precautions are the same as for the cut-and-sew assembly steps above.

Knitted assemblies comprising linked fabric components should have the least potential for lead contamination. The base fabric is made by knitting with yarn of a certain denier. The same yarn is used in the linking operations, which are done by machines composed of metallic machine parts, usually steel. Knit assemblies of this nature are often of higher value, and are usually not washed or garment

[1] EPA water limits are 15 ppb.
[2] A "very high" lead level from old pipes is 75 ppb.

dyed. Thus, the introduction points are limited, and with normal packaging precautions, no hazard is created by the assembly process. If buttons or other hardware items are subsequently attached, the vendor of said items should certify them to be lead free.

Knitted assemblies that are manufactured using knit-to-net-shape machinery also have limited points for contamination, as the machines are made of steel with special steel knitting needles, and with only the introduction of the base yarn for manufacture, there is only a single component that must be certified to be free of hazardous materials. Therefore, if buttons or other hardware items are added, and if certified to be free of hazardous materials, the knit-to-net-shape process is one of the safest with regard to introduction of lead. Accent yarns, ribbons or metallic strips may be introduced into the knit structure for variety and aesthetic effect. By vendor certification that these are free from lead, no added hazards are introduced.

Another sub-category of knitted garment is in the knit-to-net-shape family. In this type of manufacture, no subsequent sewing operations are required, and the garment is complete when it emerges from the machine on which it is made. Certain socks and women's panties are examples of this category.

Stitchless Garments

While almost a misnomer, the term stitchless may also be applied to garments that are assembled, or may be partially assembled using adhesives. Certain types of brassiere are made with stitchless assembly, where only fabric and adhesive are used to form cups, straps, band and wings. All assembly operations are performed with machines designed for this special purpose. Most machine parts are of steel or aluminum, and present no entry point for hazardous material incorporation. This category of garment may in fact be fully free of sewn stitches.

The term stitchless is also applied, perhaps incorrectly, to garments that may incorporate stitchless construction in the assembly of subassembly components, but are sewn into a final assembly. Components such as pockets, flaps and other design features are joined using adhesive films along with the application of heat, and are utilized to create waterproof or wind-proof garment components that can withstand significant abuse, foul weather, and repeated usage without failure. This hybrid type of assembly is usually done in low wage countries, as labor content is high, and machines employed are simple. Due to the many manual operations coupled with elementary machinery, it is difficult to generalize with regard to entry points for hazardous materials. The use of adhesives for outerwear and intimate apparel is one in which the assembly methods are unlikely to present hazard entry points. This product area is probably the one in which globally the smallest volume of units is produced.

Summary

Traditional assembly methods for apparel construction do not introduce lead into apparel products.

If normal precautions and work practices are taken to ensure the input of certified feedstock, assembly steps in all cases should cause little concern for the safety of the consumer. In the opinion of this organization, the use of vendor certified raw materials and the use of traditional assembly methods will yield highly safe apparel products, and will avoid the need for destructive testing of a larger than necessary percentage of garments to ensure consumer safety. It is our recommendation that a directive be issued that allows assembly of apparel items from certified raw materials, and does not require destructive testing of each production lot.

About [TC]²

This paper is the collaborative effort of the technical staff of [TC]², the Textile/Clothing Technology Corporation, of Cary NC. In business for over twenty-seven years, [TC]² has provided thought leadership and technology development for an entire industry.

With more than two hundred years of collective experience in the textile and apparel industry, the staff of [TC]² is uniquely qualified to provide the above analysis and to make recommendations for remediation where required. Experienced executives, engineers, and technicians who have worked in the manufacturing sector of industry and with a focus on research, technical development, teaching and consulting, have experience in all phases of apparel operations, including development, manufacturing, and distribution. This experience has been brought to bear on numerous projects benefitting the entire soft goods chain.

Attachment D

February 3, 2009

Todd Stevenson
Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East-West Highway,
Bethesda, Maryland, 20814

REF: Section 102 Mandatory Third-Party Testing of Component Parts

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association of the apparel and footwear industries, and their suppliers – I am writing to provide comments on Section 102 of the CPSIA, Mandatory Third- Party Testing for Certain Children's Products.

At the outset, let me emphasize that our members want to ensure that only safe children's products are sold and that children's product safety rules, and in particular the testing requirements used to help promote compliance with those rules, reflect the data, the safety risks, and experiences of the industry. At the same time, we also support implementation and enforcement of consumer product safety standards that do not involve burdensome requirements or extraordinary costs. This is particularly important as companies are working to transition to and incorporate new regulatory requirements during a period of severe economic stress and uncertainty.

With respect to the third party testing requirements under Section 102 of the Consumer Product Safety Improvement Act (CPSIA), we strongly support an interpretation that would permit testing and certification of component parts at the component level. We urge the Commission to adopt rules that permit component level testing and certification at the earliest possible moment.

Below we identify several concepts that would ensure that component level testing and certification lead to a more sustainable product safety system, advancing public health and children's safety.

Component Level Testing is Cost Effective

By any standard, component level testing is more cost-effective than finished product testing. Under component level testing, a component or input can only be incorporated into a final product if it meets the applicable safety standards. If such components or inputs fail to meet a particular standard, or are otherwise deemed deficient, they can be quickly replaced with compliant versions. Moreover, similarly deficient components can quickly be isolated and removed from the production process. In contrast, under finished product testing, the deficiency is only discovered when it is too late to make the necessary corrections.

For example, suppose a non-compliant upper is inadvertently used in the production of a shoe. Under component level testing, this non-compliant element would be discovered before the shoe was produced. In fact, it would likely be discovered before the input was even placed into production. The deficient upper, as well as the batch from which that upper was drawn, would be discarded. The loss would be confined only to that batch of uppers, while a replacement upper (and batch) would be used. The supplier of the uppers would be informed of the deficiency and would be able to make adjustments to its own production processes to ensure safe and compliant components in the future. If, on the other hand, that non-compliant upper had been discovered only after the shoe was assembled, the loss would have been much greater. An entire batch of shoes, as opposed to just uppers, would have to be discarded. Not only would the direct losses of the failure discovered at the finished product level be significantly larger than the previous example, but the there would be additional logistical and inventory costs as well as because of that larger disruption.

Testing costs rise significantly for finished product testing

A feature of finished product testing that leads to multiple testing of shared components also adds unnecessary costs. For example, suppose a garment contains 2 metal component parts – a snap and a zipper. Under component level testing, each part would be tested separately for the applicable lead standards. Even if those snaps and zippers were used in a variety (say 40) of different garments, there would only be one test associated with each component. Under a finished product testing regime, each component would be tested after it is removed from the sample garment. Instead of two tests for those 40 garments, the company will now have to conduct 80 tests (one for each component after it is removed from a different garment). And this would be on top of any testing that the supplier of the components would do.

Of course, the problem multiplies exponentially if companies are now required to test fabrics and threads (and other inherently lead-free materials) for lead, or if different dyes also trigger their own lead tests. Going back to the previous example, if each garment contains six components – body fabric, collar, cuff,

thread, snap, and zipper, as well as 5 possible dye options - the number of tests increases to more than 1000. Multiply that further by the number of seasons, the number of styles, and an increasingly complicated number of fabrications, which is the case for many shoes or garments, the number of tests explodes further still.

While part of this problem is addressed by swift CPSC action exempting lead testing for those components and articles that are inherently lead-free, such as textiles, the problem is not fully addressed until the CPSC recognizes component level testing and certification.

Because the lead in paint standard has already taking effect, the absence of component level testing has become a significant problem with respect to that standard. For example, paint coatings consist of a different combination of four basic process colors – black, yellow, magenta, or cyan. If a company uses 10 different colors, combined in 20 different articles, the company should be able to rely upon tests and certifications that the 4 process colors are compliant with the lead in paint standard. As long as each of these process colors is compliant, there is no mathematical combination that would permit a mixture of these colors to be non-compliant.

Component Level Testing Improves Product Safety

In addition to excessive costs, testing of components at the finished product level actually undermines product safety in several important ways. First, finished product testing means that labs are testing a great deal more product than previously. Member companies are reporting considerable back logs in labs as they adjust their capacity to react to this sudden demand. However, because there is no natural triage system in operation at labs, these capacity problems mean that labs are no longer focusing their resources on those riskier elements.

Moreover, companies prefer to design product safety into an article at the beginning. They want to develop a matrix of certified or trusted suppliers who can provide safe components and materials for use in their products. Viewing safety from this spreads the responsibility across the entire supply chain and makes sure each stakeholder is responsible for providing a safe product or component.

This component level approach also has the added benefit in that it is logical, which makes the product safety regime easier to communicate up and down the supply chain. Assembling a garment or shoe out of safe components will result in a finished product that is safe as well. Assembly processes used in this industry are not associated with the product safety risks – such as lead – identified in the CPSIA. Manufacturers are responsible for ensuring that the process of combining safe components does not result in the introduction of safety risks. The Commission should view the assembly process as simply an additional component with the assembly agent - the glue and the sewing thread - being just one more component that needs to be verified (assuming the material is not

exempt from testing) prior to production. And as noted before, if a component is deemed unsafe at the manufacturing level, a corrective action can be instituted quickly and correctly.

CPSC Should Permit Certification at the Component Level

An integral part of component level testing would be to permit companies to rely upon components that have been certified. While proper auditing needs to be built into such certification activities, supplier certification would greatly enhance the ability of sourcing managers to direct purchases toward those trusted partners. To this end, we encourage the CPSC to create a system, like the continuing guarantees (CG) under the Flammable Fabrics Act (FFA), to be available to form the basis of testing programs. As you know, a CG under the FFA is a good faith declaration that a product, fabric, or related material conforms with applicable flammability standards. The issuance of a guarantee must be based on reasonable and representative tests conducted in accordance with applicable flammability standards issued under the Flammable Fabrics Act (FFA) or based upon a guarantee received and relied upon in good faith by the guarantor. (See Section 8 of the Flammable Fabrics Act (15 U.S.C.1191) and 16 CFR 1608 General Rules and Regulations under the Flammable Fabrics Act.). A person receiving a proper guarantee in good faith is not subject to criminal prosecution though that person is still responsible to manufacture and sell products that comply with various standards. Such guarantees will ensure greater compliance and reduce burdens thereby reducing costs of production.

Recognition of component level testing and supplier certification is critical given the difficulties firms are facing in locating and securing testing through certified labs. A component level testing or certification program means that safety checks begin at an earlier stage of the design and production process, which is an important feature of any sustainable safety system. This means that companies have to have access to accredited labs many months before the product is actually produced, distributed, or sold. The CPSIA timelines which envision certification AFTER the standards take effect strikes us as backwards and, more importantly, a huge obstacle to ensuring timely validation of safe components. We acknowledge the recent decision by the CPSC to delay some testing and certification requirements and believe that this decision will have a limited positive affect in addressing some of the short term testing problems. But we urge that this matter be addressed fully -- so companies have maximum predictability -- before that stay is lifted.

In addition, the basic lab certification system creates enormous concerns that should be addressed as well. For example, lab accreditation for the lead in paint standard – which is already in effect and NOT impacted by the stay – has created problems regarding availability. The attached map (using data on the CPSIA website) shows that labs accredited for the lead in paint standard are concentrated in the Eastern part of the United States, making it difficult for companies in the West to identify accredited facilities.

Definitions Needed

At the same time, I urge the CPSC to move quickly to define critical terms such as "component," "batch," and "reasonable testing." Continued confusion and uncertainty of these and other terms has resulted in an unpredictable regulatory environment. For example, in one recent case, a garment was deemed to fail because the zipper end in the fly was deemed a failure. In this case, the testing was conducted of the "sub-component" at a finished product level.

Conclusion

I strongly believe the textile, apparel, footwear, and travel goods industries represent ideal candidates for component part testing and certification. I urge the Commission to quickly adopt and promulgate a common sense rule that permits component level testing and certification under Section 102. It is imperative that the Commission take action soon since finished product testing has already taken effect with respect to Lead in Paint.

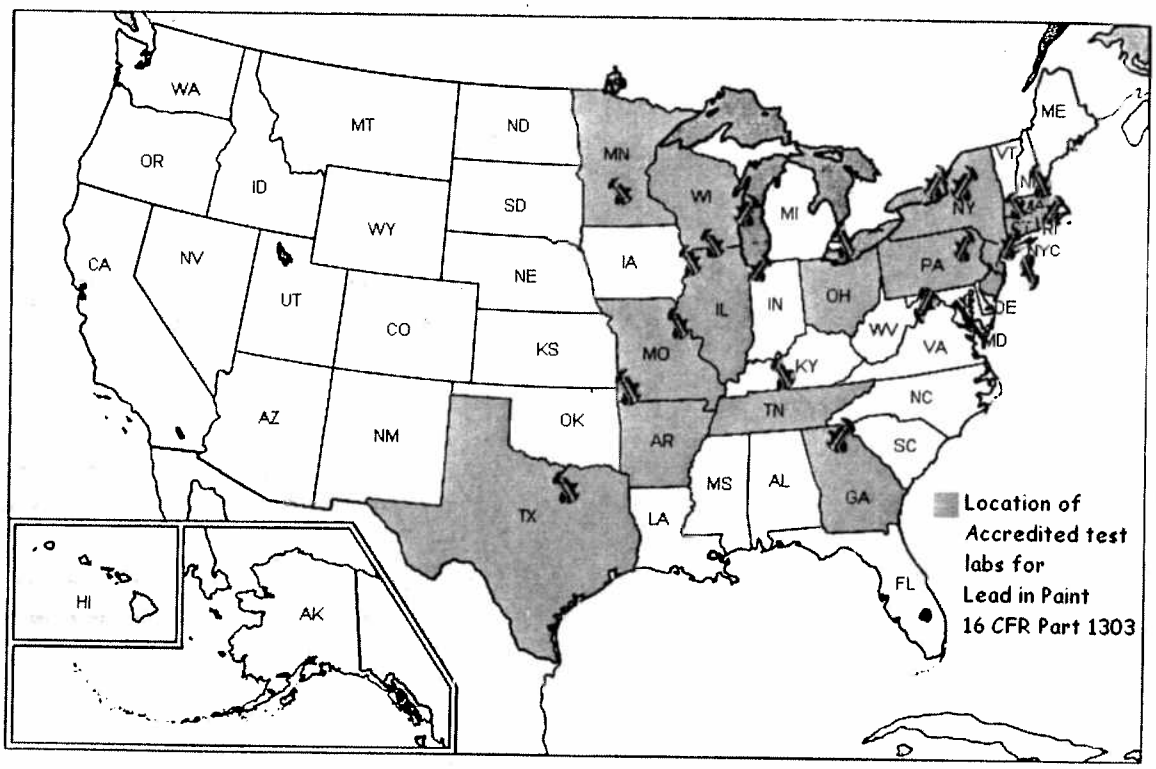
Should you have additional questions, please contact Rebecca Mond at rmond@apparelandfootwear.org at 703-797-9038.

Sincerely,

Kevin M. Burke

Kevin M. Burke
President and CEO

Attachment: Map of Accredited test labs for lead in paint


WA
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NJ
CT
RI
VT
NH
ME
NYC
HI
AK
Location of
Accredited test
labs for
Lead in Paint
16 CFR Part 1303

Stevenson, Todd

From: Steve Lamar [slamar@apparelandfootwear.org]
Sent: Tuesday, February 17, 2009 6:05 PM
To: Lead Determinations; Lead Accessibility; Lead Exclusions
Cc: Stevenson, Todd; Rebecca Mond; Hatlelid, Kristina; Steve Lamar
Subject: AAFA Feb 17 Lead Comments - Determinations, Exclusions, and Inaccessibility
Attachments: AAFA CPSIA Comments Feb 17.doc

Please find attached a statement from AAFA providing comments for each of the three rule makings today. The letter addresses issues raised in each Federal Register notice request so please make sure the comments are routed to each docket. Thanks.

Steve Lamar,
American Apparel & Footwear Association

February 17, 2009

Mr. Todd Stevenson
Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East-West Highway,
Bethesda, Maryland, 20814

Via Email: *Sec101Determinations@cpsc.gov; Sec101InaccessibleRule@cpsc.gov; Sec101Exclusions@cpsc.gov*

REF: A. Section 101 Determinations of Certain Materials or Products NPR (74 FR 2433)

B. Section 101(b) Exclusions (74 FR 2428)

C. Section 101 Inaccessible Component Parts (74 FR 2439)

Dear Mr. Stevenson:

The undersigned organizations are providing these additional comments in connection with the captioned rule-makings.

Our associations, and the members we represent, are united in support of common-sense, enforceable product safety rules that are easy to understand, that are based on risk and data, and that are the result of a predictable process.

Many of our organizations, and individual members of these organizations, have participated in previous discussions at the Consumer Product Safety Commission ("Commission") on these and related issues and have provided information and evidence to the Commission. Please find attached a copy of a letter sent on January 30 that many of our organizations endorsed providing earlier comments with respect to the non incidence of lead in fabrics. Our comments below will elaborate and expand on those earlier comments and data that have been provided to the Commission.

A. Section 101 Determinations of Certain Materials or Products NPR (74 FR 2433)

To summarize our earlier submissions, there is extensive testing data using XRF and wet chemistry and other ***overwhelming evidence to support the conclusion that textiles are inherently lead-free.*** Because of these data already submitted as part of these rulemakings, we urge the Commission in the final rules amending 16 CFR 1500 to recognize that textile

materials are inherently lead-free and to exempt textile materials from the lead-testing requirements.

The "Statement of Commission Enforcement Policy on Section 101 Lead Limits" that the Commission announced on February 6 and published on Feb 9 [http://www.cpsc.gov/ABOUT/Cpsia/101lead.pdf] paves the way for such an exemption. While we are pleased that the Commission has moved in this direction, we urge the Commission to move quickly to publish final rules that make clear that textile materials, whether they be made from natural or manufactured fibers, regardless of whether such materials are undyed, dyed or otherwise processed, are exempt from lead testing.

The lack of an articulated and comprehensive exemption for textiles in a final mandatory rule continues to create confusion and misunderstanding. Until there is a clearly articulated finding by the Commission exempting textiles pursuant to the authorities under the Consumer Product Safety Improvement Act (CPSIA), the business community, and in particular small businesses and home crafters, will not have the predictability they need.

Accordingly, we ask that the Commission use the rulemaking, published in the ***Federal Register*** on January 15, 2009 to exempt from lead testing all textile materials, whether they be made from natural or manufactured fibers, regardless of whether such materials are undyed, dyed or otherwise processed. Similarly, we ask that the Commission extend this exemption to any children's article, including apparel and other children's products, which are made entirely out of exempt textile materials.

Specifically, we urge that the proposal "children's products containing lead; proposed determinations regarding lead content limits on certain materials or products" which was in the ***Federal Register*** Jan 15, 2009 , pp. 2433-2435 be modified in the following way.

Remove the references to textile materials in section 1500.91 (c) and include all textile references in a new 1500.91 (e) that would read:

(e) The following textile materials do not exceed the 600 ppm or 300 ppm lead content limits under section 101(a) of the CPSIA, regardless of whether such materials are dyed, processed, or otherwise finished or altered:

> *(1) Natural fibers, including, but not limited to, cotton, silk, wool, hemp, rubber, and flax (linen).*
>
> *(2) Manufactured/man-made fibers, including, but not limited to, polyester, nylon, acrylic, spandex, olefin (polypropylene), rayon, acetate, and lyocell.*

(3) Products or components made exclusively from natural or manufactured/man-made fibers, or any blend thereof, including, but not limited to, yarns, fabrics, threads, trims, laces, elastic, ribbons, rope, string, legwear, footwear, garments, toys, travel goods, home furnishings and industrial fabrics.

We believe such a section would greatly clarify the level of exemption in a manner consistent with the data.

We also note that the CPSC enforcement guidance excludes metallic threads. We are unaware of any metallic threads that present a lead hazard. There are several basic processes that are used in manufacturing metallic fibers. Lead is not introduced in any case. The most common is the laminating process, which seals a layer of aluminum between two layers of acetate or polyester film. These fibers are then cut into lengthwise strips for yarns and wound onto bobbins. The metal can be colored and sealed in a clear film, the adhesive can be colored, or the film can be colored before laminating. There are many different variations of color and effect that can be made in metallic fibers, producing a wide range of looks. Metallic fibers can also be made by using the metalizing process. This process involves heating a non-lead metal until it vaporizes then depositing it at a high pressure onto the polyester film. This process produces thinner, more flexible, more durable, and more comfortable fibers. Finally, some metallic threads are actually dyed polyester or nylon filament and either contain no metals or only trace amounts of metals. In these cases, "metallic" is a term referencing a metallic appearance and not raw material content.

As a final note, we continue to urge the Commission to move quickly with respect to component-level testing. Many children's articles that contain textiles may also contain other components for which lead testing is appropriate. However, unless there is a clear path to compliance that involves testing at the component level or supplier certifications, which can be combined with the textile exemptions we are seeking herein, the relief for textiles will be limited to only a few children's products.

B. Section 101(b) Exclusions (74 FR 2428)

The Commission proposal articulates a process through which the Commission can make future determinations that materials or products may be excluded because they are inherently lead-free or contain lead below the statutory limits. The Commission is also proposing a process to exclude products or materials where lead in such products or materials will not result in the absorption of any lead into the human body during normal and reasonably foreseeable use and abuse by a child, or otherwise result in adverse impact on public health or safety.

Among other things, this process will help enable a component, even if it potentially contains lead, not to be deemed to present a risk because the lead is not bio-available to the child. Simply put, if there is detectable lead in the

product, but it is not accessible because it is not soluble in saliva or able to be ingested or inhaled, it is not a risk because there is little or no chance of exposure. Thus, if there is no or very little exposure, then the lead, even if detectable, poses minimal risk or no risk to the child.

We strongly support such a process and applaud the Commission for taking steps to articulate the rules through which this process can be followed. We would strongly urge as well that the Commission (a) articulate a timeline for the process, (b) announce how individual petitions will be publicly disclosed and (c) advise how companies can protect business-confidential information. These modifications would ensure more predictability and confidence in the process so that petitioners and other stakeholders could better track efforts to secure exclusions.

C. Section 101 Inaccessible Component Parts (74 FR 2439)

The Commission proposal articulates guidelines regarding inaccessible components. The statute defines inaccessibility narrowly to occur when a "component part is not physically exposed through a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product." The statute further disqualifies barriers such as paint, coatings, or electroplating.

In its proposal, the Commission seeks guidance as to whether "fabric coverings could be used as a barrier that would make lead within the product inaccessible to a child."

We strongly support a determination that fabric be classified as a barrier. The plain reading of the statute supports this conclusion since fabric would render a covered or encased component not physically exposed.

Moreover, there is precedence for this with respect to fabrics by the Commission. In a Jan 9, 2006 document, by Thomas and Brundage of the Commission, "Quantitative Assessment of Potential Health Effects from the Use of Fire Retardant (FR) Chemicals in Mattresses" (for additional information, please see: http://www.cpsc.gov/library/foia/foia06/brief/matttabd.pdf), which was part of a briefing package for the flammability standard for mattresses, the CPSC reported the results of quantitative assessment of potential risk of health effects from FR chemicals that could be incorporated in mattresses. Migration/exposure assessment studies on FR-treated mattress barriers were conducted, including aging studies and all applicable routes of exposure (i.e., oral, dermal and inhalation) were evaluated. The results of the exposure and risk assessment were used to determine products that are not expected to pose any appreciable health risk to consumers because the lead in internal components is inaccessible.

Moreover, we urge the Commission to explore other inaccessibility scenarios. If lead in a component is not accessible to a child through normal, foreseeable use

(i.e., whether children using the product could be exposed to the lead that is present), then the Commission should consider the lead inaccessible and the component should not have to be tested for total lead content.

By incorporating these modifications and clarifications into the final rules, the Commission can help reduce costly, unnecessary testing and compliance burdens of products and components that are inherently lead free or contain lead in amounts that are clearly below the lowest CPSIA lead limit and instead focus critical resources on products and components where there is the most risk.

Thank you for your attention to this matter.

Sincerely,

American Apparel & Footwear Association (AAFA)
American Fiber Manufacturers Association (AFMA)
American Manufacturing Trade Action Coalition (AMTAC)
American Specialty Toy Retailing Association (ASTRA)
California Fashion Association (CFA)
Coalition for Safe and Affordable Childrenswear, Inc.
Craft & Hobby Association (CHA)
Craft Yarn Council of America
ETAD – The Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers
Fashion Accessories Shippers Association (FASA)
Fashion Incubators Association
Gemini Shippers Association
Georgia Traditional Manufacturers Association (GTMA)
Halloween Industry Association (HIA)
Handmade Toy Alliance (HTA)
INDA, Association of the Nonwoven Fabrics Industry
International Sleep Products Association (ISPA)
Juvenile Products Manufacturers Association (JPMA)
National Association of Resale & Thrift Shops (NARTS)
National Cotton Council (NCC)
National Council of Textile Organizations (NCTO)
National Retail Federation (NRF)
National School Supply & Equipment Association
National Textile Association (NTA)
Outdoor Industries Association (OIA)
Real Diaper Industry Association (RDIA)
Retail Industry Leaders Association (RILA)
Rubber and Plastic Footwear Manufacturers Association (RPFMA)
SEAMS Association
Secondary Materials and Recycled Textiles (SMART)
Specialty Graphic Imaging Association (SGIA)
Sporting Goods Manufacturers Association (SGMA)
The Hosiery Association (THA)
Toy Industry Association (TIA)
Travel Goods Association (TGA)
U.S. Association of Importers of Textiles and Apparel (USA-ITA)

ATTACHMENT

January 30, 2009

Mr. Todd Stevenson
Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East-West Highway,
Bethesda, Maryland, 20814

REF: Follow Up to January 22 Textiles Meeting

Dear Mr. Stevenson:

Thank you for providing an opportunity to present data and scientific evidence regarding the incidence of lead in textiles, apparel, and other children's products containing textiles during a public meeting on January 22, 2009 at the headquarters of the Consumer Product Safety Commission (CPSC).

To sum up, our panel of textile, apparel, and retail scientific and compliance experts presented information that showed the lack of lead in textiles using XRF and wet chemistry data and explained the science of textile fibers and production of finished textiles from those fibers that explains why lead is not detected in textile materials. Specifically, we presented the following results in summary:

- The XRF and wet chemistry testing correlation was very high in data sets where both tests were used on the same components.

- XRF and wet chemistry test results of more than 3000 garments representing a wide range of natural, manufactured/man-made fiber and blended fabrics, fabric constructions, and processes failed to reveal any samples where lead was detected in the textile components at a level greater than 300 ppm. In fact, in all but four cases, test results confirmed a non-detect level.

- In a few cases, XRF testing, followed up with wet chemistry, did detect lead in amounts exceeding 100ppm, 300ppm, or 600ppm in certain metal and plastic accessories, such as buttons, zippers, snaps, and rhinestones. The incidence of these failures was extraordinarily low – representing less than 5 percent of all samples. Moreover, in many cases, it was only *part* of the component that triggered a positive lead result. For example, in one case, a garment that otherwise passed was deemed to fail because a single sub component of the zipper component – the zipper stop – failed. The relatively rare occurrence of lead in accessories does not account for the fact that new production is showing near 100 percent compliance, even in the accessories.

- Lead is not found in natural and manufactured textile fibers or introduced in the variety of textile processes used to produce thread, yarns, fabrics, garments or other textile products. Preparation for dyeing and finishing essentially removes all non-fiber chemical, including metals. No chemicals intentionally containing lead are intended to be used for coloration of apparel textiles. To prove this point to the CPSC staff, laboratory tests, based on historical information that was never commercialized, were used to try to deliberately create a lead mordant dyed sock. These tests failed to achieve satisfactory color, thereby demonstrating why lead is not an effective mordant to fix a dye to fibers. There can be traces of lead as a contaminant with the dye formulation but lead is never part of the dye molecule that colors the fiber. Data were presented that showed that even if trace amounts of lead were to be in a dye formulation, wet chemistry tests of the dyed threads still yield a non-detect lead level at the thread level.

Given this strong evidence confirming the zero risk of lead in textiles, and the extremely low risk of lead in accessories related to garments, we would like to make the following recommendations:

First, we ask that the Commission use the ongoing rule making, published in the ***Federal Register*** on January 15, 2009 to exempt from lead testing of all textile materials, whether they be natural or manufactured, regardless of whether such materials are dyed or otherwise processed. Similarly, we ask that the Commission extend this exemption to any children's article that is made entirely out of exempt textile materials.

Specifically, we urge that the proposal "children's products containing lead; proposed determinations regarding lead content limits on certain materials or products" which was in the ***Federal Register*** Jan 15, 2009 , pp. 2433-2435 be modified in the following way.

Remove the references to textile materials in section 1500.91 (c) and include all textile references in a new 1500.91 (e) that would read:

(e) The following textile materials do not exceed the 600 ppm or 300 ppm lead content limits under section 101(a) of the CPSIA, regardless of whether such materials are dyed, processed, or otherwise finished or altered:

(1) Natural fibers, including, but not limited to, cotton, silk, wool, hemp, rubber, leather, and flax (linen).

(2) Manufactured/man-made fibers, including, but not limited to, polyester, nylon, acrylic, spandex, olefin (polypropylene), rayon, acetate, and lyocell.

(3) Products or components made exclusively from natural or manufactured/man-made fibers, or any blend thereof, including, but not limited to, yarns, fabrics, threads, trims, laces, legwear, footwear, garments, toys, travel goods, home furnishings and industrial fabrics.

Second, since the test data presented showed a strong correlation between XRF testing and wet chemistry test data, we urge the CPSC to move quickly to authorize the use of XRF technology to support testing that can be used as the basis of certifications on general conformity certificates.

Third, an exemption for textile components will help relieve testing burdens for companies making products that rely upon textiles. We believe this burden can be reduced further, without any harm to public safety, through the authorization of component level testing. To help companies source and ship compliant products, the need for component testing is crucial. This will allow end product manufacturers to create a supplier matrix early in the manufacturing process, and develop relationships that will support the CPSIA requirements. Of course, many companies will supplement component testing by conducting periodic and random audits of end products, and by relying upon other ongoing validation and certification procedures they may use. Relying solely upon testing after production is complete, as is the case with the current system, will only increase costs and the adverse impact of non-compliance, and not allow the manufacturer or importer enough time to take corrective actions. Thus, we urge the Commission to move quickly to adopt these needed reforms, including clear and practical definitions for key terms such as components and batches, at the earliest possible moment.

Fourth, we note that the comment period (i.e., comments are due February 17) on several of these rule makings is going to continue past the February 10 date when the new lead rules are currently scheduled to take effect. This issue was discussed briefly during our meeting on January 22. Given that final regulations will not be promulgated, much less digested, understood and implemented, until well after the February 10 date, we believe a delay in the implementation of the February 10 lead limits is appropriate. We note that a coalition led by the National Association of Manufacturers recently submitted a letter, co-signed by many of the organizations and entities listed below, that urges a delay until August 14, 2009, or 90 days after the publication of final rules, whichever comes later. We strongly support that request.

Finally, we refer back to the letter dated November 14 by Ms. Cheryl Falvey, CPSC General Counsel, relating to a "Request for Reconsideration of Application of the Consumer Product Safety Improvement Act's (CPSIA) Limit on Lead Permissible in Children's Products in Regard to Unsold Inventory as of February 2009". That letter advised the respondent to petition the Commission directly for relief to be able to sell inventory that cannot be brought into compliance by the February 10 deadline. In our presentation on January 22, we provided overwhelming evidence that textiles and the majority of accessories in garments present no risk

of lead exposure. At the same time, we note that there may be isolated cases of lead detection in some accessories in inventory. This is not surprising since new lead standards enacted by the CPSIA on August 14, 2008 were not known a year earlier when buying decisions for those accessories were being made. Although testing and compliance requirements for new accessories will achieve significantly improved compliance rates moving forward, it is simply not possible to retroactively bring the affected inventory into full compliance with either the 600 ppm or the 300 ppm limit.

Given these facts, and the data supporting our contention that there is very low incidence of lead in inventories, we herewith petition the Commission, on an emergency basis, to permit the sale of such items out of inventory.

Thank you for your attention to this matter.

Sincerely,

American Apparel & Footwear Association (AAFA)
American Fiber Manufacturers Association (AFMA)
American Manufacturing Trade Action Coalition (AMTAC)
California Fashion Association (CFA)
Coalition for Safe and Affordable Childrenswear, Inc.
Craft Yarn Council of America
ETAD – The Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers
INDA, Association of the Nonwoven Fabrics Industry
International Sleep Products Association
National Cotton Council (NCC)
National Council of Textile Organizations (NCTO)
National Retail Federation (NRF)
National Textile Association (NTA)
Outdoor Industries Association (OIA)
Retail Industry Leaders Association (RILA)
Secondary Materials and Recycled Textiles (SMART)
Specialty Graphic Imaging Association (SGIA)
Sporting Goods Manufacturers Association (SGMA)
The Hosiery Association (THA)
Travel Goods Association (TGA)
U.S. Association of Importers of Textiles and Apparel (USA-ITA)

Stevenson, Todd

From: Steve Lamar [slamar@apparelandfootwear.org]
Sent: Thursday, February 19, 2009 5:28 PM
To: Steve Lamar; Lead Determinations; Lead Accessibility; Lead Exclusions
Cc: Stevenson, Todd; Rebecca Mond; Hatlelid, Kristina
Subject: FW: Joint Submission by Coalition of Trade Associations Regarding Lead and Textiles in Connection with Feb 17 Comment Requests - 4 additional signatories
Attachments: Multi Association Follow Up Letter Feb 17.doc

Please find attached a revised submission to add in 4 additional signatory trade associations. Those four trade associations are:

Craft & Hobby Association (CHA)
Halloween Industry Association (HIA)
Juvenile Products Manufacturers Association (JPMA)
Toy Industry Association (TIA)

Respectfully Submitted on behalf of this coalition by:

Steve Lamar,
American Apparel and Footwear Association

From: Steve Lamar
Sent: Tuesday, February 17, 2009 6:04 PM
To: 'Sec101Determinations@cpsc.gov'; 'Sec101InaccessibleRule@cpsc.gov'; 'Sec101Exclusions@cpsc.gov'
Cc: 'tstevenson@cpsc.gov'; Rebecca Mond; 'Hatlelid, Kristina'; Steve Lamar
Subject: Joint Submission by Coalition of Trade Associations Regarding Lead and Textiles in Connection with Feb 17 Comment Requests

Please find attached a joint submission by a coalition of 30 trade associations regarding the 3 comment periods that close today. The joint letter contains information for each of the Federal Register notices so please make sure a copy is provided for each docket. Thanks.

Associations signing on to this letter include:

American Apparel & Footwear Association (AAFA)
American Fiber Manufacturers Association (AFMA)
American Manufacturing Trade Action Coalition (AMTAC)
American Specialty Toy Retailing Association (ASTRA)
California Fashion Association (CFA)
Coalition for Safe and Affordable Childrenswear, Inc.
Craft Yarn Council of America
ETAD – The Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers
Fashion Accessories Shippers Association (FASA)
Fashion Incubators Association
Gemini Shippers Association
Handmade Toy Alliance (HTA)
INDA, Association of the Nonwoven Fabrics Industry
International Sleep Products Association (ISPA)
National Association of Resale & Thrift Shops (NARTS)

National Cotton Council (NCC)
National Council of Textile Organizations (NCTO)
National Retail Federation (NRF)
National School Supply & Equipment Association
National Textile Association (NTA)
Outdoor Industries Association (OIA)
Real Diaper Industry Association (RDIA)
Retail Industry Leaders Association (RILA)
SEAMS Association
Secondary Materials and Recycled Textiles (SMART)
Specialty Graphic Imaging Association (SGIA)
Sporting Goods Manufacturers Association (SGMA)
The Hosiery Association (THA)
Travel Goods Association (TGA)
U.S. Association of Importers of Textiles and Apparel (USA-ITA)

Respectfully Submitted on behalf of this coalition by:

Steve Lamar,
American Apparel and Footwear Association

Consumers Union * Consumer Federation of America
*** Kids in Danger * Public Citizen ***
*** U.S. Public Interest Research Group ***

February 17, 2009

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East-West Highway
Bethesda, Maryland 20814
Via: Sec101Determinations@cpsc.gov
Facsimile (301) 504-0127

RE: Section 101(a) Determinations and Section 101 (b) Exclusions

Comments of Consumers Union, Consumer Federation of America, Kids in Danger, Public Citizen and the U.S. Public Interest Research Group to the U.S. Consumer Product Safety Commission
on
"Children's Products Containing Lead; Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion"

Introduction

Consumers Union of U.S., Inc. (CU), Consumer Federation of America (CFA), Kids in Danger, Public Citizen and the U.S. Public Interest Research Group (jointly "We") submit the following comments in response to the U.S. Consumer Product Safety Commission ("CPSC" or "Commission") in the above-referenced matter ("Determinations or Exclusions").[1]

Background

Section 101 of the CPSIA provides for specific lead limits in children's products. Section 101(b)(2) provides that 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.

[1] "Children's Products Containing Lead; Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion," 74 Fed. Reg. 2428 (January 15, 2009).

The CPSC has published this Notice of Proposed Procedures and Requirements in order to implement Section 101 of the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, ("CPSIA") which amends the Consumer Product Safety Act. Sections 101(a) of the CPSIA provides for specific lead limits in children's products, and prohibits products designed or intended primarily for children 12 and under from containing in excess of 600 ppm of lead as of February 10, 2009. 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 have this lower limit.

Under Section 3 of the CPSIA, the Commission is granted authority to issue regulations to implement the CPSIA. There may be certain classes of products or materials that inherently do not contain lead or contain lead at levels that would not exceed the lead content limits under Section 101 (a). The Commission is proposing to exercise its authority under Section 3 to make determinations that certain commodities or classes of materials or products do not exceed the lead limits of Section 101(a). The effect of such determination would be to relieve that material or product form testing requirements of section 102 for the purpose of supporting the required certification. Sections 102 requires that products be tested and certified to meet the lead limits of section 101(a).

Recommendations

We note that the Commission has decided to use its broad authority under Section 3 in order to "make determinations that certain commodities or classes of materials or products do not exceed the lead limits of [S]ection 101(a)."[2] We are pleased that, regardless of any determination to exclude certain types of

[2] Id. at 2429.

products and materials from testing requirements, the Commission will uphold the statutory lead level requirements. In addition, we are encouraged that the Commission will obtain and test product on the marketplace to ensure that the limits of Section 101(a) are being met and will take enforcement action against compliance violators. This marketplace surveillance should act as an effective deterrent to companies that might otherwise be tempted to introduce lead into products exempted from testing as a cost cutting measure. We note that a sampling frequency has not been specified, however, the schedule for sampling products from the market by the Commission should be done with a reasonable frequency so as to act an effective deterrent.

We support the procedures for excluding certain materials and products using the best-available, objective, peer-reviewed, scientific evidence showing that lead in such products will not result in the absorption of any lead into the body. We agree with the Commissions stated approach, where this procedure takes into account reasonable foreseeable use and abuse by a child as well as the effects of product aging, and will require a notice and hearing to seek public comment should such exclusions appear warranted after initial Commission review.

Respectfully submitted,

Donald L. Mays
Senior Director, Product Safety & Technical Public Policy
Consumers Union

Janell Mayo Duncan
Senior Counsel
Consumers Union

Rachel Weintraub
Director of Product Safety and Senior Counsel
Consumer Federation of America

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. PIRG

Elizabeth Hitchcock
Public Health Advocate
U.S. PIRG

Stevenson, Todd

From: Mays, Don [MAYSDO@consumer.org]
Sent: Tuesday, February 17, 2009 5:47 PM
To: Lead Determinations
Subject: Section 101(a) Determinations and Section 101(b) Exclusions
Attachments: Determinations or Exclusions.pdf

We are respectfully submitting these comments on Section 101(a) and Section 101(b) Exclusions.

Donald L. Mays
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VIA E-MAIL

February 17, 2009

Office of the Secretary
Consumer Product Safety Commission
4330 East West Highway, Rm. 502
Bethesda, MD 20814

RE: Comments on Section 101(a) determinations, Section 101(b) determinations, and Section 101 determinations of certain materials or products NPR under the Consumer Product Safety Improvement Act

Dear Sir or Madam:

We submit these comments in response to the following notices of proposals to exempt from testing requirements certain materials that inherently do not contain lead, and to establish procedures to exempt products and materials from the lead standards and testing requirements in the future:

- ✓ Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion, 74 Fed. Reg. 2428 (Jan. 15, 2009).

- Proposed Determinations Regarding Lead Content Limits on Certain Materials or Products; Notice of Proposed Rulemaking, 74 Fed. Reg. 2433 (Jan. 15, 2009).

We recognize the tremendous task the Commission faces in implementing the Consumer Product Safety Improvement Act ("CPSIA" or "Act"), and in meeting the schedules set forth in the Act. Our comments are limited to three recommendations to improve the referenced proposals. We submit the comments on behalf of the California Attorney General, and not on behalf of any other state agency.

1. **Clearly state in the regulations that materials and products the Commission determines do not ordinarily have lead still must comply with the lead standards.**

Our first comment relates to the proposed procedures and requirements for requesting an inherent lead content level determination by the Commission ("Section 101(a) determination"),

and to the proposed determinations regarding the lead content in certain natural materials and metal alloys ("Section 101 determinations of certain materials or products NPR"). Both proposals are designed to relieve certain materials and products that inherently do not contain lead or that contain lead at levels below the limits from the testing requirements in section 102 of the CPSIA.[1] We understand the Commission's rationale to be that companies should not have to test for lead in materials or products that the Commission has determined inherently do not contain lead, based on its review of objectively reasonable and representative test results or other scientific evidence.

We agree with the rationale behind the proposal, but the Commission must make explicit in the regulations that its determination does not exempt the material or product from the lead standards in section 101. The preambles to both proposals say this. 74 Fed. Reg. at 2429 ("[o]f course, even where a material or product has been so relieved of the testing requirement, it must still meet the statutory lead level requirements in actual fact"); 74 Fed. Reg. at 2433 (same). But the proposed regulations do not. The omission may lead to confusion. A person who reads the regulations in the Code of Federal Regulations could wrongly conclude that materials the Commission has determined inherently do not contain lead are not subject to the lead standards.

To avoid confusion, proposed sections 1500.89 and 1500.91 should state that "a determination by the Commission under this section that a material or product does not contain lead levels that exceed 600 ppm, 300 ppm or 100 ppm does not relieve the material or product from complying with the applicable lead standard." This addition will clarify that it remains illegal to sell products with materials that ordinarily do not contain lead if, due to contamination during the manufacturing process or from some other source, the material contains lead above the legal limit.

2. **Request more documentation about factories where products and materials are made before determining that the products or materials inherently do not contain lead.**

Our second comment relates solely to the procedures for applying for a determination that a product inherently does not contain lead ("Section 101(a) determination"). The proposed regulation lists categories of documentation that an applicant must include in any request for a determination under section 1500.89. Two of the categories relate to information about the manufacturing process. One of the categories requests "[d]ata or information on manufacturing processes through which lead may be introduced into the product or material." 74 Fed. Reg at 2432 (proposed 16 C.F.R. § 1500.89(c)(4)(iii)). The other requests "[a]n assessment of the manufacturing processes which strongly supports a conclusion that they would not be a source of

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[1] It is not clear to us that the Commission's authority under Section 3 of the CPSIA to issue regulations "to implement this Act" allows it to exempt materials or products from the testing requirements in section 102. A more appropriate alternative might be to define a reasonable testing program as excluding testing of materials and products that the Commission has determined inherently do not contain lead above the legal limits.

lead contamination of the product or material." *Id.* (proposed § 1500.89(c)(4)(vi). These categories should be expanded to require data and information about the facilities where materials or products are manufactured, including what other materials or products are manufactured there.

Consumer products can be contaminated with lead when the products or constituent materials are manufactured at a facility or with equipment used for products with lead. For instance, we have been told that polyvinyl chloride ("PVC") made in factories or with equipment previously used for leaded PVC may contain lead, even if lead is not intentionally added to the new PVC. Similarly, a spray gun that has been used to apply lead paint may contaminate lead-free paints used afterward.

To help the Commission determine whether a product or material reliably will not exceed the lead limits, the applicant must describe what kinds of factories and equipment are used to make the product or material. Where the applicant seeks an exemption for an entire product, the information should cover all of the materials used in the product. The applicant also must disclose whether products or materials containing lead previously were manufactured or used at the same facilities, or with the same equipment, and whether such products or materials continue to be made or used there. We recommend adding the following categories to the information an applicant must provide under section 1500.89(c)(4):

- Data or information on the facilities and manufacturing processes used to manufacture the material or product, and any materials used in the product.

- An assessment of the likelihood, or lack thereof, that the use of leaded materials at a facility or in equipment at any time will result in lead contamination of a material or product that ordinarily does not contain lead.

3. **Continue to make the documentation submitted in support of petitions under the proposed procedures available to the public, or identify documents withheld as protected trade secrets.**

Our third comment relates to the procedures and requirements for an inherent lead content level determination ("Section 101(a) determination"), and for an exclusion from the lead requirements ("Section 101(b) determination"). Under the proposed procedures for both types of determination, the Office of Hazard Identification and Reduction will assess materials submitted in support of an application and make a preliminary recommendation to grant or to deny the request. If the recommendation is to grant the request, the Commission "will publish a notice of proposed rulemaking inviting public comment on whether the preliminary determination [or proposed exclusion] should be granted in final form." 74 Fed. Reg. at 2432-33 (proposed 16 C.F.R. §§ 1500.89(e), 1500.90(e)).

The Commission's practice to date appears to be to post entire applications and supporting documentation on its website – although we would not know if the Commission has

withheld petitions or documents. We encourage the Commission to continue to post applications and supporting documents, and to make this part of the formal application process by adding it to the regulations. In cases where the Commission withholds information because it is a trade secret, *see* 15 U.S.C. § 2055(a)(2), it should identify the materials withheld and the reason or reasons for withholding the materials.[2]

This approach will encourage companies to make full and candid disclosures as part of their petitions, while giving the public a meaningful opportunity to evaluate the petition and the Commission's preliminary determinations.

Thank you for considering our comments.

Sincerely,

HARRISON M. POLLAK
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

HMP:

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[2] Since the proposed regulation contemplates publicizing the preliminary determination in a notice of proposed rulemaking, the Commission's procedures for disclosing the identity of regulated entities and their products do not apply. 16 C.F.R. § 1101.44 (exception for disclosures that are part of a rulemaking proceeding).

Stevenson, Todd

From: Harrison Pollak [Harrison.Pollak@doj.ca.gov]
Sent: Tuesday, February 17, 2009 9:10 PM
To: Lead Determinations; Lead Electronic Devices
Cc: Ed Weil; Timothy Sullivan
Subject: California AG Comments re § 101 Determinations and Electronic Devices Interim Rule
Attachments: CA AG Comments re 101 Determinations 17Feb09.pdf

Please accept the attached comments from the California Attorney General concerning:

+ Section 101(a) determinations
+ Section 101(b) determinations, and
+ Section 101 determinations of certain materials or products NPR

Thank you.

Harrison Pollak
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February 17, 2009

Via Electronic Mail

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

Re: Section 101(a) Determinations; Section 101(b) Exclusions

Dear Mr. Stevenson:

On behalf of the Fashion Jewelry Trade Association (FJTA),[1] we appreciate this opportunity to submit these comments in response to the Consumer Product Safety Commission's (CPSC) Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion.[2] These proposed procedures are intended to implement Section 101(a) and 101(b) of the Consumer Product Safety Improvements Act of 2008 (CPSIA).[3] We address separately the proposed Procedures for Determinations Regarding Lead Content of Materials or Products under Section 101(a) of the CPSIA, and the Procedures for Exclusions from Lead Limits under Section 101(b) of the CPSIA.

Procedures for Determinations Regarding Lead Content of Materials or Products under Section 101(a) of the CPSIA

FJTA agrees that the Commission should exempt commodities or classes of materials that are not likely to exceed the lead limits of Section 101(a) of the CPSIA. Indeed, FJTA supports the proposed exemptions the Commission has already issued in the form of a proposed rule.[4]

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[1] FJTA members include approximately 255 suppliers and retailers of fashion or costume jewelry, many of whom are small businesses. FJTA does not represent the vending machine industry and its members do not make toy jewelry. The fashion jewelry industry is about a $9 billion industry in the U.S.; many industry members are small businesses.

[2] 74 Fed. Reg. 2,428 (January 15, 2009).

[3] Pub. L. No: 110-314, 122 Stat. 3,016 (August 14, 2008).

[4] *See* 74 Fed. Reg. 2,433 (January 15, 2009).

The effect of such exclusions is to relieve the manufacturer or importer from testing the material or product. We support the recent action to stay third-party testing and certification except as to standards already in force or proposed by the Commission and urge the Commission to act quickly to address critical issues of component testing. The Commission is well aware of the lack of laboratory capacity to test the myriad of materials that might potentially require testing and certification. Because the material or product must still meet the statutory lead limits required under the CPSIA, we believe that the Commission can adopt a streamlined process to exclude such materials pursuant to its authority under Section 3 and Section 102 of the CPSIA and need not handle such requests under Section 101(b)(1) of the CPSIA. Based on published literature, receipt of test data, input from laboratories conducting testing for lead, or other reasonable scientific data or information, the CPSC could exclude from the requirements of testing any product, material or class of materials that will likely meet the lead limits.

FJTA believes that the Commission can and should expand the list of excluded materials to cover all the low-lead materials excluded under California law pursuant to a settlement agreement under California's Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as the "Proposition 65" initiative).[5] These exclusions were adopted based on a consensus process involving an assessment of the lead content of various materials used in jewelry. In addition to the materials the Commission has already proposed for exclusion, FJTA urges the Commission to exclude elastic, fabric, ribbon, rope, or string, unless these items contain intentionally added lead, as well as two other natural materials: horn and shell. Adhesive and stainless steel were also exempt under the Proposition 65 proceeding.

The immediate impact of the failure to recognize exclusions for the fabric items and other natural materials has been limited by the recent stay of testing and certification requirements, but there is no scientific evidence that any of the materials excluded under the Proposition 65 settlement have resulted in any increase in children's exposure to lead. Consequently, requiring companies interested in using materials that are excluded from the California lead limits to undergo an extensive additional rulemaking process to obtain an exclusion under federal law, imposes additional and unnecessary burdens on industry. We do not believe the proposed process is required under the CPSIA where low lead materials are concerned. The CPSC has authority and Section 3 to make exclusion determinations. This situation is particularly troublesome for the jewelry industry since the state of California has submitted a request to

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[5] *See People v. Burlington Coat Factory Warehouse Corporation, et al,* Case No. RG 04-162075 (Alameda Superior Court June 15, 2006). This agreement was subsequently enacted as legislation in California as A.B. 1681, amended by A.B. 2901. *See* Cal. Health & Safety Code §§ 25214.1-.4. The California requirements were enacted legislatively in the State of Minnesota as well. *See* Minn. Stat. § 325E.389.

recognize its jewelry law as exempt from the scope of preemption. Such a request necessarily encompasses recognition of all the excluded materials.

Procedures for Exclusions from Lead Limits under Section 101(b) of the CPSIA

Section 101(b) provides that the omission may exclude specific products or materials from the total lead limits of Section 101 after notice and a hearing if it determines that lead in such product or material will neither result in the absorption of any lead into the body, taking into account normal and reasonably foreseeable use and abuse conditions, nor have any other adverse impact on public health or safety.[6] FJTA, along with the Manufacturing Jewelers and Suppliers of America (MJSA), Footwear Distributors and Retailers of America (FDRA), National Retail Federation (NRF) and United Dance Merchants of America (UDMA), submitted a request to exclude crystal and glass rhinestones and beads from the total lead limits (hereafter "Crystal Petition") and is vitally interested in the process for exemptions for materials that might exceed the total lead limits but do not pose a hazard to children under reasonably foreseeable use conditions.

We agree with the Commission that Section 101(b) does not require a "hearing on the record" and that an oral hearing is not necessary to satisfy the due process requirements. Because Section 101(e) provides that a pending rulemaking will not delay the effect of any provision or limit on total lead, however, we urge the Commission to immediately docket the Crystal Petition and to issue a statement of enforcement discretion regarding children's products using crystal in a manner that adheres to the provisions of California Health & Safety Code §§ 25214.1.4 governing exclusions for crystal. Once docketed, under the Administrative Procedures Act (APA), the Commission could issue an immediate temporary final rule to exclude crystal from the total lead limits until the rulemaking was completed. Immediate action will not result in harm to children who wear or handle crystal or glass rhinestones, as is evidenced by the California exemption, but is urgently needed to avoid the disastrous consequences of a ban of crystal and rhinestones in jewelry and apparel. Without prompt action companies are being forced to accept returns of safe product for destruction, or to compensate customers for unsold products featuring crystal and rhinestones.

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[6] CPSIA § 101(b)(1). The finding is to be based on "best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will neither – (A) result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product; nor (B) have any other adverse impact on public health or safety."

The Commission's proposal outlines certain technical requirements for exclusions as part of a new section 1500.90 of the Commission regulations. We offer these additional thoughts on the proposed procedures.

The proposed regulations reflect the language of Section 101(b)(1) of the CPSIA, which authorizes the Commission to exclude products or materials that will neither result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking or other children's activities, and the aging of the product, nor have any other adverse impact on public health or safety.

First, in considering exemption requests, the Commission must consider the relevant use and abuse scenarios associated with the particular product or material involved. If only hand to mouth contact is foreseeable, for example, then this is the only foreseeable use and abuse condition that should be evaluated. The statute should not be interpreted to require the Commission to demand data on any exposure condition if a particular route of exposure is not likely or if data is offered relating to a more severe potential exposure condition. Further, the Commission must consider the age of the child handling the product in evaluating reasonably foreseeable use and abuse situations. Younger children are likely to be more at risk of accidental ingestion than older children. The Commission should base determinations on the typical child in the particular age ranges, and action on requests for exclusions may properly recognize differences between various age groups of children.[7]

Second, the proposed regulations require the submitter of a request for exemption to provide best available, objective, peer-reviewed, scientific evidence to support a request for an exclusion that addresses how much lead is present in the product, how much lead comes out, the conditions under which that may happen, and information relating a child's interaction, if any, with the product. In many instances, tests or studies on the specific product or material used in children's products are available but may not be published in peer-reviewed journals. Test data using accepted published test methods or methods accepted by other government agencies should also provide reliable information. Reports or the absence of reports or incidents involving the material for which an exemption is requested may also be considered.[8]

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[7] The scientific basis for a complete exclusion for crystal beads and rhinestones in children's products was set forth by submitters in the Crystal Petition, but the submitters noted they did not object to the 1 gram limit established under California law applicable to crystal and glass beads and rhinestones used in jewelry for children 6 and under.

[8] No peer-reviewed studies of the impact of foreseeable use and abuse of crystal or glass beads or rhinestones used in children's products on blood lead levels in children have been identified, for

(continued ...)

We also question inclusion of a requirement that those seeking an exemption provide "best-available, objective, peer-reviewed, scientific evidence that is unfavorable to the request that is reasonably available to the requestor." The absence of a definition of when such information is "reasonably available" creates questions about the appropriateness of such a condition and implications from a cost and paperwork standpoint on submitters. FJTA understands this to mean simply a reasonable review of scientific literature to determine if specific published studies on the material that is the subject of an exemption request can be readily identified. The principal obligation of submitters is to provide reasonable data to support a request. The purpose of publishing such requests for public comment is to provide those who might oppose an exemption with an opportunity to submit best-available scientific evidence suggesting that the exemption should not be granted. Indeed, the proposed approach not only goes well beyond the statutory language, but also beyond legal precedent and custom necessitating a more explicit Congressional mandate than what the CPSIA provides. Submitters should be asked to provide best available data supporting the requested exemption for the material that is subject of the requested exemption, with data relevant to the expected use and exposure conditions in children's products. The CPSC can rely on the public comment process to elicit information on possible countervailing information.

Conclusion

FJTA urges the Commission to finalize the procedures for considering requests for exemption, but not to delay action on the Crystal Petition while it considers procedural rules. Crystal is a safe material that has different physical properties than other materials used in children's products that might exceed the lead limits. Every day action on the Crystal Petition is delayed is a day of lost sales, product returns, and confusion. The fastest possible action on the Crystal Petition and issuance of a clear statement of enforcement discretion is urgently needed while the Commission continues to consider rules for these requests.

Sincerely,

Sheila A. Millar

cc: Michael Gale, Executive Director, Fashion Jewelry Trade Association

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(...continued)
example, but the Crystal Petition discussed available test data on mouthing and ingestion scenarios, and compared it with similar data on total versus accessible lead in metal with less than 600 ppm or less than 300 ppm conducted by the CPSC staff.

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February 17, 2009

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Via Electronic Mail

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U.S. Consumer Product Safety Commission
4330 East-West Highway
Room 502
Bethesda, MD 20814

Re: Section 101 Determinations of Certain Materials or Products NPR

Dear Mr. Stevenson:

On behalf of the Fashion Jewelry Trade Association (FJTA),[1] we appreciate this opportunity to submit these comments in response to the Consumer Product Safety Commission's (CPSC) Request for Comments and Information entitled *Children's Products Containing Lead: Proposed Determinations Regarding Lead Content Limits on Certain Materials or Products; Notice of Proposed Rulemaking.*[2] This proposal identifies certain materials or products that will meet the limits set forth in Section 101(a) of the Consumer Product Safety Improvements Act of 2008 (CPSIA).[3] FJTA supports the CPSC's proposed list of materials that do not inherently contain lead or contain lead that does not exceed the CPSIA lead limits of 600 ppm or 300 ppm. We urge the CPSC to also add to the list certain other no- or low-lead materials, to clarify the scope of the exemption when there is other "processing," and to also clarify that exempt metals used as electroplating materials need not be tested.

Fashion jewelry manufacturers use a wide variety of materials, many of which the CPSC has proposed for exemption. FJTA generally supports the list of proposed materials which would be exempt from testing under Section 102 of the CPSIA. In particular, the Commission proposes to exempt the following "natural" materials: 1) precious gemstones (diamond, ruby,

[1] FJTA members include approximately 255 suppliers and retailers of fashion or costume jewelry, many of whom are small businesses. FJTA does not represent the vending machine industry and its members do not make toy jewelry. The fashion jewelry industry is about a $9 billion industry in the U.S.; many industry members are small businesses.

[2] 74 Fed. Reg. 2,433 (January 15, 2009).

[3] Pub. L. No: 110-314, 122 Stat. 3,016 (August 14, 2008).

sapphire, emerald); 2) certain semiprecious gemstones not based on lead or lead compounds and not associated in nature with lead;[4] 3) natural or cultured pearls, 4) wood, 5) natural fibers such as cotton, silk, wool, hemp, flax, linen; and 6) other natural materials, including coral, amber, feathers, fur and untreated leather.

In addition, the Commission proposes to exclude "certain metals and alloys," including 1) surgical steel, and 2) precious metals including gold (at least 10 karat), sterling silver (at least 925/1000), platinum, palladium, rhodium, osmium, iridium, ruthinium.

FJTA supports exempting all of the materials proposed by the Commission. The basis for the exemptions are well-established in general literature. However, FJTA urges adoption of additional materials from the testing requirement of section 102 of the CPSIA, and recommends revisions in the proposal to effectuate fully the intended exclusions.

As noted in its previous responses to other requests for comment, FJTA members are complying with California legislation, enacted pursuant to a settlement agreement under California's Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as the "Proposition 65" initiative).[5] Specifically, FJTA urges the Commission to exclude *all* of the low-lead materials recognized by California. In addition to the materials the Commission has proposed for exclusion via this Notice, certain additional fabrics or similar materials were excluded under the Proposition 65 agreement, including elastic, fabric, ribbon, rope, or string, unless these items contain intentionally added lead. These common materials should be excluded. Similarly, in addition to natural materials such as coral, amber and fur, the Proposition 65 agreement excludes horn and shell. We ask that these exclusions be recognized as well. Adhesive and stainless steel are also exempt under the jewelry legislation.

The Commission has proposed that to qualify for the proposed exemptions, the materials must be "untreated and unadulterated with respect to the addition of materials or chemicals, including pigments, dyes, coatings, finishes or any other substance," *and* may "not undergo any other processing that could result in the addition of lead into the product or material." As

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[4] Semiprecious gems associated with lead in nature and thus excluded from this exemption include aragonite, bayldonite, boleite, cerussite, crocoite, ekanite, linarite, mimetite, phosgenite, samarskite, vanadinite, and wulfenite. Note that these materials are not used in jewelry.

[5] *See People v. Burlington Coat Factory Warehouse Corporation, et al,* Case No. RG 04-162075 (Alameda Superior Court June 15, 2006). This agreement was subsequently enacted as legislation in California as A.B. 1681, amended by A.B. 2901. *See* Cal. Health & Safety Code §§ 25214.1-.4. The California requirements were enacted legislatively in the State of Minnesota as well. *See* Minn. Stat. § 325E.389.

proposed, this could eviscerate the benefit of the exemption. Many fabrics are dyed or pigmented. Clarifying the role of component and raw material testing will assure that dyes, pigments and other finishes will not result in the finished product exceeding the lead limits. FJTA therefore suggests that the proposed regulation be revised to provide as follows:

> 1500.91(c). The following materials do not exceed the 600 ppm or 300 ppm lead content limits under Section 101(a) of the CPSIA provided that they are not treated, adulterated or processed in a manner that could result in the addition of lead in excess of these limits.

We also recommend that the Commission revise proposed subsection (6) and add a new subsection (7) to the materials or products listed in proposed section 1500.91(c) as follows:

> (6) Other natural materials including coral, amber, feathers, fur, untreated leather, horn and shell.
>
> (7) elastic, ribbon, rope and string.

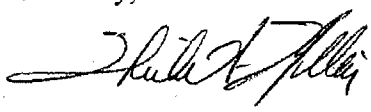
We urge the Commission to clarify that precious metals excluded in accordance with proposed 1500.91(d)(2) are not subject to testing when used as electroplating over other metals. The proposed regulation is confusing by including a reference to metals that are not excluded. We suggest revising proposed section (d) and adding a new section (e) of the proposed regulation as follows:

> 1500.91(d). The following metals and alloys do not exceed the 600 ppm or 300 ppm lead content limits under section 101(a) of the CPSIA provided that no lead or lead-containing metal is intentionally added:
>
> (1) Surgical steel.
>
> (2) Precious metals: Gold (at least 10 karat); silver (at least 925/1000); platinum; palladium; rhodium; osmium; iridium; ruthenium.
>
> 1500.91(e). The exemptions in subsection (d) apply to the listed metals and alloys when used alone, or as solder, clad, fill or electroplating, but do not apply to any other non-exempt metal or metal alloy.

***

FJTA appreciates the opportunity to submit these views and, as always, would be happy to provide additional information or respond to questions.

Sincerely,



Sheila A. Millar

cc: Michael Gale, Executive Director, Fashion Jewelry Trade Association

Stevenson, Todd

From: Millar, Sheila A. [Millar@khlaw.com]
Sent: Tuesday, February 17, 2009 5:43 PM
To: Lead Determinations; Lead Exclusions
Cc: Falvey, Cheryl; gmullan@cpsc.gov; Hatlelid, Kristina; FJTA@aol.com
Subject: Section 101 Determinations of Certain Materials or Products NPR; Section 101(a) Determinations; Section 101(b) Exclusions
Attachments: 2_17_09 Rev Section 101 Determinations NPR.pdf; 2_17_09 Section 101a and b Comments.pdf

Attached please find comments on behalf of the Fashion Jewelry Trade Association in response to the above-referenced proceedings. A copy of these comments relating to the Paperwork Reduction Act burdens posed by these proposals will be sent to the Office of Management and Budget.

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BEFORE THE
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

JOINT COMMENTS
OF
AMERICAN HONDA MOTOR CO., INC.,
AMERICAN SUZUKI MOTOR CORPORATION,
ARCTIC CAT INC.,
BOMBARDIER RECREATIONAL PRODUCTS INC.,
KAWASAKI MOTORS CORP., U.S.A.,
POLARIS INDUSTRIES INC., and
YAMAHA MOTOR CORPORATION, U.S.A.

Children's Products Containing Lead: Proposed Procedural Rule on Exclusions	)	**SECTION 101(b) Exclusions**
74 Fed. Reg. 2,428 (Jan. 15, 2009)	)	

February 17, 2009

I. INTRODUCTION

American Honda Motor Co., Inc., American Suzuki Motor Corporation, Arctic Cat Inc., Bombardier Recreational Products Inc., Kawasaki Motors Corp., U.S.A., Polaris Industries Inc. and Yamaha Motor Corporation, U.S.A. (the "Companies") appreciate the opportunity to submit these joint comments regarding the Consumer Product Safety Commission's ("CPSC") proposed rules establishing procedures governing petitions for exclusion from the lead standard pursuant to Section 101(b) of the Consumer Product Safety Improvement Act ("CPSIA"), 74 Fed. Reg. 2428 (January 15, 2009).

The Companies are manufacturers, importers and/or distributors of youth model all-terrain vehicles ("ATVs"), youth model snowmobiles and/or youth model off-road motorcycles ("youth motorized recreational vehicles") intended for children 12 years of age and younger.

II. RELEVANT STATUTORY PROVISIONS

Section 101(a) of the CPSIA establishes a new limit of 600 ppm on lead content in any part of a children's product. This limit decreases to 300 ppm in August of 2009 and to 100 ppm in 2011.

Section 101(b)(1)(A) of the Act provides that the Commission may, by regulation, exclude a specific product or material from the lead standard prescribed by Section 101(a) if the Commission determines, after notice and a hearing, on the basis of the best available, objective, peer-reviewed, scientific evidence that lead in the product or material will not result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of the product by a child, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product. The Commission must also determine

that the presence of lead in the product or material for which an exclusion is sought will not have any other adverse impact on public health or safety.

III. COMMENTS ON PROPOSED PROCEDURAL RULES

On January 27, 2009, the Companies petitioned for a temporary exclusion under Section 101(b)(1) for certain components of youth motorized recreational vehicles. The Companies crafted their petition in accordance with the provisions of the proposed rules.

On the basis of their experience preparing the temporary exclusion petition, the Companies support the proposed procedural rules. The proposed rules are reasonable and clear about the information required to support an exclusion petition. The rules do not impose onerous paperwork requirements, nor do they demand unreasonable showings of information or data.

The Companies have only one observation with respect to the proposed procedural rules. In footnote two of the proposed rules, the Commission notes that the statutory language of Section 101(b)(1) "makes it difficult to make a showing that would be adequate to exclude any material or product on that basis." This sentiment was echoed in the Statement of Enforcement Policy that was released by the Commission on February 6, 2009, which stated that "Congress obviously established a very demanding standard for such exclusions. Indeed, the Commission staff is not yet aware of any substance as to which the required showing can be made."

The Companies submit that these statements appear to describe an inappropriately difficult standard to be met in order to qualify for an exclusion, and urge the Commission to moderate this unreasonable interpretation in the final procedural rule. Indeed, the comments suggest the possibility that no petition might qualify for an exclusion under the Section 101(b)(1) standards, which would render the Section meaningless.

The Commission should not interpret Section 101(b)(1) to be meaningless. The canons of statutory construction require the Commission to give some meaning to Section 101(b)(1), and not to conclude that Congress enacted "an exemption ... without any significant effect at all." *Dunn, et al. v. Commodity Futures Trading Commission, et al.*, 519 U.S. 465, 472 (1985). It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979), cited by *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

In enacting the exclusion provision in Section 101(b)(1), Congress must have intended to provide an avenue for the Commission to provide relief for ***some*** accessible components with lead levels above the Section 101(b) standard, when the components are evaluated in the context of a child's reasonably foreseeable use and abuse of the product. Senator Amy Klobuchar, a strong supporter of the CPSIA, noted in a letter to the Commission dated January 26, 2009, that the CPSIA allows for an exclusion for certain accessible components, and that the ATV components identified in the petition "would appear to come under this exception". Her letter offered no support for the proposition that there might be no material or substance that could qualify for an exclusion.

Very briefly, in their petition, the Companies have provided evidence, supported by a toxicologist and behavioral scientists, that exposure to the lead-containing elements under reasonably foreseeable conditions, will not result in a measurable increase of children's blood lead levels. The Companies believe that this evidence meets the Section 101(b)(1) standard with respect to the lead-containing components of their products, and they urge the Commission to grant their petition promptly.

Respectfully submitted,

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Stevenson, Todd

From: Jones, Erika Z. [EJones@mayerbrown.com]
Sent: Tuesday, February 17, 2009 6:12 PM
To: Lead Exclusions
Cc: Falvey, Cheryl; Mullan, John
Subject: Section 101(b) Exclusions
Attachments: Section 101(b) Exclusions.pdf

The attached comments on the proposed procedures and requirements for an exclusion under Section 101(b) of the CPSIA, which were published at 74 Fed. Reg. 2428 (Jan. 15, 2009), are submitted on behalf of the seven identified companies, which include

manufacturers, importers and/or distributors of youth model all-terrain Vehicles, youth snowmobiles and small off-road motorcycles intended for children age 6 to 12.

<<Section 101(b) Exclusions.pdf>>

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