



TO: The Commission
Alberta E. Mills, Secretary

THROUGH: Austin C. Schlick, General Counsel
Jason K. Levine, Executive Director

FROM: Daniel R. Vice, Assistant General Counsel,
Regulatory Affairs
Barbara E. Little, Attorney, Regulatory Affairs

SUBJECT: ASTM's Revised Safety Standard for Infant Swings

DATE: September 7, 2022

BALLOT VOTE DUE: Tuesday, September 13, 2022

In 2012, the Commission issued a Safety Standard for Infant Swings (16 CFR part 1223) under the Consumer Product Safety Improvement Act of 2008 (CPSIA). That mandatory standard incorporated by reference ASTM F2088-12a, *Standard Consumer Safety Specification for Infant Swings*. ASTM revised its standard five times, and the Commission has issued three direct final rules to update the mandatory standard for infant swings to incorporate by reference the then-latest version of ASTM F2088. The current version referenced in CPSC's mandatory standard is ASTM F2088-21.

ASTM has again revised its standard and notified the Commission of the revised standard (F2088-22). Under the CPSIA, when ASTM notifies CPSC that it has revised a voluntary standard for a durable infant or toddler product that the Commission has incorporated by reference, the revised standard automatically becomes the mandatory standard, unless the Commission determines that the revised standard "does not improve the safety of the consumer product" and so informs the voluntary standards organization.

Staff is forwarding to the Commission a briefing memorandum recommending that the Commission issue a direct final rule to update the ASTM standard incorporated by reference in the Safety Standard for Infant Swings. Attached for Commission consideration is a draft *Federal Register* notice for that purpose. If approved by the Commission, the Office of the General Counsel will seek approval of the incorporation by reference from the Office of the Federal Register, in accordance with the requirements in 1 CFR part 51, and upon receiving such approval, will send the notice to the *Federal Register* for publication.

Please indicate your vote on the following options:

- I. Approve publication of the attached notice in the *Federal Register*, as drafted.

(Signature)

(Date)

- II. Approve publication of the attached notice in the *Federal Register*, with the following changes.

(Signature)

(Date)

- III. Determine that the proposed revision does not improve the safety of infant swings and therefore do not approve publication of the attached notice in the *Federal Register*.

(Signature)

(Date)

- IV. Take other action specified below.

(Signature)

(Date)

Attachment: Draft *Federal Register* notice: Safety Standard for Infant Swings

[Billing Code 6355-01-P]

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1223

[Docket No. CPSC-2013-0025]

Safety Standard for Infant Swings

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: In November 2012, the U.S. Consumer Product Safety Commission (CPSC) published a consumer product safety standard for infant swings with modifications to make the standard more stringent under section 104 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). The standard incorporated by reference the 2012 voluntary standard for infant swings that was in effect at the time. The CPSIA sets forth a process for updating mandatory standards for durable infant or toddler products that are based on a voluntary standard when the voluntary standards organization revises the standard, unless the Commission determines the revision does not improve the safety of the consumer product. Consistent with the CPSIA's update process, the Commission issued direct final rules in June 2013, January 2021, and October 2021, each time to update the incorporation by reference for the mandatory standard to reflect ASTM's revision of the voluntary standard. In May 2022, ASTM approved another revision to the voluntary standard for infant swings, ASTM F2088-22. ASTM notified CPSC of this revision on July 5, 2022. Consistent with the CPSIA's process for updating mandatory standards for durable infant or toddler products that are based on a voluntary standard, when the voluntary standards organization revises the standard, this direct final rule updates the mandatory

standard for infant swings to incorporate by reference ASTM's 2022 version of the voluntary standard.

DATES: The rule is effective on January 1, 2023, unless CPSC receives a significant adverse comment by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If CPSC receives such a comment, it will publish a notice in the *Federal Register*, withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of January 1, 2023.

ADDRESSES: You can submit comments, identified by Docket No. CPSC-2013-0025, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: www.regulations.gov. Follow the instructions for submitting comments. CPSC typically does not accept comments submitted by electronic mail (email), except as described below. CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal.

Mail/hand delivery/courier Written Submissions: Submit comments by mail, hand delivery, or courier to: Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7479. If you wish to submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public, you may submit such comments by mail, hand delivery, or courier, or you may email them to: cpsc-os@cpsc.gov.

Instructions: All submissions must include the agency name and docket number. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: <https://www.regulations.gov>. Do not submit through

this website: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information, please submit it according to the instructions for mail/hand delivery/courier/confidential written submissions.

Docket: For access to the docket to read background documents or comments received, go to: <https://www.regulations.gov>, and insert the docket number, CPSC-2013-0025, into the “Search” box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Carlos Torres, Project Manager, Division of Mechanical and Combustion Engineering, U.S. Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone: (301) 987-2504; e-mail: ctorres@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. Background

1. Statutory Authority

Section 104(b)(1) of the CPSIA requires the Commission to assess the effectiveness of voluntary standards for durable infant or toddler products and to adopt mandatory standards for these products. 15 U.S.C. 2056a(b)(1). A mandatory standard must be “substantially the same as” the corresponding voluntary standard, or it may be “more stringent than” the voluntary standard, if the Commission determines that more stringent requirements would further reduce the risk of injury associated with the product. *Id.*

Section 104(b)(4)(B) of the CPSIA specifies a process for updating the Commission’s rules when a voluntary standards organization revises a standard that the Commission previously incorporated by reference under section 104(b)(1). First, the voluntary standards organization must notify the Commission of the revision. Once the Commission receives this notification, the

Commission may reject or accept the revised standard. The Commission may reject the revised standard by notifying the voluntary standards organization, within 90 days of receiving notice of the revision, that it has determined that the revised standard does not improve the safety of the consumer product and that it is retaining the existing standard. If the Commission does not take this action to reject the revised standard, the revised voluntary standard will be considered a consumer product safety standard issued under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the Commission received notification of the revision or on a later date specified by the Commission in the *Federal Register*. 15 U.S.C. 2056a(b)(4)(B).

2. *Safety Standard for Infant Swings*

Under section 104(b)(1) of the CPSIA, the Commission adopted a mandatory rule for infant swings, codified in 16 CFR part 1223. The rule incorporated by reference ASTM F2088-12a, *Standard Consumer Safety Specification for Infant Swings* with modifications to make the standard more stringent. 77 FR 66703 (Nov. 7, 2012). The mandatory standard included performance requirements and test methods, as well as requirements for warning labels and instructions, to address hazards to children.

In 2013, ASTM notified CPSC that it had issued a revised standard for infant swings, ASTM F2088-13, and the Commission published a direct final rule incorporating by reference ASTM F2088-13, with no modifications. 78 Fed. Reg. 37706 (June 24, 2013). After the Commission issued the revised mandatory standard in 2013, ASTM approved two more revisions to the infant swing standard: ASTM F2088-15 and ASTM F2088-19. However, ASTM did not notify CPSC of these revisions under CPSIA section 104(b)(4)(B). In October 2020, ASTM notified CPSC that it had revised the voluntary standard for infant swings, ASTM F2088-20, and the Commission published a direct final rule incorporating by reference ASTM

2088-20, with no modifications. 86 Fed. Reg. 4961 (January 19, 2021).¹ In August 2021, ASTM notified CPSC that it had issued a revised standard for infant swings, ASTM F2088-21, and the Commission published a direct final rule incorporating by reference ASTM F2088-21, with no modifications. 86 Fed. Reg. 59609 (October 28, 2021).

In May 2022, ASTM published a revised version of the incorporated voluntary standard. On July 5, 2022, ASTM notified the Commission that it had approved and published the revised version of the voluntary standard. On July 14, 2022, the Commission provided notice in the *Federal Register* of the availability of the revised standard and sought comment on the effect of the revisions on the safety standard for infant swings. (87 FR 42117). No comments were received.

As discussed in section **B. Revisions to ASTM F2088**, based on CPSC staff's review of ASTM F2088-22,² the Commission will allow the revised voluntary standard to become the mandatory standard.³ Accordingly, by operation of law under section 104(b)(4)(B) of the CPSIA, ASTM F2088-22 will become the mandatory consumer product safety standard for infant swings on January 1, 2023. 15 U.S.C. 2056a(b)(4)(B). This direct final rule updates 16 CFR part 1223 to incorporate by reference the revised voluntary standard, ASTM F2088-22.

B. Revisions to ASTM F2088

The ASTM standard for infant swings includes performance requirements, test methods, and requirements for marking, labeling, and instructional literature, to address hazards to children associated with infant swings. ASTM F2088 applies to swings with a powered

¹ One revision to ASTM F2088-20 was to change the title for the standard from “*Standard Consumer Safety Specification for Infant Swings*” to “*Standard Consumer Safety Specification for Infant and Cradle Swings*.” The change to the title did not alter the scope of the standard; performance requirements and test methods for cradle swings had been in the scope of the standard since ASTM first adopted it. The revision was a clarifying change to the title to make it clear that the standard also applied to cradle swings.

² CPSC staff's briefing package regarding ASTM F2088-22 is available at: [INSERT LINK].

³ The Commission voted TBD-TBD to approve this notice.

mechanism used to provide a swinging or gliding seat/cradle in any direction relative to the frame. The swinging or gliding mechanism can be powered by batteries, AC adapter, wind-up mechanism, or other means. A cradle swing allows the infant to swing while lying flat. The cradle swing is intended for children from birth until the infant begins to push up on hands and knees (approximately 5 months). An infant swing enables the infant to swing in a seated position and is intended for children from birth until the infant attempts to climb out of the product (approximately 9 months).

ASTM F2088-22 contains substantive changes to the specified warning statement for infant swings in Section 8.6 *Warning Statements*. Specifically, in Section 8.6.1 *Infant Swing*, the revised standard changes the wording in the last warning bullet, as follows (changes are highlighted in italics):

- ASTM F2088-21: Stay near and watch infant during use. This product is not safe for unsupervised use or unattended sleep.
- ASTM F2088-22: Stay near and watch *baby* during use. This product is not safe *for sleep or unsupervised use. If baby falls asleep, remove baby as soon as possible and place baby on a firm, flat sleep surface such as a crib or bassinet.*

Thus, the word “infant” is replaced with “baby” in the first sentence. The order of the warnings is switched in the second sentence, first to warn that the product is not safe for sleep, and then to warn against unsupervised use. Lastly, a third new sentence provides guidance advising caregivers to remove a baby who has fallen asleep to a product that is safe for sleep.

The Commission assesses that the change from “infant” to “baby” makes the warning more personal to the parent or caregiver. Typically, parents or caregivers identify the occupant of the swing as “my baby” or “the baby,” as opposed to the more impersonal, more clinical, and

generic term “infant.” The use of the term “baby” rather than “infant” also aligns with the Ad Hoc Working Task Group’s wording developed in late 2014.⁴

The Commission assesses that the change from “*This product is not safe for unsupervised use or unattended sleep*” to “*This product is not safe for sleep or unsupervised use*” is an improvement in safety. The statement “. . . *not safe for unsupervised use or unattended sleep*” requires consumers to infer what is meant by “unattended.”⁵ Furthermore, consumers are likely to understand and comply with a message directly instructing them on how to avoid the hazard.^{6,7}

The Commission assesses that the addition of new language stating: “If baby falls asleep, remove baby as soon as possible and place baby on a firm, flat sleep surface such as a crib or bassinet” is an improvement in safety. The basis for this addition is the American Academy of Pediatrics guidance on safe sleep, which states: “If your baby falls asleep in a car seat, stroller, *swing*, infant carrier or sling, you should move them to a firm sleep surface on their back as soon as possible.”⁸ (Emphasis added). The new language clearly states that a swing is not safe for sleep. The new warning language instructs that in the case that the baby falls asleep, caregivers

⁴ The ASTM Ad Hoc Language Task Group (Ad Hoc TG) is made up of members of the various durable nursery products voluntary standards committees, including CPSC staff. The Ad Hoc TG was formed to harmonize the wording of common provisions (e.g., introduction, scope, protective components), as well as the warning label requirements, across durable infant and toddler product voluntary standards.

⁵ Smith, T. P. (2018). Human Factors Staff Response to NPR Comments, and Revised Warning Requirements for High Chairs (CPSIA Section 104). CPSC Memorandum to Stefanie C. Marques, Project Manager, High Chairs Rulemaking, U.S. Consumer Product Safety Commission, Rockville, MD. Accessed at: <https://cpsc.gov/s3fs-public/Final%20Rule%20-%20Safety%20Standard%20for%20High%20Chairs%20-%20May%2030%202018.pdf?mBuoGQbhpGcMFyO6it0gNeBOOFZrTA9>.

⁶ Fors Marsh Group (2022). “Consumer Product Safety Commission (CPSC): Sleep Warnings Final Report” U.S. Consumer Product Safety Commission, Rockville, MD. (Task Order: 61320619F1101) Accessed at: <https://cpsc.gov/s3fs-public/Consumer-Product-Safety-Commission%E2%80%93Sleep-Warnings-Final-Report.pdf?VersionId=MfJcAAip4YNWVf.RllvXQtwNN7chjHyt>

⁷ Wogalter, M.S.; Godfrey, S.S.; Fontenelle, G.A.; DeSaulniers, D.R.; Rothstein, P.R.; and Laughery, K.R. (1987). Effectiveness of Warnings. *Human Factors*, 29(5), 599-612.

⁸ <https://www.healthychildren.org/English/ages-stages/baby/sleep/Pages/A-Parents-Guide-to-Safe-Sleep.aspx#:~:text=If%20your%20baby%20falls%20asleep,specifically%20marketed%20for%20infant%20sleep>.

should move the baby to a firm, flat sleep surface. The new language provides tangible examples that consumers can refer to as safe sleep surfaces, such as a crib and a bassinet. In addition, CPSC staff contracted a focus group study⁹ including contextual interviews to gather caregivers' perspectives regarding products in which infants may fall asleep, that the manufacturer asserts are not intended for infant sleep. This study sought to capture caregivers' beliefs about the safety, utility, and risks of infants falling asleep in seated products, their reaction to labels designed to warn against unsupervised sleep, and their ability to discern how those labels influence caregiver behavior. Caregivers evaluated specific language, which states: "If baby falls asleep, move baby as soon as possible to a firm, flat sleep surface such as a crib or bassinet." Overall, the phrase was well received and met parents and caregivers' request for clear guidance on what to do if their child falls asleep in one of these products.

In summary, the revised warning statement provides concise guidance to parents and caregivers that infant swings are not safe for sleep and provides guidance that is consistent with CPSC messaging about the importance of placing sleeping babies on firm, flat sleep surfaces. In addition, the revised warning statement adopts a more personal tone with use of the word "baby" instead of "infant." The Commission concludes that these changes to the warning statement improve the safety of infant swings.

C. Incorporation by Reference

Section 1223.2 of the direct final rule incorporates by reference ASTM F2088-22. The Office of the Federal Register (OFR) has regulations regarding incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss, in the preamble to a final rule,

⁹ Fors Marsh Group (2022). "Refining Sleep Messaging for Seated/Non-Sleep Products Focus Group Study" U.S. Consumer Product Safety Commission, Rockville, MD. (Task Order: 61320621F1006) Accessed at: <https://cpsc.gov/s3fs-public/Refining-Sleep-Messaging-for-Seated-Non-Sleep-Products-Focus-Group-Study-4-15-22.pdf?VersionId=aEey8C2nwBfXGrmCEYcLr7QEXexqZMmg>

ways in which the material the agency incorporates by reference is reasonably available to interested parties, and how interested parties can obtain the material. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR regulations, section **B. Revisions to ASTM F2088** of this preamble summarizes the major provisions of ASTM F2088-22 that the Commission incorporates by reference into 16 CFR part 1223. The standard itself is reasonably available to interested parties. Until the direct final rule takes effect, a read-only copy of ASTM F2088-22 is available for viewing, at no cost, on ASTM's website at: <https://www.astm.org/CPSC.htm>. Once the rule takes effect, a read-only copy of the standard will be available for viewing, at no cost, on the ASTM website at: <https://www.astm.org/READINGLIBRARY/>. Interested parties can also schedule an appointment to inspect a copy of the standard at CPSC's Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone: (301) 504-7479; e-mail: cpsc-os@cpsc.gov. Interested parties can purchase a copy of ASTM F2088-22 from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428-2959 USA; telephone: (610) 832-9585; www.astm.org.

D. Certification

Section 14(a) of the Consumer Product Safety Act (CPSA; 15 U.S.C. 2051-2089) requires manufacturers of products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, to certify that the products comply with all applicable CPSC requirements. 15 U.S.C. 2063(a). Such certification must be based on a test of each product, or on a reasonable testing program, or for children's products, on tests of a sufficient number of samples by a third party conformity assessment body accredited by CPSC to test according to the applicable requirements. As noted,

standards issued under section 104(b)(1)(B) of the CPSIA are “consumer product safety standards.” Thus, they are subject to the testing and certification requirements of section 14 of the CPSA.

Because infant swings are children’s products, a CPSC-accepted third party conformity assessment body must test samples of the products. Products subject to part 1223 also must comply with all other applicable CPSC requirements, such as the lead content requirements in section 101 of the CPSIA,¹⁰ the tracking label requirements in section 14(a)(5) of the CPSA,¹¹ and the consumer registration form requirements in section 104(d) of the CPSIA.¹² ASTM F2088-22 makes no changes that would impact any of these existing requirements.

E. Notice of Requirements

In accordance with section 14(a)(3)(B)(vi) of the CPSA, the Commission previously published a notice of requirements (NOR) for accreditation of third party conformity assessment bodies for testing infant swings. 78 FR 15836 (March 12, 2013). The NOR provided the criteria and process for CPSC to accept accreditation of third party conformity assessment bodies for testing infant swings to 16 CFR part 1223. The NORs for all mandatory standards for durable infant or toddler products are listed in the Commission’s rule, “Requirements Pertaining to Third Party Conformity Assessment Bodies,” codified in 16 CFR part 1112. *Id.*

ASTM F2088-22 did not change the testing requirements, testing equipment, or testing protocols for infant swings. Accordingly, the revisions do not change the way that third party conformity assessment bodies test these products for compliance with the safety standard for infant swings. Testing laboratories that have demonstrated competence for testing in accordance

¹⁰ 15 U.S.C. 1278a.

¹¹ 15 U.S.C. 2063(a)(5).

¹² 15 U.S.C. 2056a(d).

with ASTM F2088-21 are competent to test in accordance with the revised standard ASTM F2088-22. Laboratories will begin testing to the new standard when ASTM F2088-22 goes into effect, and the existing accreditations that the Commission has accepted for testing to this standard will cover testing to the revised standard. Therefore, the Commission considers the existing CPSC-accepted laboratories for testing to ASTM F2088-21 to be capable of testing to ASTM F2088-22 as well. Accordingly, the existing NOR for this standard will remain in place, and CPSC-accepted third party conformity assessment bodies are expected to update the scope of the testing laboratories' accreditations to reflect the revised standard in the normal course of renewing their accreditations.

F. Direct Final Rule Process

On July 14, 2022, the Commission provided notice in the *Federal Register* of the revision to the standard and requested comment on whether the revision improves the safety of infant swings covered by the standard. 87 FR 42117. No comments were submitted. Now, the Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA; 5 U.S.C. 551-559) generally requires agencies to provide notice of a rule and an opportunity for interested parties to comment on it, section 553 of the APA provides an exception when the agency “for good cause finds” that notice and comment are “impracticable, unnecessary, or contrary to the public interest.” *Id.* 553(b)(B). The Commission concludes that when it updates a reference to an ASTM standard that the Commission incorporated by reference under section 104(b) of the CPSIA, further notice and comment are unnecessary.

Specifically, under the process set out in section 104(b)(4)(B) of the CPSIA, when ASTM notifies CPSC that it has revised a standard that the Commission has previously incorporated by reference under section 104(b)(1)(B) of the CPSIA, that revision will become

the new CPSC standard, unless the Commission determines that ASTM's revision does not improve the safety of the product. Thus, unless the Commission makes such a determination, the ASTM revision becomes CPSC's standard by operation of law. The Commission is allowing ASTM F2088-22 to become CPSC's new standard because its provisions improve the safety of the product. The purpose of this direct final rule is to update the Code of Federal Regulations (CFR) so that it reflects the version of the standard that takes effect by statute. This rule updates the reference in the CFR, but under the CPSIA, ASTM F2088-22 takes effect as the new CPSC standard for infant swings, even if the Commission does not issue this rule. Thus, public comments would not alter substantive changes to the standard or the effect of the revised standard as a consumer product safety standard under section 104(b) of the CPSIA. Under these circumstances, further notice and comment are unnecessary.

In Recommendation 95-4, the Administrative Conference of the United States (ACUS) endorses direct final rulemaking as an appropriate procedure to expedite rules that are noncontroversial and not expected to generate significant adverse comments. *See* 60 FR 43108 (Aug. 18, 1995). ACUS recommends that agencies use the direct final rule process when they act under the "unnecessary" prong of the good cause exemption in 5 U.S.C. 553(b)(B). Consistent with the ACUS recommendation, the Commission is publishing this rule as a direct final rule, because CPSC does not expect any significant adverse comments.

Unless CPSC receives a significant adverse comment within 30 days of this notification, the rule will become effective on January 1, 2023. In accordance with ACUS's recommendation, the Commission considers a significant adverse comment to be "one where the commenter explains why the rule would be inappropriate," including an assertion challenging "the rule's underlying premise or approach," or a claim that the rule "would be ineffective or

unacceptable without a change.” 60 FR 43108, 43111 (Aug. 18, 1995). As noted, this rule merely updates a reference in the CFR to reflect a change that occurs by statute, and public comments should address this specific action.

If the Commission receives a significant adverse comment, the Commission will withdraw this direct final rule. Depending on the comment and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking, providing an opportunity for public comment.

G. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601-612) generally requires agencies to review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603, 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed in section **F. Direct Final Rule Process** of this preamble, the Commission has determined that further notice and the opportunity to comment are unnecessary for this rule. Therefore, the RFA does not apply. CPSC also notes the limited nature of this document, which merely updates the incorporation by reference to reflect the mandatory CPSC standard that takes effect under section 104 of the CPSIA.

H. Paperwork Reduction Act

The current mandatory standard for infant swings includes requirements for marking, labeling, and instructional literature that constitute a “collection of information,” as defined in the Paperwork Reduction Act (PRA; 44 U.S.C. 3501-3521). While the revised mandatory standard revises the labeling language for infant swings, the revised language would not add to the burden hours because the products already require marking, labeling, and instructional

literature under the current standard. The revised labeling provisions merely require different language to that already required by the standard, which would impose minimal if any additional burden because the firm is already required to put labels on the product. The Commission took the steps required by the PRA for information collections when it promulgated 16 CFR part 1223, and the marking, labeling, and instructional literature for infant swings are currently approved under OMB Control Number 3041-0159. Because the information collection burden is unchanged, the revision does not affect the information collection requirements or approval related to the standard.

I. Environmental Considerations

The Commission's regulations provide a categorical exclusion for the Commission's rules from any requirement to prepare an environmental assessment or an environmental impact statement where they "have little or no potential for affecting the human environment." 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

J. Preemption

Section 26(a) of the CPSA provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement is identical to the federal standard. 15 U.S.C. 2075(a). Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to CPSC for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA deems rules issued under that provision "consumer product safety standards." Therefore, once a rule issued under section 104 of the CPSIA takes effect, it will preempt in accordance with section 26(a) of the CPSA.

K. Effective Date

Under the procedure set forth in section 104(b)(4)(B) of the CPSIA, when a voluntary standards organization revises a standard that the Commission adopted as a mandatory standard, the revision becomes the CPSC standard within 180 days of notification to the Commission, unless the Commission timely notifies the standards organization that it has determined that the revision does not improve the safety of the product, or the Commission sets a later date in the *Federal Register*. 15 U.S.C. 2056a(b)(4)(B). The Commission is taking neither of those actions with respect to the standard for infant swings. Therefore, ASTM F2088-22 will take effect as the new mandatory standard for infant swings on January 1, 2023, 180 days after July 5, 2022, when the Commission received notice of the revision.

L. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801-808) states that before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The CRA submission must indicate whether the rule is a “major rule.” The CRA states that the Office of Information and Regulatory Affairs determines whether a rule qualifies as a “major rule.”

Pursuant to the CRA, this rule does not qualify as a “major rule,” as defined in 5 U.S.C. 804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General.

List of Subjects in 16 CFR Part 1223

Consumer protection, Imports, Incorporation by reference, Infants and children, Law enforcement, Safety.

For the reasons discussed in the preamble, the Commission amends 16 CFR chapter II as follows:

PART 1223 – SAFETY STANDARD FOR INFANT SWINGS

1. The authority citation for part 1223.2 continues to read as follows:

Authority: Sec. 104, Pub. L. 110-314, 122 Stat. 3016 (15 U.S.C. 2056a); Sec 3, Pub. L. 112-28, 125 Stat. 273.

2. Revise § 1223.2 to read as follows:

§ 1223.2 Requirements for Infant Swings.

Each infant swing must comply with all applicable provisions of ASTM F2088-22, *Standard Consumer Safety Specification for Infant and Cradle Swings*, approved on May 1, 2022. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. A read-only copy of the standard is available for viewing on the ASTM website at <https://www.astm.org/READINGLIBRARY/>. You may obtain a copy from ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428-2959; telephone (610) 832-9585; www.astm.org. You may inspect a copy at the Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone (301) 504-7479, e-mail cpsc-os@cpsc.gov, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, e-mail fr.inspection@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Dated: _____

Alberta E. Mills, Secretary
Consumer Product Safety Commission

TO: The Commission
Alberta E. Mills, Secretary

DATE: September 7, 2022

THROUGH: Austin C. Schlick, General Counsel
Jason K. Levine, Acting Executive Director
DeWane Ray, Deputy Executive Director for Safety
Operations

FROM: Duane E. Boniface, Assistant Executive Director
Office of Hazard Identification and Reduction

Carlos G. Torres, Project Manager
Division of Mechanical and Combustion Engineering,
Directorate for Engineering Sciences

SUBJECT: Notice of Revision to the Safety Standard for Infant Swings
(16 CFR Part 1223)

Introduction/Background

On November 7, 2012, the Commission published a final rule issuing a mandatory standard for infant swings that incorporated by reference ASTM F2088-12a, *Standard Consumer Specification for Infant Swings*, with modifications (77 FR 66703).¹ The final rule is codified at 16 CFR part 1223. The standard is intended to address swings tipping over or collapsing, structural failures, and child entanglement in the restraints or entrapment in leg holes.

ASTM has revised the voluntary standard for infant swings six times, and the Commission has issued three direct final rules (in addition to the initial final rule establishing the mandatory standard) to update the mandatory standard for infant swings to incorporate by reference the latest version of ASTM F2088:

- On June 24, 2013, the Commission published a direct final rule to update part 1223 to reflect incorporation by reference of ASTM F2088-13, with no modifications (78 FR 37706).
- On January 19, 2021, the Commission published a direct final rule to update part 1223 to reflect incorporation by reference of ASTM F2088-20, with no modifications (86 FR 4961).
- On October 28, 2021, the Commission published a direct final rule to update part 1223 to reflect incorporation by reference of ASTM F2088-21, with no modifications (86 FR 59609).

¹ The modifications included changes to the required warning label content and a revised test method to address an omission in the voluntary standard for toy mobiles attached to swings.

On May 1, 2022, ASTM approved and published its seventh revision of ASTM F2088. ASTM notified CPSC of the revision on July 5, 2022.² On July 14, 2022, the Commission published in the *Federal Register* a Notice of Availability, requesting comment on whether the revision improves the safety of infant swings (87 FR 42117). The public comment period closed on July 28, 2022, and CPSC did not receive any comments. The revised standard will take effect as the new mandatory standard on January 1, 2023, unless the Commission specifies a later date in the *Federal Register* or notifies ASTM by October 3, 2022, that it has determined that the revision does not improve the safety of infant swings. See 15 U.S.C. 2056a(b)(4)(B).

This memorandum outlines the differences between ASTM F2088-22 and ASTM F2088-21. Based on staff's evaluation of the revised voluntary standard, staff recommends that the Commission allow ASTM F2088-22 to be considered the new consumer product safety standard for infant swings. Additionally, staff recommends that the Commission issue a direct final rule to update the incorporation by reference in part 1223 to ASTM F2088-22, if the Commission allows the revision to become the mandatory standard.

Discussion

The CPSC's current mandatory Safety Standard for Infant Swings in 16 CFR part 1223 incorporates by reference ASTM F2088-21, with no modifications.

ASTM F2088-21 applies to swings with a powered mechanism used to provide a swinging or gliding seat/cradle in any direction relative to the frame, Figure 1. The swinging or gliding mechanism can be powered by batteries, AC adapter, wind-up mechanism, or other means. A cradle swing allows the infant to swing while lying flat, and it is intended for children from birth until the infant begins to push up on hands and knees (approximately 5 months). An infant swing enables the infant to swing in a seated position, and it is intended for children from birth until the infant attempts to climb out of the product (approximately 9 months).



Figure 1. Examples of Infant Swings

² Voluntary Standards organizations must notify CPSC of revisions to voluntary standards that have been adopted as part of a consumer product safety standard pursuant to 15 U.S.C. § 2056a.

The revision to ASTM F2088-21 consists of substantive changes to the specified warning statement for infant swings in Section 8.6 *Warning Statements*. Specifically, in Section 8.6.1 *Infant Swing* the revised standard changes the wording in the last warning bullet, as follows (changes are highlighted in italics):

from

- Stay near and watch infant during use. This product is not safe for unsupervised use or unattended sleep.

to

- Stay near and watch *baby* during use. This product is not safe *for sleep or unsupervised use. If baby falls asleep, remove baby as soon as possible, and place baby on a firm, flat sleep surface such as a crib or bassinet.*

The word “infant” is replaced with “baby” in the first sentence. The order of warnings is switched in the second sentence, first to warn that the product is not safe for sleep, and then to warn against unsupervised use. Lastly, a third new sentence provides guidance advising caregivers to remove a baby who has fallen asleep to a product that is safe for sleep.

Staff’s Assessment of the Revised Standard

Under section 104(b)(4)(B) of the CPSIA, unless the Commission determines that ASTM’s revision to a voluntary standard that is referenced in a mandatory standard “*does not improve the safety of the consumer product covered by the standard,*” the revised voluntary standard becomes the new mandatory standard. Staff determines that the substantive change in the latest revision to ASTM F2088 is an improvement to the safety of the product. The new warning statement provides concise guidance to the caregiver that infant swings are not intended for safe sleep and provides guidance that is consistent with CPSC messaging about the importance of placing sleeping babies on firm, flat sleep surfaces, such as a crib or bassinet. Specifically, and as described in detail in the memorandum from the Division of Human Factors, Tab A, the change from “infant” to “baby” makes the tone of the warning more personal to the caregiver and aligns with the Ad Hoc Wording Task Group’s wording developed in late 2014, which uses “baby” instead of “infant.”³ Changing the order of the warning language to first advise against sleep in the product emphasizes the importance of not allowing the baby to sleep in the product. In addition, removing the word “unattended” obviates the need for the caregiver to determine what constitutes “unattended sleep.” The addition of the statement about what to do in the event the baby falls asleep provides clear, tangible examples of safe sleep surfaces for the baby, and the statement was well received and understood in focus group studies. Additionally, the statement is consistent with CPSC’s new infant sleep product rule⁴, in that it addresses infants sleeping in products that are not intended for infant sleep.

Staff concludes that the changes made in ASTM F2088-22 will improve the safety of infant swings covered by the standard. Therefore, staff recommends that the Commission allow the

³ The ASTM Ad Hoc Language Task Group (Ad Hoc TG) of members of the various durable nursery products voluntary standards committees, including CPSC staff. The Ad Hoc TG was formed to harmonize the wording of common provisions (e.g., introduction, scope, protective components), as well as the warning label requirements, across durable infant and toddler product voluntary standards.

⁴ 86 FR 33,022, 33,034-35 (June 23, 2021)

revised voluntary standard to become the consumer product safety standard for infant swings, pursuant to section 104(b)(4)(B) of the CPSIA.

Staff also recommends that the Commission publish the draft direct final rule to revise the incorporation by reference in 16 CFR part 1223 to the revised voluntary standard, ASTM F2088-22.

Effect of the Changes on CPSC Acceptance of Third Party Testing Laboratories

The notice of requirements (NORs), as set forth in the final rule for infant swings, provides the criteria and process for the Commission's acceptance of accreditation of third party conformity assessment bodies for testing infant swings to 16 CFR part 1223 (which incorporates ASTM F2088-21). The NORs for all standards for durable infant or toddler products are listed in the Commission's rule, *Requirements Pertaining to Third Party Conformity Assessment Bodies*, at 16 CFR part 1112.

As discussed above, ASTM F2088-22 adds a warning statement to the product, which does not necessitate a change in the way that third party conformity assessment bodies test these products. Therefore, testing laboratories that have demonstrated competence for testing in accordance with ASTM F2088 will have the competence to test in accordance with the revised standard.

For these reasons, staff recommends that the Commission accept the existing accreditations for testing to this standard as sufficient for testing to the revised standard as well. If the Commission follows this recommendation, the existing NOR for this standard would remain in place, and CPSC-accepted, third party conformity assessment bodies would be expected, in the normal course of renewing accreditation(s), to update the scope of the testing laboratories' accreditation(s) to reflect the revised standard.

If the Commission approves the draft direct final rule, CPSC staff will notify all CPSC-accepted laboratories by e-mail and will provide links to the *Federal Register* notice to explain the changes to the standard and the effective date.

Effective Date

Section 104(b)(4)(B) of the CPSIA provides that the revised standard will become effective 180 days after the date on which an organization notifies the Commission of the revision, unless the Commission notifies an organization within 90 days of receiving the notification of the revision, that it has determined that the proposed revision does not improve the safety of a consumer product covered by the standard, or the Commission specifies a later effective date in the *Federal Register*. Under this time frame, ASTM F2088-22 will become the new mandatory standard for infant swings, effective January 1, 2023, unless the Commission notifies ASTM by October 3, 2022, that it has determined that the proposed revision does not improve the safety of infant swings, or the Commission specifies a later effective date in the *Federal Register*. Because the change to the voluntary standard is minor and limited to a change in the warning statement, staff does not believe that specifying a later effective date is necessary and recommends that the Commission allow the updated standard to take effect as the new mandatory standard on the statutory effective date of January 1, 2023.

Recommendation

Staff recommends that the Commission allow ASTM F2088-22 to become the new mandatory standard for infant swings, with an effective date of January 1, 2023.

TO: Carlos Torres, Project Manager
Division of Mechanical and Combustion
Directorate for Engineering Sciences

THROUGH: Mark Kumagai, Associate Executive Director
Directorate for Engineering Sciences

FROM: Rana Balci-Sinha, Division Director
Division of Human Factors
Directorate for Engineering Sciences

Celestine T. Kish, Sr. Engineering Psychologist
Division of Human Factors
Directorate for Engineering Sciences

SUBJECT: ESHF Staff's Assessment of Revisions to ASTM F2088-22
Infant and Cradle Swings (16 CFR Part 1223)

DATE: September 7, 2022

Introduction/Background

This memorandum provides the Directorate for Engineering Sciences, Division of Human Factors (ESHF) staff's assessment of the most recent revisions made to the marking and labeling requirements in ASTM F2088-22, *Standard Consumer Safety Specification for Infant and Cradle Swings*. The current mandatory standard codified in 16 CFR part 1223 incorporates by reference ASTM F2088-21.

Background

On November 7, 2012, the Commission published a final rule issuing a mandatory standard for infant swings that incorporated by reference the standard in effect at that time, ASTM F2088-12a, *Standard Consumer Specification for Infant Swings*, with modifications (77 FR 66703).⁵ The final rule was codified at 16 CFR part 1223. Since then, ASTM has revised the voluntary standard for infant swings six times, and the Commission has issued three direct final rules (in addition to the initial final rule establishing the mandatory standard) to update the mandatory standard for infant swings to incorporate by reference the latest version of ASTM F2088:

- On June 24, 2013, the Commission published a direct final rule to update part 1223 to reflect incorporation by reference of ASTM F2088-13, with no modifications (78 FR 37706).
- On January 19, 2021, the Commission published a direct final rule to update part 1223 to reflect incorporation by reference of ASTM F2088-20, with no modifications (86 FR 4961).

⁵ The modifications included changes to the required warning label content and a revised test method to address an omission in the voluntary standard for toy mobiles attached to swings.

- On October 28, 2021, the Commission published a direct final rule to update part 1223 to reflect incorporation by reference of ASTM F2088-21, with no modifications (86 FR 59609).

On July 5, 2022, ASTM notified CPSC that it published a revised 2022 version of ASTM F2088 that affects the marking and labeling requirements for infant swings. The revised standard is ASTM F2088-22, which ASTM approved on May 1, 2022, and published in May 2022.

This memorandum assesses the only change between ASTM F2088-22 and the most current version of ASTM F2088 (2021 version) that is incorporated by reference into 16 CFR part 1223. The change affects the wording of the fall and strangulation warning that is addressed in the marking and labeling requirement.

Review of substantive change to ASTM F2088-22

ASTM F2088-22 changes the wording of the fall and strangulation warning required in the marking and labeling requirement.

In Section 8.6.1 *Warning Statements*, ASTM:

- replaces the word “*infant*” with “*baby*” when instructing caregivers to stay near and watch the occupant during product use;
- switches the order of the warnings in the language from “*This product is not safe for unsupervised use or unattended sleep*” to “*This product is not safe for sleep or unsupervised use*” to emphasize first the importance of not allowing the occupant to sleep in the product;
- adds the statement “*If baby falls asleep, remove baby as soon as possible and place baby on a firm, flat sleep surface, such as a crib or bassinet*” to the list of warning statements for infant swings.

Staff assesses that the change from “*infant*” to “*baby*” is an improvement in safety because it makes the tone of the warning more personal to a parent or caregiver. Typically, parents and caregivers identify the occupant of the swing as “my baby” or “the baby,” as opposed to the more impersonal, more clinical, and generic term “infant.” The use of the term “baby” also aligns with the Ad Hoc Committee’s initial wording developed in late 2014.

Staff assesses that the change from “*This product is not safe for unsupervised use or unattended sleep*” to “*This product is not safe for sleep or unsupervised use*” is an improvement in safety. The statement “. . . *not safe for unsupervised use or unattended sleep*” requires consumers to infer what is meant by “unattended.”⁶ Furthermore, consumers are likely to

⁶ Smith, T. P. (2018). Human Factors Staff Response to NPR Comments, and Revised Warning Requirements for High Chairs (CPSIA Section 104). CPSC Memorandum to Stefanie C. Marques, Project Manager, High Chairs Rulemaking, U.S. Consumer Product Safety Commission, Rockville, MD. Accessed at: <https://cpsc.gov/s3fs-public/Final%20Rule%20-%20Safety%20Standard%20for%20High%20Chairs%20-%20May%2030%202018.pdf?mBuoGQbhhxpGcMFyO6it0gNeBOOFZrTA9>.

understand and comply with a message directly instructing them on what to do to avoid the hazard.^{7,8}

Staff assesses that the addition of new language stating: “If baby falls asleep, remove baby as soon as possible and place baby on a firm, flat sleep surface such as a crib or bassinet” is an improvement in safety. The basis for this addition is the American Academy of Pediatrics guidance on safe sleep, which states: “If your baby falls asleep in a car seat, stroller, *swing*, infant carrier or sling, you should move them to a firm sleep surface on their back as soon as possible.”⁹ (Emphasis added). The new language clearly states that the swing is not safe for sleep. In the case that the baby falls asleep, caregivers should move the baby to a firm, flat sleep surface. The infant sleep products rule requires that any product marketed or intended for sleep must meet one or more of the federal safety standards for cribs, bassinets and cradles, play yards, or bedside sleepers.¹⁰ The new language provides tangible examples that consumers can refer to as safe sleep surfaces, such as a crib and a bassinet. In addition, CPSC staff contracted a study¹¹ for focus groups and contextual interviews to gather caregivers’ perspectives regarding products in which infants may fall asleep, that the manufacturer asserts are not intended for infant sleep. Infant products that were included in this study were rockers, bouncers, swings, or stroller/carrier travel systems. This study sought to capture caregivers’ beliefs about the safety, utility, and risks of infants falling asleep in seated products, their reaction to labels designed to warn against unsupervised sleep, and their ability to discern how those labels influence caregiver behavior. Caregivers evaluated specific language, which states: “If baby falls asleep, move baby as soon as possible to a firm, flat sleep surface such as a crib or bassinet.” Overall, the phrase was well received and met parents and caregivers’ request for clear guidance on what to do if their child falls asleep in one of these products.

CONCLUSION

ESHF staff concludes that the wording change to the 8.6.1 Fall and Strangulation warning is an improvement to safety. The personal tone by using the word “baby,” as opposed to “infant,” the specific guidance that the product is “not safe for sleep,” and the specific directions to move the infant to a safe sleep product such as a crib or bassinet, all provide consumers with clear and concise instructions for safe use of an infant swing.

⁷ Fors Marsh Group (2022). “Consumer Product Safety Commission (CPSC): Sleep Warnings Final Report” U.S. Consumer Product Safety Commission, Rockville, MD. (Task Order: 61320619F1101) Accessed at: <https://cpsc.gov/s3fs-public/Consumer-Product-Safety-Commission%E2%80%9393Sleep-Warnings-Final-Report.pdf?VersionId=MfJcAAip4YNWVf.RllvXQtWNN7chjHyt>

⁸ Wogalter, M.S.; Godfrey, S.S.; Fontenelle, G.A.; DeSaulniers, D.R.; Rothstein, P.R.; and Laughery, K.R. (1987). Effectiveness of Warnings. *Human Factors*, 29(5), 599-612.

⁹ <https://www.healthychildren.org/English/ages-stages/baby/sleep/Pages/A-Parents-Guide-to-Safe-Sleep.aspx#:~:text=If%20your%20baby%20falls%20asleep,specifically%20marketed%20for%20infant%20sleep.>

¹⁰ <https://www.cpsc.gov/Newsroom/News-Releases/2022/CPSCs-New-Federal-Infant-Sleep-Products-Safety-Standard-Takes-Effect>

¹¹ Fors Marsh Group (2022). “Refining Sleep Messaging for Seated/Non-Sleep Products Focus Group Study” U.S. Consumer Product Safety Commission, Rockville, MD. (Task Order: 61320621F1006) Accessed at: <https://cpsc.gov/s3fs-public/Refining-Sleep-Messaging-for-Seated-Non-Sleep-Products-Focus-Group-Study-4-15-22.pdf?VersionId=aEey8C2nwBfXGrmCEYclR7QEXexqZMmg>