

[BILLING CODE 6355-01 P]

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1120

[Docket No. CPSC-2010-0043]

RIN 3041-AC79

Determination That Children's Upper Outerwear in Sizes 2T to 12 with Neck or Hood Drawstrings and Children's Upper Outerwear in Sizes 2T to 16 with Certain Waist or Bottom Drawstrings are a Substantial Product Hazard

AGENCY: Consumer Product Safety Commission.

ACTION: Proposed rule.

SUMMARY: The Consumer Product Safety Commission ("CPSC" or "Commission") is proposing a rule to specify that children's upper outerwear garments in sizes 2T to 12 or the equivalent that have neck or hood drawstrings, and in sizes 2T to 16 or the equivalent that have waist or bottom drawstrings that do not meet specified criteria, have characteristics that constitute substantial product hazards. Items of children's upper outerwear with these features have been involved in a number of deaths and serious injuries from entanglement of the drawstrings with items such as playground slides, cribs, and school buses. The proposed rule would enhance understanding in the industry about how the Commission views such garments and would facilitate the process of obtaining the appropriate corrective action when such garments are found in commerce.

DATES: Submit comments by [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. CPSC-2010-0043, by any of the following methods:

1. *Electronic Submissions.* Submit electronic comments to the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. (To ensure timely processing of comments, the Commission is no longer directly accepting comments submitted by electronic mail (email). The Commission encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.)

2. *Written Submissions.* Submit written submissions in the following ways:

a. *FAX:* 301-504-0127.

b. *Mail/Hand delivery/Courier* (for paper, disk, or CD-ROM submissions): Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received, including any personal information provided, may be posted without change to

www.regulations.gov. Accordingly, we recommend that you

not submit confidential business information, trade secret information, or other sensitive information that you do not want to be available to the public.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov and insert the docket number, CPSC 2010-0043, into the "Search" box and follow the prompts.

FOR FURTHER INFORMATION CONTACT: *Technical information:*

Jonathan Midgett, Division of Human Factors, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301)504-7692, email jmidgett@cpsc.gov. *Legal information:* Harleigh Ewell, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301)504-7683; email hewell@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. Background

1. *The hazard.* Drawstrings in children's upper outerwear can present a hazard if they become entangled with other objects [Ref. 6]. (Documents supporting statements in this notice are identified by [Ref. #], where # is the number of the reference document as listed below in section 0 of this notice.) Drawstrings in the neck and

hood areas of children's upper outerwear present a strangulation hazard when the drawstring becomes caught in objects such as playground slides. Drawstrings in the waist or bottom areas of children's upper outerwear can catch in the doors or other parts of a motor vehicle, thereby presenting a "dragging" hazard when the driver of the vehicle drives off without realizing that someone is attached to the vehicle. The injury data associated with drawstrings is discussed below in section D of this preamble.

2. *Previous industry actions to address the hazard.*

In 1994, at the urging of CPSC, a number of manufacturers and retailers agreed to modify or eliminate drawstrings from hoods and necks of children's clothing [Ref. 1]. In 1997, the American Society for Testing and Materials (now ASTM International) addressed the hazards presented by drawstrings on upper outerwear by creating a voluntary consensus standard, ASTM F 1816-97, *Standard Safety Specification for Drawstrings on Children's Upper Outerwear*, to prohibit drawstrings around the hood and neck area of children's upper outerwear in sizes 2T to 12, and also to limit the length of drawstrings around the waist and bottom in sizes 2T to 16 to 3 inches outside the drawstring channel when the garment is expanded to its

fullest width. For waist and bottom drawstrings in sizes 2T to 16, toggles, knots, and other attachments at the free ends of drawstrings were prohibited. Further, waist and bottom drawstrings in sizes 2T to 16 that are one continuous string were required to be bartacked, *i.e.*, stitched through to prevent the drawstring from being pulled through its channel. The ASTM standard is copyrighted, but can be viewed as a read-only document, only during the comment period on this proposal, at <http://www.astm.org/cpsc.htm>, by permission of ASTM.

The Commission's staff has estimated that the age range of children who would be likely to wear garments in sizes 2T to 12 is from 18 months to 10 years [Ref. 4]. The age range of children who would be likely to wear garments in sizes 2T to 16 is 18 months to 14 years.

3. *Previous actions by the Commission to address the hazard.* On July 12, 1994, the Commission announced a cooperative effort with a number of manufacturers and retailers that agreed to eliminate or modify drawstrings on the hoods and necks of children's clothing [Ref. 1].

In February 1996, the Commission issued guidelines [Ref. 8] for consumers, manufacturers, and retailers that incorporated the requirements that became ASTM F 1816-97.

On May 12, 2006, the CPSC's Office of Compliance posted a letter [Ref. 2], on CPSC's website, to the manufacturers, importers, and retailers of children's upper outerwear, citing the fatalities and urging them to comply with the industry standard, ASTM F 1816-97. The letter explained that the CPSC staff considers children's upper outerwear with drawstrings at the hood or neck area to be defective and to present a substantial risk of injury under section 15(c) of the Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1274(c). Recalls of noncomplying products that were toys or other articles intended for use by children could be sought under that section. (At that time, section 30(d) of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2079(d)(2007) provided that a risk that could be regulated under the FHSA could not be regulated under the CPSA unless the Commission, by rule, found that it was in the public interest to regulate the risk under the CPSA. Thus, at that time, a recall would be sought under the authority of section 15 of the FHSA, rather than the similar recall authority under section 15 of the CPSA, discussed below in section A.4 of this preamble. Section

30(d) of the CPSA was repealed by the CPSIA, so that now a recall of a consumer product that is a toy or other article intended for use by children can be sought either under the CPSA, without a finding by rule that it is in the public interest to do so, or under the FHSA.)

The 2006 letter also indicated that the Commission would seek civil penalties if a manufacturer, importer, distributor, or retailer distributed noncomplying children's upper outerwear in commerce and failed to report that fact to the Commission as required by section 15(b) of the CPSA, 15 U.S.C. 2064(b) (discussed below in section A.4 of this preamble). From 2006 through 2009, the Commission's staff participated in 78 recalls of noncomplying products with drawstrings and obtained a number of civil penalties based on the failure of firms to report the defective products to CPSC as required by section 15(b) of the CPSA [Ref. 4].

4. *Section 15 of the CPSA.* Section 15 of the CPSA authorizes the CPSC to order corrective actions regarding substantial product hazards. Section 15(a)(2) of the CPSA defines "substantial product hazard" as a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of

injury to the public. The term "defect" is discussed in 16 CFR 1115.4.

Section 15(b)(3) of the CPSA (15 U.S.C. 2064(b)(3)) requires manufacturers, distributors, and retailers of a consumer product or other product over which the Commission has jurisdiction under any act enforced by the Commission (other than motor vehicle equipment as defined in 49 U.S.C. 30102(a)(7)), and which is distributed in commerce, to immediately inform the Commission if they obtain information that reasonably supports the conclusion that the product contains a defect which could create a substantial product hazard under section 15(a)(2) of the CPSA. After giving interested persons an opportunity for a hearing, the Commission may require manufacturers, distributors, and retailers, if in the public interest, to: (1) give notice of the defect to various persons; (2) repair the product; or (3) refund the purchase price. 15 U.S.C. 2064(c) and (d).

Section 15(j) of the CPSA authorizes the Commission to issue rules establishing that defined characteristics of a consumer product that present a risk of injury shall be deemed to be a substantial product hazard if: (1) the characteristics are readily observable; (2) the characteristics have been addressed by voluntary standards;

(3) such standards have been effective in reducing the risk of injury; and (4) there is substantial compliance with such standards. These requirements are discussed separately in sections B through E of this preamble below.

B. The defined characteristics

As explained above in section A.4 of this preamble, the requirements of the ASTM F 1816-97 voluntary standard to reduce the risk of strangulation or being dragged by a vehicle due to neck, hood, waist, or bottom drawstrings define the characteristics that present the substantial product hazard associated with garments subject to that standard.

C. The characteristics are readily observable

In the case of drawstrings, all of the requirements of the ASTM voluntary standard can be evaluated with simple physical manipulations of the garment, simple measurements of portions of the garments, and unimpeded visual observation. The Commission concludes that the product characteristics defined by the voluntary standard are readily observable. (The preceding is not intended to be a definition of "readily observable," and more complicated or difficult actions to determine the presence or absence of

defined product characteristics also may be consistent with "readily observable." The Commission intends to evaluate this issue on a case-by-case basis.)

D. The voluntary standard has been successful in reducing the risk of injury.

1. *Hood and neck drawstring incidents.* The CPSC staff examined reports of fatalities and injuries for the age groups whose upper outerwear is subject to the voluntary standard [Ref. 6]. CPSC staff is aware of 56 reports of neck and hood drawstring entanglements between January 1985 and September 2009. Eighteen (32 percent) of these entanglements were fatal. The majority of the entanglements involved a neck or hood drawstring becoming snagged on a slide. Also, in several incidents, a neck or hood drawstring became entangled on parts of a crib. Of the 38 nonfatal neck or hood drawstring incidents involving children in the age range of 18 months to 10 years (the ages estimated to be associated with sizes 2T to 12), 30 incidents resulted in an injury. In the remaining eight incidents, the neck or hood drawstring became snagged or entangled but no injury was reported. The year with the highest number of reported fatalities (three) was 1994. The 3 years with the highest number of reported incidents

(including both fatal and nonfatal incidents) were 1992 (11), 1993 (9), and 1994 (9). Slides were associated with 10 of the fatalities, 26 of the injury incidents, and all 8 of the no-injury incidents (jackets or sweatshirts snagged by a hood or neck drawstring on playground slides prior to the child's subsequent escape or rescue).

The specification for drawstrings on children's upper outerwear, ASTM F 1816-97, was approved in June 1997 and published in August 1998. CPSC staff is aware of 12 fatalities and 33 nonfatal incidents during the 12 years (1985-1996) prior to the ASTM standard that involved children aged 18 months to 10 years of age where the neck or hood string of upper outerwear became entangled. On average, this resulted in one reported fatality and about three reported nonfatal incidents a year. In the 8 years for which reporting is complete (1999 through 2006) after ASTM F 1816-97 was published, CPSC staff received reports of two fatal and two nonfatal neck or hood drawstring incidents. (The years 1997 and 1998 are omitted from this comparison because that was the transition period during which the ASTM standard was developed and published.) On average, this is approximately one fatality every 4 years and about one nonfatal entanglement every 4 years. For the years for which reporting is complete, the data show a

reduction in the annual average number of reported fatalities after the ASTM standard of 75 percent. The corresponding reduction in the annual average number of reported non-fatal entrapments is 91 percent. It should be noted that CPSC staff continues to receive incident reports for the years 2007 through 2009. CPSC staff is aware of three fatalities and no non-fatal incidents since January 2007. When reporting for 2007-2009 is complete, the percent reduction in the annual average number of reported fatalities associated with neck/hood drawstrings will be at most 55 percent if no additional fatal incidents are reported.

2. *Waist and bottom drawstring incidents.* Between January 1985 and September 2009, CPSC staff is aware of 27 entanglement incidents associated with a waist or bottom drawstring on children's upper outerwear [Ref. 6]. Of these 27 incidents, 8 (30 percent) were fatal, 11 (41 percent) resulted in injuries, and 8 (30 percent) involved snags or entanglements that did not result in an injury. All eight fatalities identified with waist and bottom drawstrings (seven involving a bus and one involving a slide) occurred in the years 1991 through 1996. From 1991 to 1996, there were 19 waist and bottom drawstring incidents, of which 13 involved buses (7 fatalities and 6

nonfatal incidents). CPSC staff is not aware of any bus-related drawstring incidents after 1996. There were seven waist and bottom drawstring incidents from 1999 to the present (all nonfatal), two of which involved children caught on car doors. For years in which reporting is considered complete, the number of reported fatalities associated with waist and bottom drawstrings have fallen from the eight reported fatalities between 1985 and 1996 to zero since adoption of the ASTM voluntary standard in 1997. For the corresponding periods for which reporting is complete (1985 through 1996 and 1999 through 2006), reported nonfatal injuries fell from 11 in 12 years to 6 in 8 years. These data suggest that after the ASTM standard was adopted, for waist and bottom drawstrings the annual average of reported fatalities fell by 100 percent and the annual average of reported nonfatal incidents fell by about 18 percent. Reporting is ongoing for 2007-2009. CPSC staff is not aware of any reported fatalities for this time. Staff has one report of a non-fatal incident occurring between 2007-2009. These numbers may change in the future.

3. *Effectiveness of the voluntary standard.* To the extent that reductions in deaths and injuries are due to compliance with the voluntary standard, either by eliminating drawstrings altogether or by making them meet

the requirements of the standard, the effectiveness of the voluntary standard is likely to be higher than the reductions in reported deaths and injuries indicate. This is because many items of upper outerwear manufactured before the industry widely adopted the ASTM standard, and that had drawstrings that did not comply with that standard, probably remained in use long after the standard was adopted. Based on the injury data, the Commission concludes that the ASTM voluntary standard has been effective in reducing the risk of injury from children's upper outerwear with drawstrings.

E. There is substantial compliance with the voluntary standard.

In the context of the findings needed for a rule under section 15(j) of the CPSA to deem product characteristics regulated by a voluntary standard to be a substantial product hazard, "substantial compliance" refers to the extent the industry manufacturing and distributing the product complies with the voluntary standard. The issue is what degree of compliance will be deemed "substantial" in a particular situation. Neither section 15(j) of the CPSA nor the legislative history of the CPSIA (which amended the CPSA to add paragraph (j) to section 15 of the CPSA)

defines or explains what constitutes substantial compliance.

The Commission notes, however, that the term "substantial compliance," which is used in section 15(j) of the CPSA, also appears elsewhere in the CPSA, as well as in the Federal Hazardous Substances Act ("FHSA") and the Flammable Fabrics Act ("FFA"), in the context of whether the Commission can issue a mandatory rule addressing a risk that also is addressed by a voluntary standard. Because the provisions in the FHSA and FFA relating to substantial compliance are basically identical to those in the CPSA, only the CPSA is referenced in the following discussion.

Sections 7 and 9 of the CPSA prohibit the Commission from issuing a consumer product safety rule if there is a voluntary standard that passes a two-pronged test: (1) If the voluntary standard were universally complied with, it would adequately reduce, or eliminate, the unreasonable risk of injury that would be addressed by the rule; and (2) there will be substantial compliance with the voluntary standard. Failure of a voluntary standard to meet either prong of this test allows the Commission to issue a mandatory standard. The use of the concept of "substantial compliance" as a finding that can determine whether a mandatory consumer product safety rule can be issued will

be referred to in this preamble as the "rulemaking context."

The most comprehensive explanation of the Commission's views on substantial compliance in the rulemaking context is in the findings the Commission made in issuing the Safety Standard for Bunk Beds, 16 CFR Parts 1213, 1500, and 1513. Those findings are codified in appendices to 16 C.F.R. parts 1213 and 1513 and state, in relevant part, that the Commission does not believe that there is any single percentage of conforming products that can be used in all cases to define "substantial compliance." Instead, the percentage must be viewed in the context of the hazard the product presents, and the Commission must examine what constitutes substantial compliance with a voluntary standard in light of its obligation to safeguard the American consumer.

The findings in the rulemaking for bunk beds discuss a number of factors that the Commission should consider in the rulemaking context in determining whether there is substantial compliance. Factors that may influence the Commission to conclude that a mandatory standard is needed and that there is not substantial compliance include that:

- the risk is severe;
- no intervening action is required to create the risk;

- the risk targets a vulnerable population, such as children;
- the product has a long life and thus might be passed on to other children; and
- the product can be made relatively easily by very small companies.

See, e.g., Appendix to 16 CFR part 1213.

In the context of a rule under section 15(j) of the CPSA, the same factors would argue that the Commission should find substantial compliance, in order that the public be protected by the issuance of the rule.

Table 1 (below) shows information about the CPSC recalls for the years 2006 through 2009. The number of cases related to recalls of children's upper outerwear garments with drawstrings numbered 78 for that period, involving about 2 million units.

The number of recalls in 2008 and 2009 was more than the number of recalls in 2006 and 2007; however, the annual average number of outerwear garments recalled in 2006 and 2007 (about 650,000) was about 75 percent greater than the annual average number recalled in 2008 and 2009 (about 377,000).

Table 1
CPSC Office of Compliance Recalls
Drawstrings on Children's Upper Outerwear
2006 - 2009

| Year | Number of Recall Cases | Number of Units of Upper Outerwear Recalled |
|--------------|------------------------|---|
| 2006 | 17 | 676,597 |
| 2007 | 14 | 626,172 |
| 2008 | 24 | 227,868 |
| 2009 | 23 | 526,193 |
| Total | 78 | 2,056,830 |

Source: Communication from CPSC Office of Compliance, March 18, 2010

Using population data, garment sizing information, and assumptions about purchase and use, one can calculate the number of units recalled as a proportion of sales. This calculation provides a rough estimate of the extent of compliance with the voluntary standard.

As explained earlier in section A.2 of this preamble, the voluntary standard applies to sizes 2T to 12 for neck and hood drawstrings and sizes 2T to 16 for drawstrings at

the waist and bottom of upper outerwear. Information available to CPSC's staff indicates that a child's age generally matches the child's clothing size or is a year or two below the clothing size [Ref. 4]. For example, a child 12 years old might wear a size 12 garment or a size 14. Similarly, for smaller sizes, children who are as young as 18 months can be wearing size 2T clothing. Thus, the ages of children wearing size 2T to 12 (the sizes covered by the voluntary standard for upper outerwear with hood or neck drawstrings) would be 18 months to 10 years. The ages of children typically wearing size 2T to 16 (the sizes covered by the voluntary standard for upper outerwear with waist or bottom drawstrings) would be 18 months to 14 years.

For each of the years 2006 through 2009, the population of children of ages 18 months to 10 years was about 38 million and the population of children of ages 18 months to 14 years was approximately 55 million [Refs. 3, 4].

No numerical data about recent annual sales of children's upper outerwear is available. A press release concerning a 1994 cooperative agreement between CPSC and manufacturers and retailers of children's clothing suggests that annual sales of garments with hood and neck drawstrings was 20 million, although no source for that

information is provided [Ref. 1]. However, because one way to comply with the voluntary standard is to eliminate drawstrings entirely, the garments to which the voluntary standard applies include all children's upper outerwear in the specified sizes, not just those with drawstrings.

Given children's growth patterns, it may be that, on average, at least one new piece of upper outerwear is purchased each year for each child. If so, then sales of children's upper outerwear could total the population of children who wear children's sizes 2T to 16, or at least 55 million.

Given these assumptions, and assuming that all violative items of children's upper outerwear were recalled in the years 2006 through 2009, it would appear that the percentage of children's upper outerwear garments sold in those years that complied with the drawstring requirements of ASTM F 1816-97 was in the high-90-percent range. While the number of recalled units in the years 2006 through 2009 totaled about 2 million units, the number of units sold during those 4 years, under the assumptions above, totaled 220 million. Thus, for the period 2006 through 2009, the units recalled by CPSC would account for about 1 percent of all units sold. In other words, given the assumptions noted, there was about 99 percent compliance with the

voluntary standard. Even if these assumptions are not entirely accurate, the Commission concludes that the compliance with ASTM F 1816-97 is very high and constitutes substantial compliance as that term is used in section 15(j) of the CPSA.

F. Size and Age Determination Issues

Children's upper outerwear that is labeled with a size in the 2T to 16 numerical size range clearly would be a garment subject to the ASTM F 1816-97 standard. In many cases, however, the garment's label may lack a numerical size, instead using a "small (S), medium (M), or large (L)" sizing system. It is fairly obvious when clothing is small enough for younger children and therefore would be included in the sizes specified in the ASTM standard. In contrast, it is not always apparent which non-numerical sizes correspond to the sizes at the upper end of the ranges in the standard, that is, size 12 and size 16, because styles and sizing systems vary. To determine which of these designations would be equivalent to sizes 2T to 16, the Commission's staff searched internet sites to locate clothing size charts in which firms link children's non-numerical sizes with numerical sizes [Ref.7]. All of the charts that were located, 31 of which were for girls'

apparel and 29 for boys' apparel, were included in the review. For each firm, letter sizes were recorded for boys' and girls' sizes 10 through 18 to explore the overlap in letter sizes one size below and one above the 12 and 16 endpoints in the standard. The number of firms adopting each size equivalence is presented below.

Table 2--Number of Firms by Number and Letter Size Equivalency

| | <u>Girls</u> | | | | | <u>Boys_</u> | | | | |
|-----------|--------------|----------|----------|-----------|------------|--------------|----------|----------|-----------|------------|
| | <u>S</u> | <u>M</u> | <u>L</u> | <u>XL</u> | <u>XXL</u> | <u>S</u> | <u>M</u> | <u>L</u> | <u>XL</u> | <u>XXL</u> |
| 10 | 1 | 23 | 7 | | | 1 | 21 | 7 | | |
| 12 | | 17 | 14 | | | | 17 | 11 | 1 | |
| 14 | | | 21 | 10 | | | 1 | 19 | 8 | 1 |
| 16 | | | 9 | 17 | 1 | | | 15 | 9 | |
| 18 | | | | 9 | 1 | | | 1 | 16 | 2 |

As can be seen in the table, firms vary in how they define those sizes. For example, although most firms equate children's sizes 10 with Medium, some equate size 10 with Small (S) and some with Large (L).

To increase the likelihood that as many products as possible that are subject to the ASTM standard will be included in the applicable size definition while minimizing the overlapping inclusion of products that are not subject

to the ASTM standard, the Commission proposes that non-numerical equivalencies for sizes 12 and 16 be based on the size equivalency that is (1) used by a substantial percent of children's apparel firms and (2) does not exclude a substantial percent of firms at a higher size equivalency.

For example, for girls' size 12 apparel, 55 percent of the size equivalencies shown in the chart above equate size 12 to size Medium. However, if Medium and smaller is selected as equivalent to size 12 and smaller, then another 45 percent of size equivalencies (in the Large category) are excluded. Therefore, to ensure that products covered by the standard are included, it appears to be more appropriate to select Large as the upper limit size equivalency for size 12 girls' upper outerwear. For boys size 12, 59 percent of the size equivalencies equate size 12 to Medium, but if that size equivalency is selected, then another 38 percent of size equivalencies (in the Large category) are excluded. Thus, it appears more appropriate to select Large as the upper limit size equivalency for size 12 boys' upper outerwear. While there is another data point showing size 12 equivalent to XL, it would constitute only 3 percent of equivalencies, and therefore it would be possible that products not covered by the standard would be included. Thus, it does not appear reasonable to include

that size. Using this approach and based on the table above, the Commission proposes that boy's and girls' size Large (L) should be defined as size 12 and that boys' and girls' sizes Extra-Large (XL) be defined as equivalent to size 16.

The proposed rule also would declare that the number and letter size-equivalency system used by a particular firm can, at the Commission's option, be used to determine the equivalency of that firm's sizes to the numerical system.

In cases where garment labels give a range of sizes, if the range includes any size that is subject to ASTM F 1816-97 the garment will be considered subject, even if other sizes in the stated range, taken alone, would not be subject. For example, a coat sized 12-14 remains subject to the prohibition of hood and neck area drawstrings, even though the ASTM standard prohibits head and neck drawstrings only in garments up to size 12. On the other hand, a size 13-15 coat would not be considered to be within the scope of the ASTM standard's prohibition of neck and hood drawstrings, but it would be subject to the ASTM standard's requirements for waist or bottom strings.

To address garments for which the lettered sizing system sizes given above are insufficient to determine

whether an item of upper outerwear is equivalent to sizes 2T to 16, the Commission's staff considered the possibility of determining garment equivalency on the basis of anthropometric data or a market survey of the actual size of garments marked 2T to 16. It was determined that such efforts were not feasible due to the vagaries of fashion and the varied purposes served by outerwear (e.g., how many layers of clothing will be worn under the garment). The Commission invites comments on how to determine the equivalency of unlabeled or ambiguously labeled garments to sizes 2T to 16.

In cases where the equivalency of a garment's size to the relevant size in the 2T to 16 system is not readily apparent, the Commission's staff will assemble evidence on that issue. The Commission concludes that, once equivalency has been established, the existence of any final rule under section 15(j) of the CPSA applicable to the product will obviate any need for the staff to present additional evidence to establish that the product contains a defect that presents a substantial risk of injury to the public.

G. Description of the Proposed Rule

Elsewhere in this issue of the FEDERAL REGISTER, the Commission is publishing a proposed rule to establish a new part 1120, titled, "Substantial Product Hazard List" which would codify the Commission's determinations that certain consumer products or classes of consumer products have characteristics whose existence or absence presents a substantial product hazard. Products that are determined in rules issued under section 15(j) of the CPSA to present a substantial product hazard, such as the rule proposed in this notice for drawstrings, would be listed in a new § 1120.3.

This proposed rule for drawstrings would create a new § 1120.3(b)(1) to specify that items of children's upper outerwear that are subject to ASTM F 1816-97, but that do not comply with it, are substantial product hazards under section 15(a)(2) of the CPSA. The proposal also would create a new § 1120.2(c) to define a "drawstring" as "a non-retractable cord, ribbon, or tape of any material to pull together parts of outerwear to provide for closure."

To facilitate determining which garments that are sized under a sizing system other than the numerical system (2T to 16) would be equivalent to sizes 2T to 16, proposed § 1120.3(b)(2)(i) would provide that garments in girls'

size Large (L) and boys' size Large (L) are equivalent to size 12 and proposed § 1120.3(b)(2)(ii) specifies that garments in girls' size Extra-Large (XL) and boys' size Extra-Large (XL) are equivalent to size 16.

Proposed § 1120.3(b)(2)(iii) would provide that if a garment is labeled for a range of sizes, the garment would be considered subject to ASTM F 1816-97 if any size within the range is subject to ASTM F 1816-97. Proposed § 1120.3(b)(2)(iv) would provide that, in order to fall within the scope of § 1120.3(b)(2)(i) through (iii), a garment need not state anywhere on it, or on its tags, labels, package, or any other materials accompanying it, the term "girls" or the term "boys" or whether the garment is intended for girls or boys. In addition, proposed § 1120.3(b)(2)(v) would provide that a size may be considered equivalent to the 2T to 16 range if a manufacturer, importer, distributor, or retailer has stated that it is equivalent. Last, proposed § 1120.3(b)(vi) would state that the Commission may use any other evidence that would tend to show that an item of children's upper outerwear is a size that is equivalent to sizes 2T to 16.

H. Certification

The Commission has received inquiries about whether a product that is subject to a rule under section 15(j) of the CPSA will have to be tested and certified as required by section 14(a) of the CPSA. The answer to that question is "no." Section 14(a) of the CPSA requires that products subject to a consumer product safety rule under the CPSA or a similar rule, ban, standard, or regulation under any other act enforced by the Commission must be certified as complying with all applicable CPSC-enforced 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 (those designed or intended primarily for children 12 years of age or younger), on tests by a third-party conformity assessment body (also known as a "third-party laboratory") recognized by the Commission. Under section 14(a) of the CPSA, the only type of rule *under the CPSA* that can trigger the requirement for testing and certification is a "consumer product safety rule." Section 3(a)(6) of the CPSA defines a "consumer product safety rule" as "a consumer products safety standard described in section 7(a) [of the CPSA] or a rule under [section 8 of the CPSA] declaring a consumer product a banned hazardous product." A rule under section 15(j) of the CPSA does not fit into either category, so products

subject to a rule under section 15(j) of the CPSA are not, for that reason, subject to the testing and certification requirements of section 14(a) of the CPSA. The Commission is aware that section 11(g)(1)(A) of the CPSA, 15 U.S.C. 2060(g)(1)(A), relating to judicial review, refers to a rule issued under section 15(j) of the CPSA as a "consumer product safety rule." However, this provision is limited to judicial review situations and, therefore, does not equate rules under section 15(j) of the CPSA with consumer product safety rules. (Although a rule under section 15(j) of the CPSA does not trigger the requirement for testing and certification, products subject to a rule under section 15(j) of the CPSA may need to be tested and certified if they are subject to *other* CPSC requirements, such as flammability requirements, the lead content requirements in section 101 of the CPSIA, or the phthalate content requirements of section 108 of the CPSIA.)

The Commission understands that retailers may be demanding certification tests to all CPSC requirements applicable to children's products. The discussion above makes it clear that certification to the proposed rule is not required by federal law or this regulation. While certification is not required by law, retailers still have a responsibility to report to the CPSC under section 15(b)

with regard to this rule. The Commission believes that because the retailer has an independent reporting obligation to the Commission, it should not be permitted to seek indemnity for a penalty assessed because of its own failure to report. The Commission would consider an agreement to indemnify a retailer for any civil penalties assessed for a failure to report to be void as against public policy. The Commission seeks comment on this position.

I. Preemption

The Commission has received inquiries about whether a rule under section 15(j) of the CPSA would have the effect of preempting State laws or regulations that are not identical to the requirements of the voluntary standard. Under section 26(a) of the CPSA, 15 U.S.C. 2075(a), if a "consumer product safety standard under [the CPSA]" 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. (Section 26(c) of the CPSA provides that States or political subdivisions of States may apply to the Commission for an exemption from this preemption under

certain circumstances.) As discussed in the preceding section H of this preamble, a rule under section 15(j) of the CPSA is not a "consumer product safety standard." Accordingly, the preemptive effect of section 26(a) of the CPSA does not apply to a rule under section 15(j) of the CPSA.

J. Paperwork Reduction Act

This proposed rule would not impose any information collection requirements. Accordingly, this rule is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

K. Environmental Considerations

The Commission's environmental review regulation at 16 CFR part 1021 has established categories of actions that normally have little or no potential for affecting the human environment and therefore do not require either an environmental assessment or an environmental impact statement. The proposed rule is within the scope of the Commission's regulation, at 16 CFR 1021.5(c)(1), that provides a categorical exclusion for rules to provide design or performance requirements for products. Thus, no

environmental assessment or environmental impact statement for this rule is required.

L. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA), 5 USC 601-612, requires agencies to consider the impact of proposed rules on small entities, including small businesses. For the reasons given immediately below, the Commission concludes that the proposed rule will not have a significant impact on a substantial number of small entities.

Aggregate information about the market for children's outerwear is not readily available; these types of garments are not reported separately by the U.S. Department of Commerce. Nearly all manufacturers of these garments would be considered small businesses under the Small Business Administration (SBA) guidelines applicable to such enterprises (fewer than 500 employees). According to SBA data for 2006, of 9,343 U.S. firms that manufactured "cut and sew" apparel, 9,286, or 99.4 percent, had fewer than 500 employees, and more than 80 percent had fewer than 20 employees. Firms that manufacture children's outerwear would be a subset of the cut and sew manufacturing category, but these statistics would support the assumption that nearly all are small businesses. SBA firm-size data

for clothing retailers also show that nearly all of these firms would be considered to be small businesses.

The Commission's staff estimates that a very high percentage of small businesses that manufacture or sell children's upper outerwear already sell only garments that comply with ASTM F 1816-97. Therefore, these firms would not be adversely affected if children's upper outerwear garments with drawstrings are added to the list of products that present a substantial product hazard. Also, the Commission's Office of Compliance and Field Operations already considers children's upper outerwear with hood or neck area drawstrings that are subject to, but do not comply with, ASTM F 1816-97 to be a substantial product hazard and would seek recalls of such products regardless of whether they were added, by rule, to the list of substantial product hazards under Section 15(j) of the CPSA. Finally, conformance to ASTM F 1816-97 is achieved for many garments distributed in commerce by simply eliminating drawstrings from the manufacturing process with minimal or no increase in resulting production costs.

M. Effective Date

The Commission proposes that any final rule based on this proposal become effective 30 days after its date of

publication in the FEDERAL REGISTER. After that date, all items of children's upper outerwear that are subject to, but do not comply with, the ASTM F 1816-97 will be deemed to be substantial product hazards regardless of the date they were manufactured or imported.

N. Request for Comments

The Commission invites interested persons to submit their comments to the Commission on any aspect of the proposed rule. Comments should be submitted as provided in the instructions in the **ADDRESSES** section at the beginning of this notice.

O. References

1. Press Release: "CPSC Works With Industry To Remove Drawstring Hazard," *News from CPSC*, July 12, 1994.

2. Letter from John Gibson Mullan, Director, CPSC's Office of Compliance, to Manufacturers, Importers and Retailers of Children's Upper Outerwear, May 19, 1996.

3. Population estimates based on data from the Bureau of the Census, U.S. Department of Commerce, www.census.gov/popest/national/asrh/NC-EST2008/NC-EST2008-01.xls and from the National Center for Health Statistics,

Centers for Disease Control and Prevention,
www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_09.pdf .

4. CPSC staff memorandum, "Extent of Compliance with ASTM F 1816-97: Standard Safety Specification for Drawstrings on Children's Upper Outerwear," from Elizabeth W. Leland, Economist, Directorate for Economic Analysis, to Jonathan D. Midgett, Ph.D., Engineering Psychologist, Division of Human Factors, April 14, 2010.

5. CPSC staff memorandum, "Inclusion of Drawstrings on Children's Outerwear on the List of Substantial Product Hazards: Small Business Considerations," from Charles L. Smith, Economist, Directorate for Economic Analysis, to Jonathan D. Midgett, Ph.D., Engineering Psychologist, Division of Human Factors, Leader, Children's Program Area Team, January 26, 2010.

6. CPSC staff memorandum, "Reported Frequencies of Fatal and Nonfatal Incidents Related to Drawstrings on Children's Upper Outerwear Between 1985 and 2009," from John Topping, Mathematical Statistician, Division of Hazard Analysis, to Jonathan Midgett, Children's Hazard Team Coordinator, January 25, 2010.

7. CPSC staff memorandum, "Recommendation to Deem Children's Upper Outerwear with Drawstrings a Substantial Product Hazard," from Jonathan D. Midgett, Ph.D.,

Children's Hazards Team Coordinator and Robert J. Howell, Assistant Executive Director, Office of Hazard Identification and Reduction, to the Commission, April 20, 2010.

8. *CPSC Guidelines for Drawstrings on Children's Upper Outerwear*, September 1999.

List of Subjects in 16 CFR part 1120

Administrative practice and procedure, Clothing, Consumer protection, Infants and children, Imports, Incorporation by reference

For the reasons stated above, and under the authority of 15 U.S.C. 2064(j), 5 U.S.C. 553, and section 3 of Public Law 110-314, 122 Stat. 3016 (August 14, 2008), the Consumer Product Safety Commission proposes to amend 16 CFR part 1120 as follows:

PART 1120 - SUBSTANTIAL PRODUCT HAZARD LIST

1. The authority citation for part 1120 is revised to read as follows:

Authority: 15 U.S.C. 2064(j); Sec. 3, Pub. L. 110-314, 122 Stat. 3016.

2. Add a new § 1120.2(c) to read as follows:

§ 1120.2 Definitions.

* * * * *

(c) *Drawstring* means a non-retractable cord, ribbon, or tape of any material to pull together parts of outerwear to provide for closure.

Add a new § 1120.3(b) to read as follows:

§ 1120.3 Substantial product hazard list.

* * * * *

(b) (1) Children's upper outerwear in sizes 2T to 16 or the equivalent, and having one or more drawstrings, that is subject to, but not in conformance with, the requirements of ASTM F 1816-97, *Standard Safety Specification for Drawstrings on Children's Upper Outerwear*. 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. You may obtain a copy from ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA, 19428-2959 USA, telephone: 610-832-9585; <http://www2.astm.org/>. You may inspect a copy at the Office of the Secretary, U.S. Consumer Product Safety

Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814, telephone 301-504-7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to:

http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(2) At its option, the Commission may use one or more of the following methods to determine what sizes of children's upper outerwear are equivalent to sizes 2T to 16:

(i) Garments in girls' size Large (L) and boys' size Large (L) are equivalent to girls' or boys' size 12, respectively. Garments in girls' and boys' sizes smaller than Large (L), including Extra-Small (XS), Small (S), and Medium (M), are equivalent to sizes smaller than size 12. The fact that an item of children's upper outerwear with a hood and neck drawstring is labeled as being larger than Large (L) does not necessarily mean that the item is not equivalent to a size in the range of 2T to 12.

(ii) Garments in girls' size Extra-Large (XL) and boys' size Extra-Large (XL) are equivalent to size 16. The fact that an item of children's upper outerwear with a waist or bottom drawstring is labeled as being larger than

Extra-Large (XL) does not necessarily mean that the item is not equivalent to a size in the range of 2T to 16.

(iii) In cases where garment labels give a range of sizes, if the range includes any size that is subject to a requirement in ASTM F 1816-97, the garment will be considered subject, even if other sizes in the stated range, taken alone, would not be subject to the requirement. For example, a coat sized 12 through 14 remains subject to the prohibition of hood and neck area drawstrings, even though this requirement of the ASTM standard only applies to garments up to size 12. A size 13 through 15 coat would not be considered within the scope of the ASTM standard's prohibition of neck and hood drawstrings, but would be subject to the requirements for waist or bottom drawstrings.

(iv) To fall within the scope of paragraphs (2)(i) through (2)(iii) of this section, a garment need not state anywhere on it, or on its tags, labels, package, or any other materials accompanying it, the term "girls," the term "boys," or whether the garment is designed or intended for girls or boys.

(v) The Commission may determine equivalency to be as stated in a manufacturer's (including importer's), distributor's, or retailer's statements of what sizes are

equivalent to sizes 2T to 16. A firm's statement of what sizes are equivalent to sizes 2T to 16 may not be used to show that the size of a garment is not equivalent to a size in the range of 2T to 16.

(vi) The Commission may use any other evidence that would tend to show that an item of children's upper outerwear is a size that is equivalent to sizes 2T to 16.

May 11, 2010

Dated: _____

// SIGNED //

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission