



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

This document has been electronically approved and signed.

THIS MATTER IS NOT SCHEDULED FOR A BALLOT VOTE.

A DECISION MEETING FOR THIS MATTER IS SCHEDULED ON: September 9, 2010

TO: The Commission August 25, 2010
 Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel
 Kenneth R. Hinson, Executive Director

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

SUBJECT: Final Interpretative Rule: Interpretation of Children’s Product

The Office of the General Counsel is providing for Commission consideration the attached draft *Federal Register* notice on a final interpretative rule providing guidance on the factors that must be considered when evaluating what is a children’s product.

Please indicate your vote on the following options.

I. Approve publication of the draft notice in the *Federal Register* without change.

 (Signature) _____
 (Date)

II. Publish the draft notice in the *Federal Register* with changes.
 (Please specify.)

 (Signature) _____
 (Date)

III. Do not approve publication of the draft notice in the *Federal Register*.

(Signature)

(Date)

IV. Take other action. (Please specify.)

(Signature)

(Date)

Attachments:

Draft *Federal Register* Notice – Final Interpretative Rule: Interpretation of “Children’s Product.”

Memorandum from Jonathon D. Midgett, Office of Hazard Identification and Reduction, and John Boja, Office of Compliance and Field Investigations, to Robert J. Howell, Assistant Executive Director, Health Sciences, *Interpretation of Children’s Product-Staff Responses to Public Comments*, dated August 2010.

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1200

Interpretation of “Children’s Product”

[Docket No. CPSC-2010-0029]

AGENCY: Consumer Product Safety Commission.

ACTION: Final Interpretative Rule.

SUMMARY: The Consumer Product Safety Commission (“CPSC,” “Commission,” or “we”) is issuing a final interpretative rule on the term “children’s product” as used in the Consumer Product Safety Improvement Act of 2008 (“CPSIA”), Public Law 110-314. The final interpretative rule provides additional guidance on the factors that are considered when evaluating what is a children’s product.

EFFECTIVE DATE: This rule is effective **[insert the date of publication in the Federal Register]**.

FOR FURTHER INFORMATION CONTACT:

Jonathan D. Midgett, Office of Hazard Identification and Reduction, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814, telephone (301) 504-7692, email jmidgett@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. Background

Section 235(a) of the CPSIA amended section 3(a)(2) the Consumer Product Safety Act (“CPSA”) by creating a new definition of “children’s product.” 15 U.S.C. 2052(a)(2). “Children’s product” is defined as “a consumer product designed or intended

primarily for children 12 years of age or younger.” Several CPSIA provisions use the term “children’s product.” For example, section 101(a) of the CPSIA provides that, as of August 14, 2009, children’s products may not contain more than 300 parts per million (ppm) of lead. On August 14, 2011, the limit shall be reduced to 100 ppm unless the Commission determines that it is not technologically feasible to move to this lower limit for a particular product or product category. As another example, section 102 of the CPSIA requires third party testing of certain children’s products, and section 103 of the CPSIA requires tracking labels for children’s products.

The statutory definition of “children’s product” also specifies certain factors that are to be taken into consideration when making a determination about “whether a consumer product is primarily intended for a child 12 years of age or younger.” These factors are:

- A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable;
- Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger;
- Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; and
- The Age Determination Guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

B. Discussion of Comments to the Proposed Interpretative Rule and Changes to the Final Interpretative Rule

In the *Federal Register* of April 20, 2010 (75 FR 20533), the Commission published a proposed interpretative rule to help interested parties determine whether a particular consumer product is a “children’s product.” The intent was to give interested parties a better understanding of our approach to evaluating children’s products. The proposed interpretative rule would create a new section in the CFR interpreting the definition of children’s product and the accompanying statutory factors.

The Commission received numerous comments from individuals and groups, including consumers, consumer organizations, manufacturers, trade associations, and testing laboratories. Several commenters supported the rule; other commenters sought to clarify, expand, or limit the scope of the rule.

We initially proposed this section under Chapter II of Title 16, Part 1500 of the Federal Hazardous Substances Act (“FHSA”). However, because the definition of children’s product amends section 3(a)(2) of the Consumer Product Safety Act (“CPSA”), on our own initiative, we have renumbered the final rule to become a new Part 1200, Definitions, under Subchapter B – Consumer Product Safety Act Regulations.

As a result of our decision to place the final rule in a new part 1200, we have, on our own initiative, created a new § 1200.1 to describe the purpose of the new part 1200. Section 1200.1 states that part 1200 is intended to provide guidance on the definition of children’s product and the factors considered for making determinations regarding children’s products as set forth under 15 U.S.C. 2052(2). Additionally, proposed §

1500.92, “Definition of children’s product,” is now renumbered as § 1200.2 in the final interpretative rule.

We describe and respond to the comments in part B of this document and also describe the final rule. To make it easier to identify comments and our responses, the word “Comment,” in parentheses, will appear before the comment’s description, and the word “Response,” in parentheses, will appear before our response. We also have numbered each comment to help distinguish among different comments. The number assigned to each comment is purely for organizational purposes and does not signify the comment’s value, importance, or the order in which it was received.

1. *Definition of “Children’s Product” – § 1200.2(a)(2) (Formerly § 1500.92(a)(1)).* Proposed § 1500.92(a) would provide that, under section 3(a)(2) of the CPSA, a children’s product means a consumer product designed or intended primarily for children 12 years of age or younger. We interpreted the term “designed or intended primarily” to apply to those consumer products mainly for children 12 years old or younger. A determination of whether a product is a “children’s product” will be based on consideration of the four specified statutory factors. In addition, because the statutory factors incorporate the concept of “use” by the child in some manner, we interpreted “for use” by children 12 years or younger to generally mean that children will physically interact with such products based on the reasonably foreseeable use and misuse of such product.

(Comment 1) - Several commenters state that the definition should be clear that children’s products are only those designed or intended by the manufacturer to be intended primarily for children 12 years of age or younger and that a product falls outside the scope of

the definition if the product was designed or intended primarily by the manufacturer for older children or adults. In addition, some commenters request that the Commission limit the scope of the definition by emphasizing that the manufacturer's intent is the determinative factor for evaluating whether a consumer product is a children's product. According to these commenters, the interpretative rule should make clear that the remaining statutory criteria would be subordinate to statements made by manufacturers about the intended age of the users.

(Response 1) - We disagree that a determination of what is a children's product be based solely on the manufacturer's intent. The statute provides that the definition of a "children's product" is a consumer product designed or intended primarily for children 12 years of age or younger. In determining whether a consumer product is primarily intended for a child 12 years of age or younger, section 3(a)(2)(A) through (D) of the CPSA expressly mandates an analysis of four factors that "shall be considered": 1) a statement by the manufacturer about the intended use of the product, including a label on such product if such statement is reasonable; 2) whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger; 3) whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; and 4) the Age Determinations Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.

The manufacturer's intent, including labeling, is only one of four factors that we must consider. While we agree that the manufacturer's intent plays an important role in making initial children's product determinations, it is not necessarily determinative, always determinative, or entitled to greater weight than any other factor. Courts have

held that, as a general rule, when a statute requires an agency to consider a factor, the agency must reach “an express and considered conclusion” about the bearing of the factor, but need not give “any specific weight to the factor.” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 516 (D.C. Cir. 1983) (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978)).

All the factors must be considered when determining whether a particular consumer product is considered to be primarily intended for children 12 years of age or younger, and we will not assign any more or less weight for any individual factor or to the factors as a whole. Given the unique qualities and uses of many products in the marketplace, many of which are used both by adults and children, evaluations of many products will continue to require case by case review.

(Comment 2) - Other commenters state that the proposed definition of children’s product should not contain a definition of “for use” by children that is based on “physical interaction” and “foreseeable use and misuse” of such products by children. According to the commenters, the requirement that children physically interact with such products would capture many household products that would not be primarily designed or intended for children 12 years of age or younger.

(Response 2) - We disagree that the interpretation of “for use” would capture general use products that are not primarily intended for use by children. We interpret “for use” to include physical use of a product in order to distinguish products, such as diaper bags that are intended to be used *with* children by the parent or caregiver from products that are intended for use *by* children. Products that are for use by children are those with which they will interact or have direct physical contact, such as with the diaper

itself. Contrary to the commenters' assertions, many household products are not primarily intended for use by children, but may be touched by children. Products that are considered general use products, such as televisions, stereo equipment, and appliances, do not become children's products simply because children may have contact with them because the products are not designed or intended primarily for use by children 12 years of age or younger.

The term "use" or "for use" takes into account the concept that children will be exposed to products under reasonably foreseeable conditions of handling, including both use and misuse. When evaluating products, the Commission not only considers what the manufacturer intended, but the product's reasonably foreseeable use, and what a child using the product may reasonably be expected to do with the product. The question of whether there will be reasonably foreseeable use of a product by a child is a determination that is made initially by the manufacturer. As part of the manufacturer's initial determination, the manufacturer should assess whether there will be reasonably foreseeable misuse or abuse of the product arising out of the product's intended use or ordinary purpose. While we recognize that the reasonably foreseeable misuse of the product would not be reflected in the manufacturer's statement of intended use or product representation to consumers, the Commission has consistently considered both use and misuse in assessing likely exposures from children's products under reasonably foreseeable conditions of handling. The Commission is not intending by including the concept of misuse to convert a product which is intended for use by an adult into a children's product simply because a child could come into contact with the adult product.

(Comment 3) - A few commenters state that the proposed interpretative rule affects other requirements previously established for toys and children's products. Specifically, the commenters give as an example board/table games which were identified under the Age Determination Guidelines as being appropriate for children in the 6 year old range. The commenters assert that the games would have to comply with ASTM F963 (a toy standard that is now a mandatory consumer product safety standard pursuant to section 106 of the CPSIA), applicable FHSA requirements under 16 CFR 1500.50 through 1500.53, lead in surface coatings under 16 CFR 1303, and phthalates requirements of the CPSIA. If the games are general use products, the commenters claim that such products would not be required to comply with the lead in substrate requirements or the tracking label requirements, or the mandatory third party testing requirements under the CPSIA.

(Response 3) – We recognize that the same board game could be considered differently under separate provisions of the CPSIA and the cited FHSA regulations. However, the statute uses the term “primarily” in describing the circumstances under which a product shall be considered a “children's product” under the CPSIA. There are places where the statutes and regulations can be read consistently. For example, to the extent that toys or other articles contain small parts that are intended for use by children under 3 years of age, it is reasonable to conclude that they are children's products. Likewise, for toys and other articles intended for use by children under 8 years of age that are subject to the use and abuse tests at 16 CFR 1500.50 through 1500.53, and the sharp points and edges tests at 16 CFR 1500.48 through 1500.49, such products would also logically be considered children's products. We have added a sentence to clarify this in the rule. The final interpretative rule now states in relevant part:

Toys and articles that are subject to the small parts regulations at 16 CFR Part 1501 and ASTM F963, would logically fall within the definition of children's product since they are intended for children 12 years of age or younger. Toys and other articles intended for children up to 96 months (8 years old) that are subject to the requirements at 16 CFR 1500.48 through 1500.49 and 16 CFR 1500.50 through 1500.53, and ASTM F963 would similarly fall within the definition of children's products given their age grading for these other regulations. Therefore, a manufacturer could reasonably conclude on the basis of the age grading for these other regulations that it must comply with all requirements applicable to children's products including, but not limited to, those under the Federal Hazardous Substances Act, ASTM F963, "Standard Consumer Safety Specification for Toy Safety," and the Consumer Product Safety Improvement Act of 2008.

We discuss children ages 9 through 12 in the comments and responses to proposed § 1500.92(c)(1) (now renumbered as § 1200.2(c)(1) in the final rule).

(Comment 4) - One commenter states that the definition of children's products should include pet foods. Another commenter states that adult absorbent care products should be distinguished from children's diapers.

(Response 4) - Pet foods and adult absorbent products are outside the scope of this interpretative rule because these products are regulated under the Federal Food, Drug, and Cosmetic Act ("FFDCA"). Pet food falls within the definition of "food" at section

201(f) of the FFDCA, which defines “food,” in part, as “articles used for food or drink for man or other animals.”

As for diapers, although children’s diapers are considered children’s products and, as such, are subject to the requirements of 16 CFR 1610.36(f) and 1611.36(f), Standard for the Flammability of Clothing Textiles and Standard for the Flammability of Vinyl Plastic Film, adult absorbent products are devices as defined at section 201(h) the FFDCA, and the Food and Drug Administration classifies a “protective garment for incontinence” as a class I device (see 21 CFR 876.5920).

2. Definition of “General Use Product” – § 1200.2(b)(1) (Formerly § 1500.92(b)(1)). Proposed § 1500.92(b)(1) would define a general use product to mean a consumer product that is not designed or intended primarily for use by children 12 years old or younger. The proposal also would interpret a general use product as a consumer product “mainly for consumers older than age 12” and would explain that some products may be designed or intended for consumers of all ages, including children 12 years old or younger, but are intended mainly for consumers older than 12 years of age. The proposal would provide that, “[e]xamples of general use products may include products that a child would not be likely to interact with, or products that consumers older than 12 would be as likely, or more likely to interact with. Products used by children 12 years of age or younger that have a declining appeal for teenagers are likely to be considered children’s products.”

(Comment 5) - Several commenters would have us make explicit that, if a product is as likely or more likely to be used by a child older than 12 years of age than by a child 12 years of age or younger, the product may not be considered a children’s product. Other commenters state that the terms “as likely” and “just as appealing” (which appeared in the

preamble to the proposed rule and not in the codified text itself (see 75 FR at 20534)) to compare younger and older children adds subjectivity and uncertainty to the determination process. These commenters believe that, if a determination is not clear cut, the Commission should err in protecting child safety and health. In addition, the commenters state that products having intrinsic play value for young children should be considered children's products.

(Response 5) - We do not accept the assumption that a product that is "as likely" or "just as appealing" to a child older than 12 years of age would preclude that product from ever being considered a children's product. We will consider all four of the statutory factors to determine if the product is used mainly by children 12 years of age or younger, or whether such products are used mainly by older children and adults.

We also disagree with those commenters that any product that has intrinsic play value for young children would automatically be considered a children's product. Young children often find intrinsic play value in a number of general use products, such as shoelaces or keys, but they do not become children's products simply because children may play with them. The Commission has other statutory authorities to address nonchildren's products that may pose a risk to children.

3. *Other products specifically not intended for use by children 12 years of age or younger – § 1200.2(b)(2) (Formerly § 1500.92(b)(2)).* Proposed § 1500.92(b)(2) would state that products, such as cigarette lighters, candles, and fireworks, which the Commission has traditionally warned adults to keep away from children, are not subject to the CPSIA's lead limits, tracking label requirement, and third-party testing and certification provisions. Similarly, this section would provide that products that incorporate performance requirements

for child resistance are not children's products because they are designed specifically to ensure that children cannot access the contents. This would include products such as portable gasoline containers and special packaging under the Poison Prevention Packaging Act.

We did not receive any comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(b)(2), we have finalized this section without change.

4. *Factors Considered – § 1200.2(c)(Formerly § 1500.92(c))*. Proposed § 1500.92(c) would set forth the statutory factors that must be considered to determine whether a consumer product is primarily intended for a child 12 years of age or younger.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c), we have finalized this section with a nonsubstantive grammatical change.

5. *Manufacturer's Statement – § 1200.2(c)(1) (Formerly § 1500.92(c)(1))*. Proposed § 1500.92(c)(1) would explain that a manufacturer's statement about the product's intended use, including the product's labels, should be reasonably consistent with the expected use patterns for a product. This section also would provide that, "[a] manufacturer's statement that the product is not intended for children does not preclude a product from being regulated as a children's product if the primary appeal of the product is to children 12 years of age or younger. Similarly, a label indicating that a product is for ages 10 and up does not necessarily make it a children's product if it is a general use product. The manufacturer's label, in and of itself, is not considered to be determinative."

(Comment 6) - One commenter would revise the interpretative rule to clarify the "gray" area of products designed or intended both for children 9 to 12 years old and for

teenagers and older. The commenter states that the manufacturer's statement should refer to ages 9 and up, rather than ages 10 and up.

(Response 6) - We agree that the hardest questions regarding determinations on whether a product is intended primarily for children 12 years of age or younger will often involve this age group. For example, the use and abuse test methods and sharp points and edges test methods discussed in part B.1 of this document and § 1200.2(a) do not extend past 96 months (8 years of age). Older children have advanced cognitive and motor skills, as well as the ability to care for their belongings, compared to younger children. Thus, products in this category may have characteristics that are also appropriate for products intended for older children and adults. A number of products intended for this age group (9 and up, 10 and up, 11 and up, and 12 and up) will require further evaluation on a case-by-case basis. However, we have revised the final rule to include ages 9 and up, rather than ages 10 and up, to reflect that age group. The sentence now states, "Similarly, a label indicating that a product is for ages 9 and up does not necessarily make it a children's product if it is a general use product."

6. *Packaging, Display, Promotion or Advertising – § 1200.2(c)(2) (Formerly § 1500.92(c)(2))*. Proposed § 1500.92(c)(2) would restate the statutory factor on whether a product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(2), we have finalized this section without change.

7. *Implied or Express Representations – § 1200.2(c)(2)(i) (Formerly § 1500.92(c)(2)(i))*. Proposed § 1500.92(c)(2)(i) would explain that advertising that

expressly declares that the product is intended for children 12 years of age or younger will support a determination that a product is a children's product while advertising showing children 12 years of age or younger using the product may support a determination that the product is a children's product. The proposal would state that such representations may be found in packaging, text, illustrations and/or photographs depicting consumers using the product, instructions, assembly manuals, or advertising media used to market the product.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(2)(i), we have finalized this section without change.

8. *Product's Physical Location— § 1200.2 (c)(2)(ii) (Formerly § 1500.92(c)(2)(ii))*. Proposed § 1500.92(c)(2)(ii) would state that the product's physical location near, or visual association with, children's products may be a factor in making an age determination, but is not determinative.

(Comment 7) - One commenter states that if a store decides to place a youth basketball in a toy shop section, instead of the teen and adult sporting goods section, it does not make it less of a basketball, and the location should not be determinative in the analysis.

(Response 7) - We agree that a product's location is not determinative. The physical placement of a product in a store may not be known when age determinations are made, and manufacturers may not have any control over the placement of their products. However, if such marketing information is known, it should be considered in the determination analysis because the physical location of a product in a store is part of the product's marketing.

(Comment 8) - One commenter states that the packaging, marketing, and placement in a retail store should be the main indication that the product is targeting children 12 years of age and under. The commenter asserts that the interaction between this factor and the others should be clearly stated.

(Response 8) - While the packaging, marketing, and store placement will be considered, these factors do not necessarily outweigh the other factors that may need to be considered in making an age determination. We will weigh all of the relevant factors on a case-by-case basis. Therefore, other than renumbering the provision to be § 1200.2(c)(2)(ii), we have finalized this section with nonsubstantive punctuation changes.

9. *Marketing with Other Products – § 1200.2(c)(2)(iii)(Formerly § 1500.92(c)(2)(iii))*. Proposed § 1500.92(c)(2)(iii) would state that the product's association or marketing in conjunction with nonchildren's products may not be determinative as to whether the product is a children's product. For example, packaging and selling a stuffed animal with a candle would not preclude a determination that the stuffed animal is a children's product since stuffed animals are commonly recognized as being primarily intended for children.

(Comment 9) - One commenter states that stuffed animals sold with adult products should be considered general use items since the manufacturer intended the product for distribution to adults.

(Response 9) - We disagree with the commenter. Packaging of toys or other articles intended for children along with adult products occurs occasionally. Therefore, we will not assume that all products in a co-packaged product are general use products if

the co-packaged product contains toys or other articles that are appealing to children.

These determinations will be made on a case by case basis.

Therefore, other than renumbering the provision to be § 1200.2(c)(2)(iii), we have finalized this section without change.

10. *Commonly Recognized by Consumers – § 1200.2(c)(3) (Formerly § 1500.92(c)(3))*. Proposed § 1500.92(c)(3) would state that the consumer perception of the product's use by children, including its reasonably foreseeable use and misuse, will be evaluated. In addition, the proposed interpretative rule would state that sales data, market analyses, focus group testing, and other marketing studies may help support an analysis regarding this factor.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(3), we have finalized this section without change.

11. *Additional Features and Characteristics of Children's Products – § 1200.2(c)(3)(i) (Formerly § 1500.92(c)(3)(i))*. Proposed § 1500.92(c)(3)(i) would list additional considerations that may help distinguish children's products from nonchildren's products. For example, the proposed rule would include considerations such as small sizes that would not be comfortable for the average adult, exaggerated features (large buttons, bright indicators) that simplify the product's use, safety features that are not found on similar products intended for adults, colors commonly associated with childhood (pinks, blues, bright primary colors), decorative motifs commonly associated with childhood (such as animals, insects, small vehicles, alphabets, dolls,

clowns, and puppets); and features that do not enhance the product's utility (such as cartoons), but contribute to its attractiveness to children 12 years of age or younger.

We did not receive any specific comment requesting modification of this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(3)(i), we have finalized this section without change.

12. *Principal Use of Product – § 1200.2(c)(3)(ii) (Formerly § 1500.92(c)(3)(ii))*. Proposed § 1500.92(c)(3)(ii) would state that a product's principal use may help consumers distinguish children's products from nonchildren's products. The proposed interpretative rule would explain that just because an item could be used as a children's product, such as when a child pretends that a broom is a horse, that does not mean the item is a children's product because the product's principal use is for sweeping.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(3)(ii), we have finalized this section without change.

13. *Cost – § 1200.2(c)(3)(iii). (Formerly § 1500.92(c)(3)(iii))*. Proposed § 1500.92(c)(3)(iii) would state that the cost of a given product may influence consumer perception regarding the determination of the age of intended users.

(Comment 10) - A few commenters state that cost should not be a factor because many products, such as craft products and Halloween products, have low cost, and that this factor does not correlate with whether the products are more likely to be given to children. Another commenter states that we should clarify the consideration of "cost" in determining what is a children's product and include representative monetary frameworks for some categories.

(Response 10) - Although the cost of a product, by itself, is not determinative, the cost of an item is still an important consideration. Low cost items are often given to children, and very expensive items are less likely to be given to children because children are not as careful with products as adults and may accidentally destroy the products. Given the variety of products in the marketplace, we cannot provide monetary frameworks for categories of products and must evaluate products on a case by case basis. Therefore, other than renumbering the provision to be § 1200.2(c)(3)(iii), we have finalized this section without change.

14. *Children's Interactions – § 1200.2(c)(3)(iv) (Formerly § 1500.92(c)(3)(iv))*. Proposed § 1500.92(c)(3)(iv) would explain that products for use in a child's environment by the caregiver, but not for use by the child, would not be considered primarily intended for a child 12 years of age or younger.

(Comment 11) - One commenter asserts that children interact with lamps intended for use in a child's room, albeit, in a limited fashion, i.e., turning the lamp on and off.

(Response 11) - We agree that lamps intended for use by children would be considered children's products. Such lamps may invite physical interaction with the lamp because they are decorated with childish themes. They may be appropriate in a child's room but not in an older child's or adult room because of the childish embellishments or design. Such lamps could be turned on and off by young children who have the necessary motor skills and, therefore, those products would be considered children's products. However, adult lamps that are placed in children's rooms would be considered general use products if they have no distinguishing features which would convert them into children's products. In addition, certain lamps that may be excluded

from the category of children's products are lamps with nursery themes that are clearly intended to be placed in an infant's room, but would not otherwise be touched by infants who are not old enough to operate such lamps.

15. *The Age Determination Guidelines – § 1200.2(c)(4) (Formerly § 1500.92(c)(4))*. Proposed § 1500.92(c)(4) would quote the statutory factor at section 3(a)(2)(D) of the CPSA regarding the Age Determination Guidelines (“Guidelines”) issued by the Consumer Product Safety Commission staff in September 2002, and any successor to such guidelines. The proposal also would explain that a product's appeal to different age groups and the capabilities of those age groups may be considered when making determinations about the appropriate user groups for products.

(Comment 12) - A few commenters state that the Guidelines are only intended to evaluate the play value of toys and should not be expanded to evaluate whether children of certain ages can successfully perform specific tasks if the product or type of product is not specifically mentioned by the Guidelines.

(Response 12) – We disagree with the commenters. Congress has mandated that the Age Determination Guidelines be one of the four statutory factors to be considered in determining whether a product is primarily designed or intended for children. The Guidelines generally describe the factors that appeal to children and the activities that they can perform across childhood and can be used in making an age determination of any product, whether it is a toy or other article intended for use by children. The Guidelines provide information about social, emotional, cognitive, and physical developments during childhood. That information applies to many products not actually mentioned by name in the Guidelines.

16. *Examples – § 1200.2(d) (Formerly § 1500.92(d)).* Proposed § 1500.92(d) would provide examples to help manufacturers understand what types of products would constitute a children’s product under the CPSA.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(d), we have finalized this section without change.

17. *Furnishings and Fixtures - § 1200.2(d)(1) (Formerly § 1500.92(d)(1)).* Proposed § 1500.92(d)(1) would give examples of general home furnishings and fixtures (such as ceiling fans, humidifiers, and air purifiers) that often are found in children’s rooms or schools, but would not be considered children’s products unless they are decorated or embellished with a childish theme, have play value, and/or are sized for a child. The proposal also would give examples of home or school furnishings that are primarily intended for use by children and considered children’s products, such as infant tubs, bath seats, and child-sized chairs. We also stated that decorative items, such as holiday decorations and household seasonal items that are intended only for display and with which children are not likely to interact, are generally not considered children’s products because they are intended to be used by adults.

(Comment 13) - One commenter states that hooks should be considered general use products, whether or not they are embellished with a children’s theme.

(Response 13) - Any home furnishing that is embellished or decorated with a design that is appealing to children who are old enough to interact with that product could be found to be a children’s product if it is intended primarily for children 12 years of age or younger. Hooks embellished with a childish theme, such as pirate’s hook, would be

placed in child's room and such children would be likely to physically interact with the object, such as putting clothes on and off the hook. Plain hooks or hooks intended for a nursery room, with a nursery theme, would not be intended for use by the infant, and therefore, would not be considered a children's product.

(Comment 14) - One commenter seeks clarification on the factors on furniture and collections of furniture that are suitable for children from birth through college. According to the commenter, manufacturers use various terms that are confusing, including "juvenile" and "youth" furniture. In addition, the commenter requests an ability to obtain informal and quick opinions from the Commission staff, to make such opinions publically available on the web, and to create a mechanism for resolving disputes.

(Response 14) - The manufacturer is in the best position to initially determine whether a "collection" of furniture is designed or intended primarily for children 12 years of age or younger. However, to the extent that children 12 years of age or younger will be using such furniture from birth or toddler age through their formative years, we consider such furniture to be children's products because children will be interacting with such furniture throughout their childhood. These items are likely to be sized for small children and may have other characteristics, such as bright colors or embellishments, that would be appealing to children. Although, such products may come with extension kits or other modifications to make them more appropriate for older children, the furniture is intended primarily for use by young children who may also use such furnishings later as they become older. To provide guidance regarding determinations that have been made by the Commission, we will consider posting on our website, <http://www.cpsc.gov>,

products that have been determined to be either children's products or general use products, subject to our public disclosure of information requirements under 15 U.S.C. 2055, CPSC regulations at 16 CFR part 1101, and the availability of CPSC resources.

(Comment 15) - One commenter requests that general home furnishings include carpets and rugs as examples.

(Response 15) - To provide additional clarity to this section, the final rule includes carpets and rugs in the examples of general home furnishings, provided that such carpets and rugs are not otherwise decorated or embellished with childish themes. Such childish themes may include designs that allow children to play on the rug or carpet, such as a railroad track, or have cartoon characters that appeal especially to young children, but not to older children or adults. A particular color or size of a rug or carpet, by itself, would be insufficient to make a determination that a rug or carpet is a children's product.

(Comment 16) - Another commenter requests that general home furnishings include holiday decorations, regardless of theme, because such products are for display only and are not intended to be children's products. One commenter also states that not all Halloween products should be considered children's products.

(Response 16) - We agree, in part, and disagree, in part, with the commenters. We agree that most holiday decorations, including seasonal decorations, are not children's products, even though they may be appealing to children. However, certain products such as Halloween costumes, which are considered toys and sold and marketed in toy stores, would continue to be considered children's products if intended primarily for children 12 years of age or younger. Other products which are sold in toy stores, as

well as in craft or novelty shops, may need to be evaluated on a case-by-case basis, taking into account the statutory factors.

18. *Collectibles – § 1200.2(d)(2) (Formerly § 1500.92(d)(2))*. Proposed § 1500.92(d)(2) would distinguish adult collectibles from children’s collectibles based on themes that are inappropriate for children 12 years of age or younger; features that preclude use by children during play, such as high cost, limited production, and display features (such as hooks or pedestals); and whether such items are marketed alongside children’s products.

(Comment 17) - A few commenters request that model trains be specifically included in the definition of general use products. The commenters state that the average age of a model railroader is 53 years old and that there is a level of sophistication required to operate the locomotives. Additionally, the commenters note that model trains may be costly, with prices from \$50 up to \$1,575.

(Response 17) - We agree that certain model railroads and trains are not children’s products given the large number of adult model railroad hobbyists, the costs involved, and the level of sophistication required to operate them. Model trains and model train accessories (such as scenery, scale buildings and supplies), are made by model railway manufacturers who sell their trains at model train shops and model train hobby stores. Model trains are also distinguished from children’s train sets in that model trains are more realistic. Children’s train sets may have childish or decorative motifs and are easier to assemble and use by a child. By contrast, model railroad hobbyists collect trains, build miniature landscapes for the trains, or even operate their own miniature railroads outdoors. Accordingly, the final rule adds “model railways and trains made by

model railway manufacturers” to the list of examples of “collectible” items that would be considered general use products.

(Comment 18) - One commenter asks that we add fragility of the materials as a consideration in determining collectibles. The commenter also requests a registry of collectibles or online listing to provide clear guidance.

(Response 18) – We stated in our example in proposed § 1500.92(d)(2) that collectible plush bears are those which have high cost, are highly detailed, with fragile accessories, display cases, and platforms. We believe that fragility of the materials may also be considered when assessing a collectible because children are less likely to be given items that can break. Accordingly, we have revised this section to include “fragile features” as a characteristic to help distinguish collectibles from children’s products. The first sentence in this section now states, “Adult collectibles may be distinguished from children’s collectibles by themes that are inappropriate for children 12 years of age or younger, have features that preclude use by children during play, such as high cost, limited production, fragile features, display features (such as hooks or pedestals), and are not marketed alongside children’s products”.

As for the commenter’s request regarding a registry of collectibles or online listing, we will consider posting determinations on our website, and will consider whether an online registry of collectibles is feasible at that time.

(Comment 19) - One commenter disputes the implication that collectibles must be of high cost or uniquely marked. The commenter asserts that labeling products “Not a toy” or “Not for use by children 12 and under” would be important elements in identifying such products as intended for adults.

(Response 19) - We agree that not all collectibles are high cost. High cost is simply one among several considerations we will evaluate when making a determination. Generally, many collectibles are of higher cost and/or marked to distinguish such products from similar children's products. The cost of an item, while not determinative, can be an important consideration because very expensive items are less likely to be given to children who may accidentally destroy them. In addition, as discussed in part B.5 of this document, the statement by a manufacturer about the intended use of a product, including a label on such product, will be considered in making any age determination. However, all relevant factors must be weighed on a case-by-case basis to make a product determination.

19. *Jewelry - § 1200.2(d)(3) (Formerly § 1500.92(d)(3)).* Proposed § 1500.92(d)(3) would provide characteristics for distinguishing children's jewelry from adult jewelry. For example, the proposed interpretative rule would explain that jewelry intended for children is generally sized, themed, and marketed to children and that characteristics such as size, very low cost, play value, childish themes on the jewelry, and sale with children's products may suggest that the jewelry is a children's product. The proposed interpretative rule also would explain that many aspects of an item's design and marketing are considered when determining the age of consumers for whom the product is intended and will be purchased. The proposed interpretative rule listed, as aspects of the item's design and marketing the following factors: advertising; promotional materials; packaging graphics and text; size; dexterity requirements for wearing; appearance (coloring, textures, materials, design themes, licensing, level of realism); and cost.

(Comment 20)- One commenter disputes the considerations that are used in distinguishing adult jewelry from children's jewelry, including considerations such as dexterity requirements and play value. In addition, this commenter states that the proposed interpretative rule failed to include design drawings, brand plans, and compliance with standards for adult jewelry as considerations of a manufacturer's intent in developing a product. The commenter asserts that the proposed interpretative rule improperly expands the application of the Age Determination Guidelines to products other than toys.

(Response 20) - We disagree that we place an undue emphasis on dexterity or play value when making age determinations. Dexterity requirements may be useful for making distinctions between children's and adult jewelry. While some elastic bracelets may be useful to people suffering from arthritis, delicate clasps are of no use to younger children, which would indicate that such jewelry is intended for older consumers. While jewelry is not considered a toy, some jewelry can have play value. The most common type of play associated with children's jewelry is role playing. However, although some general use products may have intrinsic play value, they do not become children's products based on that characteristic alone. Play value and dexterity are only a few of the characteristics that are examined in making determinations for jewelry.

Additionally, regarding the commenter's criticism that the proposed rule did not include design drawings, brand plans, and compliance with adult jewelry standards, the proposed interpretative rule specifically indicated that many aspects of an item's design and marketing are considered when determining the age of consumers for whom the jewelry is intended and by whom it will be purchased. Although the commenter states

that design drawings and brand plans should be relevant considerations in making an age determination, such information has not been readily available for review, perhaps because such information may be proprietary. Moreover, the manufacturer's intent in designing, branding, or developing a product is applicable to the factor regarding the statement by the manufacturer about the intended use of the product. As discussed in § 1200.2(a)(1), the manufacturer's statement is only one of four statutory factors considered in making a determination. Accordingly, we decline to revise the interpretative rule to include such factors.

We also disagree that we improperly expanded the Age Determination Guidelines (2002) to cover products other than toys. The Guidelines are among the factors that must be considered when making determinations. The descriptions of factors that appeal to children and the activities that they can perform across childhood are described generally in the Guidelines for use in age determinations of any product, whether it is a toy or other article intended for children. The Guidelines provide information about social, emotional, cognitive and physical developments during childhood that are applicable to many products that are not specifically named in the Guidelines.

20. *DVDs, Video Games, and Computers – § 1200.2(d)(4) (Formerly § 1500.92(d)(4))*. Proposed § 1500.92(d)(4) would consider most computer products and electronic media devices, such as CDs, DVDs, and DVD players, to be general use products. However, the proposal also would explain that some CDs and DVDs may have encoded content that is intended for and marketed to children, such as children's movies, games or educational software. The proposed interpretative rule would explain that CPSC staff may consider ratings given by entertainment industries and software rating

systems when making an age determination. The proposed interpretative rule would note that, among the CDs and DVDs that have content embedded that is intended for children, certain CDs and DVDs that contain content for very young children would not be handled or otherwise touched by children because they do not have the motor skills to operate media players and because such products, by themselves, do not have any appeal to children. Accordingly, the proposed interpretative rule would indicate that these types of DVDs or CDs would not be considered children's products because they are not used "by" children and children do not physically interact with such products, whereas DVDs and CDs and other digital media that may be handled by older children could be considered children's products. Further, the proposed interpretative rule would say that DVDs and CDs and other digital media that may be handled by older children could be considered children's products if such movies, video games, or music were specifically aimed at and marketed to children 12 years of age or younger and have no appeal to older audiences.

(Comment 21) - Several commenters assert that the approach distinguishing CDs and DVDs for very young children who lack the motor skills to operate CDs and DVDs, from CDs and DVDs for older children who have such motor skills is a false distinction. These commenters state that a very young child is not allowed to handle a CD or DVD unless he or she learns to insert it properly into a CD or DVD player. The commenters claim that a child will interact much more with the CD or DVD player than he or she will interact with the CD or DVD itself.

(Response 21) - We agree that CDs, DVDs, video games, and other electronic media are functional only in the media player or device, that children are more likely to

play with the controls on a media player or device, and that many media players or devices are considered general use items. However, with respect to the DVDs and CDs themselves, we must consider the four statutory factors to assess these products. The child will have some physical interaction with such products if only for the purpose of insertion of the disk. That is why the proposed interpretive rule states that the CDs and DVDs with content intended for children younger than 4 years old were not determined to be children's products because children younger than 4 are usually not allowed to use household digital media players. However, having defined use to mean physical interaction with the product, because DVDs and CDs and other digital media may be handled by older children to load and unload DVDs in their appropriate media devices, CDs and DVDs could be considered children's products if such movies, video games, or music were specifically aimed at and marketed to children 12 years of age or younger and have no appeal to older audiences. It should also be noted that the final rule also states that some media players or devices that play electronic content, if embellished or decorated with childish themes or sized for children, could be considered children's products because children 12 years of age or younger would likely be the main users of such items, and older children and adults would be unlikely to use such products.

(Comment 22) - One commenter sought clarification on how this section would affect the existing process for video game research and rating procedures regarding age. Another commenter states that the existing rating systems should be used to determine whether the product is intended for children aged 12 years and under.

(Response 22) - We do not expect that our definition of what is or is not a children's product to affect the research of products under development on children's

electronic media. The definition would not affect existing rating mechanisms, which fall under the authority of the Federal Communications Commission. Video game rating systems would be considered by staff as one indicator of age range for purposes of age grading.

(Comment 23) - Other commenters ask that we add more products to a general use category, including game consoles, book readers, digital media players, cell phones, and digital assistant communication devices sized for use by adults, irrespective of any childish decorations, to avoid any confusion. Some commenters also seek clarification that an accessory to an electronic children's product (i.e., transformers, cables, and connectors) is not itself a children's product if it is not for use by children but is, instead, likely to be used by parents or guardians. One commenter states that DVDs are exempt from the small parts requirement under ASTM F963-08. Accordingly, this commenter seeks clarity on how children's DVDs would be treated.

(Response 23) - We believe that most of these product categories including game consoles, book readers, digital media players, cell phones and digital assistant communication devices, and accessories to such devices, that are intended for older children and adults fall in the general use category. Accordingly, the final rule adds them as examples to the list of general use items, along with DVD and CD players. However, we disagree that electronic media players and devices that are uniquely decorated with childish themes are general use items. Since younger children likely would be the only users of such devices, the devices would be children's products. In addition, the exemption from small parts for DVDs has no bearing on the requirements because

product determinations are made for children 12 years of age and younger, while the small parts tests are only applicable to children and 3 years of age.

21. *Art Materials – § 1200.2(d)(5)(Formerly § 1500.92(d)(5))*. Proposed § 1500.92(d)(5) would consider art materials sized, decorated, and marketed to children 12 years of age or younger, such as crayons, finger paints and modeling dough, to be considered children’s products. The proposed interpretative rule would explain that crafting kits and supplies that are not specifically marketed to children 12 years of age or younger likely would be considered products intended for general use but that the marketing and labeling of raw materials (such as modeling clay, paint and paint brushes) may often be given high priority for these art materials because the appeal and utility of these raw materials has such a wide audience.

(Comment 24) - One commenter states that the emphasis on marketing will lead to confusion because many art tools are small and may also be used by an adult. The commenter states that a more compelling and logical framework is to consider the circumstances under which a child will be using the product. The commenter asserts that, if the product has an instructional purpose which will be under the supervision of an adult, such products should be considered general use products, including child-sized craft tools, child-sized musical instruments, child-sized saddles and equestrian equipment, and classroom science kits.

(Response 24) - Size, marketing, and other factors will be considered when making age determinations. However, the level of expected supervision needed for a product is not one of the statutory factors considered when making a children’s product determination. If the product otherwise meets the definition of “children’s product,” the

amount of supervision over the child's use of a children's product will not otherwise affect the determination. Accordingly, products such as child-sized craft tools, child-sized musical instruments, and child-sized saddles and equestrian equipment would be assessed on a case-by-case basis to determine whether such products are, in fact, children's products. We do note, however, that if the sizing of the product indicates that children 12 years of age or younger would be more likely to use such products than older children or adults, the product would likely fall under the children's product category, rather than the general use category.

As for classroom science kits, we address such products in part B.23 of this document and its discussion of § 1200.2(d)(7).

(Comment 25) - One commenter states that duplicative third party testing should not be required for products that are covered under the Labeling of Hazardous Art Materials Act (LHAMA). Accordingly, this commenter requests that LHAMA be included as a FHSA labeling law in addition to the guidance that most art materials are general use products.

(Response 25) – We disagree with the comment. Section 14 of the CPSA requires children's products to be tested for compliance to children's product safety rules, and it defines children's product safety rules as “a consumer product safety rule under [the CPSA] or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance.” The LHAMA requires that the manufacturer, importer, or repackager of art materials have their product's formulation reviewed by a toxicologist for its potential to cause chronic adverse health effects. A conformance statement on the

product is used to certify that the product has been so reviewed. However, the CPSIA introduces additional test requirements for lead in children's products under section 101 beyond what is required under LHAMA. Because the definition of "children's product safety rule" is broader than certification of art materials and art products to only FHSA requirements, testing under section 14 of the CPSA is not "duplicative" to LHAMA certification.

As for the commenter's request that we include LHAMA as a labeling requirement under the Federal Hazardous Substances Act (FHSA), we note that, under LHAMA, there is no testing required. LHAMA requires a literature review, and the conformance statement is the certification that the product has been reviewed by a toxicologist as required under the LHAMA regulations. An art material primarily designed or intended for children 12 years of age and younger would have to be certified by a third party that it did not contain lead, but it would not require third party certification to the LHAMA requirements.

As for declaring that most art materials are general use products, we reiterate that determining whether a particular product is a "children's product" may depend on multiple factors and may need to be done on a case-by-case basis.

22. *Books* – § 1200.2(d)(6) (Formerly § 1500.92(d)(6)). Proposed § 1500.92(d)(6) would state that the content of a book can determine its intended audience. The proposed interpretative rule would explain that children's books have themes, vocabularies, illustrations, and covers that match the interests and cognitive capabilities of children 12 years of age or younger. The proposal also would explain that the age guidelines provided by librarians, education professionals, and publishers may be

dispositive for determining the intended audience. Furthermore, some children's books have a wide appeal to the general public, and in those instances, further analysis may be necessary to assess who the primary intended audience is based on consideration of relevant additional factors such as product design, packaging, marketing and sales data.

(Comment 26) - One commenter asks us to clarify whether children's magazines are covered by the CPSIA. Another commenter states that sales data should not be considered for books since adults purchase books for children. (Response 26) -

Children's magazines are evaluated using the same principles as those that apply to children's books in the interpretive rule. If intended primarily for children 12 years of age or younger, magazines must comply with the CPSIA requirements for children's products. We consider sales data to be relevant to the extent that it reveals where the products are sold such as in a children's book or toy store. We recognize that most children's products are purchased by adults and will not be evaluating such data. 23. *Science Equipment – § 1200.2(d)(7) (Formerly § 1500.92(d)(7))*. Proposed § 1500.92(d)(7) would consider microscopes, telescopes, and other scientific equipment that would be used by an adult, as well as a child, to be general use products. The proposed interpretative rule would explain that equipment with a marketing strategy that targets schools, such as scientific instrument rentals, would not convert such products into children's products if such products are intended for general use, regardless of how the equipment is leased, rented, or sold. However, the proposal would further explain that, in general, scientific equipment that is specifically sized for children and/or has childish themes or decorations intended to attract children is considered a children's product and that toy versions of such items are also considered children's products.

(Comment 27) - Several commenters state that school supplies, such as science equipment, writing devices, and musical instruments used in educational settings, should be considered general use items. They argue that many items that are specified in these curriculums can be easily found at department stores, hardware stores, grocery stores, and specialty shops. In addition, other commenters state that many science and math programs and kits are principally designed and used as instructional materials for teachers in a classroom setting. Accordingly, they request that we revise the rule to include such items as general use items when marketed and sold for the purpose of supervised, hands-on educational instruction. In addition, a few commenters request that pens, pencils, and other office supplies be specifically included as general use items because they are used mainly by the general public.

(Response 27) – We agree with the commenters that many math and science kits that are sent to schools for the purpose of teaching these subjects contain materials, such as rubber bands, staples, paper clips, and other items, that can be found in any hardware or grocery store. In determining whether these products should now be considered children’s products because of their new use, packaging, and marketing to schools, we considers the intended user of the product and the level of interaction between the user and the product. Products solely intended for use by the instructor would not be considered children’s products.

Some pens and pencils are designed and intended primarily for children 12 years old and younger. However, if a pen, pencil, or other office supply is not designed or intended primarily for children 12 years old and younger, it would not be considered a children’s product.

24. *Sporting Goods and Recreational Equipment – § 1200.2(d)(8) (Formerly § 1500.92(d)(8))*. Proposed § 1500.92(d)(8)) would consider sporting goods that are primarily intended for consumers older than 12 years of age to be general use items. The proposed interpretative rule would explain that regulation-sized sporting equipment, such as basketballs, baseballs, bats, racquets, and hockey pucks, are general use items even though some children 12 years of age or younger will use them. However, this section would provide that sporting goods become children’s products when they are sized to fit children or are otherwise decorated with childish features that are intended to attract child consumers. Likewise, this section would provide that recreational equipment, such as roller blades, skateboards, bicycles, camping gear, and fitness equipment, are considered general use products unless they are sized to fit children 12 years of age or younger and/or are decorated with childish features by the manufacturer.

(Comment 28) - Several commenters state that sporting equipment intended for “tweens,” teens, and young adults should not be considered “children’s products.” One commenter states that “legitimate” sporting goods should be general use products whether they are used by a 9 year old or 13 year old and that “size” is irrelevant to making the determination. The commenter asserts that their uses and essential purposes are no different than sporting equipment used by teens. Another commenter states that the cost of testing these products was too high and resulted in delays in manufacturing.

(Response 28) - We agree that “tweens” (whom, for purposes of this response, we consider to be individuals under 13, but not younger than 9 years of age) and teens often use regulation sized sporting goods. Unless such items are specifically marketed to

children or have extra features that intentionally make them more suitable for children than for adults, they would be considered general use products. However, we disagree that sizing of the sporting equipment would be irrelevant to the age determination. If children 12 years or younger would mainly use the product because it would be too small or inappropriate for older children to use, then it would be considered a children's product.

As for the comment regarding testing costs and manufacturing delays, such matters are outside the scope of this rulemaking. Comments related to testing and certification are addressed in separate rulemaking on product certification published in the *Federal Register* on May 20, 2010 (75 FR 28336).

(Comment 29) - One commenter states that the interpretative rule should be clear that a product sized for an adult, such as a baseball glove, is considered a general use product even if there is a cartoon character on it. In addition, the commenter asserts that a wading pool may be a children's product based on size alone, regardless of whether it contains additional play features, and requests a definition for "shallow" in reference to wading pool depth.

(Response 29) - We agree that the presence of a cartoon character on an adult-sized product is not sufficient to label a product as a children's product. Age determinations take into account the principle use patterns of a given product, so if a baseball glove is too large for children to use, it would not be intended for use by children 12 years of age or younger and therefore not be a children's product, no matter how it is decorated. We will review all relevant factors to assess products on a case-by-case basis.

In response to the comment regarding wading pools, we agree that such pools may be intended for children even without additional play features. The size, decorations, and depth of a pool may be sufficient to determine that a product is intended for use by children. However, the Commission does not have regulations setting forth the dimensions of wading pools.

25. *Musical Instruments – § 1200.2(D)(9) (Formerly § 1500.92(d)(9))*. Proposed § 1500.92(d)(9) would consider musical instruments suited for an adult musician as well as a child to be general use products. Instruments primarily intended for children can be distinguished from adult instruments by their size and marketing themes. The proposed interpretative rule also would explain that products with a marketing strategy that targets schools, such as instrument rentals, would not convert such products into children's products if such products are intended for general use, regardless of how the instruments are leased, rented, or sold. These instruments are intended by the manufacturer for use primarily by adults, although there also may be incidental use by children through such programs. However, this section also would provide that products that produce music or sounds in a manner that simplifies the process so that children can pretend to play an instrument are considered toys primarily intended for children 12 years of age or younger.

(Comment 30) - One commenter states that the proposed rule should explicitly exclude from the definition of children's product electronically-aided musical instruments and musical devices that are preprogrammed by the user or the manufacturer.

(Response 30) - We agree that the preprogrammed sounds and demonstration pieces in electronically-aided musical instruments would be considered general use

products. However, toys that have preprogrammed sounds will continue to be considered children's products. Accordingly, we have revised the rule to add "including electronically-aided musical instruments" after "Musical instruments."

26. Other Issues

(Comment 31) - One commenter states that the effective date should be delayed to give manufacturers an opportunity to evaluate whether or not their products are children's products pursuant to this rule. (Response 31) - Because this is an interpretative rule, a delayed effective date is not required by the Administrative Procedure Act (5 U.S.C.

553(d)). (Comment 32) - A few commenters raise issues with footwear. These commenters state that there is no certainty as to whether an article of footwear is a children's product and that the issue is confused especially with youth footwear.

According to the commenters, many 12-year olds wear adult footwear and that size does not necessarily relate to age. The commenters request an objective standard of footwear of 24 centimeters (cm) or more as being intended for adults.

(Response 32) - We believe that the manufacturer is in the best position to make an initial determination regarding whether footwear is primarily intended for children 12 years of age or younger. However, where there is ambiguity, we will rely on the statutory factors, rather than a single factor since it is possible that other features can strongly indicate that the footwear is intended primarily for children 12 years old or younger even though the length of the footwear exceeds 24 cm.

List of Subjects 16 CFR Part 1200

Business and industry, Infants and children, Consumer protection, Imports, Toys

D. Conclusion

For the reasons stated above, the Commission adds 16 CFR part 1200 to read as follows:

**PART 1200 – DEFINITION OF CHILDREN’S PRODUCT UNDER THE
CONSUMER PRODUCT SAFETY ACT**

Authority: 15 U.S.C. 2052(2)

1200.1 Purpose

This part provides guidance on the definition of children’s product and the factors considered for making determinations regarding children’s products as set forth under 15 U.S.C. 2052(2).

§ 1200.2 Definition of Children’s Product:

(a) *Definition of “Children’s Product”* - Under section 3(a)(2) of the Consumer Product Safety Act (CPSA), a children’s product means a consumer product designed or intended primarily for children 12 years of age or younger. The term “designed or intended primarily” applies to those consumer products mainly for children 12 years old or younger. Whether a product is a children’s product is determined by considering the four specified statutory factors. The examples discussed herein may also be illustrative in making such determinations. The term “for use” by children 12 years or younger generally means that children will physically interact with such products based on the reasonably foreseeable use and misuse of such product. Toys and articles that are subject to the small parts regulations at 16 CFR Part 1501 and ASTM F963, would logically fall within the definition of children’s product since they are intended for children 12 years of age or younger. Toys and other articles intended for children up to 96 months (8 years old) that are subject to the requirements at 16 CFR 1500.48 through 1500.49 and 16 CFR

1500.50 through 1500.53, and ASTM F963 would similarly fall within the definition of children's products given their age grading for these other regulations. Therefore, a manufacturer could reasonably conclude on the basis of the age grading for these other regulations that it must comply with all requirements applicable to children's products including, but not limited to, those under the Federal Hazardous Substances Act, ASTM F963, "Standard Consumer Safety Specification for Toy Safety," and the Consumer Product Safety Improvement Act of 2008.

(b) *Definition of "General Use Product"* – (1) A general use product means a consumer product that is not designed or intended primarily for use by children 12 years old or younger. General use products are those consumer products mainly for consumers older than age 12. Some products may be designed or intended for consumers of all ages, including children 12 years old or younger, but are intended mainly for consumers older than 12 years of age. Examples of general use products may include products that a child would not be likely to interact with, or products that consumers older than 12 would be as likely, or more likely to interact with. Products used by children 12 years of age or younger that have a declining appeal for teenagers are likely to be considered children's products.

(2) Other products are specifically not intended for use by children 12 years of age or younger. These products, such as cigarette lighters, candles, and fireworks, which the Commission has traditionally warned adults to keep away from children, are not subject to the CPSIA's lead limits, tracking label requirement, and third-party testing and certification provisions. Similarly, products that incorporate performance requirements for child resistance are not children's products as they are designed specifically to ensure that children cannot

access the contents. This would include products such as portable gasoline containers and special packaging under the Poison Prevention Packaging Act.

(c) *Factors Considered* – To determine whether a consumer product is intended primarily for a child 12 years of age or younger, the following factors must be considered:

(1) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable. A manufacturer's statement about the product's intended use, including the product's label, should be reasonably consistent with the expected use patterns for a product. A manufacturer's statement that the product is not intended for children does not preclude a product from being regulated as a children's product if the primary appeal of the product is to children 12 years of age or younger. Similarly, a label indicating that a product is for ages 9 and up does not necessarily make it a children's product if it is a general use product. The manufacturer's label, in and of itself, is not considered to be determinative.

(2) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.

(i) These representations may be express or implied. For example, advertising expressly declaring that the product is intended for children 12 years of age or younger will support a determination that a product is a children's product. Advertising showing children 12 years of age or younger using the product may support a determination that the product is a children's product. These representations may be found in packaging, text, illustrations and/or photographs depicting consumers using the product, instructions, assembly manuals, or advertising media used to market the product.

(ii) The product's physical location near, or visual association with, children's products may be a factor in making an age determination, but is not determinative. For example, a product displayed in a children's toy section of a store may support a determination that the product is a children's product. However, where that same product is also sold in department stores and marketed for general use, further evaluation would be necessary. The Commission generally evaluates products based on the entire domestic market as opposed to a shelf-by-shelf or store-by-store analysis.

(iii) The product's association or marketing in conjunction with nonchildren's products may not be determinative as to whether the product is a children's product. For example, packaging and selling a stuffed animal with a candle would not preclude a determination that the stuffed animal is a children's product since stuffed animals are commonly recognized as being primarily intended for children.

(3) Whether the product is commonly recognized by consumers as being intended for use by children 12 years of age or younger. Consumer perception of the product's use by children, including its reasonably foreseeable use and misuse, will be evaluated. Sales data, market analyses, focus group testing, and other marketing studies may help support an analysis regarding this factor.

(i) Features and Characteristics - additional considerations that may help distinguish children's products from nonchildren's products include:

(A) small sizes that would not be comfortable for the average adult;

(B) exaggerated features (large buttons, bright indicators) that simplify the product's use;

(C) safety features that are not found on similar products intended for adults;

(D) colors commonly associated with childhood (pinks, blues, bright primary colors);

(E) decorative motifs commonly associated with childhood (such as animals, insects, small vehicles, alphabets, dolls, clowns, and puppets);

(F) features that do not enhance the product's utility, (such as cartoons), but contribute to its attractiveness to children 12 years of age or younger; and

(G) play value, i.e., features primarily attractive to children 12 year of age or younger that promote interactive exploration and imagination for fanciful purposes (whimsical activities lacking utility for accomplishing mundane tasks; actions performed for entertainment and amusement).

(ii) principal use of the product – just because an item could be used as a children's product, such as when a child pretends that a broom is a horse, does not mean the item should be regulated as a children's product where the principal use is for sweeping;

(iii) cost – the cost of a given product may influence the determination of the age of intended users; and

(iv) children's interactions, if any, with the product - products for use in a child's environment by the caregiver but not for use by the child would not be considered to be intended primarily for a child 12 years of age or younger.

(4) The Age Determination Guidelines issued by the Consumer Product Safety Commission staff in September 2002, and any successor to such guidelines. The product's appeal to different age groups and the capabilities of those age groups may be considered when making determinations about the appropriate user groups for products.

(d) *Examples* - To help manufacturers understand what constitutes a children's product under the CPSA, the following additional examples are offered:

(1) *Furnishings and Fixtures* - general home furnishings and fixtures (including, but not limited to: rocking chairs, shelving units, televisions, digital music players, ceiling fans, humidifiers, air purifiers, window curtains, tissue boxes, rugs, carpets, clothing hooks and racks) that often are found in children's rooms or schools would not be considered children's products unless they are decorated or embellished with a childish theme, have play value, and/or are sized for a child. Examples of home or school furnishings that are intended primarily for use by children and considered children's products include infant tubs, bath seats, small bean bag chairs with childish decorations, bunk beds with children's themes, child-sized desks, and child-sized chairs. Decorative items, such as holiday decorations and household seasonal items that are intended only for display, with which children are not likely to interact, are generally not considered children's products, since they are intended to be used by adults.

(2) *Collectibles* - Adult collectibles may be distinguishable from children's collectibles by themes that are inappropriate for children 12 years of age or younger; features that preclude use by children during play, such as high cost, limited production, fragile features, and display features (such as hooks or pedestals); and how they are marketed (they are not marketed alongside children's products). For example,

collectible plush bears have high cost, are highly detailed, with fragile accessories, display cases, and platforms on which to pose and hold the bears. Children's bears have lower costs and simple accessories that can be handled without fear of damage to the product. Another example of collectible items includes model railways and trains made by model railway manufacturers.

(3) Jewelry - Jewelry intended for children is generally sized, themed, and marketed to children. One or more of the following characteristics of jewelry may cause a piece of jewelry to be considered a children's product: size; very low cost; play value; childish themes on the jewelry; sale with children's products (such as a child's dress); sale with a child's book, a toy, or party favors; sale with children's cereal or snacks; sale at an entertainment or educational event attended primarily by children; sale in a store that contains mostly children's products; and sale in a vending machine. In addition, many aspects of an item's design and marketing are considered when determining the age of consumers for whom the product is intended and will be purchased: marketing; advertising; promotional materials; packaging graphics and text; size; dexterity requirements for wearing; appearance (coloring, textures, materials, design themes, licensing, and level of realism); and cost. These characteristics will help jewelry manufacturers and consumers determine whether a particular piece of jewelry is designed or intended primarily for children 12 years of age or younger, or whether it more frequently appeals to consumers older than 12 years of age.

(4) DVDs, Video Games, and Computers –

Most computer products and electronic media, such as CDs, DVDs, and video games, are considered general use products. In addition, electronic devices such as DVD

players, CD players, game consoles, book readers, digital media players, cell phones, digital assistant communication devices, and accessories to such devices that are intended mainly for children older than 12 years of age or adults are products for general use. However, electronic media players and devices that are uniquely embellished or decorated with childish themes would not fall under the general use category because children 12 years or younger would likely be the main users of such devices.

(5) Art Materials - Materials sized, decorated, and marketed to children 12 years of age or younger, such as crayons, finger paints and modeling dough, would be considered children's products. Crafting kits and supplies that are not specifically marketed to children 12 years of age or younger likely would be considered products intended for general use. The marketing and labeling of raw materials (such as modeling clay, paint and paint brushes) may often be given high priority in an age determination for these art materials because the appeal and utility of these raw materials has such a wide audience.

(6) Books - The content of a book can determine its intended audience. Children's books have themes, vocabularies, illustrations, and covers that match the interests and cognitive capabilities of children 12 years of age or younger. The age guidelines provided by librarians, education professionals, and publishers may be dispositive for determining the intended audience. Some children's books have a wide appeal to the general public, and in those instances, further analysis may be necessary to assess who the primary intended audience is based on consideration of relevant additional factors such as product design, packaging, marketing and sales data.

(7) Science Equipment - Microscopes, telescopes, and other scientific equipment that would be used by an adult, as well as a child, are considered general use products. Equipment with a marketing strategy that targets schools, such as scientific instrument rentals, would not convert such products into children's products if such products are intended for general use, regardless of how the equipment is leased, rented, or sold. This equipment is intended by the manufacturer for use primarily by adults, although there may be incidental use by children through such programs. In general, scientific equipment that is specifically sized for children and/or has childish themes or decorations intended to attract children is considered a children's product. Toy versions of such items are also considered children's products.

(8) Sporting Goods and Recreational Equipment –

Sporting goods that are intended primarily for consumers older than 12 years of age are considered general use items. Regulation-sized sporting equipment, such as basketballs, baseballs, bats, racquets, and hockey pucks, are general use items even though some children 12 years of age or younger will use them. Sporting goods become children's products when they are sized to fit children or are otherwise decorated with childish features that are intended to attract child consumers. Likewise, recreational equipment, such as roller blades, skateboards, bicycles, camping gear, and fitness equipment, are considered general use products unless they are sized to fit children 12 years of age or younger and/or are decorated with childish features by the manufacturer.

(9) Musical Instruments - Musical instruments, including electronically-aided instruments, suited for an adult musician as well as a child are general use products.

Instruments intended primarily for children can be distinguished from adult instruments by their size and marketing themes. Products with a marketing strategy that targets schools, such as instrument rentals, would not convert such products into children's products if such products are intended for general use, regardless of how the instruments are leased, rented, or sold. These instruments are intended by the manufacturer for use primarily by adults, although there also may be incidental use by children through such programs. However, products that produce music or sounds in a manner that simplifies the process so that children can pretend to play an instrument are considered toys intended primarily for children 12 years of age or younger. In general, instruments that are specifically sized for children and/or have childish themes or decorations intended to attract children are considered children's products.

Dated: _____

Todd A. Stevenson, Secretary
Consumer Product Safety Commission



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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This document has been
electronically approved and signed.

Memorandum

Date: August 25, 2010

TO : Robert J. Howell
Assistant Executive Director
Office of Hazard Identification and Reduction

THROUGH: Mary Toro
Director, Regulatory Enforcement
Office of Compliance and Field Investigations

Robert B. Ochsman, Ph.D.
Director, Division of Human Factors
Directorate for Engineering Sciences

FROM : Jonathan D. Midgett, Ph.D.
Office of Hazard Identification and Reduction

John Boja, Ph.D.
Office of Compliance and Field Investigations

SUBJECT : Interpretation of Children's Product – Staff Responses to Public Comments

I. Introduction

On August 14, 2008, the Consumer Product Safety Improvement Act (hereafter referred to as the "Act" or the "CPSIA") was signed into law [Public Law 110-314]. Several requirements of this law refer to *children's products*. As defined in section 3(a)(16) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2052(a)(16)), a *children's product* is "a consumer product designed or intended primarily for children 12 years of age or younger." The Act also specifies certain factors that should be taken into consideration when making a determination about whether a product is "intended primarily for children," specifically:

- (A) A statement by a manufacturer about the intended use of such product, including a label on such product if such a statement is reasonable
- (B) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger
- (C) Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger
- (D) The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines

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Since this definition could encompass many consumer products, the U.S. Consumer Product Safety Commission (“CPSC” or “Commission”) faces the challenge of interpreting this definition in a manner that will help industry identify the products covered by the Act. This memorandum responds to comments submitted by the public on the interpretation of the scope of products addressed by the term *children’s product* posted in the Federal Register on April 20, 2010. (Vol. 75, No. 75, p. 20533-20541). Comments about legal aspects of the proposed interpretive rule have not been addressed in this memo but rather have been addressed by the Office of the General Counsel in the preamble of the final interpretive rule.

II. Discussion

Definition of a Children’s Product

A few commenters state that the proposed interpretive rule affects other requirements previously established for toys and children’s products. Specifically, the commenters give as an example board/table games which were identified under the Age Determination Guidelines as being appropriate for children in the 6 year old range. The commenters assert that the games would have to comply with ASTM F963 (a toy standard that is now a mandatory consumer product safety standard pursuant to section 106 of the CPSIA), applicable FHSA requirements under 16 CFR 1500.50-53, lead in surface coatings under 16 CFR 1303, and phthalates requirements of CPSIA. If the games are general use products, the commenters claim that such products would not be required to comply with the lead in substrate requirements or the tracking label requirements, or the mandatory third party testing requirements under the CPSIA.

Staff Response

To the extent that toys or other articles are or contain small parts that are intended for use by children under 3 years of age, they will continue to be considered children’s products and subject to third-party testing and certification requirements. Such toys and articles continue to be subject to the small parts regulations at 16 CFR part 1501 and must comply with all applicable requirements under the FHSA, ASTM F963, and the CPSIA.

In addition, for toys and other articles intended for use by children under 8 years of age that are subject to the use and abuse tests at 16 CFR 1500.50 through 1500.53, and the sharp points and edges tests at 16 CFR 1500.48 through 1500.49, such products will continue to be considered children’s products. The use and abuse tests are used to evaluate the reasonably foreseeable use of products by children to evaluate the normal use of toys and other articles intended for use by children as well as the reasonably foreseeable damage or abuse to which the articles may be subjected. Such toys and other articles intended for children under 8 years of age that are subject to the requirements at 16 CFR 1500.48 through 1500.49 and 16 CFR 1500.50 through 1500.53, and ASTM F963, will continue to be considered children’s products and must comply with all applicable regulations under the FHSA, ASTM-F963 and the CPSIA.

Gray Areas

A commenter argued that the interpretive rule should clarify the “gray” area of products designed or intended both for children 9-12 years old and for teenagers and older. This commenter stated that the manufacturer’s statement should refer to ages 9 and up, rather than ages 10 and up.

Staff Response

Staff agrees with the commenter that questions regarding determinations on whether a product is mainly intended for children 12 years old or younger or for consumers older than 12 years of age will occur. Older children have advanced cognitive and motor skills, as well as the increased ability to care for their belongings, compared to younger children. Thus, products in this category may have some characteristics that are also appropriate for older children and adults. Note that if the product is primarily intended for children ages 9 through 12, it would be considered a children's product. Accordingly, many determinations regarding this age group will need to be assessed on a case-by-case basis by CPSC staff. The use of ages 9 and up in a manufacturer's statement, rather than 10 and up, is acceptable but not the determinative factor in an analysis.

Physical Location and Marketing

One commenter stated that if a store places a youth basketball in a toy shop section and not by the teen and adult sporting goods, the location does not make it less of a basketball, and the location should not be determinative in the analysis. Another commenter stated that the packaging, marketing, and placement in a retail store should be the main indication as to whom a product is targeted. This commenter asserted that the interaction between this factor and the others should be clearly stated.

Staff Response

Physical location in a store is rarely known when age determinations are made; however, at times it may be ascertained. If such marketing information is known, it must be considered in the analysis because the physical location of a product in a store is an important part of the product's marketing. The packaging, marketing, and store placement, however, will be considered along with the other factors required to be evaluated pursuant to the CPSIA. Staff weighs all of the relevant factors on a case-by-case basis.

Combination Products

One commenter stated that stuffed animals sold with adult products should be considered general use items since the manufacturer intended the product for distribution to adults.

Staff Response

The age determination of a stuffed animal must take into consideration many features of the product, including co-packaged products. These determinations will be made on a case-by-case basis by CPSC staff, and the fact a stuffed animal is co-packaged with a general use item does not mean the stuffed animal is automatically a general use item as well.

Cost

A few commenters stated that cost should not be a factor given that many products, such as craft products and Halloween products, have low cost. One commenter stated that the interpretive rule should clarify its consideration of "cost" in determining what a children's product is, including exemplary monetary frameworks for some categories.

Staff Response

Staff believes that the cost of the product is relevant to determine whether a product is intended primarily for children because very expensive items are less likely to be given to children.

Children are not as careful with products as adults are and may accidentally destroy them. Staff does not intend to provide any framework for cost given the sheer number of products intended primarily for children and will consider each product on a case-by-case basis.

The Interpretation of “Use” as Interaction with a Product

One commenter asserted that children interact with lamps intended for use in a child’s room, albeit in a limited fashion, i.e., turning the lamp on and off.

Staff Response

Staff agrees that lamps designed or intended primarily for use by children would be considered children’s products. CPSC’s Office of Compliance staff considers only those lamps that have additional features on them that would invite a child to interact with the lamp, such as sound effects, images, or shapes of popular children’s cartoon or movie characters, or similar features, as children’s products. The types of lamps that may be excluded from the category of children’s products are lamps with nursery themes that children who are old enough to operate lamps would not choose to decorate their rooms.

The Age Determination Guidelines

A few commenters stated that the Age Determination Guidelines (2002) are only intended to evaluate the play value of toys, and should not be expanded to evaluate whether children of certain ages can successfully perform specific tasks even if the specific product or type of product is not specifically mentioned by the Guidelines.

Staff Response

Congress has mandated that the Age Determination Guidelines be one of the four statutory factors to be considered in determining whether a product is designed or intended primarily for children. The descriptions of factors that appeal to children and the activities that they can perform across childhood are described with enough generality by the Guidelines for using in an age determination of any product, whether it is a toy or not. The Guidelines provide information about social, emotional, cognitive and physical developments during childhood. That information will apply to many products that are not specifically mentioned in the Guidelines.

Furnishings

- a. One commenter stated that hooks should be considered general use products, whether or not they are embellished with a children’s theme.

Staff Response

Any home furnishing that is embellished with a theme that is appealing to children who are old enough to interact with that product could be considered a children’s product. Overtly babyish, nursery themed hooks with which a child could not interact might not be considered a children’s products.

- b. One commenter sought clarification as to whether furniture and collections of furniture that are suitable for children from birth through college would be considered intended primarily for children 12 years old or younger. According to the commenter, various terms are used by manufacturers that are confusing, including “juvenile” and “youth”

furniture. In addition, this commenter requested that the Commission provide a method for manufacturers to obtain informal and quick opinions about age determinations from the Commission staff, to be made publicly available on the web, as well as a mechanism for resolving disputes.

Staff Response

Some children 12 years of age and younger will be using bedroom furniture intended specifically for the child, such as cribs that convert into a bed, from birth through their formative years. CPSC staff considers such furniture to be children's products, since they will be interacting with such furniture throughout their childhood. In order to provide guidance regarding determinations that have been made, staff will consider the feasibility of posting on the CPSC website, <http://cpsc.gov>, products that have been found to be children's products or general use products, subject to CPSC's rules for public disclosure of information. Discussions between staff and individual firms in regards to specific products are likely confidential and will not be made public. Chapter 2 of the *Regulated Products Handbook* describes the procedures for presenting one's views and supporting evidence for resolving disputes with staff findings.

- c. One commenter specifically requested that general home furnishings specifically include carpets and rugs in the examples.

Staff Response

Staff has no objection to including carpets and rugs in the examples. Carpets and rugs intended for use by children 12 years old and younger remain subject to the rule.

- d. Another commenter requested that general home furnishings specifically include holiday decorations, regardless of theme, intended for display only, since they are not intended to be children's products. One commenter stated that not all Halloween products are children's products.

Staff Response

Staff takes into account the use of a product, such as holiday decorations, and acknowledges that many decorations with appeal to children would not be intended for children. All four factors mandated by Congress must be included in an analysis on a case-by-case basis.

Models and Collectibles

- a. A few commenters requested that model trains be specifically included in the definition of general use products, given the average age of a model railroader (53 years old), the level of sophistication required to operate the locomotives, and cost, which ranges in pricing from \$50 up to \$1575.

Staff Response

Staff agrees that replica model railroads are not children's products given that many hobbyists are adults, the costs involved, and the level of sophistication required to operate them. In addition, many of the products associated with replica scale model railroad sets would not be considered children's products. Model trains and model train accessories (such as scenery, scale buildings and supplies), are made by model railway manufacturers who sell their trains at model

train shops and model train hobby stores. Model trains are also distinguished from children's train sets in that model trains are more realistic. Children's train sets may have childish or decorative motifs and are easier to assemble and use by a child. By contrast, model railroad hobbyists collect trains, build miniature landscapes for the trains, or even operate their own miniature railroads outdoors. Staff determines the appropriate ages for products such as trains based on a case-by-case analysis of the four factors mandated by Congress.

- b. Another commenter requested that this section of the draft rule be further clarified to add fragility of the materials as a consideration in determining collectibles. This commenter also requested a registry of collectibles online to provide clear guidance.

Staff Response

Fragility was mentioned in an example as a pertinent feature for consideration. We stated in our example that collectible plush bears are those which have high cost, are highly detailed, with fragile accessories, display cases, and platforms. We believe that fragility of the materials may also be considered when assessing a collectible because children are less likely to be given items that can break. The Commission can consider the feasibility of an online registry of collectibles.

- c. One commenter disputed the implication that collectibles must be of high cost or uniquely marked. The commenter asserted that labeling products "Not a toy" or "Not for use by children 12 and under" would be important elements in identifying such products as intended for adults.

Staff Response

Staff agrees that not all collectibles are of high cost; however, that is just one factor among many. A label or other statement by a manufacturer that conveys the manufacturer's intent will be considered in making any age determination if it is reasonable, as set forth in the CPSIA and reiterated in the proposed interpretive rule. These determinations will be made on a case-by-case basis taking into account the statutory factors.

Jewelry

One commenter disputed several considerations that are used in distinguishing adult jewelry from children's jewelry, including considerations such as dexterity requirements and play value. In addition, this commenter also stated that the proposed interpretive rule failed to include design drawings, brand plans, and compliance with standards for adult jewelry as considerations of a manufacturer's intent in developing a product. The commenter also asserted that the proposed interpretive rule improperly expands the application of the Age Determination Guidelines to products other than toys.

Staff Response

Staff disagrees that undue emphasis is placed on dexterity or play value when making age determinations. Dexterity requirements may be useful for making distinctions between children's and adult jewelry. While some elastic bracelets may be useful to people suffering from arthritis, delicate clasps are of no use to younger children, which would indicate that such jewelry is intended for older consumers. Moreover, many products, including jewelry, can have play value. The most common type of play associated with children's jewelry is that of role playing.

However, these are only some of the factors that may be considered in making determinations regarding jewelry, and a number of other factors may also be considered when products are ambiguous. The proposed interpretive rule specifically states that many aspects of an item's design and marketing are considered when determining the age of consumers for whom the product is intended and will be purchased. Staff takes a balanced approach that includes all of the relevant features of a product.

Although the commenter also stated that staff should consider design drawings and brand plans as a relevant factor in making an age determination, such information has historically not been readily available for review. Moreover, the manufacturer's intent in designing, branding, or developing a product may be applicable to the factor regarding the statement by the manufacturer about the intended use of the product but does not otherwise affect consumer perceptions regarding the product. As stated above, the manufacturer's statement is only one of four statutory factors considered in making a determination.

The Age Determination Guidelines are among the factors that must be considered when making determinations. The descriptions of factors that appeal to children and the activities that they can perform across childhood are described with enough generality by the Guidelines for use in age determinations of any product, whether it is a toy or other product. The Guidelines provide information about social, emotional, cognitive and physical developments during childhood that are applicable to many products that are not actually mentioned by name in the Guidelines.

DVDs, Video Games, and Computers

- a. Several commenters asserted that the approach distinguishing CDs and DVDs for very young children who lack the motor skills to operate CDs and DVDs from older children with adequate motor skills is a false distinction. These commenters stated that the older child is not allowed to handle a CD or DVD unless they learn to insert it into a CD or DVD player. The commenters claimed that the child will interact much more with the CD or DVD player than he or she will interact with the CD or DVD itself.

Staff Response

We agree that CDs, DVDs, video games, and other electronic media are functional only in the media player or device, that children are more likely to play with the controls on a media player or device, and that many media players or devices are considered general use items. However, with respect to the DVDs and CDs themselves, we must consider the four statutory factors to assess these products. The child will have some physical interaction with such products if only for the purpose of insertion of the disk. However, the staff has defined "use" to mean physical interaction with the product. The child will have some physical interaction with such products if only for the purpose of insertion of the disk. That is why the proposed interpretive rule states that the CDs and DVDs with content intended for children younger than 4 years old were not determined to be children's products because children younger than 4 are usually not allowed to use household digital media players. Because DVDs and CDs and other digital media may be handled by older children to load and unload DVDs in their appropriate media devices, CDs and DVDs could be considered children's products if such movies, video games, or music were specifically aimed at and marketed to children 12 years of age or younger and have no appeal to older audiences. Those media players or devices decorated with childish themes or sized for

children would still likely be considered children's products because older children and adults would be unlikely to use such products.

- b. One commenter sought clarification on how this section would affect the existing process for video game research and rating procedures regarding age. Another commenter stated that the existing rating systems should be used for age grading purposes.

Staff Response

Video game rating systems would be considered by staff as one indicator of age range for purposes of age grading. CPSC staff does not expect these determinations, which are made for the purpose of determining whether certain provisions and testing requirements are applicable under the acts administered by the Commission, to affect video game research or existing rating mechanisms. Such determinations are regulated by the Federal Communications Commission and are not affected by the determinations made under the guidance provided in this interpretive rule.

- c. Other commenters sought to place additional products in the general use category including game consoles, book readers, digital media players, cell phones, and digital assistant communication devices sized for use by adults, irrespective of any childish decorations, to avoid any confusion. Commenters also sought clarification that an accessory to an electronic children's product is not itself a children's product if it is not for use by children but instead likely to be used by their parents or guardians (i.e., transformers, cables, and connectors). One commenter stated that DVDs are exempt from the small parts requirement in clause 4.6.1.2 of ASTM F963-08. Accordingly, this commenter sought clarity on how children's DVDs would be treated.

Staff Response

CPSC staff believes that most electronic devices, including game consoles, book readers, digital media players, cell phones, and digital assistant communication devices that are intended for older children and adults fall in the general use category. However, staff disagrees that electronic media players and devices that are uniquely decorated with childish themes would be general use products. Since younger children likely would be the only users of such devices, staff considers them to be children's products. In addition, the exemption from small parts regulations has no bearing on the requirements to limit the lead content of children's products as mandated in the CPSIA. CPSC Compliance staff considers DVDs and CDs as general use items and therefore, not subject to the lead content limits under CPSIA.

Marketing of Child-Sized Versions of General Use Products

One commenter stated that the emphasis on marketing will lead to confusion because many art tools are small and may also be used by an adult. According to this commenter, a more compelling and logical framework is to consider the circumstances under which a child will be using the product. This commenter stated that if the product has an instructional purpose and will be used under the supervision of an adult, such products should be considered general use products, including child-sized craft tools, child-sized musical instruments, child-sized saddles and equestrian equipment, and classroom science kits.

Staff Response

Size, marketing, and other factors are all considered when making age determinations. Where placing emphasis on one feature over another is warranted, the weighting is determined by the most obvious features of a product. While the level of expected supervision needed for a product may be considered in some instances, it is not one of the four statutory factors to be considered when making a children's product determination, unless stated on the packaging. If the product otherwise meets the definition of "children's product," the amount of supervision over the child's use of a children's product will not otherwise affect the determination. Products such as child-sized craft tools, child-sized musical instruments, child-sized saddles and equestrian equipment, and classroom science kits would be assessed on case-by-case basis to determine whether such products are, in fact, children's products. If the sizing of the product indicates that children under 12 years of age would be more likely to use such products, they would likely fall under the children's product category, rather than the general use category.

Art Materials and LHAMA

Another commenter stated that duplicative third-party testing for products that are covered under LHAMA should not be required. Accordingly, this commenter requested that LHAMA be included as a Federal Hazardous Substances Act (FHSA) labeling law in addition to the guidance that most art materials are general use products.

Staff Response

The LHAMA requires that the manufacturer, importer, or repackager of art materials have their product's formulation reviewed by a toxicologist for its potential to cause chronic adverse health effects. A conformance statement on the product is used to certify that the product has been so reviewed. The CPSIA introduces additional test requirements for lead in children's products under section 101. Therefore, the testing is not duplicative. Additionally, under LHAMA, there is no testing required. LHAMA requires a literature review, and the conformance statement is the certification that the product has been reviewed by a toxicologist as required under the LHAMA regulations. An art material primarily designed or intended for children 12 years of age and younger would have to be certified by a third party that it did not contain lead, but it would not require third party certification to the LHAMA requirements.

Books

One commenter sought clarity regarding whether children's magazines are covered by the CPSIA. Another commenter states that sales data should not be considered for books since adults purchase books for children.

Staff Response

Children's magazines are evaluated using the same principles as those that apply to children's books in the interpretive rule. If intended primarily for children 12 years of age or younger, magazines must comply with the CPSIA requirements for children's products. We consider sales data to be relevant to the extent that it reveals where the products are sold such as in a children's book or toy store. We recognize that most children's products are purchased by adults and will not be evaluating such data.

Science Equipment

- a. Several commenters stated that school supplies, such as science equipment, writing devices, and musical instruments, used in educational settings should be considered general use items. They argued that many of the general use materials that are specified in these curriculums can be easily found at department stores, hardware stores, grocery stores, and specialty shops. In addition, other commenters stated that many science and math programs and kits are principally designed and used as instructional materials for teachers in a classroom setting. Accordingly, they requested that the proposed interpretive rule be revised to include such items as general use items when marketed and sold for the purpose of supervised, hands-on, educational instruction.

Staff Response

Staff agrees with the commenters that many math and science kits that are sent to schools for the purpose of teaching these subjects contain materials, such as rubber bands, staples, paper clips, and other items, that can be found in any hardware or grocery store. In determining whether these products should now be considered children's products because of their new use, packaging, and marketing to schools, staff considers the intended user of the product and the level of interaction between the user and the product. Products solely intended for use by the instructor would not be considered children's products.

- b. A few commenters requested that pens, pencils, and other office supplies be specifically included as general use items because they are used mainly by the general public.

Staff Response

Some pens and pencils are designed and intended primarily for children 12 years old and younger. However, if a pen, pencil, or other office supply is not designed or intended primarily for children 12 years old and younger, it would not be considered a children's product.

Sporting Goods and Recreational Equipment

- a. Several commenters stated that sporting equipment intended for tween, teens, and young adults should not be considered children's products. One commenter stated that legitimate sporting goods should be considered general use whether it is used by a 9 year old or 13 year old and that size is irrelevant. Their uses and essential purposes are no different than sporting equipment used by teens. Another commenter stated that the cost of testing these products is too high and will result in delays in manufacturing.

Staff Response

Staff acknowledges that tweens and teens often use regulation-sized sporting goods. Unless such items are specifically marketed to children 12 years of age or younger or have extra features that intentionally make them more suitable for children than for adults, staff would consider them to be general use products. However, a youth sporting good may be specifically designed for use by a certain age population (such as 10 years old and younger) which is recognized by the rules of that sport as the appropriate size for that age group. Therefore, such products would be considered a children's product. The price of testing or otherwise complying with this rule is not a factor for determining the intended age of consumers who would use a given product.

- b. One commenter stated that the interpretive rule should clearly state that a product sized for an adult, such as a baseball glove, is considered a general use product, even if there is a cartoon character on it. In addition, the commenter stated that a wading pool may be a children's product based on size alone, regardless of whether it contains additional play features, and requested a definition for "shallow" in reference to wading pool depth.

Staff Response

Staff agrees that the presence of a cartoon character on an adult-sized product is not sufficient to label a product as a children's product. Age determinations take into account the principle use patterns of a given product, so if a baseball glove is too large for children to use, it would obviously not be intended primarily for use by children and therefore would not be a children's product, no matter how it is decorated. Age determinations must take into account all of the factors mandated by Congress and consider all of the features of a product. Wading pools may be intended primarily for children even without additional play features. The size, decorations, and depth of a pool may be enough to determine that a product is intended primarily for use by children.

Musical Instruments

One commenter stated that the proposed rule should explicitly exclude from the definition of children's product electronically-aided musical instruments and musical devices that are preprogrammed by the user or the manufacturer.

Staff Response

Staff agrees that the preprogrammed sounds and demonstration pieces in electronically-aided musical instruments would not be sufficient to place a musical instrument intended for adults into the scope of the children's product interpretation described in this rule.

Footwear

A few commenters raised issues regarding footwear. These commenters stated that there is no certainty as to whether an article of footwear is a children's product and that the issue is confused especially with youth footwear. According to the commenters, many 12-year olds wear adult footwear, and that size does not necessarily relate to age. They suggested an objective standard of footwear of 24 cm or more as being intended for adults.

Staff Response

Staff believes that the manufacturer is in the best position to make an initial determination regarding whether footwear is intended primarily for children 12 years of age or younger. However, where there is ambiguity, CPSC staff will rely on the four statutory factors, rather than a single factor, since it is possible that other features can strongly indicate whether footwear is intended primarily for children 12 years old or younger even though the length of the footwear may exceed 24 cm.

III. Conclusion

This memorandum provides CPSC staff responses to public concerns about the interpretation of the scope of a *children's product* as defined by the CPSIA. Staff believes that identifying a *children's product* is a reasonable and achievable task for manufacturers or importers of

consumer products if they follow the analytical principles discussed in the proposed interpretive rule and weigh the four factors mandated by Congress for making such determinations.