

# Rules and Regulations

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 111

[Notice 2009–19]

#### Procedural Rules for Audit Hearings

**AGENCY:** Federal Election Commission.

**ACTION:** Agency procedure; correction.

**SUMMARY:** On July 10, 2009, the Federal Election Commission published a Procedural Rule (“Commission”) instituting a program that provides committees that are audited pursuant to the Federal Election Campaign Act of 1971, as amended (“FECA”) with the opportunity to have a hearing before the Commission prior to the Commission’s adoption of a Final Audit Report. Procedural Rules for Audit Hearings, 74 FR 33140 (July 10, 2009). The Commission is now adding a further statement at the end of that procedural rule to conform this statement to other agency procedural rules.

**DATES:** Effective August 7, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Joseph F. Stoltz, Assistant Staff Director, Audit Division, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** On July 10, 2009, the Commission published a Procedural Rule instituting a program that provides committees that are audited pursuant to the Federal Election Campaign Act of 1971, as amended (“FECA”) with the opportunity to have a hearing before the Commission prior to the Commission’s adoption of a Final Audit Report. Procedural Rules for Audit Hearings, The Commission is now adding a statement to that procedural rule to conform the rule to other agency procedural rules and policy statements.

On page 33143, in the first column, at the end of paragraph E, insert the following:

The above provides general guidance concerning notice to those being audited and announces the general course of action that the Commission intends to follow. This notice sets forth the Commission’s intentions concerning the exercise of its discretion in its audit program. However, the Commission retains that discretion and will exercise it as appropriate with respect to the facts and circumstances of each audit it considers. Consequently, this notice does not bind the Commission or any member of the general public.

Dated: July 29, 2009.

On behalf of the Commission.

**Steven T. Walther,**

*Chairman, Federal Election Commission.*

[FR Doc. E9–18541 Filed 8–6–09; 8:45 am]

**BILLING CODE 6715–01–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### 16 CFR Part 1500

#### Children’s Products Containing Lead; Interpretative Rule on Inaccessible Component Parts

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule.

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

**DATES:** *Effective Date:* This interpretative rule is effective on August 14, 2009.

**FOR FURTHER INFORMATION CONTACT:**

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Maryland 20814; e-mail [khatlelid@cpsc.gov](mailto:khatlelid@cpsc.gov); telephone 301–504–7254.

**SUPPLEMENTARY INFORMATION:**

#### A. Background

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

#### B. Statutory Authority

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

#### C. Notice of Proposed Rulemaking

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

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

- An inaccessible component part is one that is located inside the product and not capable of being touched or mouthed by a child, whether or not such part is visible to a user of the product;

- An inaccessible part is one that may be enclosed in any type of material, *e.g.*, hard or soft plastic, rubber or metal. However, the Commission requested comments specifically on the use of fabric as a barrier, and the impact of aging on a children's product;

- To assess whether a part is inaccessible, the accessibility probes defined in the Commission's existing regulations for evaluating accessibility of sharp points or sharp metal or glass edges (16 CFR 1500.48 and 1500.49) could be used. An accessible lead-containing component part would be defined as one that contacts any portion of the specified segment of the accessibility probe. An inaccessible lead-containing component part would be defined as one that cannot be contacted by any portion of the specified segment of the accessibility probe; and

- Use and abuse tests are appropriate for evaluating whether lead-containing component parts of a product become accessible to a child during normal and reasonably foreseeable use and abuse of the product by a child. The purpose of the tests is to simulate use and damage or abuse of a product by children and to expose potential hazards that might result from use and abuse. 16 CFR 1500.50–1500.53.

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

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

##### 1. Summary of the Law—Section 1500.87(a)

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

content of a product inaccessible to a child."

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

##### 2. Physical Accessibility—Section 1500.87(b)

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

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

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

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

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

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

##### 3. Testing and Certification Requirements for Inaccessible Component Parts

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

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

requirements or the testing requirements, would require testing and certification to the lead content limits.

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

#### *4. Rulemaking Authority—Section 1500.87(c)*

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

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

#### *5. Use of Accessibility Probes—Section 1500.87(d)*

Proposed § 1500.87(d) stated that:

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

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

The Commission agrees that, for products that are effectively sealed so that there is no point of entry to any internal parts that contain lead, use of the probes would not be necessary to demonstrate that the parts are not accessible. However, it would be necessary to test the material which encases or encloses the inaccessible lead-containing part, unless it is a material that the Commission has specifically determined falls below the lead content limits of the CPSIA. The Commission established procedures for a Commission determination that a specific material or product does not exceed the lead content limits specified under section 101(a) of the CPSIA (74 FR 10475 (March 11, 2009)). In addition, the Commission has issued a notice of proposed rulemaking regarding lead content limits on certain materials or products which have been preliminarily determined to fall below the lead content limits of the CPSIA (74 FR 2433 (January 15, 2009)).

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

In considering reasonably foreseeable use and abuse, the Commission finds that the accessibility probes are appropriate for testing the wider range of products for children through age twelve years. The probes are used to evaluate possible gaps or holes in a product through which a young child's finger might physically contact a lead-containing component part. Because older children's larger fingers generally would have more limited access to gaps that would be accessible to smaller children, the Commission believes that, in most cases, the probes will indicate whether access is possible.

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

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

Some commenters asked that we clarify that access to a component containing smaller components that may, themselves, contain lead-containing parts does not mean that a lead-containing component is accessible if the lead is fully enclosed within the larger component which can be touched by an accessibility probe.

The Commission interprets a lead-containing component part to mean the material used to construct the part includes lead in its formulation, not that the part contains smaller parts that contain lead. For example, assume that the product is a sealed ball made of plastic and that the sealed ball has a lead content that complies with the CPSIA lead limits. Inside the sealed ball are metal beads that contain lead. In this example, the metal beads are lead-containing component parts, but the ball is not. If the sealed ball does not provide access to the beads inside it, through a hole or a crevice, or after being subject to use and abuse testing, then the lead-containing parts would be deemed inaccessible. The Commission also notes that, for certain electronic devices that contain accessible lead-containing

parts, there is an interim final rule which provides exemptions for such parts for which it is not technologically feasible to comply with the lead content limits (74 FR 6990 (February 12, 2009)).

*6. Use of Use and Abuse Tests—Section 1500.87(e) and (f)*

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

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

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

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

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

The test methods in 16 CFR 1500.50–1500.53 are used to simulate the normal and reasonably foreseeable use, damage, or abuse of toys and other articles intended for children in three separate age groups. Accordingly, revised §§ 1500.87(e), (f), and (g) make clear that the use and abuse tests at 16 CFR 1500.50–1500.53 will be used to evaluate accessibility of lead-containing component parts of a children's product for the specific age group the product is intended. In addition, § 1500.87(h) is revised to make clear that the test under § 1500.87(g) will apply to products intended for children that are over 96 months through 12 years of age. Accordingly, we have revised §§ 1500.87(e) through (h) to read as follows:

(e) For products intended for children that are 18 months of age or less, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.51 (excluding the bite test of 1500.51(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(f) For products intended for children that are over 18 months but not over 36 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.52 (excluding the bite test of 1500.52(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(g) For products intended for children that are over 36 months but not over 96 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.53 (excluding the bite test of 1500.53(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(h) For products intended for children over 96 months through 12 years of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.53 (excluding the bite test of 1500.53(c)) intended for children aged 37–96 months will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product by a child through 12 years of age.

*7. The Exclusion of the Bite Test From Use and Abuse Testing*

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

Some commenters requested an explanation for the exclusion of the bite test. One commenter pointed out that the proposed rule excludes the bite test from 16 CFR 1500.51 and 1500.52, but not § 1500.53, and stated that the bite test from all three sections should be excluded.

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

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

*8. Fabric Coverings Used as Barrier—Section 1500.87(g)*

Several commenters claimed that fabric coverings are appropriate barriers. Some commenters gave examples of a fabric-covered button or base of a zipper that would form a barrier to a lead-containing part, such as a metal button or zipper base, thus rendering it inaccessible to a child. The commenters said that such use of fabric must withstand wear and tear and remain intact through the life of a garment. In addition, the commenters noted that fabrics in footwear applications must be durable and able to withstand abrasion and other abuse and must not wear out over the expected life of a shoe. They asserted that fabrics are barriers especially given that the use of tools is not to be considered in an accessibility evaluation. Another commenter said that fabric coverings surrounding the inner parts of mattresses and foundations are barriers for which there is no point of entry and which must withstand normal use of these products.

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

Although test data was not submitted that specifically address the possibility

of leaching of lead through fabric coverings, leaching involves a liquid dissolving a portion of a material or otherwise extracting a chemical from the material. Because fabrics, in general, cannot be considered to be impervious to liquids such as saliva and stomach acid, we believe that leaching of lead from an underlying material is possible. However, unlike other children's products that have lead-containing components that are accessible, children will not touch the lead-containing component with the hands or fingers if the component is enclosed or encased in fabric. Thus, leaching of lead from such a product is not likely to occur except in the case of mouthing or swallowing an item that is completely encased or enclosed in fabric. Whether a fabric-covered product or a fabric-covered component part of a product can be mouthed or swallowed should be determined through appropriate testing.

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

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

new § 1500.87(i) to explain that a children's product that is or contains a lead-containing part which is enclosed, encased, or covered by fabric and passes the appropriate use and abuse tests on such covers, is inaccessible to a child unless the product or part of the product in one dimension is smaller than 5 centimeters. The Commission also has renumbered proposed § 1500.87(g), which pertained to the intentional disassembly or destruction of products by children, as § 1500.87(j).

#### *9. Intentional Disassembly and Destruction—Section 1500.87(j) (Formerly Section 1500.87(g))*

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

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

#### *10. Miscellaneous Comments*

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

Conversely, other commenters said that, with respect to textile products, the necessary durability of such products already incorporates consideration of aging and wear and tear. Another commenter claimed that additional testing to account for aging for their type of products does not need to be done, because the product lifespan of children's electronics is shorter than for other children's products, and aging leads to products becoming unusable.

Section 101(b)(2)(A) of the CPSIA provides that aging of the product may be considered in the evaluation of the accessibility of component parts. However, because of the wide range of products and product types subject to the lead content requirements of the CPSIA, the Commission believes that such evaluations are necessarily specific to individual products or product types and may not be generalized. Currently, the Commission does not have specific requirements on the effects of aging on children's products. Testing for aging on children's products is similar to normal use testing. Section 8.5 of ASTM-F963 provides that normal use testing would entail tests intended to simulate normal use conditions so as to ensure that

hazards are not generated through normal wear and deterioration of the product. Such tests would be used to uncover hazards rather than to demonstrate the reliability of the toy. However, ASTM-F963 does not specify requirements because it would not be possible to define such requirements in view of the wide range of children's products in the marketplace. Since any evaluation on the effects of aging on the integrity of product must be conducted on product by product basis, the Commission will continue to review the effects of aging of the integrity of the children's products and will issue further guidance on this issue in the future if it deems such guidance is necessary.

#### *11. Compact Disks and DVDs*

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

Acrylic polymer layers of a compact disk or DVD are not considered to be a coating within the definition of section 1303 because the acrylic polymer layers are not a surface coating that is separable from the substrate through scraping. If the internal metallic layer of a disk is not accessible to a child, testing and certification would not be required. The Commission notes that the issue of whether there is any lead in compact disks or DVDs has been raised in various proceedings. However, we have not received any test data or information regarding lead content in CDs or DVDs and would require further information before we can evaluate these products properly. Moreover, given the very large numbers of children's products in the market, an interpretative rule on accessibility is not the appropriate forum for the Commission to address such product-specific issues. Rather, the interpretative rule is intended to provide guidance to allow manufacturers of children's products to assess whether their own products or component parts of their products are inaccessible for purposes of section 101(b)(2) of the CPSIA. Product-specific requests should be made under the rule

on procedures and requirements for a Commission determination or exclusion (74 FR 10475 (March 11, 2009)).

#### E. Effective Date

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

#### List of Subjects in 16 CFR Part 1500

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

#### F. Conclusion

■ For the reasons stated above, the Commission amends 16 CFR chapter II as follows:

#### PART 1500—HAZARDOUS SUBSTANCES AND ARTICLES: ADMINISTRATION AND ENFORCEMENT REGULATIONS

■ 1. The authority citation for part 1500 continues to read as follows:

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

■ 2. Add a new § 1500.87 to read as follows:

##### § 1500.87 Children's products containing lead: inaccessible component parts.

(a) The Consumer Product Safety Improvement Act (CPSIA) provides for specific lead limits in children's products. Section 101(a) of the CPSIA provides that by February 10, 2009, products designed or intended primarily for children 12 and younger may not contain more than 600 ppm of lead. After August 14, 2009, products designed or intended primarily for children 12 and younger cannot contain more than 300 ppm of lead. On August 14, 2011, the limit may be further reduced to 100 ppm after three years, unless the Commission determines that it is not technologically feasible to have this lower limit.

(b) Section 101 (b)(2) of the CPSIA provides that the lead limits do not apply to component parts of a product that are not accessible to a child. This section specifies that a component part is not accessible if it is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably

foreseeable use and abuse of the product including swallowing, mouthing, breaking, or other children's activities, and the aging of the product, as determined by the Commission. Paint, coatings, or electroplating may not be considered to be a barrier that would render lead in the substrate to be inaccessible to a child.

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

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

(e) For products intended for children that are 18 months of age or less, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.51 (excluding the bite test of § 1500.51(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(f) For products intended for children that are over 18 months but not over 36 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.52 (excluding the bite test of § 1500.52(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(g) For products intended for children that are over 36 months but not over 96 months of age, the use and abuse tests set forth under the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.53 (excluding the bite test of § 1500.53(c)), will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

(h) For products intended for children over 96 months through 12 years of age, the use and abuse tests set forth under

the Commission's regulations at 16 CFR 1500.50 and 16 CFR 1500.53 (excluding the bite test of § 1500.53(c)) intended for children aged 37–96 months will be used to evaluate accessibility of lead-containing component parts of a children's product as a result of normal and reasonably foreseeable use and abuse of the product.

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

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

Dated: July 31, 2009.

**Todd A. Stevenson,**

*Secretary, Consumer Product Safety Commission.*

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#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 174

[EPA–HQ–OPP–2009–0101; FRL–8428–7]

##### **Bacillus thuringiensis Cry1A.105 Protein; Time Limited Exemption From the Requirement of a Tolerance; Correction**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule, correction.

**SUMMARY:** On May 20, 2009 EPA published a Final Rule that established an 18-month, time-limited exemption from the requirement of a tolerance for residues of the *Bacillus thuringiensis* Cry1A.105 protein in or on the food and feed commodities cotton seed, cotton seed oil, cotton seed meal, cotton hay, cotton hulls, cotton forage and cotton gin byproducts when used as a plant-incorporated protectant. Subsequent to the publication of the May 20, 2009 Final Rule, the Agency identified an error in the Analytical Methods section of that Rule's preamble. Through this action, EPA is republishing the tolerance exemption with a new effective date and opportunity to request a hearing, and a corrected Analytical Methods section. The conditions of the