

[FR Doc. E8-26843 Filed 11-14-08; 8:45 am]
BILLING CODE 4910-13-P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Labeling Requirement for Toy and Game Advertisements; Final Rule

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (“Commission” or “CPSC”) is issuing a final rule for advertisements of certain toys and games. Section 105 of the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016 (August 14, 2008), (“CPSIA”), directs the Commission to promulgate regulations to effectuate this section with respect to advertising for certain toys and games in catalogues and other printed materials not later than 90 days after enactment. The final rule details requirements regarding the size and placement of the cautionary labeling and the use of abbreviated warnings. The rule exempts catalogues circulated solely between businesses from the rule’s requirements, except where the recipient business is one that could be expected to be purchasing the product for the use of children rather than for resale. There is a grace period of 180 days for distribution of catalogues and other printed materials printed prior to the effective date of February 10, 2009.

DATE: The effective date of this rule with respect to catalogues and other printed materials is February 10, 2009. The Commission is providing a grace period of 180 days, or until August 9, 2009, during which catalogues and other printed materials printed prior to February 10, 2009 may be distributed without the required cautionary statements. Catalogues and other printed materials that are printed on or after February 10, 2009 must have the required cautionary statements. All catalogues and other printed materials distributed on or after August 9, 2009 must comply with this rule, regardless of when they were printed. This rule addresses only catalogues and other printed materials; however, the CPSIA extends the requirements to Internet advertisements as well. Internet advertisements must comply with Section 24 of the Federal Hazardous Substances Act as amended by the CPSIA no later than December 12, 2008.

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SUPPLEMENTARY INFORMATION:

A. Background

Section 24(a) of the Federal Hazardous Substances Act (FHSA) prescribes cautionary labeling requirements for toys or games that are intended for use by children from 3 to 6 years old and contain small parts. The cautionary statement warns potential purchasers that these products are not for children under 3 years old due to choking hazards. Section 24(b) of the FHSA prescribes similar requirements for balloons, small balls, and marbles intended for children 3 years and older, or any toy or game which contains such a balloon, small ball, or marble.

Section 105 of the CPSIA amends section 24 of the FHSA to require that, when a product’s packaging requires a cautionary statement, advertising for the product that provides a direct means for purchase or order of the product (including catalogues, other printed materials, and Internet Web sites) must bear the same cautionary statement. Section 105 provides some guidelines on the format of the cautionary statement. Specifically, it must be prominently displayed in the primary language used in the advertisement, in conspicuous and legible type in contrast by typography, layout, or color with other material printed or displayed in the advertisement, and in a manner consistent with 16 CFR part 1500.

Section 105 of the CPSIA also allows the Commission to provide a grace period of no more than 180 days for catalogues and other printed material printed prior to the effective date. In addition, the Commission is directed to determine the applicability of the requirements to catalogues and other printed material distributed solely between businesses and not to individual consumers.

Section 105(2) of the CPSIA exempts the Commission from conducting Regulatory Flexibility Act and Paperwork Reduction Act analyses for this rulemaking. On September 29, 2008, the Commission voted unanimously (2-0) to approve the publication in the **Federal Register** of a notice of proposed rulemaking (NPR) for advertising requirements. The notice was published Monday, October 6, 2008. 73 FR 58063.

B. Response to Comments

In response to the **Federal Register** notice proposing advertising labeling requirements, the Commission received approximately 52 comments.

1. Hazards Required To Be Labeled in Advertisements

Comments: Several commenters asked that the Commission clarify the scope of the advertising requirements. A couple of commenters questioned whether, now that the Standard Safety Specification for Toy Safety (ASTM F973) is becoming mandatory, the labeling requirements therein become part of the advertising labeling requirements.

Response: Section 24 of the Federal Hazardous Substances Act requires that packaging for toys and games intended for use by children between the ages of 3 to 6 that contain small balls, marbles, or small parts require a precautionary labeling warning that such items present choking hazards and are not appropriate for children under 3. Section 24 of the Federal Hazardous Substances Act also requires that packages for balloons have warnings related to the choking and suffocation hazards that balloons present to children less than 8 years of age. The rule requires that, when a product’s packaging is required to have any of the cautionary statements regarding choking hazards required by section 24 of the Federal Hazardous Substances Act, advertising for the product that provides a direct means for the purchase or order by a consumer must have the appropriate cautionary statements. Thus, the rule only applies to warnings regarding choking hazards presented by small parts, small balls, marbles and balloons.

The labeling requirements of ASTM F963 are not required to be included in product advertisements under this rule. Again, the cautionary statements required in advertisements by this rule are those found in section 24 of the Federal Hazardous Substances Act—specifically, cautionary statements regarding choking hazards presented by small parts, small balls, marbles, and balloons.

2. Permissibility of Additional Safety Warnings

Comments: Several commenters asked whether businesses could include other safety warnings, statements or information in Internet, catalogue or other advertising in a form and format in the sole discretion of the advertiser.

Response: This rule does not preclude advertisers from including other safety warnings, statements or information in

their advertisements. Further, additional safety warnings not required by the rule need not be in the format prescribed by this rule.

3. Direct Means for the Purchase or Order

Comments: Some commenters asked whether the rule applies to advertising leaflets sent directly to consumers where consumers would be required to make the purchase at a store.

Response: Such an advertisement would not be providing a direct means for the purchase or order of the product, since the consumer would be required to make a trip to the store to purchase the product. Thus, the advertisement would not require the cautionary statements.

Comments: Others questioned whether a Web site address alone on a flyer or free-standing insert would constitute a "direct means of purchase."

Response: This would not constitute a direct means of purchase, since a purchaser would still need to take the additional step of going to the website to purchase the product, wherein the cautionary warnings would be present. However, if the flyer or free-standing insert directed the purchaser to a specific phone number for order, this would constitute a "direct means for the purchase or order," so that the flyer or free-standing insert would need to comply with the requirements of the rule.

Comments: A couple of commenters questioned the applicability of the rule to coupons and cards that consumers can mail in (e.g., with proof of purchase, payment for shipping and handling, sometimes for a fee).

Response: A mail in coupon for a toy or game subject to the cautionary statements of section 24 of the FHSA would require the cautionary statements adjacent to the description of the toy or game, since the coupon would be providing a direct means to purchase or order the product in question. If the coupon was one which needed to be taken to the store or used for an online Internet purchase, and did not include a mail-in option, then it would not need to comply with the advertising requirements in the final rule.

4. Type-Size Requirements

Comments: Several commenters expressed concern about the proposed minimum type-size requirements of 0.08 inches, stating that it seemed unnecessary. Some commenters suggested that the size of the required cautionary statements only be "reasonably related" to the size of other text in the advertisement, except for the

heading, which would be consistent with the provisions for literature and descriptive material that accompany a product subject to Child Safety Protection Act labeling, as specified in 16 CFR 1500.121 and 16 CFR 1500.19.

Response: The Commission agrees that specifying the type size in absolute terms is not necessary if the warning text meets requirements that specify the type size relative to the other text in the advertisement. The Commission finds that a modified version of the type-size requirements for cautionary labeling of accompanying literature containing directions for use, specified in 16 CFR 1500.121(c)(6), is sufficient to satisfy the conspicuousness requirement for the advertising warnings. Specifically, the requirement reads, "The type size of abbreviated cautionary statements shall be reasonably related to the type size of any other printed matter in the product advertisement, and must be in conspicuous and legible type by typography, layout, or color with other printed matter in the advertisement and separated from other graphic matter."

5. Placement Requirements

Comments: Several commenters requested more flexibility in the placement of the full cautionary statements so that they are not required to appear at the bottom or top of the same page as the abbreviated warning or across two facing pages. For example, some commenters suggested that the statements be allowed to be located elsewhere in the catalogue, such as on the inside cover. One commenter suggested the use of a single general warning on the front cover of the catalogue stating that some of the products within might contain small parts. Another suggested placing the warnings in the catalogue Table of Contents to identify entire sections subject to the cautionary statements. One commenter suggested that, at the very least, the full cautionary statements be permitted anywhere on the same or facing page that contains the abbreviated warning.

Response: The Commission recognizes the concerns expressed by some commenters about the large amount of space in print catalogues that could be occupied by the full text of the required cautionary statements. The Commission's original proposal, which involved permitting the use of abbreviated warnings as long as a full cautionary statement was included at the bottom or top of the same or facing page for each abbreviated warning, was an attempt to address this situation. Members of the catalogue industry, however, have provided the CPSC with

mock-up catalogue pages that approximate how some of their catalogue pages would appear if they met the requirements proposed in the NPR, and these samples reveal that the required cautionary statements would still take up a substantial amount of space, even with the use of abbreviated warnings. Thus, the Commission has concluded that, if abbreviated warnings are employed, then a single set of full cautionary statements must be included either (1) near the beginning of the print catalogue, before any pages containing advertisements of products available for purchase, or (2) adjacent to the ordering information. The bottom of every catalogue page that includes abbreviated warnings must provide a reference to the precise location of the full cautionary statements. Each full cautionary statement should clearly identify its corresponding number code to be referenced in the abbreviated warnings (as detailed in the "Abbreviated Warnings" section).

The Commission believes that a single general cautionary statement located on the cover of, or elsewhere in, a catalogue would provide little to no benefit to consumers if it merely warned that some of the products advertised might contain small parts or other choking hazards. Under such circumstances, consumers would have no way of identifying those products that present the warned-about hazard. The Commission, however, does believe that it is appropriate to permit a cautionary statement on the front cover, or an equally conspicuous location, of a catalogue to replace the corresponding abbreviated warnings within the catalogue if that cautionary statement applies to all products available for purchase in that catalogue and if this fact is clear to consumers. For example, if a catalogue only contained balloons subject to FHSA labeling, a single full cautionary statement—specifically, the cautionary statement identified in 16 CFR 1500.19(b)(2)—may appear on the cover of the catalogue rather than individually labeling each product advertisement within the catalogue.

Similarly, because full cautionary statements will no longer appear on each page or two-page spread of the catalogue and because some catalogue pages may include products that require identical cautionary labeling, the final rule permits the use of a single full cautionary statement at the top of a page to replace individual warnings on that page, provided that the page contains products that would require the same cautionary statement and that this fact is clear to consumers. If, for example, a page contains products that would all

require the cautionary statement related to small parts, the abbreviated warnings associated with small parts that would otherwise appear in each product advertisement on that page could be replaced with the cautionary statement identified in 16 CFR 1500.19(b)(1) positioned at the top of the page. This, again, presumes that consumers are notified that this cautionary statement applies to all products on that page. For example, a full cautionary statement related to small parts could be preceded by the statement, "All products on this page contain small parts." Because a "section" of a catalogue might extend over multiple pages, the Commission finds that a single cautionary statement at the beginning of a section could be missed by consumers and is not appropriate.

6. Abbreviated Warnings

Comment: Some commenters suggested that the abbreviated warnings proposed in the Notice of Proposed Rulemaking, though better than the full cautionary statements, were still too lengthy. The commenters suggested several alternative approaches, including the use of abbreviated warnings without the prohibited age range, the use of a safety alert symbol and numbered codes to identify the applicable cautionary statements, and the use of icons alone to represent the applicable cautionary statements. One commenter also suggested that the abbreviated warnings be allowed to be combined in some manner. No commenter objected to the use of abbreviated warnings of some kind.

Response: The Commission recognizes that certain products will require multiple cautionary statements and that this could lead to substantial redundancy even with the use of abbreviated warnings. For example, each abbreviated warning begins with a safety alert symbol; thus, an advertisement that requires multiple abbreviated warnings would require multiple safety alert symbols. Additionally, three of the abbreviated warnings include the phrase "Not for under 3 yrs." Advertising for a toy or game that requires more than one of these warnings, therefore, would repeat this phrase multiple times. This is further complicated by the possibility of the advertisement also requiring an abbreviated warning that warns "Not for under 8 yrs." Simultaneous warnings that a toy is not for children "under 3 yrs" and not for children "under 8 yrs" could create confusion among consumers, and seems unnecessary given that one age range encompasses the other. For these reasons, the final

rule permits a product advertisement that would require multiple abbreviated warnings to combine those warnings into a single abbreviated warning.

Comments: Some commenters suggested the use of a European symbol that is intended to communicate that a toy is not suitable for children under age three.

Response: It is unclear whether consumers would correctly interpret such a symbol as a warning about a choking hazard rather than simply an age recommendation. Moreover, this symbol may not be suitable to warn about balloon-related choking hazards to children under eight.

7. Grace Period

Comments: Most of the comments confirmed that the costs to catalogue publishers could be significant if a grace period is not granted. One retailer, for example, estimated that if the Commission does not provide for a grace period, the cost to reprint, ship, and mail new catalogues could be as high as \$3.7 million.¹ Another commenter estimated that it could cost his company \$1 million to republish its catalogues before their normal life cycles ended.² Another commenter stated that it is taking some time to obtain the information from manufacturers concerning which products require the cautionary statements.³ Some retailers cannot begin to change the layout of their catalogue pages to reflect the cautionary statements until they receive this information from the manufacturers.

No commenter objected to the allowance of a grace period.

Response: Although the specific estimates cannot be confirmed, based on published estimates that the cost per copy of printing catalogues exceeds \$1 for most firms (excluding layout and postage),⁴ the Commission agrees it is reasonable to expect that some firms could face very significant costs if they had to reprint a large number of catalogues because a grace period was not provided.

¹ Comment from Stephanie Lester, Vice President, International Trade, Retail Industry Leaders Association (20 October 2008).

² Terry Clayton, General Manager and COO, Triarco Arts and Crafts (14 October 2008).

³ Comment from James H. Rice, CEO and Mary Ann Everett, Vice President, Creative Catalog Concepts (15 October 2008).

⁴ Telephone conversation with Rick Woldenberg and Lisa Guili of Learning Resources, Inc. and Sandy Schusteff of ETA/Cuisenaire (8 September 2008) and Jim Tierney, "Print, Production and Paper," *Multichannel Merchant* (1 November 2007), available at http://multichannelmerchant.com/printchannel/printchannel/print_production_paper (last accessed on 10 September 2008).

The Commission recognizes that before the passage of the CPSIA, many manufacturers did not have this information assembled in a format that could be easily provided to retailers. Thus, manufacturers have had to assemble this information and develop procedures for providing this information to their retailers.

Comment: Some catalogue publishers stated that a 180 day grace period would not be sufficient and requested a grace period exceeding 180 days in length be provided by the Commission.

Response: The CPSIA only authorizes the Commission to provide a grace period of "no more than 180 days" for catalogues and other printed material printed prior to February 10, 2009.

Comment: One commenter requested a grace period for Internet advertisements.

Response: The CPSIA provides that the effective date for Internet Web site advertisements is December 12, 2008, and does not provide the Commission with any authority to provide a grace period with respect to Internet Website advertisements.

8. Applicability of Rule to Television Advertisements

Comments: Several commenters asked the Commission to confirm that this rule does not apply to television advertisements.

Response: While the CPSIA prescribes an effective date for advertisements on Internet Web sites and an effective date with respect to catalogues and other printed materials, there is no effective date prescribed for television advertisements. This rule addresses only catalogues and other printed materials; thus, the requirements of the rule are not applicable to television advertisements.

9. Business to Business Catalogues

Comment: The Commission received two comments opposing the requirement that catalogues distributed to schools and similar entities contain the cautionary statements. These comments stated that the cost to some businesses that supply educational products could be significant and that some businesses might have trouble separating their "school or nursery" customers from other institutional consumers.

Response: The Commission acknowledges that there will be some costs to businesses to comply with this requirement, but finds that institutional consumers purchasing products for the use of children could benefit from knowing which products contain choking hazards and are not appropriate

for some age groups. The flexibility provided in the placement of warnings and in the option of using abbreviated warnings should alleviate somewhat the costs to businesses.

Comment: Three comments from the general public opposed exempting catalogues distributed solely between businesses. These comments stated that the warnings would benefit retailers as well as consumers.

Response: The information in the cautionary statements may be of some benefit to retailers. However, the need that retailers have for the information is different from that of consumers. The intent of this requirement is to caution parents that a product has small parts, small balls, marbles, or latex balloons, and therefore, is not appropriate for young children, before the consumer purchases an item through a catalogue or the Internet. Retailers need this information to know in which section of the store to stock and which items will require cautionary statements in their catalogues. The CPSIA requires manufacturers to provide this information to retailers. However, there may be more effective or less expensive means of providing this information to retailers than through the use of warnings designed for consumers.

Comment: One of the comments opposing any exemption for business to business catalogues noted that sometimes bulk purchases are made for dentists' or physicians' offices, carnivals, and fairs, among other places.⁵

Response: Under the final rule, any catalogue that is distributed to these types of entities is required to include the appropriate cautionary statements since the businesses could be expected to be purchasing products for the use of children.

C. Explanation and Description of the Rule

Following is a brief explanation and description of the principal provisions of the Commission's regulation.

1. Type-Size Requirements

As discussed in the Response to Comments section (Section B), several commenters expressed concern about the proposed minimum type-size requirement of 0.08 inches, stating that it seemed unnecessary. The Commission agrees that specifying the type size in absolute terms is not necessary if the warning text also must meet requirements that specify the type size relative to the other text in the

advertisement. The final rule revises the type-size requirement to read, "The type size of abbreviated cautionary statements shall be reasonably related to the type size of any other printed matter in the product advertisement, and must be in conspicuous and legible type by typography, layout, or color with other printed matter in the advertisement and separated from other graphic matter."

2. Placement Requirements

As noted and more fully discussed in the Response to Comments section (Section B), several commenters requested more flexibility in the placement of the full cautionary statements so that they are not required to appear at the bottom or top of the same page as the abbreviated warning or across two facing pages. The Commission generally agrees with the concerns expressed by some commenters about the large amount of space in print catalogues that could be occupied by the full required cautionary statements. Mock-up catalogue pages that approximated how some of the catalogue pages would appear if they met the requirements proposed in the NPR revealed that the required cautionary statements would still take up a substantial amount of space, even with the use of abbreviated warnings. The Commission has concluded that, if abbreviated warnings are employed, the use of a single set of full cautionary statements either (1) near the beginning of the print catalogue, before any pages containing advertisements of products available for purchase, or (2) adjacent to the ordering information, is permissible. The bottom of every catalogue page that includes abbreviated warnings, however, must provide a reference to the precise location of the full cautionary statements. Also, each full cautionary statement must clearly identify its corresponding number code to be referenced in the abbreviated warnings (as discussed below).

The Commission believes that a single general cautionary statement located on the cover of, or elsewhere in, a catalogue would provide little or no benefit to consumers if it merely warned that some of the products advertised might contain small parts or other choking hazards. Under such circumstances, consumers would have no way of identifying those products that present the warned-about hazard. The final rule, however, does permit a cautionary statement on the front cover, or equally conspicuous location, of a catalogue to replace the corresponding abbreviated warnings within the catalogue if that cautionary statement applies to all products available for purchase in that

catalogue and if this fact is clear to consumers. For example, if a catalogue only contained balloons subject to the FHSA choking hazard labeling, a single full cautionary statement is permitted—specifically, the cautionary statement identified in 16 CFR 1500.19(b)(2)—to appear on the cover of the catalogue rather than individually labeling each product advertisement within the catalogue.

Similarly, because full cautionary statements will no longer appear on each page or two-page spread of the catalogue and because some catalogue pages may include products that require identical cautionary labeling, the final rule permits the use of a single full cautionary statement at the top of a page to replace individual warnings on that page, provided that the page contains products that would require the same cautionary statement and that this fact would be clear to consumers. If, for example, a page contains products that would all require the cautionary statement related to small parts, the abbreviated warnings associated with small parts that would otherwise appear in each product advertisement on that page could be replaced with the cautionary statement identified in 16 CFR 1500.19(b)(1) positioned at the top of the page. This, again, presumes that consumers are notified that this cautionary statement applies to all products on that page—for example, a full cautionary statement related to small parts could be preceded by the statement, "All products on this page contain small parts." Because a "section" of a catalogue might extend over multiple pages, the Commission finds that a single cautionary statement at the beginning of a section could be missed by consumers and would not be appropriate.

3. Abbreviated Warnings for Catalogues and Other Printed Materials

Some commenters suggested that the abbreviated warnings included in the proposed rule, though better than the full cautionary statements, were still too lengthy. The Commission recognizes that certain products will require multiple cautionary statements and that this could lead to substantial redundancy even with the use of abbreviated warnings. The final rule permits a product advertisement that would require multiple warnings to combine those warnings into a single abbreviated warning, as more fully detailed below.

In the abbreviated warnings proposed in the notice of proposed rulemaking, emphasis was placed on the source of the choking hazard—for example,

⁵ Comments of Consumers Union of U.S. Inc., et al. (20 October 2008).

“SMALL PARTS”—rather than on the choking hazard itself because the full cautionary statements would already display the phrase “CHOKING HAZARD” prominently and would be visible on the same or facing page; the source of the choking hazard was one of the easiest ways to distinguish among the full cautionary statements on the page. The use of the less-than symbol (<) in the original abbreviated warnings also was dependent on the full

cautionary statements being located on the same or facing page.

The abbreviated warnings in the final rule now consist of three parts, in the following sequence:

(1) The safety alert symbol and the phrase “CHOKING HAZARD.”

(2) Number codes, separated by commas, enclosed within a single set of parentheses, and ending in a period that identifies the required cautionary statements for the product being advertised (see 16 CFR 1500.20(e)(2)).

(3) The prohibited age range written in the form “Not for under X yrs,” where X is either 3 or 8, based on the most restrictive age range for all required cautionary statements for that product.

For example, a product that requires the cautionary statements specified in 16 CFR 1500.19(b)(1) and 16 CFR 1500.19(b)(2) could use the following abbreviated warning in its advertising:

FIGURE 8

▲ CHOKING HAZARD (1,2). Not for under 8 yrs.

This approach allows consumers to focus on two key pieces of information: The nature of the hazard (choking) and the prohibited age range for that product (under 3 years or under 8 years). This is reasonably consistent with warnings literature, which generally recommends that consumer products with limited available space for warning labels select certain information for emphasis, exclude less important information, and refer the reader to more complete cautionary information elsewhere.⁶ Information about the source of the choking hazard, though important, is likely to be less important during the purchasing stage than knowing that a choking hazard exists and for whom the toy is not appropriate. The Commission also believes that the prohibited age range is necessary for those cases in which consumers do not seek out the full cautionary statement elsewhere.

Those consumers who would like additional details about the choking hazards, however, can use the displayed codes to identify which of the cautionary statements shown at the beginning of the catalogue or adjacent to the ordering information apply. While on first glance, the abbreviated warnings appear longer than the abbreviated warnings originally proposed in the proposed rule, this is true only for products that require a single cautionary statement since the abbreviated

warnings can now be combined. Furthermore, space on any given catalogue page will be regained by permitting the full cautionary statements to be moved from the same page as the abbreviated warnings to the beginning of the catalogue or adjacent to the ordering information.

The Commission had considered the use of icons rather than abbreviated warnings to further reduce the amount of space required for warnings in a catalogue, but several issues suggest that abbreviated warnings would be superior for consumers at this time. The primary criterion for evaluating an icon or symbol is the extent to which consumers are likely to understand its intended meaning.⁷ Some commenters suggested the use of a European symbol that is intended to communicate that a toy is not suitable for children under age three, but it is unclear whether consumers would correctly interpret such a symbol as a warning about a choking hazard rather than simply an age recommendation.

Moreover, this symbol may not be suitable to warn about balloon-related choking hazards to children under eight. The commenters have proposed no other specific icon designs to distinguish among the various choking hazards that must be addressed through cautionary labeling, making it impossible to judge whether small unique icons would be sufficiently legible to allow consumers to distinguish among them. Additionally, developing icons or symbols that would be reasonably understandable without consumers first having to learn the intended meaning of the icon is highly unlikely; abstract or arbitrary icons

probably would have to be relied upon. Such icons are likely to communicate little to no information about the hazard and, therefore, would require consumers to seek out the full cautionary statements to obtain this information and to eventually learn the icon's meaning. In general, consumers are less likely to use information that is provided at the point-of-sale as the effort required to process that information increases,⁸ a finding that is consistent with the scientific consensus that consumers are less motivated and less likely to perform appropriate behaviors, such as complying with a warning, as the effort required to do so increases even by a small amount.⁹ Some consumers will not put forth the effort to seek out and learn the meanings of icons, especially if their safety implications are not obvious. As a consequence, these consumers would be unlikely to receive the relevant safety information. In contrast, abbreviated warnings would provide consumers with basic information about the hazard and prohibited ages immediately.

4. Internet Warnings

Section 105 of the CPSIA stipulates that the Commission shall promulgate a final rule “with respect to catalogues and other printed material” by November 12, 2008. The CPSIA does not mandate that the Commission promulgate a final rule with regard to requirements for Internet advertising. The final rule contains no requirements

⁶ Laughery, K.R., & Hammond, A. (1999). Overview. In M.S. Wogalter, D.M. DeJoy, & K.R. Laughery (Eds.), *Warnings and risk communication* (pp. 3–13). Philadelphia: Taylor & Francis. Wogalter, M.S., & Leonard, S.D. (1999). Attention capture and maintenance. In M.S. Wogalter, D.M. DeJoy, & K.R. Laughery (Eds.), *Warnings and risk communication* (pp. 123–148). Philadelphia: Taylor & Francis. Wogalter, M.S., & Vigilante, Jr., W.J. (2006). Attention switch and maintenance. In M.S. Wogalter (Ed.), *Handbook of warnings* (pp. 245–265). Mahwah, NJ: Lawrence Erlbaum Associates.

⁷ *American national standard criteria for safety symbols* (ANSI Z535.3, Rev. Ed.). (2002). Rosslyn, VA: National Electrical Manufacturers Association.

⁸ Mazis, M.B., & Morris, L.A. (1999). Channel. In M.S. Wogalter, D.M. DeJoy, & K.R. Laughery (Eds.), *Warnings and risk communication* (pp. 99–121). Philadelphia: Taylor & Francis.

⁹ Kalsher, M.J., & Williams, K.J. (2006). Behavioral compliance: Theory, methodology, and results. In M.S. Wogalter (Ed.), *Handbook of warnings* (pp. 313–331). Mahwah, NJ: Lawrence Erlbaum Associates.

specific to Internet Web site advertising. However, the requirements for Internet advertisements in Section 24 of the Federal Hazardous Substances Act, as amended by Section 105 of the CPSIA, will go into effect on December 12, 2008.

5. Business to Business Catalogues

The CPSIA directs the Commission to determine the applicability of the advertising requirements to catalogues and other printed materials that are distributed solely among businesses. In the notice of proposed rulemaking, it was noted that although the cautionary statements could be of some value to retailers, the value would be lower than the value of the cautionary statements in catalogues distributed to households and other end users. However, the costs of incorporating the cautionary statements into the catalogues distributed solely to businesses would be the same as the costs of including the cautionary statements in catalogues distributed to retail consumers.

Several of the comments that endorsed exempting catalogues that are distributed solely between businesses confirmed some of the assumptions that were included in the analysis contained in the notice of proposed rulemaking. These commenters stated that if the goal was to caution the ultimate consumer that the products contained small parts, balls, marbles or balloons before they purchased the product, then that goal would not be served by requiring the warnings in catalogues that are never seen by the end consumers.

They stated the benefit of the cautionary statements to resellers is low, but that significant costs could be incurred in including the cautionary statements in the catalogues.

Moreover, several commenters noted that manufacturers are required to provide retailers with the information concerning the required cautionary statements applicable to any of their products and that requiring the cautionary statements in catalogues that are distributed solely among businesses would limit the ability of manufacturers to convey this information in ways that could be more effective and less costly.

The Commission also expressed concern in the notice of proposed rulemaking that exempting catalogues that were distributed to entities that could be expected to provide children with direct access to the product, such as schools and day care centers, could thwart the intent of the law. These organizations share some of the characteristics of businesses and many are in fact businesses. However, because the people ordering products at these

organizations would be ordering products for the use of children, they could benefit from knowing which products contain choking hazards and are not appropriate for some age groups.

Several commenters responded to a question posed by the Commission in the NPR as to how catalogues distributed solely between businesses could be distinguished from those intended for distribution to final consumers. Several stated that in many cases there is no clear way to distinguish between catalogues distributed solely between businesses from those intended for distribution to final consumers, including those distributed to entities such as schools, churches, day care centers, and recreational facilities. One commenter suggested that this is a factual distinction that could best be made through "inquiry or observation of the use of the catalog." ¹⁰ In other words, if the catalogue is being distributed to households or to entities that purchase products for the use of children, it is not a catalogue that is distributed solely among businesses.

Other commenters stated that some catalogues that are intended only for other businesses do have characteristics that can be used to distinguish them from catalogues intended for the general public and some manufacturers and distributors have procedures in place that serve to limit sales and distribution to resellers. For example, some have minimum order quantities that are greater than a typical consumer would order. Some manufacturers or distributors require a sales tax identification number before taking an order from an entity or providing them with a catalogue. This serves to limit their sales to resellers. Some manufacturers will only provide catalogues to existing customers or those businesses that have registered with it.

The final rule provides that catalogues that are distributed solely between businesses are exempted from the requirements unless the recipient business is one that could be expected to be purchasing the product for the use of children instead of for resale. Examples of businesses that could be expected to purchase products for the use of children include schools, day care centers, churches, and recreational facilities.

C. Effective Date and Grace Period

Section 105 of the CPSIA provides that the requirements for Internet

advertising shall take effect December 12, 2008. It provides that the requirements will apply to catalogues and other printed materials published or distributed on or after February 10, 2009. This includes catalogues that were printed prior to February 10, 2009, but not distributed until after February 10, 2009. The CPSIA authorizes the Commission to provide a grace period of not more than 180 days for catalogues and other printed material printed prior to February 10, 2009, during which time distribution of such catalogues and other printed materials shall not be considered a violation of the standard.

Based on research and on comments received in response to the notice of proposed rulemaking, the Commission has determined that there can be relatively long lead times for developing and printing catalogues. Some publishers expect to distribute catalogues for as long as two years after printing. Thus, it is likely that there are catalogues in circulation now, or that have been printed, or will be printed over the next several weeks, that do not contain the cautionary statements, but that are intended for distribution after February 10, 2009. Absent a grace period, the retailers, manufacturers, and importers who published the catalogues would have to stop distributing them on February 10, 2009.

The catalogues still in stock would have to be discarded and replacement catalogues would have to be printed, a cost to the publishers both in terms of discarding of the catalogues and in the possible loss in sales if the business experienced delays in obtaining reprinted catalogues.

The cost of providing a grace period—that some consumers may purchase games or toys from catalogues that they would not have purchased had they seen the cautionary labeling—though difficult to quantify, is likely to be small. The same cautionary statements are required on the products' packaging, and a parent could return or keep the product out of reach until the children are older if need be.

Even with a grace period of 180 days, all catalogues distributed after August 9, 2009, which includes all catalogues distributed in anticipation of the 2009 holiday shopping season, will have to contain the required cautionary statements.

Because of the significant lead time involved in printing catalogues and the relatively small cost of providing a grace period of 180 days, the Commission is providing a grace period of 180 days for catalogues and other printed materials.

¹⁰ Comment from Richard Woldenberg, Chairman, Learning Resources, Inc. (16 October 2008).

D. Environmental Considerations

The National Environmental Policy Act and the Council on Environmental Quality Act regulations and CPSC procedures for environmental review require the Commission to assess the possible environmental effects associated with the advertising labeling rule. As a labeling rule, this rule falls within the provisions of 16 CFR 1021.5(c) which designates categories of actions conducted by the Consumer Product Safety Commission that normally have little or no potential for affecting the human environment. In the NPR, the Commission made a preliminary finding that neither an environmental assessment nor an environmental impact statement was required for this rule. The only comments received on this issue emphasized the importance of providing for a grace period to avoid having to discard large stocks of catalogues and print replacement catalogues. The final rule does include a grace period for catalogues and other printed materials. Because this rule will at most cause a very slight increase in the amount of material entering the waste stream annually, the Commission finds that neither an environmental assessment nor an environmental impact statement is required.

List of Subjects in 16 CFR Part 1500

Consumer protection, Labeling.

Conclusion

■ Under authority of section 3 and section 105 of the Consumer Product Safety Improvement Act, Public Law 110–314, 122 Stat. 3016 (August 14, 2008), the Commission amends Title 16, Chapter II, Subchapter C, Part 1500 as set forth below.

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.

■ 2. Add § 1500.20 to read as follows:

§ 1500.20 Labeling requirement for advertising toys and games.

(a) *Scope.* This section applies to catalogue and other printed material advertisements which provide a direct means of purchase or order of products

requiring cautionary labeling under sections 24(a) and (b) of the FHSA.

(b) *Effective Date.* Under the Consumer Product Safety Improvement Act of 2008, Public Law 110–314, 122 Stat. 3016 (August 14, 2008), (“CPSIA”), the effective date of the CPSIA’s amendment to Section 24 of the FHSA to require cautionary statements in catalogues and other printed materials is February 10, 2009. By this rule, the Commission is providing a grace period of 180 days, or until August 9, 2009, during which catalogues and other printed materials printed prior to February 10, 2009, may be distributed without such cautionary statements. Catalogues and other printed materials that are printed on or after February 10, 2009, must have the required cautionary statements. All catalogues and other printed materials distributed on or after August 9, 2009, must comply with this rule. This rule addresses only catalogues and other printed materials; however, the CPSIA extends the requirements for cautionary statements to Internet advertisements as well. Internet advertisements must comply with Section 24 of the FHSA as amended by the CPSIA no later than December 12, 2008.

(c) *Definitions.* For the purposes of this section, the following definitions shall apply.

(1) *Ball* means a spherical, ovoid, or ellipsoidal object that is designed or intended to be thrown, hit, kicked, rolled, dropped, or bounced. The term “ball” includes any spherical, ovoid, or ellipsoidal object that is attached to a toy or article by means of a string, elastic cord, or similar tether. The term “ball” also includes a multi-sided object formed by connecting planes into a generally spherical, ovoid, or ellipsoidal shape that is designated or intended to be used as a ball, and any novelty item of a generally spherical, ovoid, or ellipsoidal shape that is designated or intended to be used as a ball. The term “ball” does not include dice, or balls permanently enclosed inside pinball machines, mazes, or similar other containers. A ball is permanently enclosed if, when tested in accordance with 16 CFR 1500.53, it is not removed from the outer container.

(2) *Small ball* means a ball that, under the influence of its own weight, passes in any orientation, entirely through a circular hole with a diameter of 1.75 inches (44.4 mm) in a rigid template ¼ inches (6 mm) thick. In testing to

evaluate compliance with this regulation, the diameter of opening in the Commission’s test template shall be no greater than 1.75 inches (44.4 mm).

(3) *Latex balloon* means a toy or decorative item consisting of a latex bag that is designed to be inflated by air or gas. The term does not include inflatable children’s toys that are used in aquatic activities such as rafts, water wings, swim rings, or other similar items.

(4) *Marble* means a ball made of hard material, such as glass, agate, marble, or plastic, that is used in various children’s games, generally as a playing piece or marker. The term “marble” does not include a marble permanently enclosed in a toy or game. A marble is permanently enclosed if, when tested in accordance with 16 CFR 1500.53, it is not removed from the toy or game.

(5) *Small part* means any object which, when tested in accordance with the procedures contained in 16 CFR 1501.4(a) and 1501.4(b)(1), fits entirely within the cylinder shown in Figure 1 appended to 16 CFR part 1501. The use and abuse testing provisions of 16 CFR 1500.51 through 1500.53 and 1501.4(b)(2) do not apply to this definition.

(6) *Direct means of purchase or order* means any method of purchase that allows the purchaser to order the product without being in the physical presence of the product. Advertising that provides a direct means of purchase or order of a product would include catalogues or other printed advertising material that contain order blanks, telephone numbers or fax numbers for placing orders, and Internet Web sites that enable consumers to purchase a product online or through the use of a telephone number or fax number provided on the Internet Web site.

(d) *Advertising requirements.* Any toy or game that requires a cautionary statement about the choking hazard associated with small parts, balloons, small balls, or marbles must bear that cautionary statement in the product’s advertising if the advertising provides a direct means to purchase or order the product.

(1) The advertising for any article that is a toy or game intended for use by children who are at least three years old but less than six years of age shall bear or contain the following cautionary statement if the toy or game includes a small part:

FIGURE 1

**WARNING:**

**CHOKING HAZARD--Small parts
Not for children under 3 yrs.**

(2) The advertising for any latex balloon, or toy or game that contains a latex balloon, shall bear the following cautionary statement:

FIGURE 2

**WARNING:**

**CHOKING HAZARD--Children under 8 yrs. can
choke or suffocate on uninflated or broken balloons.
Adult supervision required.**

**Keep uninflated balloons from children.
Discard broken balloons at once.**

(3)(i) The advertising for any small ball intended for children three years of age or older shall bear the following cautionary statement:

FIGURE 3

**WARNING:**

**CHOKING HAZARD--This toy is a small ball.
Not for children under 3 yrs.**

(ii) The advertising for any toy or game intended for children who are at least three years old but less than eight years of age that contains a small ball shall bear the following cautionary statement:

FIGURE 4

**WARNING:**

**CHOKING HAZARD--Toy contains a small ball.
Not for children under 3 yrs.**

(4)(i) The advertising for any marble intended for children three years of age or older shall bear the following cautionary statement:

FIGURE 5



WARNING:

**CHOKING HAZARD--This toy is a marble.
Not for children under 3 yrs.**

(ii) The advertising for any toy or game intended for children who are at least three years old but less than eight years of age that contains a marble shall bear the following cautionary statement:

FIGURE 6



WARNING:

**CHOKING HAZARD--Toy contains a marble.
Not for children under 3 yrs.**

(e) *Abbreviated warnings for catalogues and other printed materials.* Abbreviated versions of the required cautionary statements are permitted in each individual product advertisement, provided that the corresponding full cautionary statements appear in the catalogue and a statement referring to the precise location of the full cautionary statements—such as the page number on which the cautionary statements can be found—is located at the bottom of each catalogue page that contains one or more abbreviated cautionary statements. If abbreviated cautionary statements are used:

(1) The full cautionary statements associated with the abbreviated cautionary statements shall appear:

(i) Near the beginning of the catalogue, before any catalogue pages that contain advertisements of products available for purchase, or

(ii) Adjacent to the ordering information or order form in the catalogue.

(2) The full cautionary statements shall be in conspicuous and legible type in contrast by typography, layout or color.

(3) The full cautionary statements shall be clearly numbered according to the following scheme:

Required cautionary statement	Number
16 CFR 1500.19(b)(1) ¹	1
16 CFR 1500.19(b)(2) ²	2
16 CFR 1500.19(b)(3)(i) ³	3
16 CFR 1500.19(b)(3)(ii) ⁴	4
16 CFR 1500.19(b)(4)(i) ⁵	5
16 CFR 1500.19(b)(4)(ii) ⁶	6

(4) The abbreviated cautionary statements shall consist of items 1500.20(e)(3)(i) through 1500.20(e)(3)(iv):

(i) A safety alert symbol substantially similar to that shown in figure 7.

FIGURE 7



(ii) The phrase, “CHOKING HAZARD,” written in capital letters.

(iii) Numbers, separated by commas and enclosed within a single set of parentheses, that identify the applicable cautionary statements for the product being advertised, followed by a period. These numbers shall match the numbers used to identify each full cautionary statement, as specified in 1500.20(e)(2).

(iv) A single prohibited age range written as either “Not for under 3 yrs” or “Not for under 8 yrs,” based on the most restrictive age range for all required cautionary statements for that product. Thus, if an advertised product requires the cautionary statement specified in 16 CFR 1500.19(b)(2), the prohibited age range in the abbreviated

cautionary statement shall be “Not for under 8 yrs.”

(v) For example, see Figure 8 for the abbreviated cautionary statement for an advertisement of a product that requires the cautionary statements specified in 16 CFR 1500.19(b)(1) and 16 CFR 1500.19(b)(2).

FIGURE 8

▲ CHOKING HAZARD (1,2). Not for under 8 yrs.

(f) *Alternatives to cautionary statements for individual product advertisements in catalogues and other printed materials.* Multiple identical full or abbreviated cautionary statements may be replaced with a single full cautionary statement under the following circumstances:

(1) If all products available for purchase within a catalogue require the same cautionary statement, that cautionary statement, in full, may appear on the front cover, or equally conspicuous location, of the catalogue in lieu of repeating the cautionary statement within the catalogue, provided that it is communicated to consumers that the cautionary statement applies to all products in the catalogue.

(2) If all products on one catalogue page or on two facing catalogue pages require the same cautionary statement, that cautionary statement, in full, may appear at the top of the page or pages in lieu of repeating the cautionary statement in each product advertisement, provided that it is communicated to consumers that the cautionary statement applies to all products on the catalogue page or pages.

(g) *Prominence and conspicuousness of labeling statements.* The type size of abbreviated cautionary statements shall be reasonably related to the type size of any other printed matter in the product advertisement, and must be in conspicuous and legible type by typography, layout, or color with other printed matter in the advertisement and separated from other graphic matter.

(h) *Business to Business Catalogue Exception.* The requirements of section 24(c) of the Federal Hazardous Substances Act, as amended by section 105 of the CPSIA, do not apply to catalogues and other printed materials distributed solely between businesses unless the recipient business is one that could be expected to be purchasing the product for the use of children (instead of for resale, e.g.). Examples of businesses that can be expected to be purchasing products for the use of children include day care centers, schools, and churches.

Note: This Appendix will not appear in the Code of Federal Regulations.

List of Relevant Documents

1. Memorandum from Robert Franklin, Directorate for Economic Analysis, to Barbara E. Parisi, Attorney, Office of General Counsel,

“Response to Comments Raising Economic Issues Associated with Section 105 of the Consumer Product Safety Improvement Act of 2008 (Concerning the Inclusion of Cautionary Labeling for Toys and Games in Catalogues and Other Printed Materials),” October 2008.

2. Memorandum from Timothy P. Smith, Engineering Psychologist, Division of Human Factors, Directorate for Engineering Sciences, to Barbara Parisi, Regulatory Affairs Attorney, Office of the General Counsel, “Response to NPR Comments and Revised Requirements for the Size and Placement of Cautionary Statements Specified in Section 105, Labeling Requirement for Advertising Toys and Games, of the CPSIA,” October 21, 2008.

3. Memorandum from Barbara E. Parisi, Attorney, Office of the General Counsel, to the Commission, “Response to Comments Raising Questions Regarding the Scope of the Labeling Requirements for Advertising Toys and Games,” October 24, 2008.

Dated: November 7, 2008.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E8-26964 Filed 11-14-08; 8:45 am]

BILLING CODE 6355-01-P

DEPARTMENT OF THE INTERIOR**National Park Service****36 CFR Part 7**

RIN 1024-AD71

Special Regulation: Areas of the National Park System, National Capital Region

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service (NPS) is finalizing regulations governing viewing of the Inaugural Parade by the Presidential Inaugural Committee. The rule also extends the permissible duration and extent of demonstrations and special events in Washington, DC, including the Inaugural, the Lighting of the National Christmas Tree and Christmas Pathway of Peace, the Cherry Blossom Festival, the Fourth of July Celebration, and the Smithsonian Folklife Festival.

DATES: *Effective Date:* November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Robbin Owen, National Park Service,

National Capital Region, National Mall and Memorial Parks, Division of Park Programs, 202-619-7225.

SUPPLEMENTARY INFORMATION:**Background**

On August 8, 2008, the NPS proposed a rule that applies to activities of the Presidential Inaugural Committee (PIC) for the Inaugural. The rule also proposed to clarify the application process and extend the permissible duration of demonstrations and special events in Washington, D.C., including the Inaugural, the Lighting of the National Christmas Tree and Christmas Pathway of Peace, the Cherry Blossom Festival, the Fourth of July Celebration, and the Festival of American Folklife (73 FR 46215). Persons and organizations interested in submitting comments were asked to submit them through the Federal Rulemaking Portal at <http://www.regulations.gov> or to the National Park Service's Division of Park Programs at 1100 Ohio Drive, SW., Room 128, Washington, DC 20242. NPS also issued a news release that alerted the media to the proposed rule, and copies were available at the National Capital Region's Division of Park Programs, where permit applications are submitted. Copies were also mailed to past applicants who had requested a permit to demonstrate on Federal parkland at Inaugural Parades.

As noted in the preamble to the proposed rule, Pennsylvania Avenue, is among the world's most famous streets and is located in the heart of the Nation's Capital. Americans throughout history have marched, paraded, promenaded, and protested their way up and down Pennsylvania Avenue. NPS recognizes that the Inaugural is a national celebration event for the benefit of all citizens, and that it is not a private event. Furthermore, park areas along Pennsylvania Avenue, must be available to the public as well as demonstrators for viewing the Inaugural Parade.

In recent litigation, the U.S. District Court for the District of Columbia determined that the NPS's practice and procedure of submitting a permit application on behalf of the PIC violated its regulations with respect to the duration of special events and the timing of the submission of the application (*ANSWER Coalition v. Kempthorne*, 537 F.Supp.2d 183 (D.D.C. March 20, 2008)). The Court stated,