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CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1234

[Docket No. CPSC- 2015-0019]

Revisions to Safety Standard for Infant Bath Tubs

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: In accordance with section 104(b) of the Consumer Product Safety Improvement Act of 2008 (CPSIA), the U.S. Consumer Product Safety Commission (CPSC), in March 2017, published a consumer product safety standard for infant bath tubs. The standard incorporated by reference the applicable ASTM voluntary standard. The CPSIA sets forth a process for updating standards that the Commission has issued under the authority of section 104(b) of the CPSIA. In accordance with that process, we are publishing this direct final rule, revising the CPSC's standard for infant bath tubs to incorporate by reference a more recent version of the applicable ASTM standard.

DATES: The rule is effective on January 15, 2019, unless we receive significant adverse comment by [insert date 30 days after publication in the FEDERAL REGISTER]. If we receive timely significant adverse comments, we will publish notification in the *Federal Register*, withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of January 15, 2019.

ADDRESSES: You may submit comments, identified by Docket No. CPSC-2015-0019, by any of the following methods:

Submit electronic comments in the following way:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail), except through www.regulations.gov.

Submit written submissions as follows:

Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions) to: Division of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to <http://www.regulations.gov>. Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

FOR FURTHER INFORMATION CONTACT: Keysha Walker, Compliance Officer, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: 301-504-6820; e-mail: kwalker@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Authority

A. Authority to Update Rules Issued Under Section 104(b) of the CPSIA

Section 104(b)(1)(B) of the CPSIA, also known as the Danny Keysar Child Product Safety Notification Act, requires the Commission to promulgate consumer product safety standards for durable infant or toddler products. The law requires that these standards are to be

“substantially the same as” applicable voluntary standards or more stringent than the voluntary standards if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product.

Section 104(b) of the CPSIA also sets forth a process for updating CPSC’s mandatory durable infant or toddler standards when the voluntary standard upon which such standards are based are modified. Section 104(b)(4)(B) of the CPSIA provides that if an organization revises a standard that has been adopted, in whole or in part, as a consumer product safety standard under this subsection, it shall notify the Commission. By statute, the revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the date on which the organization notifies the Commission (or such later date specified by the Commission in the Federal Register) unless, within 90 days after receiving that notice, the Commission notifies the organization that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard and that the Commission is retaining the existing consumer product safety standard.

B. Safety Standard for Infant Bath Tubs

The Commission issued a safety standard for infant bath tubs on March 30, 2017, codified at 16 CFR part 1234. 82 FR 15615. The bath tub standard incorporated by reference the then-current voluntary standard for infant bath tubs, ASTM F2670-17, *Standard Consumer Safety Specification for Infant Bath Tubs*. Paragraph 3.1.2 of ASTM F2670-17 defines an “infant bath tub” as a “tub, enclosure, or other similar product intended to hold water and be placed into an adult bath tub, sink, or on top of other surfaces to provide support or containment, or both, for an infant in a reclining, sitting, or standing position during bathing by a caregiver.” Paragraph

1.1 of ASTM F2670-17 specifically excludes “products commonly known as bath slings, typically made of fabric or mesh” from the scope of the standard. However, the preambles to proposed and final rules for infant bath tubs discuss that ASTM was working to include accessories in the standard.¹ In 2017, CPSC staff recommended proceeding with the final rule intending to update the mandatory rule after updating the voluntary standard to include infant bath tub accessories. *See March 15, 2017, Briefing Package regarding Staff’s Final Rule for Infant Bath Tubs Under the Danny Keysar Child Product Safety Notification Act, at 13-14.*²

C. Notification of Recent Revision

On July 19, 2018, ASTM officially notified the CPSC that ASTM published a revised 2018 version of ASTM F2670, approved on March 1, 2018. The revised ASTM F2670 includes bath tub accessories and specifies other minor changes, as discussed below in section II of this preamble. By statute, the revised ASTM F2670-18 shall be considered a consumer product safety standard issued by the Commission, effective 180 days after July 19, 2018 (January 15, 2019), unless the Commission specifies a later effective date in the *Federal Register*, or notifies ASTM within 90 days of July 19, 2018 (October 17, 2018) that the Commission has determined that the proposed revision does not improve the safety of infant bath tubs and that the Commission will retain ASTM F2670-17 as the mandatory standard.

¹ See Proposed Rule for Infant Bath Tubs: 80 FR 48769, 48770, 84772 (August 14, 2015) (noting that infant slings are excluded from the voluntary standard and that CPSC staff was working with two ASTM task groups created to address injuries associated with the use of infant bath slings); Final Rule for Infant Bath Tubs: 82 FR 15615, 15619 (March 30, 2017). Section IV.F of the final rule describes that the Commission is moving forward with a final rule while CPSC staff continues to work with two ASTM task groups to address the risk of injury associated with the use of infant bath slings. The final rule states that if the ASTM standard is revised to address infant bath slings, Commission staff will evaluate the revised standard and advise the Commission whether to update the mandatory standard to incorporate by reference any revised standard at that time.

² Available at: <https://www.cpsc.gov/s3fs-public/Final%20Rule%20-%20Safety%20Standard%20for%20Infant%20Bath%20Tubs%20-%20March%202015%202017.pdf>.

D. Updating the Incorporation By Reference

As reviewed in sections II and VI of this preamble, the Commission determines that the proposed revision in ASTM F2670-18 improves the safety of infant bath tubs, and therefore, will allow the revision to become a consumer product safety standard effective January 15, 2019. Accordingly, the Commission is revising the incorporation by reference in 16 CFR section 1234.2 to reference ASTM F2670-18.

II. Revisions to ASTM F2670

The 2018 revision to ASTM F2670 expands the scope of the voluntary standard to include accessories used with an infant bath tub, includes new performance tests for accessories used with infant bath tubs, and makes corresponding changes to product labeling and instructions. ASTM F2670-18 also includes several non-substantive changes that do not affect safety, such as spacing, formatting, and language stating that ASTM developed the standard in accordance with principles recognized by the World Trade Organization. None of these changes affects the safety of infant bath tubs. Accordingly, below we summarize the major revisions made in ASTM F2670-18.

A. Introduction and Scope

ASTM F2670-17 specifically excludes infant bath tub accessories from the bath tub standard. The revised ASTM F2670-18 now explicitly states that included within the scope of the standard are “slings, pads, inserts and similar accessories when such accessories are used with the infant bath tub.” Adding bath tub accessories to the scope of the standard improves the safety of infant bath tubs because the revision is intended to address product failure incidents involving accessories, which are now included with the sale of some infant bath tubs.

B. Terminology

The revised standard includes six new definitions to address the addition of infant bath tub accessories and other changes recommended by the ASTM subcommittee for consistency across juvenile product safety standards. New terms include “double action release system,” “fabric,” “infant bath tub accessory,” “product,” “protective component,” and “seam.” Paragraph 3.1.5 of ASTM F2670-18 defines “infant bath tub accessory” as a “component or product sold with an infant bath tub or sold separately and that is intended to be attached or placed on or in an infant bath tub for the purpose of supporting an infant during bathing by an adult caregiver.”³ Revisions in ASTM F2670-18 use this definition to expand the scope of the voluntary standard and apply new testing and labeling requirements to such products to reduce the risk of injury associated with the use of infant bath tub accessories used with an infant bath tub.

C. General Requirements

ASTM F2670-18 contains revised general requirements that now include infant bath tub accessories, such as the general requirement for *Resistance to Collapse*. Paragraph 5.4.1 requires that infant bath tub accessories must contain latching and locking mechanisms to prevent the unintentional collapse of the product with the infant in the product, using either a single or double action release system as described in paragraphs 5.4.1.1 and 5.4.1.2, and that meet the new testing requirements in section 7 of the standard. The majority of incidents noted in the proposed and final rules for infant bath tubs involved bath tub accessories that collapsed during

³ Paragraph 3.1.5.1 further explains that an infant bath tub accessory may also be used as a standalone product, but that mode is not covered by ASTM F2670-18. ASTM is currently working on a new voluntary standard to cover standalone infant bathers. Moreover, other bath tub accessories that are not intended to support an infant while bathing, such as soap, towel holder, water pump, or a shower handle, are also not included within the definition of “infant bath tub accessory.”

use. Accordingly, revising general requirements to address this risk of injury improves the safety of infant bath tubs when used with infant bath tub accessories.

Changes in paragraphs 5.7 and 5.8 of ASTM F2670-18 improve the safety of infant bath tub accessories by extending the existing requirements for protective components and toys to include infant bath tub accessories. Paragraph 5.10 of the revised standard, *Compliance with Multi-use Products*, is a new provision aimed at addressing infant bath tub accessories that can be used alone or with an infant bath tub. ASTM F2670-18 only applies to infant bath tub accessories when used with an infant bath tub. Paragraph 5.10 states that if an infant bath tub accessory can be used as a standalone product that is subject to a different standard, the product must be tested and comply with the requirements of that standard as well. Paragraph 5.10 ensures that infant bath tub accessories are tested to every applicable standard. This revision improves safety by ensuring that existing requirements apply to infant bath tub accessories, and by ensuring that all use modes of infant bath tub accessories are required to be in compliance with applicable standards.

D. Performance Requirements

Paragraph 6.4 of ASTM F2670-18 includes new performance testing for infant bath tub accessories, *Structural Integrity/ Attachment of Infant Bath Tub Accessories*. The new requirements include: static and dynamic load testing to ensure that accessories stay attached to the bath tub during use; integrity and strength testing for fabric and mesh accessories to ensure no material breakage, disengagement, detachment, or change in the ability to support an infant; and seam strength testing of fabric and mesh accessories to ensure a breakage strength of 30 lbf or greater. The addition of performance requirements for infant bath tub accessories improves safety because the requirements are intended to address the incident data reports involving infant

bath tub accessories, as described in the proposed and final rules for infant bath tubs, that previously were not covered by the voluntary or mandatory standard.

E. Test Methods

Paragraph 7 of ASTM F2670-18 contains the test methods to determine whether the product complies with the performance requirements in paragraph 6, including the new testing requirements for bath tub accessories. Revisions to paragraph 7.1, *Latching and Locking Mechanism(s)*, add 730 cycles of testing on latching and locking mechanisms for an infant bath tub accessory while maintaining 2000 cycles of testing on the bath tub. The number of cycles for testing accessories is lower than bath tubs, with the assumption that consumers will use the accessory for a shorter length of time (while the infant cannot sit up unassisted) than the bath tub. The addition of paragraphs 7.6 *Structural Integrity – Infant Bath Tub Accessory* and 7.7 *Mesh/Fabric Attachment Strength Test Method*, provide new testing requirements that correspond to the performance requirements in paragraph 6. For example, the test method for the dynamic load test acknowledges that infants are not stationary and move around on the accessories. The new test methods for infant bath tub accessories in paragraph 7 of ASTM F2670-18 adequately determine compliance with the performance requirements in paragraph 6 of the standard, and therefore improve safety.

F. Marking and Labeling

Revisions to the marking and labeling section in paragraph 8 of the 2018 revised standard include requiring the same drowning and fall hazard warnings on infant bath tub accessories as are on the bath tub, except “infant bath tub accessories” replaces “infant bath tub.” ASTM F2670-18 provides that manufacturers can use one set of labels, solely on the bath tub, if the warnings on the bath tub are visible while the accessory is in place, and the accessory can only

be used while on the bath tub. This requirement prevents over-labeling, which can lead to warning saturation and consumers disregarding warnings. To allow the single label on the bath tub to include the accessories, the hazard statements in paragraphs 8.5.1.1 and 8.5.2.1 were changed from “exactly as stated” to “shall address.” Use of the phrase “shall address” allows manufacturers to combine the infant bath tub and infant bath tub accessory hazard statements to be merged to read: “Drowning Hazard: Babies have drowned while using infant bath tubs and infant bath tub accessories.” When infant bath tub accessories are sold separately, ASTM F2670-18 requires that the drowning and fall hazard warnings appear on the retail packaging, unless such warnings on the product are not concealed by the packaging.

G. Instructional Literature

The requirements for instructional literature in paragraph 9 of ASTM F2670-18 have been broadened to include infant bath tub accessories, similar to the marking and labeling section of the revised standard (paragraph 8).

III. Incorporation by Reference

The Office of the Federal Register (OFR) has regulations concerning incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss, in the preamble to the final rule, ways that the materials the agency incorporates by reference are reasonably available to interested persons, and how interested parties can obtain the materials. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR’s requirements, section II of this preamble summarizes the substantive revisions in ASTM F2670-18 that the Commission incorporates by reference into 16 CFR part 1234. The standard is reasonably available to interested parties, and interested parties may purchase a copy of the standard from ASTM International, 100 Barr Harbor Drive, PO Box

C700, West Conshohocken, PA 19428-2959 USA; phone: 610-832-9585; <http://www.astm.org/>.

A copy of the standard can also be inspected at CPSC's Division of the Secretariat, U.S.

Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD
20814, telephone 301-504-7923.

IV. Certification

Section 14(a) of the CPSA requires that products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, be certified as complying with all applicable CPSC requirements. 15 U.S.C. 2063(a). Such certification must be based on a test of each product, or on a reasonable testing program, or, for children's products, on tests of a sufficient number of samples by a third party conformity assessment body accredited by the Commission to test according to the applicable requirements. Standards for durable infant or toddler products that are issued under section 104(b)(1)(B) of the CPSIA are "consumer product safety standards." Thus, the revised standard for infant bath tubs is subject to the testing and certification requirements of section 14 of the CPSA.

Because infant bath tubs are children's products, samples of these products must be tested by a third party conformity assessment body whose accreditation has been accepted by the Commission. These products also must comply with all other applicable CPSC requirements, such as the lead content requirements in section 101 of the CPSIA, the phthalates prohibitions in section 108 of the CPSIA, the tracking label requirement in section 14(a)(5) of the CPSA, and the consumer registration form requirements in section 104(b) of the CPSIA.

V. Notice of Requirements

In accordance with section 14(a)(3)(B)(iv) of the CPSA, the Commission has previously published a notice of requirements (NOR) for accreditation of third party conformity assessment bodies for testing infant bath tubs (78 FR 15836 (March 12, 2013) (final rule for 16 CFR part 1112); 82 FR 15626 (final rule for infant bath tubs updating part 1112)). The NOR provided the criteria and process for our acceptance of accreditation of third party conformity assessment bodies for testing infant bath tubs to 16 CFR part 1234 (which incorporated ASTM F2670-17). The NOR is listed in the Commission's rule, "Requirements Pertaining to Third Party Conformity Assessment Bodies." 16 CFR part 1112.

Staff's analysis of the new testing requirements in ASTM F2670-18 for infant bath tub accessories concludes that such testing does not require use of new or specialized equipment that is different than testing equipment for ASTM F2670-17. Staff states that testing accessories pursuant to ASTM F2670-18 requires use of existing testing equipment and similar testing protocols that are used to test infant bath tubs, with minor adjustments. For example, the new dynamic test for accessories uses the same testing equipment as the static load test already in the standard. Moreover, staff states that the revised standard provides clear instructions and figures to describe the load placement for accessory testing. Testing laboratories that have previously demonstrated competence for testing in accordance with ASTM F2670-17 will have the competence to test in accordance with the revised standard. Therefore, the Commission will consider the existing accreditations that CPSC has accepted for testing to ASTM F2670-17 to also cover testing to F2670-18. In this case, the existing NOR for this standard will remain in place, and CPSC-accepted third party conformity assessment bodies are expected to update the scope of the testing laboratories' accreditation to reflect the revised standard in the normal course

of renewing their accreditation. CPSC staff will notify all CPSC-accepted labs by direct email and will provide links to the *Federal Register* notice to explain the changes to the standard and the effective date.

VI. Direct Final Rule Process

The Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA) generally requires notice and comment rulemaking, section 553 of the APA provides an exception when the agency, for good cause, finds that notice and public procedure are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B). The Commission concludes that when the Commission updates a reference to an ASTM standard that the Commission has incorporated by reference under section 104(b) of the CPSIA, notice and comment are not necessary.

The process set forth in section 104(b)(4)(B) of the CPSIA specifies that when ASTM revises a standard previously incorporated by reference by the Commission as a durable infant or toddler product under section 104(b)(1)(B) of the CPSIA, the revision will become the new CPSC standard, unless the Commission determines that ASTM’s revision does not improve the safety of the product. Thus, unless the Commission makes such a determination, the ASTM revision becomes CPSC’s standard by operation of law. The Commission is allowing ASTM F2670-18 to become CPSC’s new standard. The purpose of this direct final rule is merely to update the reference in the Code of Federal Regulations (CFR), so that the CFR accurately reflects the version of the standard that takes effect by statute. Public comment will not impact the substantive changes to the standard or the effect of the revised standard as a consumer product safety standard under section 104(b) of the CPSIA. Under these circumstances, notice and comment are not necessary.

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

Unless the Commission receives a significant adverse comment within 30 days, the rule becomes effective on January 15, 2019. In accordance with ACUS’s recommendation, the Commission considers a significant adverse comment to be one where the commenter explains why the rule would be inappropriate, including an assertion challenging the rule’s underlying premise or approach, or a claim that the rule would be ineffective or unacceptable without change.

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

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that agencies review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603 and 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As

explained above, the Commission has determined that notice and comment are not necessary for this direct final rule. Thus, the RFA does not apply. We also note the limited nature of this document, which updates the incorporation by reference to reflect the mandatory CPSC standard that takes effect under section 104 of the CPSIA.

VIII. Paperwork Reduction Act

The infant bath tub standard contains information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The current revision to incorporate by reference a new version of ASTM F2670 makes no changes to the information collection previously established for infant bath tubs. Thus, the revision will not have any effect on the information collection requirements related to the standard.

IX. Environmental Considerations

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

X. Preemption

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that where a “consumer product safety standard under [the Consumer Product Safety Act (CPSA)]” is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury, unless the state requirement is identical to the federal standard. Section 26(c) of the CPSA also provides that states or political subdivisions of

states may apply to the Commission for an exemption from this preemption under certain circumstances.

Section 104(b)(1)(B) of the CPSIA refers to the rules to be issued under that section as “consumer product safety standards,” thus, implying that the preemptive effect of section 26(a) of the CPSA would apply. Therefore, a rule issued under section 104 of the CPSIA will invoke the preemptive effect of section 26(a) of the CPSA when it becomes effective.

XI. Effective Date

Under the procedure set forth in section 104(b)(4)(B) of the CPSIA, when a voluntary standard organization revises a standard upon which a consumer product safety standard issued under section 104(b) of the CPSIA was based, the revision becomes the CPSC standard within 180 days of notification to the Commission, unless the Commission determines that the revision does not improve the safety of the product, or the Commission sets a later date in the *Federal Register*. The Commission has not set a different effective date. Thus, in accordance with this provision, this rule takes effect 180 days after we received notification from ASTM of revisions to these standards. As discussed in the preceding section, this is a direct final rule. Unless we receive a significant adverse comment within 30 days, the rule will become effective on January 15, 2019.

List of Subjects in 16 CFR Part 1234

Consumer protection, Imports, Incorporation by reference, Infants and children, Labeling, Law enforcement, bath tub, and Toys.

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

PART 1234 – SAFETY STANDARD FOR INFANT BATH TUBS

1. The authority citation for part 1234 continues to read as follows:

Authority: The Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314, § 104, 122 Stat. 3016 (August 14, 2008); Pub. L. 112-28, 125 Stat. 273 (August 12, 2011).

2. Revise § 1234.2 to read as follows:

§ 1234.2 Requirements for infant bath tubs.

Each infant bath tub must comply with all applicable provisions of ASTM F2670-18, Standard Consumer Safety Specification for Infant Bath Tubs, approved on March 1, 2018. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from ASTM International, 100 Bar Harbor Drive, P.O. Box 0700, West Conshohocken, PA 19428; <http://www.astm.org/>. You may inspect a copy at the Division of the Secretariat, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301-504-7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to:

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

Alberta E. Mills,
Secretary, Consumer Product Safety Commission

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