

**BEFORE THE  
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION**

**JOINT COMMENTS  
OF  
AMERICAN HONDA MOTOR CO., INC.,  
AMERICAN SUZUKI MOTOR CORPORATION,  
ARCTIC CAT INC.,  
BOMBARDIER RECREATIONAL PRODUCTS INC.,  
KAWASAKI MOTORS CORP., U.S.A.,  
POLARIS INDUSTRIES INC., and  
YAMAHA MOTOR CORPORATION, U.S.A.**

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Children's Products Containing Lead: )  
Proposed Interpretative Rule on )  
Inaccessible Component Parts ) **SECTION 101 INACCESSIBLE COMPONENT PARTS**  
74 Fed. Reg. 2,439 (Jan. 15, 2009) )  
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**February 17, 2009**

## **I. INTRODUCTION**

American Honda Motor Co., Inc., American Suzuki Motor Corporation, Arctic Cat Inc., Bombardier Recreational Products Inc., Kawasaki Motors Corp., U.S.A., Polaris Industries Inc. and Yamaha Motor Corporation, U.S.A. (the “Companies”)<sup>1</sup> submit these comments in response to the Consumer Product Safety Commission’s (“CPSC”) proposed interpretative rule regarding inaccessible component parts.<sup>2</sup> The rule proposed by the CPSC fails to give effect to all of the language of the CPSIA. In particular, the proposed rule fails to take into account that accessible parts are only those that are accessible “through normal and reasonably foreseeable use and abuse,” which is in turn defined to include “swallowing, mouthing, breaking, or other children’s activities, and the aging of the product.” In order to give effect to the CPSIA’s language, the CPSC should focus on items that can be swallowed or put in a child’s mouth. If the Commission chooses not to take this approach, at a minimum, it should include a human factors related test in the interpretative rule to determine the areas of a product that are accessible to a child “through normal and reasonably foreseeable use and abuse” before utilizing the accessibility probe described in the proposed rule to determine what parts in those identified areas are actually accessible. By including either of these options in the proposed rule, unnecessary testing will be eliminated without any increased risk of lead ingestion by children.

## **II. RELEVANT STATUTORY PROVISIONS**

Section 101(a) of the CPSIA establishes a new limit of 600 ppm on lead content in any part of a children’s product. Section 101(b)(2)(A) of the Act provides that this lead content limit

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<sup>1</sup> The Companies are manufacturers, importers and/or distributors of youth model all-terrain vehicles (“ATVs”), intended for children 12 years of age and younger. Four of the Companies – American Honda Motor Co., Inc., American Suzuki Motor Corporation, Kawasaki Motors Corp., U.S.A., and Yamaha Motor Corporation, U.S.A. – also manufacture, import and/or distribute off-road motorcycles intended for children 12 and younger.

<sup>2</sup> These comments are supported by two technical reports prepared by Applied Safety and Ergonomics, Inc. in Ann Arbor, Michigan, copies of which are attached at Appendices A and B.

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 of such product, as determined by the Commission." The Act further states that reasonably foreseeable use and abuse shall include "swallowing, mouthing, breaking, or other children's activities, and the aging of the product."

The Commission has taken the position that the statute defines accessibility as physical contact with lead containing parts, apparently based on the example in the law that states that a component is not accessible if it "is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through normally foreseeable use and abuse of the product." However, this is only an example. The statute does not indicate that this is the only circumstance in which a component part is not accessible to a child through normal and reasonably foreseeable use and abuse of the product and the language of the law suggests a broader scope to defining inaccessibility. First, the statute commits the question of the accessibility of particular components through normal and reasonably foreseeable use and abuse to a determination by the Commission. In addition, by defining reasonably foreseeable use and abuse as including "swallowing, mouthing, breaking or other children's activities," the statute clearly provides that a human factors analysis of how a child interacts with the product is to be part of that determination, and its language relating to swallowing and mouthing suggests that the proper inquiry for accessibility should focus on whether parts are ingestible or mouthable. To the extent that the proposed interpretative rule ignores the reference to swallowing and mouthing and focuses only on physical contact in defining accessibility, we suggest that this interpretation is inconsistent with the law as written and request that the Commission reconsider it in light of the reference to mouthing, swallowing, etc.

### III. COMMENTS ON PROPOSED GUIDANCE FOR INACCESSIBLE COMPONENT PARTS

#### A. Interpretation of “Accessible” Components

As previously noted, Section 101(b)(2) of the CPSIA provides that the lead limits do 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 of the product. Section 1500.87(b) of the proposed interpretative rule contains a purported restatement of this statutory provision (i.e. “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”) which erroneously omits the essential qualification “through normal and reasonably foreseeable use and abuse of such product.” This omission of a fundamental component in the statutory calculus for determining accessibility infects the entire proposed interpretative rule. For example, the preamble states that “the CPSIA specifies that accessibility is defined as physical contact with lead-containing component parts” while likewise omitting the key qualifier “through normal and reasonably foreseeable use and abuse” of the product. 74 Fed. Reg. at 2440. While the statute contains no such specification of general applicability, this mistaken reading in turn has led the Commission to wrongly accept a staff recommendation to consider that an accessible component of a children’s product “is one that a child may touch,” and that an inaccessible component part is one that is located inside the product and “not capable of being touched” by the child (emphasis added). In fact, the correct interpretation, in view of the omitted statutory language, is to consider that an accessible component part is one that a child can mouth or ingest as a result of or during normal and reasonably foreseeable use and abuse of the product or, in the alternative, as one a child will actually touch during such use or abuse. An inaccessible component part is conversely one that a

child cannot mouth or ingest or alternatively does not touch during normal and reasonably foreseeable use and abuse of the product.

When properly interpreted, the determination of whether a component part is accessible and thus subject to the lead limits necessarily involves a human factors analysis of how children 12 or younger interact with the product during normal and reasonably foreseeable use and abuse. This is further confirmed by the fact that the statute specifically defines “reasonably foreseeable use and abuse” as including various children’s behaviors (i.e. “swallowing, mouthing, breaking, or other children’s activities”) in interacting with the product. Thus, as the proposed rule recognizes, use and abuse testing provide one measure of breakage that can lead to ingestion or exposure.

The improper interpretation that an “accessible” component is any part that a child may conceivably touch may not make a significant difference for small items where a child will foreseeably contact all external components on a recurrent basis during use and abuse of the product. However, it results in a sweepingly over-broad application of the lead content requirements to large, complex children’s products such as youth ATVs and off-road motorcycles with literally hundreds of different parts that conceivably could be touched but which a child will in fact never ingest, swallow, or contact during reasonably foreseeable use and abuse of the product.

This overbroad interpretation will result in the lead content requirements applying to hundreds of parts that a child will not contact when using or even abusing the product and which thus present no risk of lead exposure. By definition, if a child cannot contact a part, the issue of ingestion or swallowing is irrelevant, and, if he or she can contact it but not swallow or mouth it, the harm that Congress sought to address is virtually not existent. Conversely, subjecting these

parts to the third party testing and certification requirements for lead content will impose substantial economic cost on the manufacturers with no commensurate safety benefit to consumers.

Further, this interpretation may ultimately result in discontinuance of these product lines because some of these parts are made from metal alloys which unavoidably contain small quantities of lead in excess of the CPSIA limits – although not in excess of the lead limits set forth in various European Union Directives for such alloys in motorized vehicles and motorcycles. (The lead in these metal alloy components is unavoidable either because small amounts of lead are needed for safe operation or functionality of the part, or because lead cannot feasibly be removed from recycled materials.)<sup>3</sup> By potentially making new youth ATVs unavailable to consumers, this interpretation may ultimately lead to greater inappropriate use by children 12 and under of adult-sized ATVs on which they are at substantially greater risk of serious acute injury or death.

**B. Test Methods**

This misreading of the lead content requirements as applying to any component part that a child might conceivably touch rather than component parts that a child will swallow or ingest or, in the alternative, actually touch during normal and reasonably foreseeable use and abuse of the product has likewise led the Commission to propose an inappropriate test method for determining “accessibility.” The Commission is proposing that the accessibility probe specified for sharp points or edges under 16 C.F.R. §§1500.48 and 1500.49 be used to determine the

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<sup>3</sup> Based on analysis circumstances and European Union Directives, CPSC has issued an interim final rule exempting components made of these same metal alloys in electronic devices from the CPSIA lead content limits on the grounds that the presence of lead is necessary for proper functioning of the components and substitution of the lead is not yet technologically feasible. 74 Fed. Reg. 6990, 6992 (Feb. 12, 2009).

accessibility of lead-containing component parts of children's products. The component part would be considered accessible if it is contacted by any portion of the specified segment of this accessibility probe during a one-time touch test.

The sharp point test is designed to identify potential risks of acute injury in the form of puncture or laceration from a single touch of the point. 16 C.F.R. §1500.48(a). The test method for sharp edges is likewise intended to identify potential risks of acute injury in the form of laceration or avulsion from a single touch of the edge. 16 C.F.R. §1500.49(a). In each case, the potential acute injury can or will occur from the contact itself with the sharp point or edge.

In contrast, the lead content limits of the CPSIA are aimed at preventing the hazard of exposure to lead, primarily through chronic ingestion or absorption. While lead poisoning may occur from the one-time ingestion of a small object containing lead, it does not result from a one-time touching of an in-place component part containing lead. The Commission's proposed use of a test method for determining potential risks of acute injury in the form of puncture, laceration or avulsion resulting from a single touch to determine the potential risk of chronic lead exposure from recurrent touching and hand-to-mouth ingestion of lead is neither technically nor scientifically appropriate.

Consequently, the proposed rule should be changed to incorporate a human factors related component to ensure that only things that will be swallowed or mouthed, or, in the alternative, touched during normal and reasonably foreseeable use and abuse are deemed accessible. For example, as outlined above, human factors experts would likely conclude that the entire surfaces of certain smaller items would be accessible (ingestible, mouthable or touchable); whereas, many portions of a youth ATV such as suspension and engine components would not be considered accessible because, although capable of being touched, it is simply not

foreseeable that they would in fact be touched by children 12 and under or otherwise accessible in a manner that would allow them to be mouthed or swallowed. If the Commission chooses to base its definition of accessibility on touching rather than swallowing or mouthing components, including a human factors component in the proposed rule would still allow the use of the accessibility probe, but its use would be limited to those areas of a product that a child will contact during normal and reasonably foreseeable use and abuse. In that circumstance, combining appropriate human factors analysis of foreseeable use and abuse with the use of an accessibility probe is essential to give proper effect to the express statutory factors established by Congress, and would more than adequately protect children from the risks of lead exposure while eliminating the cost and burden of unnecessary testing of component parts that simply will not be swallowed, mouthed, or touched by children in reasonable foreseeable circumstances.<sup>4</sup>

#### **IV. ACCESSIBILITY OF COMPONENTS DURING REASONABLY FORESEEABLE USE AND ABUSE OF YOUTH ATVS AND OFF-ROAD MOTORCYCLES**

Youth model ATVs are intended and recommended for use by children from 6 to 12 years of age. Small models of off-road motorcycles are similarly intended for use by children in this same age range.

As an initial matter, it bears emphasis that we are not aware of any scientific data showing any ingestion or absorption by children ages 6 to 12 of lead from component parts of youth model ATVs or small model off-road motorcycles during normal and reasonably foreseeable use and abuse of these products. Further, the scientific literature shows that children

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<sup>4</sup> We agree that the Commission's proposed use of the test methods in 16 C.F.R. §§1500.50 through 1500.53 for simulating normal use and reasonably foreseeable damage or abuse of articles is appropriate for determining whether any components may become detached in a shape or size which is ingestible or mouthable by younger children. In addition, the Commission has correctly determined that the intentional disassembly or destruction of products by children, including use of tools, should not be considered in evaluating products for accessibility of lead-containing components.

ages 6 to 12 do not exhibit the types of compulsive and indiscriminate “mouthing” and “swallowing” behaviors that have been observed in younger children 3 years of age and under. See S. Young, T. Rhoades, J. Diebol, “Comments on Consumer Product Safety Improvement Act (CPSIA) Section 101 Lead in Children’s Products: All-Terrain Vehicles and Off-Highway Motorcycles” (October 31, 2008) at 1-4 (attached hereto as Appendix A). Hand-to-mouth behaviors are also expected to be infrequent for children ages 6 to 12. See S. Young, R. Shah, T. Rhoades, J. Diebol, “Comments on Consumer Product Safety Improvement Act (CPSIA) Section 101 Inaccessible Component Parts: All-Terrain Vehicles and Off-Highway Motorcycles,” (February 17, 2009) at 7 (attached hereto as Appendix B).

In addition, ATVs and off-road motorcycles are gasoline-containing products that typically are not stored in the home. Given their value and mobility, these vehicles are normally stored in secure locations such as sheds or garages to which children 3 and under should not (and are not reasonably expected to) have unsupervised access. Moreover, all ATV and off-road motorcycle operators, including children 12 and under, are advised in on-product labels and in owner’s manuals and training courses to always wear protective clothing and gloves during operation. Nonetheless, it is reasonably foreseeable that at least some children age 6 through 12 may choose not to wear gloves when operating youth model ATVs and off-road motorcycles.

In determining parts that are accessible, human factors experts look at parts of a product that children are instructed to touch to utilize the product; parts that, although not instructed to touch, it is foreseeable that a child will touch while utilizing a product and other parts that a child may reasonably be expected to contact while on or around the product. With regard to youth ATVs, human factors experts have concluded that children are instructed to touch things such as the handgrips and brake and throttle levers as part of the normal operation of the vehicle. They

have also determined that children, although not instructed to do so, would also touch things like the choke knob and the pull cord starter. Finally, while sitting on or standing around an ATV, children would touch things like the fenders and gas cap.

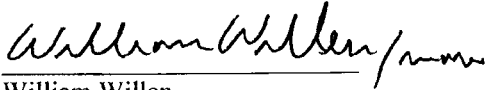
Conversely, human factors experts have concluded that it is not foreseeable that children would touch things like the engine, suspension, exhaust pipe. As an initial matter, it is not ergonomically comfortable, or in most cases even possible, to come in contact with these component parts when the operator is in the riding position. Furthermore, owner's manuals and trade association safety publications and training materials specifically instruct parents to be responsible for both pre-ride checks and periodic maintenance of the vehicle. Children 6 through 12 therefore cannot reasonably be expected to engage in repair or maintenance of the above type of components, which are in the vehicle's sub-structure, during normal or reasonably foreseeable use and abuse. Accordingly, they would not be deemed accessible and subject to the probe.

## **V. CONCLUSION**

The Companies appreciate the opportunity to submit these comments and look forward to working with CPSC in the implementation of the CPSIA lead content requirements. However, the Commission's proposed interpretation of "accessible" components erroneously fails to focus on analysis and consideration of whether a child will have contact with a component through normal and reasonably foreseeable use and abuse of the product, let alone on whether that contact will occur in a manner that can result in mouthing or ingestion. In addition, CPSC inappropriately proposes to identify accessible components by using the "single touch" test method for sharp points and edges that present a hazard of acute injury from a potential single contact without any analysis of those components that it is foreseeable that a child will actually touch. If touching is to be the standard, adding a human factors element to determine the areas

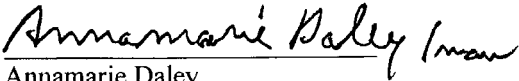
of a children's product that it is foreseeable that a child will actually touch, before using the accessibility probe will give full effect to the language of the CPSIA while ensuring that children are protected from lead exposure during normal and foreseeable use and abuse of the product.

Respectfully submitted,



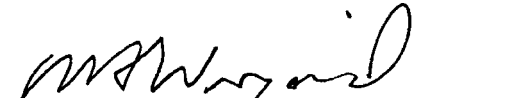
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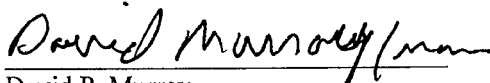
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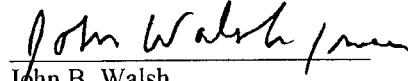
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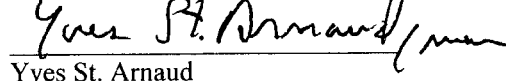
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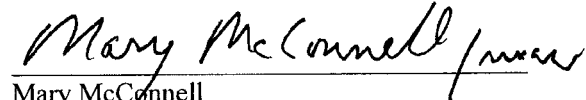
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