such an item is an article subject to the CSPA, the package of the item requires labeling.

8. Educational Materials and Mail Order Sales

a. Sales to Educational Institutions

One commenter questioned whether packages of toys or games sold exclusively to schools through catalogs require labeling. The primary purpose of the CSPA is to provide a point-ofpurchase warning of the hazards that products intended for older children present to children under three. Inasmuch as children under three are not typically present in a traditional school setting, requiring labeling on toys and games sold by mail solely to educational institutions such as kindergartens and elementary schools for use *exclusively* in those institutions would not accomplish the purposes of the CSPA. Accordingly, such items are excluded from the scope of the regulation, as long as the items are intended for children five and up. This age limitation is specified because products intended for three and four year old children may be sent to preschools or institutions such as day care centers where children under three may be present.

b. Mail Order Sales

A few commenters questioned whether the CSPA applies to products distributed to consumers through the mail, and, if so, whether it is sufficient to label just the mailing wrapper or whether both the product package and outer wrapper require labeling. Products exclusively distributed by mail are subject to the CSPA. Since the CSPA contemplates point-of-purchase inspection, firms can comply with the law by conspicuously labeling either the immediate product package or the outer wrapper. Such labeling need not be lithographed or printed on the wrapper. The use of a stamped label will suffice. The Commission notes that, if a product sold by mail is also sold in retail outlets, the retail package itself must be labeled.

9. Practices Under the Small Parts Regulation

The Commission's regulations addressing the choking hazards associated with toys and articles intended for children under three that contain small parts establish tests to determine whether such products will emit small parts under reasonably foreseeable conditions of use or abuse. They also exempt from the banning provisions specific items including writing materials (such as crayons, chalk, pencils and pens), books and other articles made of paper, modeling clay, and finger paints, watercolors, and other paint sets. Commenters questioned whether these policies apply to items regulated under the CSPA.

a. Use and Abuse Testing

The proposed rule did not include a requirement for "use and abuse" testing of toys and games. The rule noted that the Commission lacked sufficient information to establish the need to apply use and abuse tests to toys and games intended for children between three and six years of age, or on the costs associated with imposing such requirements. In addition, the decision not to require use and abuse testing was based on the language of the CSPA which referred to toys or games that "include" a small part.

Commenters split on the issue of applying use and abuse tests to toys and games. Consumer advocates favored requiring such tests, arguing that the failure to do so might mislead parents into believing a product without labeling is safe, even though small parts might detach from the product during play. Industry commenters, arguing against the requirement, contended that hazard and injury data do not support the need to impose such testing.

Given the absence of data relating to the costs of imposing such requirements and any potential benefits, the final rule retains the position expressed in the proposed rule and does not require use and abuse testing. Moreover, the Commission continues to believe that a reasonable reading of the phrase "includes a small part" provides a basis for concluding that Congress did not intend to require use and abuse testing.

The Commission notes that commenters exhibited confusion about the applicability of use and abuse tests to solid items that are intended to be removed or separated from toys or games during play or use, such as accessories for action figures and battery covers that are not screwed shut, or to items such as strip magnets that are designed to be divided into individual components. Under the Commission's existing policies, such items are evaluated by detaching them without applying use and abuse testing and placing them in the test cylinder. Similarly, if, as is discussed infra., the Commission decides that products that are currently exempt from the small parts regulation require labeling, items such as modeling clay and play dough, which separate into multiple pieces of varying sizes during use, will be evaluated without compression in the

form and shape in which they are sold at retail.

b. Exempt Products

The proposed rule was silent on the applicability of the CSPA to products that are exempt from the small parts regulation under 16 CFR 1501.3. Furthermore, there is no express reference in the CSPA or its legislative history to the status of products that are exempt from the small parts requirements. Commenters argued that the inclusion of balloons, which are expressly exempt from the small parts regulation, in the CSPA could be construed as an indication that Congress knew how to include exempt products within the scope of the statute when it wanted to. Since Congress only singled out balloons for coverage, other exempt products would not require labeling. Others contended that requiring products exempt from small parts testing to be labeled would also create an apparent inconsistency. For example, a felt tip marker intended for children between three and six years of age with a cap that is a small part would require labeling (assuming, of course, that the item is a toy), but the same item would require neither labeling nor compliance with the small parts regulation if it were intended for children under three.

Other commenters noted that the purpose of the exemptions to the small parts regulation was to avoid banning functional products which could not be produced in compliance with the small parts requirements. These commenters argued that labeling provides a reasonable alternative to alert parents purchasing toys and games for older children to the potential hazards such products may present to younger children. Furthermore, unlike the small parts performance requirements, labeling such items would not affect their ability to be produced and sold.

In its vote on the final rule, the Commission divided on the issue of whether toys and games that are exempt from the small parts regulation, if they are intended for children under three, require labeling under the CSPA, if they are intended for children three through five years of age. Accordingly, that issue will remain unresolved until such time as a majority of the Commission concurs on its resolution. Pending that resolution, toys and games that are exempted from the requirements of the small parts regulation by 16 CFR 1501.3 are not required to bear labeling under the act. However, even if the Commission elects to require labeling for exempt products, paper punch-out toys and games will still be exempt from the labeling requirements, since there is