



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING
July 20, 2011

Chairman Inez M. Tenenbaum convened the July 20, 2011, meeting of the U. S. Consumer Product Safety Commission at 10:00 a.m. in open session. Commissioners Thomas H. Moore, Nancy A. Nord, Robert S. Adler and Anne M. Northup were also in attendance. Chairman Tenenbaum made welcoming remarks.

Hearing - Agenda and Priorities for Fiscal Year 2013 Budget

Chairman Tenenbaum explained the purpose of the hearing and introduced the presenters: Ami Gadhia, Policy Counsel, for Consumers Union, presenting on behalf of Consumers Union, Kids in Danger, Consumer Federation of America and Public Citizen; Beth Scott, Regulatory Affairs Manager, The American Association of University Women; and Stephen Lamar, Executive Vice President, American Apparel and Footwear Association. After the presentations, each panel member responded to questions and comments from the Commissioners about the priorities of the Commission's activities. No decisions were made in this portion of the meeting.

Decisional Matter – ASTM F 963 Notice of Requirements - Third Party Testing for Certain Children's Products; Toys: Requirements for Accreditation of Third party Conformity Assessment Bodies (Ref: staff briefing packages dated June 29, 2011.)

Chairman Tenenbaum introduced the decisional matter and requested that the General Counsel Cheryl Falvey provide a briefing on the hypothetical timeline scenarios should ASTM revise the ASTM International's *Standard Consumer Safety Specification for Toy Safety*, F 963-08, and section 4.27 (toy chests) from ASTM International's F963-07ε1 version of the standard. After the briefing the Commissioners discussed and commented on the matter. Jan Carlson, General Attorney, Office of General Counsel, Robert J. Howell, Director of the Office of Hazard Identification and Reduction ("EXHR"), and Jonathan D. Midgett, Engineering Psychologist, Division of Human Factors, responded to questions from the Commissioners.

Chairman Tenenbaum moved that the Commission adopt a "Manager's Amendment in the Nature of a Substitute" to incorporate certain concepts in the staff draft *Federal Register* notice entitled, "Third Party Testing for Certain Children's Products; Toys; Requirements for Accreditation of Third Party Conformity Assessment Bodies." Commissioner Adler seconded the motion. Chairman Tenenbaum summarized and highlighted the changes, including a stay of enforcement until December 31, 2011. Chairman Tenenbaum called for discussion on the substitute amendment. Hearing no discussion, Chairman Tenenbaum called the question. The Commission voted unanimously (5-0) to adopt the "Manager's Amendment in the Nature of a

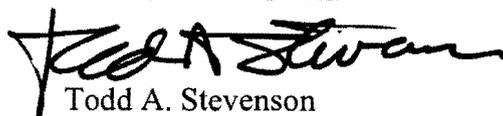
Substitute.” Chairman Tenenbaum and Commissioners Nord and Adler made statements and comments about the matter.

After discussion about the amendments, Chairman Tenenbaum moved that the Commission approve publication of the document entitled the “Manager’s Amendment in the Nature of a Substitute” for Third Party Testing for Certain Children’s Products; Toys; Requirements for Accreditation of Third Party Conformity Assessment Bodies, as amended, in the *Federal Register*. Commissioner Adler seconded the motion. Chairman Tenenbaum called for discussion. Hearing no discussion, Chairman Tenenbaum called the question. The Commission voted unanimously (5-0) to approve publication of the amended document in the *Federal Register*. Chairman Tenenbaum and Commissioners Nord and Adler made statements and comments about the matter.

Chairman Tenenbaum, and Commissioners Nord and Adler issued the attached written statements about the matter.

There being no further business on the agenda, Chairman Tenenbaum adjourned the meeting at 12:30 p.m.

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson". The signature is written in a cursive, somewhat stylized font.

Todd A. Stevenson
Secretary to the Commission

Attached: Statement of Chairman Tenenbaum
 Statement of Commissioner Nord
 Statement of Commissioner Adler



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CHAIRMAN INEZ M. TENENBAUM

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE VOTE TO ISSUE THE NOTICE OF REQUIREMENTS FOR THE FEDERAL TOY SAFETY STANDARD, ASTM F-963, AS APPROVED BY THE U.S. CONSUMER PRODUCT SAFETY COMMISSION

July 21, 2011

Yesterday, the Commission took another key step forward in the process of strengthening consumer confidence by ensuring that safer toys are on the market and in the hands of our nation's children. This safety-driven action occurred in the form of a unanimous Commission vote to issue the notice of requirements for accreditation of third party conformity assessment bodies for testing to ASTM F-963, the basis of the federal toy safety standard. Accrediting laboratories may not sound like much, but putting in place procedures that will require meaningful, independent third-party toy testing is a vital and necessary part of the process of providing parents with much greater peace of mind when standing in the toy store and when watching their children at play.

More than two years ago, in response to a wave of unsafe and violative toys in the marketplace, such as small magnets that detached from toys, chemical contaminants in and on children's products, and detachable small parts that killed or seriously injured several children, Congress said enough was enough and directed the Commission to implement mandatory toy safety standards. The inclusion of a federal toy safety standard in the Consumer Product Safety Improvement Act gave CPSC the authority to implement and enforce those rules. Under my leadership, CPSC has been steadily improving the requirements for toy safety by, for instance, putting in place limits on lead paint, total lead content and phthalates, while also implementing stronger federal safety standards for toys.

We have not accomplished all of this on behalf of our nation's children alone, however. Many toy manufacturers share our belief that an unwavering commitment to child safety can also be good business, and they are continually working to strengthen the voluntary toy safety standards that CPSC ultimately adopts, in whole or in part, as federal law. Those partners in industry also recognize that certification of a toy through independent testing is a selling point for companies. They can tell their customers that their toys passed some of the most rigorous safety standards in the world.

Without taking our eye off the agency's core safety mission, we have also worked diligently to provide time for relevant stakeholders to, as necessary, align their products with this standard. However, any further delay would be unwarranted. While I believe a wide array of toys should be, and will continue to be, available on the market, I also believe safety must always come first.

Staying true to CPSC's core mission and working to protect children by ensuring that only compliant toys are on the market should not be a controversial effort. However, not all of my

fellow Commissioners apparently agree. I reject the notion that delaying this action would somehow lead to a better result for the safety of our nation's children. The notice of requirements we approved yesterday was consistent with our approach of being transparent and open to public input, while also providing reasonable flexibility for manufacturers.

Calls for further pauses are difficult to see as anything other than wishes for delays (that would come at a real safety cost) in the hopes the underlying legal requirements will be watered down. But like justice, safety delayed is safety denied.

The Consumer Product Safety Commission under my stewardship will have no part of that. I would like all consumers, as well as manufacturers of all sizes, to know that we have carefully balanced any legitimate timing and compliance concerns with our Congressional mandate to require the third party testing of toys to the federal toy standard. We must protect our children by ensuring only safe toys are on the market. I will accept nothing less.



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STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE THE NOTICE OF REQUIREMENTS FOR THE TOY STANDARD, ASTM F-963

July 20, 2011

I voted today to issue notice of requirements (NOR) for testing toys to the current standards of the American Society for Testing and Materials (ASTM standard F 963), which Congress directed in the CPSIA to be a mandatory standard. My vote is not without reservation.

I joined in the majority's vote only because of a negotiated agreement that we would stay enforcement of the testing mandate through December 31, 2011. Had we not reached this compromise, the testing requirement would have landed in the market's lap in mid-October, just as stores are making their final preparations for the holiday season and small toy manufacturers are at the peak of filling orders. While I am relieved that companies will now have some time to find their way through the maze we have created, I have major concerns about why we are rushing to impose testing requirements to a standard we know is about to change.

The ASTM F 963 has become a mandatory safety standard by operation of law. According to the CPSIA, as ASTM updates the standard, those changes become mandatory in 180 days unless the CPSC, within 90 days, determines that they should not. Also under the CPSIA, third-party testing requirements to children's product safety standards become mandatory 90 days after we issue notice of requirements. We are able to issue this NOR without following the Administrative Procedures Act (APA), with its notice and comment requirement, because the CPSIA allows avoiding the APA until August 14, 2011. After that, we must ask for and consider public input. Therefore, by putting out the NOR today, (1) we did not need to ask for and consider public comment, but (2) we did need to stay enforcement to prevent an unnecessary economic train wreck for the toy industry immediately prior to the holidays.

To be clear, I certainly support the goal of making sure toys are as safe as they can be and I have no problem with the principle of giving industry a clear standard with a deadline to further that goal. The problem I have is that we today required industry to test to one standard, knowing the standard is about to be revised. When the stay of enforcement is lifted on January 1, 2012, most likely we will be requiring testing to an outdated standard. This puts manufacturers and retailers potentially in the situation of having to do redundant or perhaps irrelevant testing – testing mandated by the CPSC to the old standard and testing mandated by the marketplace to the new standard. Because we are taking the position that these testing requirements are rules and can only be changed (after August, 2011) by notice and comment rulemaking, there is virtually no way to get the new notice of requirements in place and labs accredited before the standard becomes effective. This puts toy manufacturers in an untenable position. Our response is that we will address these problems as they come up but, of course, in the real world, this is no response at all to the potential for confusion we are creating.

While the statute itself creates this timing problem for future updates of the toy standard (and therefore should be amended to address this issue), the choice to create the initial confusion was ours. ASTM has told us they are almost done with a comprehensive revision of their standard. This revision is expected out before year's end. Our notice of requirements could have been timed to correspond to this update. Had we done this, we would be putting out one testing requirement in early January, rather than putting out a soon-to-be-obsolete requirement now, staying its enforcement until January, and initiating rulemaking on a new NOR which will be next-to-impossible to finish before the requirements of the revised F 963 go into effect.

However, if we waited, as sound regulatory policy would direct, we would have had to seek comments from the public. Apparently this public input process is too much of a burden for the agency, so if we have the opportunity to skirt the requirement we are more than happy to do that. Like a teenager with dad's car keys, we want to squeeze in as much joy-riding as we can before the curfew hits. Our hasty decision does not achieve a net safety benefit, but it unfortunately does make things much more difficult than they need to be for the companies that are trying to understand and follow the law.

In a very slight nod to good administrative practice, the majority did accept my request that we at least consider comments to the NOR. I recognize that this is totally outside the administrative process but the expectation is that if substantive comments indicate that a mid-course correction to the convoluted path we have built is called for, the staff will present these corrections for consideration. I am also pleased that the staff is working on an outreach plan to try to minimize the inevitable confusion we are creating and I look forward to hearing from the public on this issue as well.

With its vote today, the CPSC has once again opted for rash action over rational action, to the quick and easy over the thoughtful and transparent. We know how to do better rulemaking; unfortunately, the majority today decided to push the 'quick' button instead of the 'pause and think' button.



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SUPPLEMENTAL STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE THE NOTICE OF REQUIREMENTS FOR THE TOY STANDARD, ASTM F-963

July 29, 2011

In the past, it has been the general practice for Commissioners to explain the reasoning behind their votes in written statements. However, those written statements were not generally used as opportunities to either rebut or attack the written statements of other Commissioners. There is a good reason for our practice. Without this understanding, obviously the Commissioner writing last has the last word, and the public will be forced to navigate a potentially endless merry-go-round of statements as one responds to the other.

Commissioner Adler used his statement on our vote on laboratory accreditation requirements for ASTM F963 to specifically and directly rebut my written statement in which I explained my vote. What is especially extraordinary about this is that he and I voted the same way. Nevertheless, he disagrees with my reasoning for my vote and wanted to let the world know why. Because his statement is so off-base, both in practice and as to the substance, I am issuing this supplemental statement addressing his arguments as they relate to my statement.

With respect to the issuance of the NOR triggering testing to the ASTM toy standard, Commissioner Adler apparently thinks that I am merely seeking delay for the sake of delay to the detriment of safety. He makes the unsupported statement that “a number of manufacturers have ignored this important safety standard” and that they have “gambled” they will not get caught, implying that somehow I agree with this result. Of course, the toy standard has been in place as a mandatory standard since 2009. Of course it is illegal to violate that standard. Commissioner Adler has cited no evidence to support his allegation of widespread violations of the standard. Since some at the agency have asserted that a high level of compliance translates into lower recalls, take note the number of toy recalls is down. And lofty motives do not turn gratuitous attacks on an industry into the truth; that is beneath a CPSC Commissioner.

My motivation in arguing for tying our notice of testing requirements to the most current standard is *not* to give a break to industry. It is to minimize confusion and cost—which will result in a better safety outcome. Nevertheless, he argues that ASTM is always changing its standards and those currently under consideration are “routine.” According to both our staff and ASTM, while some of the proposed changes are indeed routine, that is not true of all and some (such as that for yo yo balls) change the required test method. However, regardless of the magnitude of the changes, since we are now mandating testing to a standard that we think will be revised this fall, the fact remains that we are potentially requiring testing to an outmoded standard.

While Commissioner Adler dismisses the problems with doing this, those problems do remain. The reality is that once a new ASTM standard is issued, the marketplace will require testing to that standard.

This has nothing to do with “jumping the gun” but everything to do with retailer demands. The end result is the same. Retailers will require testing to a new standard and the CPSC will require testing to the old one. If the standards perfectly overlap there is no problem; if they do not, then there necessarily will be redundant testing. Commissioner Adler’s discussion of our ability to “grandfather” testing does not address this concern.

The problem is exacerbated in the future by the statutory requirement that revisions to the NOR initiated after August 14, 2011, be done with notice and comment rulemaking which, as was described to the Commission during the staff briefing, will make it very difficult for the statutory requirements to synchronize with the established ASTM process. While Commissioner Adler is correct that this timing problem will occur again and again in the future, the one time when we could have made it work relatively smoothly would have been with the currently proposed F 963 revisions, assuming they come out this fall. Had we waited and issued the NOR to reference the new standard, while we would have had to put this out for notice and comment, we would be ready to make the required testing to the updated standard effective in early 2012. If ASTM, in fact, did not amend their standard, then we would be in the same place with testing to the unrevised F 963 standard beginning also in early 2012.

What we did instead was to issue the NOR to a standard everyone anticipates will be revised shortly, making it out of date before testing even begins. While that means we did not have to put it out for APA-type notice and comment now, it appears we will need to start that process in the fall. It is clear that there is a net cost to this approach in terms of CPSC staff work, and confusion in the marketplace.

Since my colleague asserted that I am making a “tail wagging the dog” argument, he really ought to check the size of the tail and the size of the dog.



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**STATEMENT OF COMMISSIONER ROBERT S. ADLER
REGARDING ACCREDITATION REQUIREMENTS
UNDER ASTM F-963 AND A RELATED
STAY OF ENFORCEMENT UNTIL DECEMBER 31, 2011**

July 27, 2011

The Consumer Product Safety Improvement Act (CPSIA) of 2008 was the most ambitious and wide ranging consumer product safety law passed by Congress in a generation.¹ Recently, under the CPSIA, we cast one of the most significant votes in which I have been involved as a Commissioner. We voted to require independent third-party testing under a safety standard for toys, known as ASTM F-963 (F-963). Although this standard has been in effect since February 2009, requiring manufacturers actually to demonstrate their compliance with F-963 through testing at an independent laboratory provides a much-needed measure of assurance to the public that the toys they buy are safe.

The “Toy Law’s” Toy Standard

At times the CPSIA has been referred to as the “toy law” because it mandates that ASTM F-963 become a federal consumer product safety standard. Until CPSIA came along, F-963 was a voluntary standard governing how manufacturers produced toys. As most observers remember, CPSIA was mainly a result of two occurrences – a young child dying after swallowing loose magnets² and a series of recalls involving Chinese-produced toys containing high levels of lead.³ Although the industry’s voluntary toy standard, F-963, covered both of these types of products, Congress concluded that greater compliance was needed and directed that the CPSC make it mandatory and enforce it as federal law. As enacted, F-963 is a comprehensive safety standard that covers hazards associated with toys, such as toxic chemicals, hazardous small parts and sharp edges, magnets that destroy digestive systems when swallowed, and a multitude of other toy dangers. It is one of the most far-reaching and detailed standards that the Commission enforces.

¹ The CPSIA passed by a vote of 424-1 in the House of Representatives and a vote of 89-3 in the U.S. Senate.

² Loose magnets inside a child’s digestive tract can easily block and puncture a child’s intestines – in some cases leading to death. See, Patricia Callahan, “Toy Magnets Kill Young Boy,” Chicago Tribune, May 5, 2007, and “Inside the Botched Recall of a Dangerous Toy,” Chicago Tribune, May 7, 2007.

³ The number of recalls eventually totaled over 100, involving roughly 20 million toys.

As of February 2009, pursuant to the CPSIA's provisions, all manufacturers making toys for sale in the United States have had to comply with F-963.⁴ And, on July 20, 2011, we approved a Notice of Requirements (NOR)⁵ that guarantees manufacturers will have to prove compliance with F-963. More than two years after the rule became mandatory, the time has come for companies to be required to submit their products to independent third-party laboratories for testing and certification before these products are introduced into commerce, as required by the CPSIA. What makes this vote so significant is that manufacturers will no longer be able to wink and nod about complying with F-963; they must now demonstrate to the world that they are in compliance. With this critical step taken, there will be no excuse for manufacturers at this late date not to meet the law's clear protections for children.

Why I Supported a Stay of Enforcement

When it comes to independent third-party testing, this Commission has been judicious in its implementation of CPSIA's requirements. I believe Congress implemented this requirement because it surveyed the situation in 2007 and saw that not only were some companies failing to take basic safety precautions before selling their products, but based on the agency's small size and limited staff resources, pre-approval of products by the CPSC itself would be too much to ask of the agency. Thus, Congress' solution was to place the responsibility on manufacturers to be sure of independent confirmation that their products met required safety standards before being sold.

In other words, Congress said the manufacturer's word, by itself without verification, is no longer going to be good enough. Without question, this requirement adds some expense and inconvenience for producers of children's products. In almost all cases, it seems well worth it – with one minor caveat. That is, the cost of abruptly requiring testing to show compliance with F-963 on small and micro producers of toys seems to have been unexpectedly high.

Here, the reality of the marketplace absent our intervention would have led to the following circumstance: our enforcement of testing for F-963 would be required in October of this year. This timing would disproportionately affect the smallest of our

⁴ Whether all manufacturers have actually complied is another matter. Given the complexities of this standard, I fear that many have ignored the law. The true test will arrive when they have to submit their products to independent third party labs for testing to F-963's requirements. That is why our vote to require third party testing is so important.

⁵ A Notice of Requirements is a notice published by the CPSC informing the public of the requirements for the accreditation of independent test labs (known as third party conformity assessment bodies) to assess compliance with specific CPSC safety rules, such as F-963. Once a lab is accredited to a standard, it can do third party tests for manufacturers. See § 14(a)(3)(A) of the CPSA. Should the standard change, the test lab must seek accreditation to test according to the new requirements. In most cases, given a lab's prior accreditation, re-accrediting to meet the amended provisions of a safety standard should be relatively simple.

nation's toy makers during their busiest manufacturing season.⁶ It is true that all toy makers will be subject to the testing requirements ninety days after the NOR is published, but the requirement to test is only for newly manufactured products – which would leave large manufacturers relatively unaffected until next year. As I understand it, large manufacturers complete their holiday toy production by the summertime. Not so for the small manufacturers. Hence, not only would our enforcement of F-963's testing requirements this October be burdensome on small and micro toy makers – it would be almost exclusively burdensome on them. This seems unfair. Accordingly, with a strong reminder that all toys and other covered children's products must comply with the underlying standard of F-963, I have joined a unanimous Commission in voting to stay the enforcement of testing and certification for F-963 until December 31, 2011 out of a sense of fairness. This date matches up with the expiration of the rest of our stays, so that, beginning on December 31, 2011, all of our stays will lift, and the Commission will enforce the testing and certification of all children's products prior to their sale.

Whether the Commission Should Have Delayed Issuing the Notice of Requirements to Await a Revision in ASTM F-963.

One of my colleagues, Commissioner Nancy Nord, has issued a statement strongly arguing that the Commission should have even further delayed issuing the Notice of Requirements for F-963 to await what she calls a pending “comprehensive” revision of the standard. Our failure to do so, she argues, places toy manufacturers in the “untenable” position of having to do redundant or perhaps irrelevant testing due to the possibility of having to comply with both F-963 and ASTM's revision of it simultaneously. Although her argument carries a surface plausibility, on careful analysis, I find it to be without merit.

As a starting point, my colleague ignores a critical safety issue. Although I have no way of knowing the exact extent of compliance with F-963, I have little doubt that a number of manufacturers have ignored this important safety standard because they have gambled that the Commission lacks the resources to catch them. After the effective date of this NOR, however, manufacturers will no longer be able to sidestep the standard because they will need to show that they have independent experts passing judgment on their compliance with it. Delaying the vote therefore would have meant that the Commission was twiddling its thumbs instead of taking decisive and timely action to protect children.

Moreover, her argument slights the fact that every time ASTM updates any voluntary standard that the Commission later adopts, manufacturers will face the need to modify their testing of toys as the CPSC revises its testing requirements for third party labs. The modification to which my colleague objects is routine and places no more of a burden on manufacturers than any other F-963 upgrade. She notes this in passing, but argues that,

⁶ See July 3, 2011 letter from Handmade Toy Alliance, on file with the Office of the Secretary, CPSC.

had the Commission waited, we could have required manufacturers to meet only the requirements of the updated standard.

There are several problems with this argument. First, she omits mentioning that there is no new revision in place, and the industry has previously promised that a revision was “imminent” and then did not actually approve it for months after their announced deadlines. Second, according to staff, the most immediate changes to F-963 likely to be enacted in the near future are narrow and limited in scope, not in any way “comprehensive” or likely to require redundant or irrelevant testing. In other words, delaying for such small changes would mean the tiny tail wagged the big dog. Third, I know of no one at the Commission who advocates forcing manufacturers to test to a new, different standard before a revised NOR is made effective, so manufacturers will always have the chance to adjust to new standards in a timely and orderly way – no redundant or irrelevant testing necessary. Fourth, the only way that a manufacturer would face redundant or irrelevant testing would be if they jumped the gun and tested early to a revised ASTM standard – before the Commission required such testing. The Commission has regularly permitted a “look-back” period when we have issued NORs allowing manufacturers who (commendably) wish to begin testing prior to the Commission’s requirement to do so as long as they test at laboratories that later become accredited to the new standard. The Commission staff has made it clear they will make a similar recommendation for F-963, if appropriate. Personally, I see no reason that we would stop this practice. In other words, no harm, no foul.

Conclusion

The journey to require third party testing and certification to F-963 has been a long one. When Congress passed the CPSIA in 2008, it decided not only to make F-963 mandatory but also to require companies to prove – through testing – that the products they make and sell meet all applicable toy safety requirements. F-963 has been a mandatory toy safety standard since February 2009 and all children’s products that are subject to F-963 have been required, by law, to be in compliance for more than two years now. It is time for the Commission to take the next step and fulfill our statutory mandate to require companies, both large and small, to test their children’s toys at independent third-party labs and demonstrate their compliance with F-963.