



**U.S. CONSUMER PRODUCT SAFETY COMMISSION  
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**COMMISSIONER NANCY A. NORD**

## **Statement on the final rule for safety standards for play yards**

July 11, 2012

The Consumer Product Safety Commission recently approved a new safety rule for play yards based, in large part, on a voluntary consensus standard developed by ASTM International. I joined my colleagues in approving the new rule because I believe that it improves safety for infants. However, prior to approving the final rule, the Commission adopted an amendment deleting from the final rule a provision dealing with bassinet accessories to the play yard. Both the safety and legality of the bassinet accessory provision in the draft final rule were questioned, prompting the Commission to exclude it from the final rule and instead to put it out for public comment as a proposed rule. Doing differently would have been poor administrative practice and might have compromised infants' safety. I write to express my concerns about shortcomings in the process that resulted in this not-fully-vetted provision being included in the draft final rule.

As the Commission proposed it last year, the play yard rule specifically excluded performance requirements for accessories. Those requirements were to be addressed in separate rulemakings.<sup>1</sup> We invited public comment on the proposed play yard rule as required by the Administrative Procedure Act (APA). One comment encouraged the Commission to include in the rule requirements to prevent bassinet accessory misassembly. The Commission's staff undertook to fulfill the request by working with a task group at ASTM to create a new requirement. A draft provision from the task group—which is a subset of the larger subcommittee that develops voluntary safety

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<sup>1</sup> Safety Standard for Play Yards, 76 Fed. Reg. 58,167, 58,169 (proposed Sep. 15, 2011) (to be codified at 16 C.F.R. pt. 1221) (“While ASTM F 406-11 contains requirements to address entrapment of children in accessories, such as requirements designed to prevent changing table straps from forming loops that enter the play yard space and could cause strangulation, the specific requirements for accessories will be addressed in separate rulemakings. For example, ASTM F 406-11 addresses possible entrapment in bassinet attachments, but the performance requirements, test methods, and warning provisions for the bassinet itself will be handled in a separate rulemaking.”)

standards—was included in the draft final rule presented to the Commission. It should be noted that the bassinet accessory misassembly provisions have not been adopted by ASTM; they are still being considered.

With respect to durable nursery products like play yards, the statute requires that the Commission adopt voluntary standards as mandatory safety standards unless a more stringent standard is needed to reduce the risk of injury. The statute specifically states that we are to follow the Administrative Procedure Act (APA), which requires agencies to give the public notice and the opportunity to comment before adopting rules. Including in the final rule a provision that was not subject to public comment violates the APA: “If the APA’s notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency’s representations about which particular aspects of its proposal are open for consideration.”<sup>2</sup>

A contrary rule would undermine the logic of the modern regulatory process: Congress writes laws that delegate implementing authority to agencies in part because Congress knows that agencies will seek and consider comments from the public before issuing final rules. After all, no agency can understand the import of its proposed rules without the benefit of the laypersons and the technician’s experience. Thus, the comment about the bassinet accessory was welcome in highlighting a hazard that the proposed rule did not address. But because the public had been specifically told that rules for accessories were outside the scope of the proposed rule and would be addressed in later rulemakings that would presumably include requests for public comment, it was inappropriate for the proposed solution to be included in a draft final rule.

It should not be a surprise that there were objections to including the provision in a final rule, as the Commission learned while considering the staff’s draft. Nor should it be a surprise that some Commissioners raised safety concerns about the provision. Those concerns may yet be allayed—that is what comments are for. But the concerns that were voiced both externally and internally were a predictable product of the truncated process that gave us the draft final rule.

The voluntary standard process should be collaborative and give Commission staff, industry representatives, consumer advocates, and specific manufacturers the opportunity to draft and review standards with input from people who have different perspectives. Pressure to come to agreements too quickly can undermine both the integrity of the consensus standards process and, perhaps, even the value of the standards themselves. I am concerned that, unfortunately, this may be happening as the

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<sup>2</sup> *Environmental Integrity Project v. E.P.A.*, 425 F.3d 992, 998 (D.C. Cir. 2005).

Commission considers and adopts standards for durable nursery products. These standards are adopted under the authority of the Consumer Product Safety Improvement Act of 2008, which directs us to issue four standards a year regulating durable nursery products. I am concerned that the desire to get rules out on time may be producing rules that are insufficiently supported by evidence and careful analysis.

The Commission fixed the process for this rule. The rule that we approved will go into effect six months from the date it is published, and I believe it will improve infants' safety. And we will seek and consider public comments about the provision that caused so much concern. If we do eventually approve that provision, we can expect that it will *then* be sound as to both law and safety.