



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD
ON THE VOTE TO APPROVE THIRD PARTY TESTING FOR CARPETS AND RUGS;
REQUIREMENTS FOR ACCREDITATION OF THIRD PARTY
CONFORMITY ASSESSMENT BODIES

July 12, 2010

I oppose issuing the accreditation requirements for third party laboratories to test youth carpets and rugs for compliance with the flammability regulations for three reasons. First, the CPSIA does not require third party testing for this class of product. Second, consideration of this issue is premature. Third, we have discretion under the CPSIA and our general enforcement authority to forego regulating especially since we have no indication of a safety issue involving these products. In short, we are regulating merely for the sake of regulation, with absurd results.

What is Being Proposed?

Longstanding CPSC regulations (16 CFR 1630 and 1631) require that carpets and rugs either meet our flammability standards or, in the case of small non-complying rugs, be labeled as “flammable” and stating that they do not comply with our regulations. Our regulations do not distinguish between children’s rugs and other rugs, but apply to all carpets and rugs. The problem comes about because of the CPSIA requirement that children’s products subject to a “children’s product safety rule” be tested by a third party testing laboratory accredited by the CPSC. The ballot before us is to accredit labs to do that third party testing.

Is the Carpet and Rug Rule a Children’s Product Safety Rule?

The answer to this question determines whether third party testing is required. A reading of the rule and the CPSIA does not indicate that this is a children’s product safety rule but instead applies to all carpets and rugs across the board. The CPSIA calls for third party testing for compliance with “children’s product safety rules” and states that a “children’s product safety rule” is a consumer product safety rule issued under section 7 of the CPSA or similar rule under other acts enforced by the commission.¹ Section 7 (and 9) of the CPSA and corresponding sections of the Flammable Fabrics Act, require that we specifically identify the product being regulated and the risk of injury being addressed. There are several instances where the Flammable Fabrics Act has regulated identified children’s products. See for example, the regulation covering children’s sleepwear – clearly a “children’s product safety rule.” In its mattress flammability standard, the commission specifically stated that the regulation covers “adult mattresses, youth mattresses, crib mattresses...”² In other words, the commission knows

¹ I submit that the definition of “children’s product safety rule” in Section 14 of the CPSA is included not to broaden the meaning of the term but to make clear that the third party testing requirement applies not only to rules issued under the CPSA but also to rules issued under our other acts. There was ambiguity on this point prior to the enactment of the CPSIA and similar attempts at clarity are found throughout the statute.

² The Federal Hazardous Substances Act also provides specifically for the regulation of children’s products in Section 2(q)(1)(A) and presumably regulations issued pursuant to this section would be “children’s product safety

how to define what rules apply to children's products but did not do so in the case with carpets and rugs. Our regulation does not identify "youth carpets" and their flammability characteristics as being regulated.³ To somehow find that there is a category of so-called "youth carpets" that turns a regulation of general applicability into a children's product safety rule is nothing but bootstrapping big time.

The CPSIA also leads to the conclusion that not all consumer product safety rules are children's product safety rules. The requirement for third party testing applies only to those children's products subject to a children's product safety rule, not to every rule of general applicability (CPSA, Sec 14(a)(2)). In setting out the schedule for implementing the third party testing requirements, Congress gives examples of children's product safety rules. These examples include lead paint, cribs, pacifiers, small parts in toys, children's metal jewelry, and baby bouncers, walkers and jumpers. These are all products for which the Commission has issued regulations that are clearly and well-understood to be children's product safety rules, not regulations with general applicability. Further, we were given very little time to publish these accreditation requirements. While I realize that the CPSIA is full of unrealistic deadlines, to think within 10 months of CPSIA enactment that we could somehow accredit labs to test for all the standards we have ever issued that could somehow implicate a product used by a child is so unrealistic that Congress could not have meant such a result.⁴

Section 14 (h), added to the act by the CPSIA, also leads to the conclusion that rules of general applicability are not necessarily children's product safety rules. In this section, Congress explicitly states that general conformity certificates (GCC), as well as certificates based on third party testing, may apply to children's products. If all children's products (as opposed to those subject to a children's product safety rule) needed third party testing, then this provision would have been worded differently and would not have included a reference to a children's product subject to a GCC. Finally, if all children's products were meant to be third party tested no matter what the consumer product safety rule, then why did Congress choose to define which products are subject to third party testing for phthalates?

What is a Youth Carpet?

My second reason for opposing this decision is that it is premature. Even if one erroneously assumes that a general safety standard is a children's product safety standard, on a process level, we have not yet issued a final rule defining what is a child's product. How are rug manufacturers to know how we are defining what is a youth carpet and hence when third party testing is required? Since it will be illegal to manufacture untested rugs 90 days after the accreditation requirements are issued, it is important that manufacturers know whether their

rules." Even in regulations issued under that section, the agency has looked specifically at the class of products being regulated. See, for example, *Forester v. CPSC*, 559 F.2d.774, where the court said, "the Commission found that bicycles intended for children...include all bicycles except those specifically excepted..."

³ 16 CFR 1630 defines carpets as "a floor covering which is exposed to traffic in homes, offices and other places of assembly..." There is nothing in this definition or the rest of the rule that indicates that a particular harm to children was being contemplated with this rule.

⁴ The *Forester Case* cited above makes a similar point that not all safety rules that may affect children in a general way are children's safety rules, quoting from the legislative history of the CPSA stating, "In no event...were (the terms 'children' and 'children's articles') so broad as to give the Secretary...authority to prescribe design criteria for all products to which children have access." S.Rep. 91-237. 91st Cong., 1st Sess.5 (1969).

products are covered. Requiring testing before we have defined what is to be tested is not responsible regulating.

Our proposed regulation defining a children's product is not very clear on a number of points including what is a youth carpet. A pastel pink or blue carpet in a child's room is not necessarily a child's rug; a cartoon character woven into it rather than a stripe may or may not turn the rug into a child's product (even though there is no difference in the rug's flammability characteristics); if the rug has a puzzle on it inviting play, then it might be a child's rug (or perhaps a toy). I recently bought a small area rug for my family room with a checkerboard pattern woven into it, with checker pieces included. Here's an example of this lack of clarity hitting home. While CPSC regulators may disagree, with no small children at home, I don't think that I bought a child's product. Did I?

The regulations that apply to small carpets also show the nonsensical nature of applying a third party testing requirement to this category of products. If a small carpet does not meet the flammability requirements of the rule, it must be marked as "flammable" and state that it fails our test. Given this, exactly what are we requiring here? Are we saying that a manufacturer must actually do a third party test, get test results that show a failure and then may sell the rug anyway? What happens if the manufacturer decides to bypass the test and just marks the rug flammable? What happens if a manufacturer marks a rug flammable but it actually passes the test (remember the label must have the statement that the rug fails the test)? Are we saying if a small rug is marked flammable, the label has to be third party tested under the FFA? In December, 2009, we said in our last stay of enforcement that we would not require third party testing of labels under the FHSA but we said nothing about the FFA. We need to resolve these issues before rolling out regulations.

Efficient Enforcement Does Not Require this Result

Third, we have ample authority under Section 3 of the CPSIA and our general enforcement discretion to forego regulation of this class of products at this time. Efficient enforcement of the Act does not require this regulation; nor does safety. We have had very few rug recalls for flammability failures over the many years this regulation has been on the books. None of those few recalls have involved rugs that could in any way be classified as a "youth" rug.

In the case at hand, we are spending public resources and requiring the expenditure of private resources to address a non-existent problem. We are requiring third party testing for the sake of testing with absurd results. The public deserves better.