



U.S. Consumer Product Safety Commission
Public Hearing on Proposed Safety Standard for Bunk Beds
Thursday, May 6, 1999
10:00 a.m.

OPENING STATEMENTS

Chairman Ann Brown
Vice Chairman Thomas H. Moore
Commissioner Mary Sheila Gall.

PRESENTATIONS

Mary Ellen Fise, *General Counsel*
Consumer Federation of America

Lynn Starks, *mother of bunk bed victim*

Charles Samuels, *Government Relations Counsel*
Association of Home Appliance Manufacturers

Lawrence Fineran, *Assistant Vice President for Regulations*
National Association of Manufacturers

Frances Smith, *Executive Director*
Consumer Alert

David Schmeltzer, *former Assistant Executive Director,*
Office of Compliance, U.S. Consumer Product Safety Commission

CLOSING REMARKS

ADJOURNMENT

Outline of Statement for Bunk Bed Hearing, Thursday, May 6, 1999
Mary Ellen R. Fise, General Counsel, Consumer Federation of America

- I. Consumer Federation of America supports the Proposed Rule on Bunk Beds [64 Fed. Reg. 10245].
- II. Bunk beds pose an unreasonable risk of injury to children.
- III. There is a lack of substantial compliance with the voluntary standard.
- IV. The benefits of the proposed rule more than adequately bear a reasonable relationship to potential costs.
- V. The rule should include additional provisions, beyond the current voluntary standard, to address risks to children

April 4, 1999

Office of the Secretary
Consumer Product Safety Commission
Washington D.C. 20207-0001

Re: "Oral Comment; NPR Bunk Beds"

Dear Madame/Sir:

On April 24, 1997 my life changed forever. I found my three year old daughter, Whitney hung from her bunk-bed. Her head became trapped when she slipped through the space between the guardrail and frame of the upper bunk. The very thing that was supposed to help keep her safe had killed her. I keep asking myself why this happened. I will go to sleep every night for the rest of my life with the images of finding Whitney hanging helplessly and lifeless from her bunk-bed. I will also feel guilty for the rest of my life that there was something I could have done to protect her.

From January 1990 to October 1998 there have been 89 reports of bunk-bed related deaths. Fifty seven of those deaths were from entrapment. Over 96 percent of those who died of entrapment were ages 3 and younger. Since 1990 the CPSC has announced recalls of over 500,000 bunk-beds. But it was September 24, 1997, five months after Whitney died that her bunk-bed had been recalled by the CPSC. Whitney died a needless death. There are 500,000 bunk-beds made and sold in this country each year. Some people believe that out of the 7 to 9 million bunk-beds that are available for use in this country that an estimated death of ten children a year are acceptable. It is not acceptable. And should not be tolerated any longer. Every child is a precious gift from God. So who are they to decide that even ten children should be allowed to die. Our children are our future and we must do everything possible to protect them. I would not want any parent to walk into their child's bedroom one morning and find them hanging from an improperly made bunk-bed.

There are many mandatory federal regulations for children's products. Cribs and car seats are being regulated to help protect the infants. Many fast food restaurants put warning labels on toys that are not suitable for children younger than 3. So why are bunk-beds not on this list? It seems like the older the children get then the more they are just out of luck.

There are many manufacturers that are in compliance with the ASTM voluntary standard. But there are individuals that decide one day that they would like to start a small business of their own and manufacture bunk-beds. They fail to do any research to find out if there are any guidelines that they should be following. So therefore, non-conforming bunk-beds are being produced and killing our children.

On April 14, 1998 Governor Keating of Oklahoma signed the "Whitney Starks Act." This law regulates how bunk-beds are made and sold in Oklahoma. But this law is only protecting the children in Oklahoma. We have a nation wide problem that needs to be fixed now. Not when another ten children die.

On May 21, 1997, Whitney would have turned four years old. In the fall of that same year she would have been able to play soccer for the first time. Just like her older brother, Matthew. She looked up to her older brother. Where ever Matthew went you can be sure Whitney was following right behind him. Matthew misses his little sister. Each year around her birthday he always tells me how old she would have been. A little boy down the street asked him one day how much he missed his sister and Matthew replied "I miss her very much". The little boy said why and Matthew said because he doesn't have anyone to play with at night anymore. In September of 1998, Whitney would have started kindergarten. I will not know the joy of her coming home from her first day of school and telling me all what she had learned that day. There will be no more kisses, hugs and I love you mommy from my sweet little girl. Whitney was a child who loved life and life loved her. She would meet you for the first time and tell you that she loved you. I will no longer experience anymore firsts with Whitney. I will never know the joy of watching her walk down the aisle to marry the man of her dreams. Or calling me on the phone and shout with joy that she is pregnant with her first child. I know that God does not promise us tomorrow. But we all have hopes and dreams for our children. All of my hopes and dreams for Whitney's future died the day she died.

I made a promise to Whitney that her death would not be in vain. I know that if this ever happened to either your child or someone you loved very much then you would do everything in your power to help get this regulation passed. And I am going to do everything I possibly can to make sure this doesn't happen to anyone else's child.

Please let my personal tragedy have a positive effect to this ongoing problem. How many more of our children must die before things are changed. Don't let another child become just a statistic. To you my daughter may be just another statistic. To me she will always be Whitney Danielle Starks.

Thank You

**Lynn Starks
8421 NW 76th St.
Oklahoma City, OK 73132
405-721-3156**

April 28, 1999

COMMENTS TO THE
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION
REGARDING
THE NOTICE OF PROPOSED RULEMAKING FOR BUNK BEDS

The Association of Home Appliance Manufacturers ("AHAM") represents manufacturers of portable and major appliances. We appreciate the opportunity to participate in this proceeding because we are greatly concerned that the General Counsel's interpretation of "substantial compliance" is improper as a matter of law and would be a grave error as a matter of policy for the Commission to adopt.

AHAM participates fully in the applicable voluntary standards organizations, including Underwriters Laboratories, the Z-21 Committee for our gas-fueled products, and the ANSI process. The voluntary standards system in the United States has worked well and provides the marketplace with safe products. In the case of AHAM products, compliance with applicable UL standards, for example, is virtually 100%. Where either the Commission or UL has found a lack of compliance with these standards, appropriate corrective actions, including recalls if necessary, are undertaken. The Commission is an active participant in the voluntary standards process.

We do not believe it is justified as a matter of law or policy for the Commission to reverse its 18-year interpretation of the Consumer Product Safety Act amendment. AHAM was an active participant in that legislative process and the General Counsel's clever interpretation of the law is totally at odds with the understanding of the participants. We cannot improve upon the fine legal analysis in the comments of the American Furniture Manufacturers Association. If lack of substantial compliance can be found whenever the Commission believes that there would be a discernible improvement -- no matter how small -- for a requirement to be mandatory, then the substantial compliance criteria would be meaningless. On the contrary, we believe the legislative history is clear that the Commission cannot find a lack of "substantial compliance" if a UL standard, for example, obtains 98% compliance in the marketplace but the Commission makes a finding that a mandatory version would have 99% compliance.

The 1981 amendments place special obligations on the Commission, which, frankly, other regulatory agencies do not bear, to defer in all but rare cases to voluntary standards. There is no bright line

test to determine quantitatively whether the Commission properly finds that a mandatory requirement could be justified. If Congress had intended that the Commission could simply compare the predicted efficacy of a federal standard versus a voluntary standard, it could have said so directly and much more clearly. This does not mean at all that the Commission is crippled. In fact, the Commission has and exercises authorities that are highly effective to ensure safe consumer products. No new and strange reading of the statute is required for the Commission to fulfill its role.

Beyond the fundamental issues of statutory interpretation, it would be a serious error in policy judgment for the Commission to adopt the General Counsel's interpretation in this or any other proceeding. Voluntary standards are less intrusive, more efficient, and allow the Commission to carry out its role with one of the smaller bureaucracies in Washington. Where voluntary standards cover the risk adequately and where the vast majority of the industry is in compliance, the Commission can concentrate its resources on gaps in the standard or areas where no standards exist.

The General Counsel's interpretation undermines the credibility and value of the private voluntary safety standards system. The enormous resources industries and other interested parties put into the standard developments would be greatly diminished if it was understood that the standards would be superseded whenever the Commission determines that adopting them or different standards might be slightly more effective. Since the Commission does not have and never will have the resources to perform the functions of the voluntary standards organizations, this diminution of the important private and voluntary effort would be a serious and detrimental blow to voluntarism in the United States. It could result in a less effective patchwork of private and governmental requirements. Moreover, General Counsel's opinion heads the Commission in just the opposite direction of the re-inventing government theme and flies in the face of the Commission's own efforts to streamline its actions, lessen the burden on regulated parties and focus on priorities, such as your successful fast track recall program.

Maintaining the 18-year old interpretation of the law would not prevent the Commission from enhancing product safety. The Commission is a significant player in private voluntary standards activities. AHAM does not always agree with the substantive staff position but we recognize the significance and impact of staff involvement in these activities. It is probably not an exaggeration to state that Commission resources that would go into one rulemaking are equivalent to staff involvement in 100 voluntary private standard processes. Your involvement in private standards is a much more efficient means to affect safety. Under Chairman Brown this involvement has expanded greatly.

Worldwide, standards development is increasingly privatized. Please do not threaten U.S. leadership and competitiveness in this arena.

In addition, anyone who has been involved in individual corrective action matters with the Commission knows the power of the substantial product hazard/Section 15 process. The necessity to comply with applicable voluntary standards, the failure of which is considered in most cases to be a substantial product hazard, has every bit the enforcement and deterrent effect of a federal standard. The possible perceived benefits of additional mandatory standards are more hypothetical than real.

Thank you again for the opportunity to comment and testify on this important matter. We urge you not to adopt the General Counsel's opinion and to maintain the present relationship between manufacturers, voluntary standards, and the Commission. This is the best way to comprehensively and adequately ensure the production of safe products.

Submitted by:

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TESTIMONY OF
Lawrence A. Fineran
Assistant Vice President
Resources, Environment and Regulation
on behalf of
The CPSC COALITION
and the
NATIONAL ASSOCIATION OF MANUFACTURERS
before the
CONSUMER PRODUCT SAFETY COMMISSION
May 6, 1999

Madam Chairman, members of the Consumer Product Safety Commission (CPSC), I appreciate the opportunity to appear before you today to offer the views of the National Association of Manufacturers (NAM) and the CPSC Coalition regarding the CPSC staff interpretation of the term "substantial compliance."

The National Association of Manufacturers (NAM) is the nation's largest national broad-based industry trade group. Its 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every state and produce about 85 percent of U.S. manufactured goods. The NAM's member companies and affiliated associations represent every industrial sector and employ more than 18 million people. The NAM's mission is to enhance the competitiveness of manufacturers and improve living standards for working Americans by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength.

The NAM also heads the CPSC Coalition. The coalition is made up of a broad cross-section of industry associations and companies involved in the manufacture of

consumer products. A reference to the coalition in this testimony also includes the views of the NAM. Neither the coalition nor the NAM takes any position on the underlying inquiry about the adequacy of bunk-bed safety guidelines or standards.

The coalition is very concerned about the staff interpretation of “substantial compliance”; the opinion of the CPSC general counsel is in conflict with clear congressional intent. This interpretation could cause problems for the vast majority of industries engaged in international competition. More disturbingly, this interpretation could well lead to *less* rather than more effective consumer safety as well as compliance levels.

Section 9 of the Consumer Product Safety Act and the accompanying Senate report (S. Rpt. 97-102) make clear the preference of Congress for voluntary standards over mandatory standards. The CPSC is required to defer to voluntary industry standards when the industry is in “substantial compliance” with standards that lead to an “adequate reduction” of the risk of injury.

The coalition is concerned that the CPSC appears poised to overturn 18 years of interpretation of these terms by declaring *its* preference for mandatory over voluntary standards. Aside from contradicting the clear congressional directive, this would actually deter from the core mission of the CPSC – to increase the safety and well being of consumers of thousands of products that they encounter on a daily basis.

The CPSC has very limited staff resources. Yet, a gambler could become rich betting that staff almost always would project that a commission-formulated mandatory rule would result in at least *some* reduced risk to injury versus a consensus voluntary standard. Under the general counsel’s approach, such a conclusion would result in a

commission recommendation to proceed with a mandatory standard. Congress, however, wisely concluded in 1981 that mandatory rules do not necessarily result in reduced risk of injury to consumers and, indeed, encouraged the CPSC to rely more on the more efficient method of consensus, voluntary standards.

Voluntary vs. Mandatory Standards

The record shows that one mandatory standard would take as much time to devise, promulgate and implement as many multiples of voluntary standards. Even with additional funding for the extra staff that would be needed – and it is highly uncertain that Congress would grant this request – the additional time for all of these mandatory standards to take effect would, in the meantime, result in less reduction in risk. No agency, no matter how great its resources, is capable of easily mandating rules that are universally adhered to. The goal should be to achieve the proper balance that optimizes risk reduction and compliance. Consensus, voluntary standard-setting and compliance, as Congress found in 1981, offer at least as much of a chance at reaching this optimization as does mandatory rulemaking.

One advantage of industry-consensus standards is that they provide for greater flexibility. This is critical in responding to improved technology that would make a product safer. Rulemakings require agencies to address and respond to stakeholder concerns, and to satisfy certain mandates – also wisely put in place by Congress – to assure a fair and open process. The result, however, is that rulemakings are typically slower than the voluntary standard approach. Moreover, industries would have far

greater incentive to think of innovative ways of making products as or even more safe and at less cost to the consumer if manufacturers knew that they could incorporate the innovation into the product sooner rather than later. The CPSC, with a known, mandatory standard already in effect – and facing entrenched stakeholders – will likely face institutional resistance to quickly implement changes. Here, there is again the strong possibility of less reduction in risk – compounded by the prospect of foregoing reduced real retail prices.

Whether a standard is voluntary or mandatory is an especially crucial consideration for international trade. Other countries and trading blocs have authorities similar to the CPSC. These standards are not always harmonized and, even when they are, foreign authorities may alter their standards. U.S. industry needs the flexibility to respond to these changes while complying with CPSC-approved standards and guidelines. Voluntary, consensus standards would allow industry the ability to conform to international standards far more easily than staff-driven mandatory rules.

Substantial Compliance

CPSC staff also seeks to establish that they may proceed with a mandatory rulemaking whenever a mandatory rule would result in more “substantial compliance” than exists with a voluntary standard. The coalition notes that the fallacy in this position is that “mandatory” regulations have, at most, “substantial compliance.” There are almost always some firms someplace that are not in conformance, as the many CPSC corrective actions involving mandatory standards amply demonstrate. Thus, making a

standard “mandatory” under the guise that there is not “substantial compliance” is disingenuous.

But, and well worth pondering, where a company is found not to be compliant with a voluntary standard, the CPSC can use its enforcement authority under Section 15. Why making a standard mandatory would somehow increase the effectiveness of the CPSC enforcement staff is mystifying. Furthermore, if CPSC staff resources are diverted to formulating mandatory rules, what is the implication for enforcement efforts?

The memorandum by the CPSC general counsel on this issue complains about the lack of a specific, one-size-fits-all threshold for compliance. Indeed, a one-size-fits-all threshold is exactly what consumers, industry and the CPSC do not need. Congress knew what it was doing in 1981 and gave the commission discretion to determine what “substantial” means on an industry-by-industry basis. This is still the best way to go to assure that consumers will be reasonably protected in the most cost-effective way for them, for business and for the CPSC.

It is well worth noting, as well, that strong compliance relies heavily on retailers. Since they have buyers who are experts in various products, they are an important consideration in any enforcement scheme. With standards voluntarily set by industries, market dynamics – including product liability concerns – create pressure for manufacturers to adopt new standards and for retailers (particularly major retailers) not to purchase goods that are not in compliance.

The coalition believes that the flexible approach put forth by Commissioner Mary Sheila Gall is far better than the staff recommendation. This would allow the commissioners the opportunity to determine on a case-by-case basis how best to meet the

goal of offering reduced risk of injury on a broad array of products while staying within congressional intent. During its deliberations, the CPSC needs to remember that Congress not only expressed its desire for the voluntary approach, but it also criticized the agency of the 1970s for resorting far too readily to mandated rules.

On behalf of the coalition and the NAM, I again thank you for this opportunity to offer these views. I would be happy to take any questions that you may have.

**Comments on
The Notice of Proposed Rulemaking on Bunk Beds
Issued by the U.S. Consumer Product Safety Commission
On March 3, 1999**

By

**Frances B. Smith, Executive Director
Consumer Alert
1001 Connecticut Ave. NW, Suite 1128
Washington, DC 20036
May 6, 1999**

Good morning, ladies and gentlemen. My name is Frances Smith and I am Executive Director of Consumer Alert, a national, non-profit, non-partisan membership organization.

Consumer Alert's mission is to represent average consumers in a dynamic and competitive marketplace. We inform the public about the consumer benefits of a market economy and provide information to help consumers make more informed decisions. Consumer Alert promotes sound economic, scientific and risk data in public policy decisions.

That is why I am here today. In the Federal Register Notice announcing an opportunity for oral comments on the proposed rule on Bunk Beds, the Commission indicated that it also desired public feedback on the interpretation of "substantial compliance" with a voluntary standard as proffered by the Commission's General Counsel. I will express Consumer Alert's position both on the proposed bunk bed rule and on the implications of the General Counsel's interpretation of the statute with regard to rulemaking when a voluntary standard is present.

It is always tragic when a young child dies, whether it is the fault of an unsafe product or the result of an unsafe or unforeseen use of a product. Yet in responding to such tragedies, government agencies such as CPSC have a grave duty to uphold their own statutes. The CPSC's mission is to protect the public from "unreasonable risks of injury." In our view, the present voluntary standard -- ASTM-1427-96 -- already accomplishes that mission and therefore any further regulatory action is unwarranted.

Over one year ago, Consumer Alert submitted similar comments with regard to the Advance Notice of Proposed Rulemaking (ANPR) on Bunk Beds. At that time we noted the statutory prohibition against issuing a mandatory rule when a product is covered by a voluntary standard: "... whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standard."¹

In this case, a voluntary standard, ASTM-F-1427-96, is in existence. It was developed with the assistance of Commission staff and was the result of a consensus decision by

¹ *Consumer Product Safety Act Amendment of 1981*, Report of the Senate Committee on Commerce, Science and Transportation, No. 97-102.

manufacturers, government, and consumers. The standard obviously works well, since the Commission's staff, in its briefing package, noted only three fatal entrapment incidents which occurred in bunk beds which complied with the ASTM standard from 1990 to 1998. Two of those incidents would not have occurred had the warning against placing children under six years of age in the upper bunk been observed.

The provisions of the current ASTM standard did not address the third incident, involving entrapment of a 22-month-old child in the lower bunk end structure. However, it is our understanding that members of the ASTM bunk bed subcommittee have already agreed to implement revisions to the standard to prevent any more incidents like this, however rare. Other revisions, including the extension of the wall side guardrail, and the change in definition of a bunk bed as 30 inches, rather than 35 inches from the floor, would also be covered in the revised ASTM standard. (The subcommittee set aside the issue of extending the standard to cover adult beds.) Thus it seems to us at Consumer Alert that no reasonable argument can be made that the substance of the standard is inadequate.

In fact, it has been a full year since the Commission began this rulemaking procedure. In that amount of time it is fairly certain that the ASTM standard could have been revised and new products would be in compliance today. But when CPSC threatens to regulate, the voluntary process comes to a standstill--awaiting the uncertain future of its own existing standard.

The central point the Commission makes in its Notice of Proposed Rulemaking (NPR) is not that the standard is inadequate, but that there is insufficient *compliance* with the standard. This position is based on a finding that a number of non-complying beds have been discovered at various times, and subsequently voluntarily recalled. I applaud the staff's diligence in searching out and recalling non-complying beds. But I wonder how many other non-complying products, covered by specific mandatory rules, could be found if a similar search were to be conducted. Indeed, in our office, we receive daily news releases from CPSC covering recalls of numerous regulated products. Clearly, the existence of a mandatory rule is no guarantee of compliance, either.

When Congress amended the Consumer Product Safety Act in 1981, it did not define the meaning of "substantial compliance." Instead, it relied on the wisdom of the sitting Commissioners. They were nominated by the President and confirmed by the Senate, presumably because they possessed the wisdom and the good judgment to make those decisions. In the event the affected public, which includes the regulated industries, found a particular regulation burdensome, there was always the possibility of review by the courts.

The role of the General Counsel of the CPSC is to advise the Commission whether a proposed rule is legally supportable and would withstand judicial challenge. The General Counsel, however, does not make regulatory decisions. The Commissioners do.

The interpretation of the term "substantial compliance" by the General Counsel is quite alarming. It appeared first in the Jan. 8, 1998 staff briefing before the Commissioners, and subsequently in the General Counsel's Legal Memorandum of Dec. 16, 1998, which was part of the latest Bunk Bed Briefing Package. It is repeated, in various forms, in the NPR issued March 3, 1999.

Essentially, the General Counsel states that the term "substantial compliance" means that the rate of compliance with a voluntary standard must be the same as with a mandatory rule. In the NPR, the General Counsel's Office states: "it [the staff] believes that a mandatory standard will be more effective in reducing entrapment deaths from bunk beds than will the

voluntary standard. Therefore, the staff believes there is no substantial compliance with the voluntary standard, which consequently does not bar issuing the proposed rule."²

Elsewhere, the General Counsel states: that "substantial compliance does not exist where there is a reasonable basis for concluding that a mandatory rule would achieve a higher degree of compliance."

Again, he writes, "the Office of General Counsel maintains that two key, although not necessarily exclusive, considerations in making this determination are (1) whether, as complied with, the voluntary standard would achieve virtually the same degree of injury reduction that a mandatory standard would achieve, and (2) that the injury reduction will be achieved in a timely manner."³

I believe these interpretations are way off the mark. Any reasonable person who reads the legislative history of the 1981 amendments, or looked at the history of how the Commission has complied with those amendments, would conclude that the General Counsel's position is contrived, strained, even tortured, in its attempt to bend the law.

A voluntary standard is just that. It is not a mandatory standard, with all that that term implies. It is still voluntary, in the sense that manufacturers may choose to comply or not to comply. However, the CPSC may, if it chooses, apply the Section 15 "substantial hazard" definition to the non-complying product in an effort to bring it into compliance with the voluntary standard. To say that a voluntary standard must achieve the same degree of conformance as a mandatory standard flies in the face of both common sense and a credible understanding of congressional intent.

The case is crystal clear with bunk beds. The standard has been effective. It is flexible and easily and quickly revised. The ASTM subcommittee on bunk beds can readily adopt the three newly proposed amendments. The staff agrees that the compliance rate is likely to be 90% or higher. For any standard, whether voluntary or mandatory, that is a high rate. Common sense tells me that such a high rate of compliance can be called "substantial." If not, what would you call it?

Again I quote from the General Counsel's Dec. 16 Memorandum to the Commissioners:

"...It is our opinion that, when determining whether there has been or will be 'substantial compliance' with a voluntary standard, the Commission should compare the compliance rate of the standard to that expected with a mandatory rule. Where the relevant provisions of the proposed mandatory standard and the adopted and implemented voluntary standard are materially the same, the mandatory rule would achieve a higher degree of compliance, it may supersede the voluntary standard (if the Commission can make the other required findings)."⁴

If his interpretation of the statute were to be applied to all other voluntary standards for consumer products, CPSC could easily make the case to eliminate all non-government standards and replace them with mandatory rules.

This Commission has wrestled from time to time with other interpretations of the 1981 amendments. A case in point was the petition by the National Kerosene Heater Association (NKHA) in 1988. A voluntary standard, UL 647, had been implemented. But voluntary standards do not pre-empt state law. The State of Massachusetts had issued a ban on the sale of

² U.S. Consumer Product Safety Commission, *Notice of Proposed Rulemaking (Bunk Beds)*, March 3, 1999, *Federal Register*, Vol. 64, No. 41, p. 10249

³ *Ibid.*

⁴ U.S. Consumer Product Safety Commission, *Office of General Compliance Memorandum Regarding "Substantial Compliance,"* Dec. 16, 1998, P. 5

kerosene heaters. The NKHA, hoping to achieve federal pre-emption of the state law, petitioned CPSC to begin procedures to adopt the standard as a federal rule, through issuance of an Advance Notice of Proposed Rulemaking.

Because the 1981 amendments clearly prohibit the Commission from regulating when a voluntary standard is adequate to reduce injury and is widely complied with, the Commission's hands were tied, and it denied the NKHA petition. It would have possibly made *economic* sense for the NKHA industry to avoid having one state ban its product. But the federal statute did not address that issue. While voluntary standards have many benefits, federal pre-emption is not one of them.

I cite this example, not because it explains "substantial compliance" but because it demonstrates how seriously the Commission has regarded its obligations under the 1981 amendments giving preference to voluntary standards. Not even a request by the affected industry persuaded the Commission to interfere when an effective voluntary standard was present.

The Legislative History of the 1981 amendments, as contained in House Conference Report 97-208, describes substantial compliance in this way:

"In evaluating whether there will be substantial compliance with a voluntary consumer product safety standard, the Commission should determine whether or not there will be sufficient compliance to eliminate or adequately reduce an unreasonable risk of injury in a timely fashion. In most situations, compliance should be measured in terms of the number of complying products, rather than in terms of the number of complying manufacturers."⁵

Until now, the Commissioners have had no difficulty in interpreting what "substantial compliance" means.

Consumer Alert feels the Commission has no option but to defer to the existing standard, and terminate this rulemaking if it is serious about abiding by its own statute

Should the Commission wish to encourage even greater compliance with the ASTM standard, it may consider instituting a public education campaign designed to inform parents and caregivers about the standard's requirements. The Commission could advise parents to examine beds that were made before the standard was implemented to determine whether they are safe. They should also be warned--over and over if necessary--not to put children under the age of six on the top bunk.

As the Commissioners already know, there are annually more fatal injuries to children with adult beds than with bunk beds. Since bunk beds are already covered by an adequate standard that is effective, why not approach the issue from the perspective that parents and caregivers must exercise caution with *all beds* when young children are involved?

At the staff briefing much was made of the supposed reduced costs of a mandatory as opposed to voluntary standards. First, is it true? The additional penalties associated with criminal actions and the higher risks associated with conviction increase the likelihood that a firm will employ lawyers rather than engineers when faced with a problem. Is this wise?

Mentioned as an added benefit of a mandatory standard was that it would decrease the CPSC workload, because much of the work would be shifted to local law enforcement agencies, as well as Customs. The CPSC staff seems to view those costs incurred by other governmental groups as "free." Have they estimated the additional burden placed on those agencies? We would note that the goal of federal action is not to minimize overall agency costs, but rather to advance the public interest.

⁵ House Conference Report No. 97-208, "Legislative History of Public Law, 35, Omnibus Budget Reconciliation Act," p. 871.

One of the great dangers of all government interventions to achieve one desirable result -- in this case, child safety -- is that of unintended consequences. Has the CPSC staff considered the potential of such risks in the proposed mandatory bunk bed standard case?

- For example, does the Staff believe that more home-made or individually made bunk beds are likely under the proposed rule?
- Does the Staff believe that the results of this action will reduce the rate of bunk bed retirement? If so, would this worsen the situation?
- All accidents reflect the interaction of random factors, design factors, and operator error. In the case of bunk beds, has the staff considered the impact -- in the form of possible reduced parental supervision -- of a rule viewed as reducing the need for parental oversight?

I am grateful to the Commission for this opportunity to comment on substantial compliance in relation to the bunk bed NPR today. I will be glad to respond to any questions.

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DAVID SCHMELTZER ORAL COMMENTS: NPR BUNK BEDS

For 18 years, prior to October 3, 1997, I was Director of Compliance for the Consumer Product Safety Commission. I am testifying in this proceeding in my individual capacity, not on behalf of any of my clients. In the interest of complete disclosure, one of my clients is Intertek Testing Services (ITS). My understanding is that ITS does not presently do testing of bunk beds and at this time does not plan to do such testing.

I will be testifying in support of the proposed rule on bunk beds. Part of my presentation will relate to an experience I had when I was Director of Compliance concerning the level of compliance of the Voluntary Standard for bunk beds.

I will give my views on what constitutes substantial compliance with the Voluntary Standard.



Consumer Federation of America

**STATEMENT
BEFORE THE
CONSUMER PRODUCT SAFETY COMMISSION
ON THE NOTICE OF PROPOSED RULEMAKING ON
BUNK BEDS
[64 Fed. Reg. 10245]**

presented by:

**MARY ELLEN R. FISE
GENERAL COUNSEL &
PRODUCT SAFETY DIRECTOR**

CONSUMER FEDERATION OF AMERICA

May 6, 1999

Consumer Federation of America¹ is pleased to offer this testimony in support of the Proposed Rule on Bunk Beds [64 Fed. Reg. 10245]. Nearly 13 years ago, CFA petitioned the Consumer Product Safety Commission (CPSC) for a mandatory rule on bunk beds to address entrapment risks to children. The Commission denied the petition in 1988, whereupon CFA actively participated in the development of a voluntary standard for bunk beds. During all of this time, we have attempted to educate the public about this risk and we have applauded the CPSC's repeated recalls of dangerous bunk beds. But after 13 years, unsafe bunk beds continue to be produced and sold to unsuspecting parents, placing millions of American children at risk of fatal entrapment. If ever the voluntary route has been given a chance, it is this one. After all this time, the evidence is clear: voluntary attempts in this case have not been sufficient to protect young children. The bunk bed record of the last 13 years speaks loud and clear for promulgation by CPSC of a mandatory bunk bed rule.

Bunk Beds Pose an Unreasonable Risk of Injury to Children

The Notice of Proposed Rulemaking reports that there were 89 bunk bed-related deaths of children under age 15 between January 1990 and October 23, 1998 [64 Fed. Reg. 10246]. It is important to note, however, that the occurrence of bunk bed fatalities involving children has been a consistent trend for more than a decade. In 1988, when CFA's petition was denied, at least 72 deaths had occurred.² The staff estimates that about 10 bunk bed-related entrapment deaths are estimated to have occurred in the United States each year since 1990. Thus, it appears reasonable

¹ CFA is a non-profit association of some 250 pro-consumers groups, with a combined membership of 50 million, that was founded in 1968 to advance the consumer interest through advocacy and education.

²This number represents what was known at that time. The number of deaths could be higher as a result of reporting lags.

to conclude that between 170 and 200 bunk bed deaths have occurred during the Commission's history. In addition, between 1990 and 1998, "near miss" entrapment incidents (59) outnumber entrapment fatalities (57)--- meaning that but for the luck of the child, who was rescued by a parent or caregiver, the number of entrapment fatalities would be more than double current estimates.

It is clear that parents are not aware of the dangers of bunk beds and that the hazard is one that is not readily apparent by examining the product. Few parents are knowledgeable about entrapment spacing dimensions. In addition, certain practices (such as moving a bed up against the wall), or certain features (such as the guardrail), are believed by parents to reduce risk to their children, when in fact they may contribute to entrapment deaths. Bunk beds are often used for children under age six by parents who heed CPSC, crib manufacturers, and other organizations' advice, to discontinue use of a crib when a child reaches age two (or 35 inches in height). Finally, bunk beds are used for sleeping purposes and, as such, children are unsupervised by adults during their use. All of these factors combined underscore the need for enforceable bunk bed requirements to protect children from the unreasonable risk of entrapment death associated with bunk beds.

The Current Voluntary Standard is Inadequate

CFA agrees with the Proposed Rule's inclusion of additional provisions, beyond those currently contained in the ASTM voluntary standard, to address openings in the guardrail as well as the bunk end structure. These additional provisions have benefits that bear a reasonable relationship to their costs and removing *all* entrapment areas is necessary to assure that

youngsters sleeping in these beds will not be at risk. At this time, the voluntary standard does not address these issues and hence, compliance with the voluntary standard would not be likely to result in the elimination or adequate reduction of the risk of entrapment injury or death.

There is a Lack of Substantial Compliance with the Voluntary Standard

Over the last four years, the Commission has identified at least 44 different manufacturers of bunk beds in violation of the voluntary standard and necessitating product recalls involving over one-half million bunk beds. CPSC's last review of such compliance found that nearly 40% of those examined were in violation of the standard.

Much has been made of whether the facts before the Commission satisfy the "substantial compliance" test contained in CPSC law. The agency is prohibited from promulgating a mandatory standard if compliance with a voluntary standard would eliminate or adequately reduce the risk of injury and it is likely that there will likely be substantial compliance with the voluntary standard.

CFA believes the record before the agency more than adequately establishes that there is not substantial compliance with the voluntary standard and, therefore, the agency is justified in promulgating a mandatory standard. In evaluating whether there is substantial compliance, CFA believes that it is crucial to understand that the intent of the provisions allowing deferral to voluntary standards, including a requirement for substantial compliance, is **to allow voluntary standards to substitute for mandatory standards**. The applicable legislative history states that:

In evaluating whether there will be substantial compliance with a voluntary consumer product safety standard, the Commission should determine whether or not there will be sufficient compliance to eliminate or adequately reduce an unreasonable risk of injury in a

timely fashion. In most situations, compliance generally should be measured in terms of the number of complying consumer products rather than in terms of complying manufacturers.”³

The determination of whether the voluntary standard is a substitute for a mandatory standard necessarily requires a comparison. In fact, the concept of comparing a voluntary standard to a mandatory standard is included in both prongs of the deferral test. The first prong of the test--whether the voluntary standard adequately reduces the risk of injury -- requires the agency to compare the provisions of the voluntary standard with those it might promulgate via a mandatory standard. Congress clearly anticipated that the agency would have to compare the existing voluntary standard with the proposed mandatory standard. It is perfectly logical and supportable that the comparison of the two standards should also take place in terms of determining whether there will likely be substantial compliance.

There are also those who might argue that a percentage test should be applied to evaluate whether there is substantial compliance. CFA disagrees with that interpretation. While the legislative history (see above) states that compliance should be measured in terms of the number of complying products rather than number of complying manufacturers, this does not necessarily require or imply a percentage test. Had the drafters intended that a certain percentage of compliance is required, we believe they would have so stated. Or, in the alternative, Congress could have explicitly directed the agency to establish a single percentage threshold to be applied in all cases or Congress could have directed the agency to establish a percentage specifically for each case or rule that arises. But it did not. In addition, the phrase “In most situations...” implies that

³ H. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 871, reprinted in 1981 U.S. Code Cong. & Admin.. News 1010, 1233.

the agency is not always required to measure compliance in terms of non-complying products. Rather, the first direction Congress gave the agency is to “determine whether or not there will be sufficient compliance **to eliminate or adequately reduce an unreasonable risk of injury in a timely fashion.**”

CFA believes that such language means that the agency must consider the facts of each case to make such a determination. In the case of bunk beds, there are many factors that support a finding that there is not sufficient compliance to eliminate or adequately reduce an unreasonable risk of injury in a timely fashion. These include:

***nature and severity of risk:** in this case there is a consistent and repeated pattern of bunk bed entrapment leading to deaths of young children, a vulnerable population who is unable to protect themselves from the risk. Additionally, parents do not perceive the risk and fail to discontinue using the product.

***non-compliance with the voluntary standard already experienced:** as explained above, more than 500,000 bunk beds have been recalled by 44 different manufacturers in the last four years. Every one of those bunk beds poses a risk to its child occupant. Because of the long useful life of this furniture, this risk continues until the bunk bed is no longer used.

***repeat violations by certain manufacturers:** this is a critical factor in evaluating whether a mandatory standard is likely to be a substitute for a voluntary standard. CPSC data show that three of the five manufacturers (in one limited two month study of bunk bed conformance) whose beds were found to have serious entrapment hazards were aware of the existence of the ASTM standard and two had been previously notified by CPSC that their beds did not conform to the standard. The fact that there have been repeat violations of the mandatory

standard indicates that there are manufacturers who do not believe they need to conform because the standard is voluntary. Their failure to appreciate that bunk beds with entrapment risks create a substantial product hazard means that, in terms of substantial compliance, the voluntary standard is not a substitute for a mandatory standard.

*** increased compliance with a mandatory rule:** a bunk bed rule is likely to increase compliance with safety provisions due to the deterrent factors implicit in a federal law. Penalties for non-compliance and the publicity concerning these actions will deter potential violators. State and local officials can assist CPSC in identifying noncomplying bunk beds and enhance compliance. Importation of unsafe bunk beds will decrease as CPSC can work with U.S. Customs Service to halt hazardous beds from entering the country. Retailers and distributors will be required to comply with prohibitions against selling non-complying beds, leading to reduced availability of unsafe bunk beds. Manufacturer identification, which will increase as result of greater compliance, will assist CPSC in identifying and carrying out recalls of unsafe bunk beds.

*** reducing risk in a timely fashion:** CPSC has the ability to finalize this rule very soon, with an effective date occurring in 6 months or less. Due to past evidence of non-compliance (because the standard was “voluntary”) it is reasonable to conclude that notification by CPSC that the rule is mandatory on a certain date is substantially more likely to bring about quicker compliance, and reduction of risk, than if manufacturers believe that the requirements are voluntary.

These factors taken together indicate that the voluntary standard for bunk beds is not a substitute for a mandatory CPSC standard and that consumers will be afforded more protection with a mandatory standard.

Because the statute and legislative history do not strictly define the term “substantial compliance,” the agency must evaluate and interpret the requirement given the language of the statute and the mission of the agency. CFA believes that the Commission staff’s interpretation of the substantial compliance provision is reasonable. It is permissible. It is not arbitrary. It is not capricious. It is a logical interpretation given the language of the statute and limited legislative history. Applying this interpretation, there is not substantial compliance and a mandatory standard is warranted for bunk beds.

Conclusion

CFA believes that all statutory requirements have been more than amply satisfied and that there is more than adequate evidence in the rulemaking record to support promulgation of a final rule addressing entrapment risks posed by bunk beds. We strongly urge the Commission to move forward expeditiously to approve a final rule.

U.S. Consumer Product Safety Commission
Public Hearing on Proposed Safety Standard for Bunk Beds
Thursday, May 6, 1999
10:00 a.m.

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