U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON TESTING THE FLAMMABILITY OF CLOTHING TEXTILES, MATTRESSES AND MATTRESS PADS, AND/OR MATTRESS SETS: REQUIREMENTS FOR ACCREDITATION OF THIRD-PARTY CONFORMITY ASSESSMENT BODIES

August 9, 2010

The Consumer Product Safety Commission today voted to issue notices of accreditation for the flammability of clothing textiles, mattresses and mattress pads, and mattress sets.[1] When the agency first embarked down the path of construing general product safety standards as "children's product safety rules" with its carpets and rugs decision last month, I predicted that vote would "steer us on a course of excessive regulation." And now, once again, this agency's decision is mandating third-party testing that the law does not require, that will not reduce risk, and that will ultimately cost jobs in affected industries.

One cannot pick up a newspaper today without reading about the stalled economic recovery. The unemployment rate hovers near 10 percent, and the number is actually much higher than that if one includes those who are underemployed or who have given up looking for work for the time being. Yet this agency's rulemaking continues without regard to the economic environment, erecting regulatory barriers to American competitiveness and productivity that produce no demonstrable increase in consumer product safety. In this time of economic crisis, I believe rules that do not reduce risk are a luxury that we cannot afford.

The clothing textiles and mattress rules at issue here are not children's product safety rules for the same reasons that the carpets and rugs and vinyl plastic film rules are not children's product rules. I will summarize here the reasons that I explained more fully in my **prior statement** on carpets and vinyl film. First, treating all "consumer product safety rules" as though they are "children's product safety rules" disregards the statute's creation of a separate new term. Next, treating longstanding, general product safety rules as children's rules ignores the plain text of the rule of construction provision in the CPSIA that refers to children's products that comply with a "general conformity certification."[2] This language specifically anticipates that some children's products will comply with broad consumer product safety rules via a general conformity certificate (GCC). Since GCC's do not require third-party testing, the statute apparently did not intend for children's products to have to be third-party tested to all applicable standards. In addition, given the numerous general consumer product safety standards the agency oversees, the statute would have provided more than 10 months to issue notices of accreditation for "other children's product safety rules" if that term meant to encompass every general consumer product safety rule that applies to some children's products.[3] Nor are the clothing textile and mattress rules similar to the other rules specifically listed in the timeline for accreditation, as ordinary rules of statutory construction demand.

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[1] 16 CFR § 1610 Standard for the flammability of clothing textiles; 16 CFR § 1632 Standard for the flammability of mattresses and mattress pads; 16 CFR § 1633 Standard for the flammability (open flame) of mattress sets.

[2] CPSA § 14(h); CPSIA § 102(b).

[3] Today's decision ignores the plain language of the statutory deadline, which states, "The Commission shall publish notice of the requirements for accreditation … ***in no case*** later than 10 months after the date of enactment…" (emphasis added). CPSIA §

Even if one accepts the definition that a children's product safety rule includes every "consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission," I do not believe that clothing textile and mattress regulations promulgated under the Flammable Fabrics Act are in fact "similar" rules. For starters, the clothing textile rule involves a long-standing and successful guarantee program that is unlike any of the rules promulgated under the CPSA. That regime effectively splits responsibility for determining the compliance of certain fabrics in a way that is not readily amenable to third-party testing.

In particular, the agency recently revised the mattress rule in a painstaking process that carefully weighed the benefits and costs entailed in that regulation. As part of that process, the agency determined that the rule would have an impact of greater than $100 million on the economy, making it the rule with the single greatest economic impact in the history of the agency up to that time. Requiring third-party testing based on an overly literal interpretation of a part of the CPSIA—for which there is absolutely no evidence to suggest it applies to the mattress rule—upsets the careful balance that the mattress rule's design struck. The oddity of overlaying third-party testing and certification on this rule can be seen from the fact that the rule will now require the burning of a queen-sized prototype mattress in an accredited third-party lab to prove the inflammability of a crib mattress several times smaller.[4] Hence, this rule adopted in the name of vindicating a "children's" product safety rule neither requires testing child-sized mattresses, nor even testing the final children's product.

To accept that the CPSIA has this effect, one must believe that Congress not only disregarded all consideration of risk in areas like lead content, where it expressed clear disagreement with the agency's past decision-making, but that it also overturned all previous risk assessments conducted by the agency's nonpartisan professional staff (and impliedly repealed corresponding regulations in part) in areas where Congress was completely silent. On this theory, even a rule like the mattress rule that was crafted very carefully, over an extended period of time, and adopted by the Commission on a bi-partisan basis becomes insufficient. According to this view, every rule in the agency's history—including these general flammability rules whose requirements have always applied the same to adult and child products alike—is now superseded. Since there exists an alternative explanation that makes so much more sense, I am simply not prepared to accept an interpretation of the CPSIA that generates such negative consequences.

I do not believe we have to rely on the discretionary implementing authority given the agency in § 3 of the CPSIA to avoid today's result.[5] However, assuming the statute would demand a different result otherwise, both of these rules present strong cases for invoking that discretion. For clothing textiles, this rule overturns a long-standing fabric guarantee program. As with carpets, there is no reason to now change a system that has worked. For mattresses, the carefully conceived new regulatory framework should not upset an already well-thought-out scheme. Third-party testing will not improve children's safety, and it makes no sense to treat youth mattresses differently from adult ones.

102(a)(3)(B)(vi). Since the other deadlines in the timeline all say "Not later than …," the agency could construe the "in no case" admonition to be an absolute bar that excludes, for example, the case of issuing notices of accreditation for general consumer product safety rules like clothing textiles and mattresses that are never mentioned in the text or legislative history of the statute.

[4] Note that twin-sized mattresses would not require third-party testing, because they are not primarily designed or intended for children 12 years of age or younger. As clarified in the definition of a children's product, a twin-sized mattress is an example of a product typically purchased for a child under 12 but that would continue to be used all through the teenage years and even beyond.

[5] "The Commission may issue regulations, as necessary, to implement this Act and the amendments made by this Act." § 3 CPSIA.

Of course the CPSC can and should issue rules requiring third-party testing when such rules provide the best means to reduce risk to children. But the safety considerations that pertain to clothing textiles and mattresses are no greater for children than they are for adults. In fact, the risks to children quite possibly could be less. Neither the staff of the agency nor anyone else has provided data to the Commission demonstrating, for example, that more mattress fires occur with crib mattresses or youth-sized mattresses than occur with adult mattresses. For instance, none of the crib deaths that the agency's safe sleep team has identified in recent years resulted from a mattress fire. Given that adults are far more likely to smoke in bed than children (let alone babies), this might even be a case where the hazard to ***adults*** is uniquely greater.

And so, imposing more regulation without a corresponding improvement in product safety, the Commission continues down a path of overregulation that our economy cannot sustain. Public comments are welcome on this decision for the next 30 days. I continue to hope that affected parties will convince my colleagues to change course before we add further to what are now six notices of accreditation that we never should have issued.