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Statement on the notice of proposed rulemaking on hand-held infant carriers

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The Consumer Product Safety Commission recently proposed a new safety standard for hand-held infant carriers based on ASTM F2050-12. I joined my colleagues in voting to issue the proposed rule because I believe that, as amended, it helps fulfill the Commission's obligation to ensure that parents have safe durable products for their infants and toddlers. I look forward to seeing a final version that addresses the concerns the public raises during the notice-and-comment period.

There are, however, concerns that arose in the drafting of this standard that deserve to be discussed. Specifically, the draft standard presented to the Commission included provisions that were not fully vetted by the voluntary standards group. This is directly attributable to the statutory mandate of § 104 of the Consumer Product Safety Improvement Act, which requires the agency to select, each year, four voluntary standards for durable infant products and make them mandatory. Section 104 has warped the voluntary standards development process and thus deprived the Commission of the opportunity to vote on the best standards possible. As described below, the standards presented to the Commission under § 104—including this one—are less consensus-driven and less analyzed than they would be absent § 104's strictures. Given that, it is the responsibility of the Commission and agency staff to compensate for § 104's limitations, and ensure that the benefits of voluntary standards—for the public and the agency—are preserved.

Why the CPSC uses the voluntary standards process

Voluntary standards are product- and product-category–specific technical specifications and tests developed by representatives of manufacturers, government agencies, consumer advocates, and others. Because these standards represent the best, coordinated thinking of varied groups, they are well-regarded and widely-adopted. As a resource that would be difficult for any individual or single group to develop, Congress wisely chose to give the agency the opportunity and obligation to rely on voluntary standards when they exist and sufficiently address consumer product hazards. Under the normal requirements of the Consumer Product Safety Act, the agency must defer to voluntary standards that (1) adequately address hazards if (2) the standards are widely followed. Indeed, the Commission can only adopt its own standard if it concludes that one of these prongs is not satisfied.

In order for this process to work, the agency's staff—who are broadly-skilled yet not experts in each of the agency's 15,000 product categories—must work with the experts who develop the voluntary standards. Because the development process is driven by consensus, it can take some time. The end result, however, should be robust and fair safety standards that effectively advance safety for children and families while eschewing needlessly burdensome or costly requirements that could limit consumer choice, harm the American economy, and divert resources from innovation (including safety innovation).

How the process is altered for § 104 rules

The normal process is different, however, for a set of rules that Congress ordered the Commission to adopt in the Consumer Product Safety Improvement Act. In § 104 of the CPSIA, Congress required the agency to adopt mandatory rules for twelve durable infant or toddler products. These rules are to be substantially the same as applicable voluntary standards, or more stringent if necessary to further reduce the risk of injury.

Importantly, § 104 requires the agency to promulgate two rules every six months. This is a very fast pace for the agency, and in combination with the requirement that the agency adopt *mandatory* standards, I am concerned that the timeline appears to be warping the standards development process. While our staff has always participated in developing standards, our staff now has a special seat at the drafting table. That is, CPSC staff's suggestions drive a substantial portion of the discussion. And their suggestions are backed by the staff's power to include any preferred provision in the draft that ultimately is presented to the Commission. So even if staff suggested a provision that a voluntary standard development group disagreed with, the group may feel bound to accommodate and refine staff's suggestion because it would still likely show up in the draft standard presented to the Commission. And although the Commission can change (and has changed) the staff's drafts, the staff's say-so appropriately carries much weight, and it would be difficult for an outside group to successfully object to a staff-inserted provision.

Now, when there are problems with what staff has put forward, it will occur more often that staff's suggested provisions merely need refining, not to be jettisoned entirely. But because of § 104's timeline, the analysis of changes to standards is short-circuited. When new hazards are identified or new potential solutions are devised, there is an urge to include these in the standard by the time it reaches the Commission, whether at the proposal stage or at the final rule stage. And because the goal is to produce a rule to meet the arbitrary two-every-six-months deadline, the analysis of the new elements of the standard is truncated. But it is at precisely this stage that there should be a desire to get consensus—to get the standard right. When incompletely vetted provisions come up for the Commission's consideration, both we and the American people are deprived of the value of a complete standard development process.

Conclusion

To be clear, I have no doubt that our staff is fully committed to an open, fair, objective, and full voluntary standards development process. I must lay the blame squarely on the specific requirements of § 104, which warp the incentives and timeline of the voluntary standards process. But because that process has been negatively altered, it is the responsibility of CPSC staff—and the Commission—to strive to ensure that the proposals that come up to the Commission are fully developed.