MINUTES OF COMMISSION MEETING
January 11, 2017

Chairman Elliot F. Kaye convened the January 11, 2017, 9:30 a.m., meeting of the U.S. Consumer Product Safety Commission in open session. Commissioner Robert S. Adler, Commissioner Marietta S. Robinson, Commissioner Ann Marie Buerkle and Commissioner Joseph P. Mohorovic were in attendance. Chairman Kaye made welcoming remarks and summarized the matters.

Decisional Matter: Final Rule: Safety Standard for Sling Carriers
(Briefing package dated December 21, 2016, OS No, 5857[1])

Hope E J. Nesteruk, Project Manager for Infant Sling Carriers, Division of Mechanical Engineering and Combustion, Directorate for Engineering Sciences, and Matthew T. Mercier, Attorney from the Office of General Counsel, were present to respond to any questions. Chairman Kaye called for any questions for the staff. The Commission asked several questions of the staff on the issue.

Chairman Kaye moved to direct the staff to amend the Final Rule: Safety Standard for Sling Carriers (Draft December 20, 2016) to replace the word "Staff" with "The Commission" on page 30, the sentence that begins "Staff generally recommends designing..." Commissioner Adler seconded the motion. Chairman Kaye explained the purpose of the amendment and the Commission discussed the amendment. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (4-1) to adopt the motion. Chairman Kaye, Commissioner Adler, Commissioner Robinson and Commissioner Buerkle voted to adopt the motion and amendment. Commissioner Mohorovic voted to not adopt the motion and amendment. (The adopted amendment is attached.)

Chairman Kaye called for any other motions. Commissioner Buerkle moved that consideration of the draft final rule for sling carriers be postponed for period of one year. Commissioner Adler seconded the motion. Commissioner Buerkle explained the purpose of the motion and the Commission discussed the motion. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (3-2) to not adopt the motion. Chairman Kaye, Commissioner Adler and Commissioner Robinson and voted to not adopt the motion. Commissioner Buerkle and Commissioner Mohorovic voted to adopt the motion. (The motion (not adopted) is attached.)

Chairman Kaye called for any further motions. Hearing none, Chairman Kaye moved for approval of the staff's draft final rule, as amended, and publication of same in the *Federal Register ("FR")*. The Commission passed on any further discussion. Chairman Kaye called for a vote on the matter. The Commission voted (3-2) to approve the staff's draft final rule, as amended, and publication in the *FR*. Chairman Kaye, Commissioner Adler and Commissioner

[1] Commissioner Buerkle extended the due date for the vote from December 28, 2016 to January 3, 2017. Commissioner Mohorovic transferred the ballot vote to a decisional meeting.

Robinson voted to approve the draft final rule, as amended. Commissioner Buerkle and Commissioner Mohorovic voted to not approve the draft final rule.

Commissioner Buerkle submitted the attached statement regarding the issue.

Chairman Kaye called for any closing statements. The Commissioners each made closing statements. There being no other business, Chairman Kaye closed this portion of the meeting at 10:55 a.m.

Briefing Matter: Proposed Rule: Amendments to Fireworks Regulations
(Briefing package dated December 14, 2016 and OS No. 5355)

After introducing the matter and making an opening statement, Chairman Kaye called for the briefing to begin. Conducting the briefing were Rodney Valliere, Project Manager, Division of Chemistry, Directorate for Laboratory Sciences, and Meredith Kelsch, Attorney, Office of General Counsel, Aaron Orland, Division Director, Division of Chemistry, Directorate for Laboratory Sciences, and Howard Tarnoff, Senior Counsel for the Assistant Executive Director for Compliance. Other project team members also responded to certain questions.

The Commissioners asked questions of the staff and discussed the details of the proposed amendments.

There being no other business, Chairman Kaye adjourned the meeting at 12:20 p.m.

For the Commission:

Todd A. Stevenson
Secretariat

Attachments: The (Adopted) Amendment of Chairman Kaye
The Motion (Not Adopted) of Commissioner Buerkle
Statement of Commissioner Buerkle

Chairman Kaye Amendment on Sling Carriers

The Commission directs staff to amend the Final Rule: Safety Standard for Sling Carriers (Draft 12/20/2016) as follows:

On page 30, replace the word "Staff" with "The Commission" in the following sentence:

> Staff generally recommends designing the hazard out of a product or guarding the consumer from the hazard, rather than employing warnings, because a warning's effectiveness depends on persuading consumers to alter their behavior to avoid the hazard.

Buerkle Motion No. 1

I move that consideration of the draft final rule for sling carriers be postponed for a period of one year.

Statement of Commissioner Ann Marie Buerkle on
Promulgation of a Mandatory Standard for Infant Slings

I voted against the mandatory standard for infant slings because it is likely to ruin dozens if not hundreds of law-abiding small businesses without preventing any deaths or significant injuries.

We have just witnessed the inauguration of our forty-fifth President. This is not the time to pile on more regulation, particularly when the benefits (if any) are minimal.

In addition, the chairmen of our House and Senate authorizing Committees wrote to our Chairman after the fall elections, asking him "to avoid focusing attention and resources in the coming months on *complex, partisan, or otherwise controversial* items that the new Congress and new Administration will have an interest in reviewing." We should not have ignored this plea from Congressional leaders.

The mandatory standard for slings is precisely the type of controversial action that the CPSC Chairman was asked to avoid. To begin with, our own staff has concluded that this standard will have a significant adverse impact on a substantial number of small businesses. In my three years as Commissioner, this is the only rule where the staff has made such an affirmative determination, and I understand it has happened only a very few times in CPSC's entire history.

These costs could possibly be justified if the safety benefits of the standard were very substantial, but that is not so. The primary hazard associated with slings results from mispositioning of infants inside the sling. CPSC staff was unable to devise performance or testing requirements that would ensure slings are designed to prevent this hazard. Instead, the standard approved by the majority merely requires a warning label. While I certainly favor efforts to educate caregivers about the positioning hazard, we can do that without promulgating a mandatory standard.

In addition to the unavoidable high costs and low potential benefits, there is a serious legal question as to whether the products to be covered by this standard

properly belong to the class of "durable infant and toddler products." Section 104(f) of the Consumer Product Safety Improvement Act of 2008 (CPSIA) contains a basic definition of the term and a list of twelve product classes that are included. It does not expressly mention slings. A few years ago, the Commission promulgated a rule requiring product registration cards for durable infant and toddler products, and it added slings to the category for purposes of that rule. That regulation did not involve the disproportionate costs imposed by the standard as in this case, and the issue could certainly have been revisited once these costs became apparent. Indeed, in the preamble, the Commission candidly admits that it considered exempting wraps and certain other all-fabric carriers from the regulated class.

For most sling makers, the most significant costs of the standard will be related to third-party testing. Some of the tests are destructive, meaning that representative samples of the product must be sacrificed to the testing process. Imagine how vexing it would be to weave a beautiful wrap by hand and then, instead of selling it for a hard-earned profit, turn it over for destructive testing. Doing so would be all the more painful when one realizes that to date no wraps have failed the strength testing performed by CPSC staff.

Unfortunately, once the mandatory standard becomes effective, all slings will have to be certified, based on testing by an approved third-party laboratory. This is true even for the smallest sling makers because Congress did not allow a "small batch" exemption for section 104 standards as it did for most other standards. By insisting that all slings be classified as durable nursery products, therefore, the Commission also eliminates that avenue of relief.

In sum, I see many reasons to regard this rule as "controversial," and I think it should have been put on the back burner as Congressional leaders requested. I would gladly make a determination that this product class is not covered by section 104, but I am aware that the Commission majority does not agree. Nevertheless, there is no exigency that required us to mandate this standard right now. Section 104 requires us to promulgate standards at a relatively rapid clip

(two every six months), but it doesn't specify which ones. This standard should be at the absolute bottom of the list.

Deferring consideration of this standard would not have precluded the staff from dealing with any specific sling models that pose an unreasonable risk to consumers. The staff retains the ability to seek a recall in appropriate cases. In their letter to us, the House and Senate Chairmen recognized as much when they said "we expect and encourage the Commission to continue its routine product safety enforcement on behalf of American consumers."

I wish that section 104 gave us more flexibility than it does, but I think we could have exercised our discretion to avoid some of the problems that will result from promulgating this standard. At the very least, where the consequences of the rule are so severe and the safety payoff so slight, we should never have put this rule ahead of others in the queue.