U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

MINUTES OF COMMISSION MEETING

July 20, 1983

Third Floor Hearing Room
1111 - 18th Street, N.W.
Washington, D.C.

The July 20, 1983, meeting of the U.S. Consumer Product Safety Commission was convened in closed session by Chairman Nancy Harvey Steorts. Commissioners Stuart Statler and Sam Zagoria were present. Commissioner Edith Barksdale Sloan joined the meeting in progress.[1/]

Agenda Matters.

1. Final 30(d) Rule for Mesh-Sided Cribs and Playpens

The Commission considered litigation and adjudication matters involved in deciding whether to issue a rule under provisions of Section 30(d) of the Consumer Product Safety Act (CPSA) that would transfer from the Federal Hazardous Substances Act to the CPSA the regulation of a risk of injury from suffocation and asphyxiation associated with certain mesh-sided portable cribs and playpens. The Commission proposed this rule in the Federal Register of March 3, 1983 (48 FR 9034).

Following discussion, the Commission voted 4-0 to approve the draft Federal Register notice to issue the transfer rule on a final basis.

2. Compliance Status Report

The staff briefed the Commission on the status of various compliance activities.

1/ CPSC staff attending the meeting were personal staff of the Commissioners; the Executive Director; the General Counsel and representatives from OGC; representatives from the Directorates of Compliance and Administrative Litigation; Epidemiology and Engineering; and representatives from the Office of Program Management, Office of Media Relations and Office of the Secretary.

There being no further business on the agenda, Chairman Steorts adjourned the meeting.

For the Commission:

July 29, 1983
Date

Sadye E. Dunn
Sadye E. Dunn
Secretary

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1145

Regulation of Certain Mesh-Sided Play Yards and Cribs Under Consumer Product Safety Act

AGENCY: Consumer Product Safety Commission.

ACTION: Final rules.

SUMMARY: The Commission is issuing final rules to transfer from the Federal Hazardous Substances Act (FHSA) to the Consumer Product Safety Act (CPSA) regulation of risks of asphyxia from airway blockage and chest compression associated with certain mesh-sided play yards (playpens) and cribs if an infant becomes entrapped between the base or floor of the play yard or crib and the mesh side, in a pocket which forms when a side of the play yard or crib is not fully raised.

The Commission finds that it is in the public interest to issue these rules because public notification and remedial action can be accomplished more expeditiously under the CPSA than under the FHSA with regard to risks of asphyxia from airway blockage and chest compression associated with any of the mesh-sided play yards and cribs which are subject to these rules and described in this notice.

EFFECTIVE DATE: July 27, 1983.

FOR FURTHER INFORMATION CONTACT: Lynn Lichtenstein, Trial Attorney, Division of Administrative Litigation, Consumer Product Safety Commission, Washington, D.C. 20207. Telephone: (301) 492–6626.

I have voted to grant petitioner's request for deletion of Part III of the order which absolutely prohibits exclusive dealing, full line forcing and tying practices. The legality of these practices depends upon market conditions and other factors associated with rule of reason analysis. While *per se* treatment may have been appropriate as a fencing in device when this order was issued twelve years ago, enough time has passed to justify a return to the normal standard.

SUPPLEMENTARY INFORMATION: In the Federal Register of March 3, 1983 (48 FR 9034), the Commission proposed rules to transfer from the FHSA to the CPSA regulation of possible risks of asphyxia by airway blockage or chest compression which may be associated with certain play yards (playpens) and portable cribs with mesh sides. At the time it published the proposal, the Commission had reports of seven fatal incidents involving the asphyxiation of infants or young children in mesh-sided play yards or portable cribs, which had occurred from 1973 through 1982. (The Commission also had one report of a child's death associated with a product which was described as a mesh-sided play yard, but which may have been a mesh-sided portable crib.) Since proposing the transfer rules, the Commission has received information concering three additional deaths of children by asphyxiation associated with mesh-sided play yards and portable cribs.

Background

The type of play yard involved in these incidents is one utilizing metal tubing to form a frame which supports a floor, generally of pressed wood, approximately 6 inches above the surface on which the play yard is placed during use. A thin pad covers the floor of the play yard.

The play yard is enclosed on all four sides by an open mesh fabric. The mesh fabric sides extend down from the top of the play yard toward the floor. Some play yards are manufactured with a strip of material (sometimes called a draft shield) that may extend as high as six inches above the floor of the play yard. If a draft shield is present, the mesh sides are sewn to the draft shield, and the draft shield is attached to the floor of the play yard. If no draft shield is present, the mesh sides are attached to the floor of the play yard.

The tubular frame of the play yard is constructed so that at least one, and sometimes both, of the sides can be lowered when the product is in use.

When one side of the play yard is in a lowered position, the mesh fabric and draft shield on that side become slack and form a pocket at or below the level of the floor of the play yard. If an infant in the play yard moves or falls off the edge of the play yard floor into the pocket formed by the mesh side and draft shield, the weight of the infant creates a downward force on the pocket.

If an infant's face is pressed against the draft shield, the floor of the play yard, or the mesh itself, with sufficient force to block passage of air into the nose or mouth, or if the compression force against the infant's chest is great enough to interfere with the infant's ability to breathe, asphyxia—loss of consciousness from insufficient oxygen—may result. If asphyxia continues for a period of three to five minutes, loss of oxygen may result in permanent brain damage. If asphyxia continues for a longer period, death will ensue.

The portable cribs associated with infant deaths by asphyxiation are similar in design and construction to the play yards described above. However, the legs of the portable crib are extendable and can be adjusted so that the floor of the crib may be raised to approximately 18 inches above the surface on which the crib is placed, and the crib mattress, which covers the crib floor, may be somewhat thicker than the pad used with the play yard.

Risks of injury associated with portable cribs with mesh sides are similar to the ones described in the discussion of mesh-sided play yards. When a side of the crib is lowered, the mesh fabric and draft shield form a pocket near the floor of the crib. If an infant is placed in such a crib with one side lowered, and then moves or falls off the mattress into the mesh pocket, the weight of the infant will cause the pocket to constrict.

Constriction of the pocket can press the infant's face or body against the draft shield, the floor of the crib, the edge of the mattress, or the mesh itself, and may result in asphyxia. As stated above, asphyxia can cause permanent brain damage or death.

The proposed rules to transfer regulation of any risk of injury associated with these products to the CPSA were published in accordance with provisions of section 30(d) of that Act (15 U.S.C. 2079(d)), which states:

> A risk of injury which is associated with a consumer product and which could be eliminated or reduced to a sufficient extent by action under the Federal Hazardous Substances act * * * may be regulated under this Act [the CPSA] only if the Commission by rule finds that it is in the public interest to regulate such risk of injury under this Act.

In the notice proposing the transfer rules, the Commission expressed a preliminary finding that transfer of any risk of injury of asphyxiation by airway blockage or chest compression which may be associated with mesh-sided play yards or portable cribs is in the public interest because notification to consumers and corrective action could be accomplished more expeditiously under the CPSA in the event the Commission believes that such products present a hazard to the public.

The notice of proposal included an extensive analysis of the provisions of both the CPSA and the FHSA governing public notification and remedial action with regard to hazardous products. That notice also discussed the provisions of both acts authorizing the Commission to issue rules to address risks of injury presented by such products.

Comment on Proposal

In response to the proposal of March 3, 1983, the Commission received one comment from Juvenile Products Manufacturers Association, Inc. That comment set forth several objections to the proposed rules, and urged the Commission not to issue them on a final basis.

The first objection to the proposed rules made in this comment is that mesh-sided play yards and portable cribs are articles intended for use by children, subject to specific provisions of the FHSA. The comment states that the Commission has broad authority under the FHSA to ensure the safety of children's products distributed in the United States and discusses various sections of the FHSA applicable to rulemaking, civil and criminal litigation, and administrative adjudicative proceedings to require public notification and remedial action with regard to hazardous children's articles.

The comment states that a "most comprehensive set of generic regulations" to ensure the safety of children's articles has been issued under the FHSA, and makes reference to requirements for full-size and non-full-size cribs, published at 16 CFR 1500.18(a) (13) and (14) and Parts 1508 and 1509. However, as noted in the proposal, the comment acknowledges that the mesh-sided play yards and portable cribs described in the proposal of March 3, 1983, are not subject to any of the requirements for full-size or non-full-size cribs.

Risks of Injury

The comment observes correctly that the notice proposing the transfer rules stated that the Commission is "investigating the possibility" that mesh-sided play yards and portable cribs "may present a potential hazard of asphyxia." See 48 FR 9034. The text of the proposed rules stated that the Commission finds that it is in the public interest to transfer to the CPSA from the FHSA regulation of "the possible risk of asphyxia from airway blockage or chest compression" that "may be associated" with those products. See proposed §§ 1145.11(a) and 1145.12(a).

The comment expresses the view that the Commission's "largely unsupported statements that the products 'may' present a 'potential hazard' " do not justify issuance of final rules based on the proposal.

The Commission has considered information about the design and construction of mesh-sided play yards and portable cribs, and reports of eleven deaths of children associated with those products, as noted above. The Commission has also considered the following information about mesh-sided play yards and portable cribs:

Reports of testing of mesh-sided play yards and cribs to determine the compression forces which may result if a child becomes entrapped in the pocket which forms when one side is not fully raised.

Two consumer complaints concerning entrapment of young children in the pocket formed by the mesh sides of a play yard and a portable crib, apparently without injury to either of the children involved.

Information about the numbers of mesh-sided play yards and portable cribs estimated to be in use by consumers.

Reports of a meeting between the Commission staff and representatives of manufacturers of mesh-sided play yards and portable cribs.

The Commission concludes that this information adequately supports the conclusion that risks of injury to young children from asphyxia by airway blockage or chest compression are associated with mesh-sided play yards and portable cribs. The final rules issued below state that such risks of injury "are associated" with those products, rather than "may be associated," as stated in the proposal.

"Protection" to Manufacturers by FHSA Rulemaking

This comment also expresses the view that the purpose of the proposal is to bypass the protection afforded to manufacturers by the rulemaking provisions of both the FHSA and the CPSA, as amended by the Consumer Product Safety Amendments of 1981.

As required by section 30(d) of the CPSA, the proposed transfer rules expressed a finding by the Commission that it is in the public interest to transfer regulation of certain risks of injury that may be associated with mesh-sided play yards and portable cribs to the CPSA from the FHSA. As stated above, the basis of the Commission's public interest finding is that in the event that action is necessary to address risks of asphyxia from airway blockage or chest compression associated with those products, public notification and remedial action can be accomplished more expeditiously under the CPSA than under the FHSA.

In the preamble to the proposal, the Commission observed that both the FHSA and the CPSA contain provisions authorizing the Commission to issue orders in appropriate cases for public notification of some hazards presented by products, and for remedial action to be taken with regard to such products. The Commission observed that the provisions of the FHSA applicable to public notification and remedial action would authorize issuance of such orders for mesh-sided play yards and portable cribs only after the Commission has first completed a rulemaking proceeding to announce the Commission's determination that such products are banned because they present a mechanical hazard.

The preamble then discussed the corresponding provisions of the CPSA regarding public notification and remedial action with regard to certain hazards presented by consumer products, and observed that these provisions allow the initation of an adjudicative proceeding for the issuance of such orders without the necessity of first completing a rulemaking proceeding. See 48 FR 9035.

The objection in this comment that the purpose of the proposed transfer rules is to bypass protections afforded to manufacturers by the rulemaking provisions of the FHSA and the CPSA apparently assumes that manufacturers of mesh-sided play yards and portable cribs would be more likely to be subject to regulatory action by the Commission if it proceeds under section 15 of the CPSA rather than under one or more provisions of the FHSA.

The Commission observes that initiation of an adjudicative proceeding under section 15 of the CPSA does not assure that any order for public notification or remedial action will necessarily result. Before the Commission may issue any order under section 15 of the CPSA, it must first give all interested parties opportunity for a hearing conducted in accordance with the Commission's rules of practice for adjudicative proceedings (16 CFR Part 1025). In any such hearing, any manufacturer, distributor, or retailer named in any proposed order for public notification or corrective action would have the right to timely notice and all other rights essential to a fair hearing, including, but not limited to, the right to present evidence, to compel production of documents and testimony, to conduct cross-examination, and to be heard by objection, motion, brief, and argument. Additionally, any party to a hearing would have rights to conferences, briefs, motions and summary decisions and orders prior to hearing; and the right of appeal to the Commission from any initial decision issued after a hearing. Moreover, a decision and order issued by the Commission is subject to judicial review under provisions of the Administrative Procedure Act (5 U.S.C. 701–706).

Although provisions of the FHSA would require the Commission to issue a rule declaring a product to be a banned hazardous substance before it could initiate a proceeding under that act to order public notification or corrective action with regard to any hazard presented by the product, the comment under consideration does not describe the nature of any additional "protection" which a manufacturer would obtain from such a rulemaking proceeding.

Moreover, this comment seemingly overlooks the fact that by issuing final rules under provisions of section 30(d) of the CPSA, the Commission does not preclude the possibility of proceeding under provisions of sections 7 and 9 of the CPSA (15 U.S.C. 2056, 2058) for issuance of a consumer product safety standard applicable to mesh-sided play yards and portable cribs, or under sections 8 and 9 of the CPSA (15 U.S.C. 2057, 2058) for a banning rule applicable to those products if no consumer product safety standard under the CPSA is feasible. The notice proposing the transfer rules discussed the possibility of rulemaking under those provisions of the CPSA at 48 FR 9036.

The comment under consideration correctly observes that as a result of the Consumer Product Safety Amendments of 1981, the rulemaking provisions of sections 7, 8, and 9 of the CPSA are substantially similar to the provisions of sections 2(q)(1) and 3 (e) through (i) of the FHSA (15 U.S.C. 1261(q)(1) and 1262 (e) through (i)), which govern rulemaking proceedings applicable to toys and children's articles.

Thus, if the Commission begins any rulemaking proceeding under the CPSA for a consumer product safety standard or a banning rule applicable to mesh-sided play yards or portable cribs, manufacturers will have substantially the same procedural rights as they would have if the Commission initiated a proceeding for rulemaking applicable to these products under the FHSA.

The comment also contends that the Commission need not transfer regulation from the FHSA to the CPSA in order to act expeditiously in addressing any hazard which may be presented by

mesh-sided play yards and portable cribs. The comment observes that under the FHSA, the Commission may initiate a rulemaking proceeding under section 3(e) of the FHSA to declare an article intended for use by children to be a banned hazardous substance, and thereafter, in appropriate cases, declare the product to be an "imminent hazard" under provisions of section 3(e)(2) of the FHSA. The result of such action is to classify the product as a "banned hazardous substance" until completion of the rulemaking proceeding, and as such, subject to provisions of section 15 of the FHSA regarding notification to the public and remedial action.

In the proposal of March 3, 1983, the Commission considered the provisions of section 3(e)(2) of the FHSA, but observed that some products may present a "substantial product hazard" warranting issuance of an order for public notification or corrective action under provisions of section 15 of the CPSA, without amounting to an "imminent hazard" as that term is used in section 3(e)(2) of the FHSA. See 48 FR 9036.

Impact on Small Businesses

The comment under consideration also objects to issuance of final rules based on the proposal because the Commission has not prepared an initial analysis of the anticipated effect of the proposed transfer rules on small businesses in accordance with provisions of section 603 of the Regulatory Flexibility Act (RFA, 5 U.S.C. 603).

The comment states that some of the companies which manufacture mesh-sided play yards and portable cribs are small entities (a term used in the RFA, which includes small businesses). The comment alleges that if the transfer rules are issued on a final basis and regulatory action is taken under provisions of section 15 of the CPSA, manufacturers of mesh-sided play yards and portable cribs will lose the "protections" afforded by provisions of the FHSA which require the Commission to complete a rulemaking proceeding before it may initiate any action to compel notification to the public or corrective action to be taken with regard to any hazard which may be presented by mesh-sided play yards or portable cribs. The comment states that such a result will have a substantial impact upon those firms.

As noted in this comment, section 605(b) of the RFA (5 U.S.C. 605(b)) provides that an agency is not required to prepare an initial analysis of the anticipated impact of a proposed rule if it certifies that the rule, if issued on a final basis, will not have a significant economic impact on a substantial number of small businesses.

In the proposal of March 3, 1983, the Commission made the certification required by section 605(b) of the RFA, stating that the rules, if issued on a final basis, will not impose any legal obligation on any person or firm. The proposal stated that if the Commission issues the rules on a final basis and then determines that it should act to address any risk of injury which is subject to the rules, the Commission will be required to initiate and follow through to completion appropriate judicial or administrative proceedings under one or more sections of the CPSA before it can impose any obligation on any person or firm.

Although the comment contends that the proposal "indicates that the Commission intends to act pursuant to section 15 of the CPSA," neither the proposal nor the rules issued below will cause any action to be taken under section 15 or any other provision of the CPSA.

As noted above, while the provisions of section 15 of the CPSA were discussed in the proposal and cited as a factor in the Commission's decision to propose the transfer rules, the notice of proposal also discussed the possibility of rulemaking under provisions of sections 7, 8, and 9 of the CPSA.

If the Commission undertakes any rulemaking proceeding under the CPSA with regard to risks of asphyxia by airway blockage or chest compression associated with mesh-sided play yards or portable cribs, the Commission will comply with all applicable provisions of the RFA.

Appropriateness of Rulemaking Proceedings

The final objection to the proposed transfer rules expressed in this comment is that the Commission should address any hazard which may be presented by the products under consideration either by relying on voluntary action by manufacturers, or through a rulemaking proceeding. Since the rulemaking procedures of the FHSA and the CPSA are substantially similar, the comment argues that the proposed transfer of regulation is unnecessary.

The comment states that because all mesh-sided play yards and portable cribs are of "generic design," any action taken by the Commission to address any hazard which those products may present will have an effect on the entire industry.

The comment cites a series of decisions by the U.S. Court of Appeals for the Ninth Circuit (*Ford Motor Co. v. F.T.C.*, 673 F.2d 1008 (1981); *Patel v. I.N.S.*, 638 F.2d 1199 (1980); and *Ruangswang v. I.N.S.*, 591 F.2d 39 (1978)) and one decision by a U.S. District Court (*Pharmaceutical Manufacturers v. Finch*, 307 F. Supp. 858 (1970)) for the proposition that an agency must proceed by rulemaking if its purpose is to change the law and establish rules of widespread application.

The comment also expresses the view that rulemaking is a more appropriate means to address any hazard which may be presented by mesh-sided play yards and portable cribs, and advances several policy-oriented reasons for use of rulemaking as distinguished from adjudication under provisions of section 15 of the CPSA.

The objections to issuance of final transfer rules advanced in this portion of the comment assume that after issuing final rules, the Commission will initiate one or more adjudicative actions under provisions of section 15 of the CPSA, and will take no other action.

As this comment suggests, the possibility exists that voluntary action by manufacturers of mesh-sided play yards and portable cribs may obviate the necessity for any type of regulatory activity by the Commission.

The possibility also exists that the Commission might initiate one or more adjudicative proceedings under section 15 of the CPSA *and* begin a proceeding for the issuance of a consumer product safety rule applicable to mesh-sided play yards and portable cribs. The Commission may determine that one or more adjudicative proceedings under section 15 of the CPSA are needed to obtain public notification and remedial action with regard to products which are in channels of distribution and in the possession of consumers. At the same time, the Commission might also determine that issuance of a consumer product safety rule may be necessary to bring about some change in future production of such articles.

In view of all possible actions which could be taken under various provisions of the CPSA, the Commission concludes that the cases and other authority cited in this comment do not preclude issuance of final transfer rules in accordance with section 30(d) of the CPSA.

Moreover, the Commission observes that to the extent the cases cited in this comment suggest that the decision of whether to proceed by rulemaking or adjudication in a particular matter is beyond the informed discretion of an administrative agency, they appear to be inconsistent with decisions of the United States Supreme Court in *Bell Aerospace*

v. N.L.R.B., 416 U.S.C. 267 (1974); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S.C. 759 (1969); *F.T.C. v. Universal-Rundle Corp.*, 387 U.S.C. 244 (1967); *Moog Industries, Inc. v. F.T.C.*, 355 U.S.C. 411 (1958); and *S.E.C. v. Chenery*, 332 U.S.C. 194 (1947).

Recent Judicial Decision

As stated above, when the Commission published the proposal to transfer regulation of any risks of asphyxia by airway blockage or chest compression which may be associated with mesh-sided play yards and portable cribs, it expressed the view that such a transfer would be in the public interest because notification to the public of any hazard presented by such products and remedial action to correct any such hazard could be accomplished more expeditiously under the CPSA than under the FHSA.

The notice of proposed rulemaking observed that both the FHSA and the CPSA authorize the Commission to issue orders for public notification and remedial action with regard to certain hazards which may be presented by products. The proposal stated that the principal difference between the provisions of the FHSA and the CPSA with regard to issuance of such orders is that under the FHSA, the Commission must first issue a rule in accordance with sections 2(q)(1)(A) and 3(e) through (i) to declare the item to be a "banned hazardous substance" before it can invoke provisions of section 15 of the FHSA (15 U.S.C. 1274) regarding orders for public notification and corrective action with regard to hazardous products. Under section 15 of the CPSA (15 U.S.C. 2064) the Commission may begin a proceeding for issuance of an order for public notification and corrective action with regard to certain product hazards without any requirement to initiate or complete a rulemaking proceeding. The Commission stated that because a rulemaking proceeding under sections 2(q)(1)(A) and 3(e) through (i) of the FHSA is "complex and time-consuming," it could obtain public notification and corrective action in appropriate cases more quickly under the CPSA than under the FHSA, and for that reason, transfer of regulation from the FHSA to the CPSA is in the public interest.

Among the objections expressed in the comment received in response to the proposal is one to the effect that the Commission's belief that the rulemaking procedures of the FHSA are "complex and time consuming" is not sufficient justification for issuance of final transfer rules.

In a recent decision vacating the Commission's ban of urea formaldehyde foam insulation (UFFI), the U.S. Court of Appeals for the Fifth Circuit discussed in section 30(d) of the CPSA as a "tangential" procedural issue. *Gulf South Insulation et al.* v. *CPSC*, — F.2d — (5th Cir. No. 82-4217; April 7, 1983, as modified June 23, 1983). After rejecting the Commission's finding that the risk of injury associated with UFFI could not have been regulated sufficiently under the FHSA, the Court focused on the public interest finding required by section 30(d) for issuance of a transfer rule.

The Commission had expressed a finding that it was in the public interest to regulate UFFI under the CPSA instead of the FHSA because the rulemaking procedures of the FHSA were "complex and lengthy." The Court rejected that finding and held, narrowly, that the Commission could not discard "the due process procedures mandated by the Federal Hazardous Substances Act" to regulate UFFI under the CPSA. *Slip op.* at 3646.

The decision in the *Gulf South* case was issued shortly after the expiration of the period for receipt of written comments on the proposed transfer rules concerning risks of injury which may be associated with mesh-sided play yards and portable cribs. Section 30(d) of the CPSA limits the comment period to 30 days after publication of the notice of proposal.

By letter dated April 26, 1983, the commenter cited the Court's decision in *Gulf South* in support of the position that transfer of regulation from the FHSA to the CPSA cannot be justified by the Commission's belief that the rulemaking procedures of the FHSA are "complex and time consuming," as stated in the proposal of March 3, 1983.

The Commission has considered that portion of the decision in *Gulf South* interpreting provisions of section 30(d) of the CPSA in light of the objections to the proposal of March 3, 1983, expressed in the comment under consideration. The Commission concludes that the *Gulf South* decision is not a bar to issuance of final rules in this proceeding.

The Commission disagrees with the decision in *Gulf South* and has requested the Solicitor General to file a petition for writ of certiorari to the U.S. Supreme Court. Moreover, the Commission does not believe that the language in that decision interpreting section 30(d) of the CPSA has any application to the rules issued below.

As stated above, the Commission's finding of public interest in the proposal and in the final rules issued below is based on the expeditious notification and corrective action that are more likely to be obtained under the CPSA than under the FHSA. This conclusion is based primarily on the following reasons, which distinguish the circumstances of this proceeding involved with mesh-sided play yards and portable cribs from the circumstances surrounding the Commission's ban of UFFI:

First, in *Gulf South*, the Court seems to have been particularly concerned about the "due process" procedures that would have been provided had UFFI been regulated under the FHSA. Those procedures are in section 2(q)(2) of the FHSA (15 U.S.C. 1261(q)(2)), which makes reference to section 701 (e), (f) and (g) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 371 (e), (f) and (g)), and may involve a formal trial-type rulemaking proceeding after completion of an informal notice and comment rulemaking proceeding.

However, the mesh-sided play yards and portable cribs which are the subject of the rule in this proceeding are children's articles, and as such are subject to different regulatory procedures under the FHSA, set forth in section 3 (e) through (i). Unless the Commission *specifically elects* to use procedures of section 701 of the Food, Drug and Cosmetic Act, the provisions of section 3 (e) through (i), while more elaborate than simple notice and comment rulemaking, do not involve a trial-type proceeding with opportunity for cross-examination of witnesses. As noted above, the rulemaking procedures specified by section 3 (e) through (i) are substantially similar to the procedures for issuance of a consumer product safety rule under provisions of sections 7 and 9 or 8 and 9 of the CPSA.

Second, if after issuing final transfer rules, the Commission desires to act under provisions of section 15 of the CPSA, the Commission must conduct a hearing before it could order public notification of any hazard presented by any product, or order any corrective action to be taken with regard to that hazard. Such a hearing would provide any affected manufacturer, distributor, or retailer with the "due process" safeguards which the Court apparently believed were being denied to the UFFI industry.

In short, the Commission concludes that the judicial decision concerning the ban of UFFI is not applicable to this proceeding. As stated above, the Commission's finding that it is in the public interest to issue the final rules published below is not "based solely on a desire to avoid" the procedures of the

FHSA, as the Court viewed the circumstances in *Gulf South* at 3646.

The Commission also notes that in *Gulf South*, the Court found UFFI not to be an "extremely dangerous" product, and limited its discussion of the section 30(d) of the CPSA to products of a similar nature. Because the mesh-sided play yards and portable cribs which are the subject of this proceeding have been associated with reports of eleven children's deaths received by the Commission, these products may well be beyond the scope of the Court's decision in *Gulf South*.

Effective Date

The Administrative Procedure Act requires at 5 U.S.C. 553 that a "substantive rule" must be published at least 30 days before its effective date, unless the agency finds for good cause that an earlier effective date is needed and publishes that finding with the final rule.

As stated before, the rules issued below will not, by themselves, impose any new requirement or obligation on any person or firm. They simply announce that if the Commission takes action with regard to certain children's articles, it will do so under provisions of the CPSA rather than those of the FHSA. Of course, any action the Commission might take would provide adequate notice and opportunity to respond.

For this reason, the requirement of 5 U.S.C. 553 for publication of a substantive rule at least 30 days before its effective date is not applicable. The rules issued below shall become effective immediately.

List of Subjects in 16 CFR Part 1145

Administrative practice and procedure, Consumer protection, Infants and children.

Conclusion

PART 1145—REGULATION OF PRODUCTS SUBJECT TO OTHER ACTS UNDER THE CONSUMER PRODUCT SAFETY ACT

Therefore, after consideration of the proposal, written comment on the proposal, and other relevant information, discussed above, the Commission hereby amends Part 1145 of Title 16 of the Code of Federal Regulations by adding new §§ 1145.11 and 1145.12 to read as follows:

§ 1145.11 Certain play yards (playpens) with mesh sides; risk of asphyxia from airway blockage or chest compression.

(a) The Commission finds that it is in the public interest to regulate under the Consumer Product Safety Act, rather than under the Federal Hazardous Substances Act, risks of asphyxia from airway blockage or chest compression that are associated with play yards (playpens) with mesh sides.

(b) Therefore, if the Commission finds regulation to be necessary, any such play yards (playpens) shall be regulated under one or more provisions of the Consumer Product Safety Act.

§ 1145.12 Certain portable cribs with mesh sides; risk of asphyxia from airway blockage or chest compression.

(a) The Commission finds that it is in the public interest to regulate under the Consumer Product Safety Act, rather than the Federal Hazardous Substances Act, the risks of asphyxia from airway blockage or chest compression that are associated with portable cribs with mesh sides.

(b) Therefore, if the Commission finds regulation to be necessary, any such portable cribs shall be regulated only under one or more provisions of the Consumer Product Safety Act.

(Sec. 30(d), Pub. L. 92-573, 86 Stat. 1231, as amended Pub. L. 94-284, 90 Stat. 510, Pub. L. 97-35, 95 Stat. 703, 752 (15 U.S.C. 2079(d)

Effective date: This amendment shall be effective on July 27, 1983.

Dated: July 22, 1983.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 83-20314 Filed 7-26-83; 8:45 am]
BILLING CODE 6355-01-M