



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING

November 28, 2012

Chairman Inez M. Tenenbaum convened the November 28, 2012, 10:00 a.m., meeting of the U. S. Consumer Product Safety Commission in open session. Commissioners Nancy A. Nord and Robert S. Adler were in attendance. Chairman Tenenbaum made welcoming remarks and summarized the agenda for the meeting.

Decisional Matter: Notice of Proposed Rulemaking ("NPR") - Safety Standard for Bedside Sleepers (Briefing package dated November 7, 2012, OS No. 5281)

Chairman Tenenbaum introduced the decisional matter and asked the Commission whether there was any discussion about the issuance in the *Federal Register* ("FR") of a NPR for a safety standard for bedside sleepers under section 104(b) of the Consumer Product Safety Improvement Act ("CPSIA"). Gregory Rea, Mechanical Engineer, Division of Mechanical Engineering, and Hyun Kim, General Attorney, Office of the General Counsel, were present to respond to any questions. There being no discussion, Chairman Tenenbaum called for any motions. Commissioner Nord moved that the Commission adopt for publication of the draft NPR on a safety standard for bedside sleepers in the *FR*. Commissioner Adler seconded the motion. Chairman Tenenbaum called for any discussion. Hearing none, Chairman Tenenbaum called for the vote. The Commission voted unanimously (3-0) to approve publication in the *FR* of the NPR on a safety standard for bedside sleepers.

Decisional Matter: Notice of Proposed Rulemaking ("NPR") - Safety Standard for Hand-Held Infant Carriers (Briefing package dated November 8, 2012, OS No. 4393)

Chairman Tenenbaum introduced the decisional matter and asked the Commission whether there was any discussion about the issuance of a NPR for a safety standard for hand-held infant carriers under section 104(b) of the CPSIA. Patricia Edwards, Project Manager, Directorate for Engineering Sciences, and Andrew J. Kameros, General Attorney, Office of the General Counsel, were present to respond to any questions. There being no discussion, Chairman Tenenbaum called for any motions. Commissioner Adler moved for the adoption of the package, the NPR on a safety standard for hand-held infant carriers. Commissioner Nord moved that Commission consider her amendment of the draft NPR that she had previously circulated to the other Commissioners. Chairman Tenenbaum seconded the motion. Commissioner Nord explained the purpose of the amendment is to seek public comments regarding inclusion of Moses baskets within the definition of hand-held infant carriers. (The amendment is attached.) The Commission discussed the amendment and Moses baskets. Chairman Tenenbaum called for the question on the motion pending, Commissioner Nord's

amendment. The Commission voted unanimously (3-0) to adopt the amendment to the draft NPR.

Chairman Tenenbaum called for any other motions. Commissioner Nord moved for the suspension of the consideration of the NPR until the first meeting of the Commission in January 2013. Commissioner Adler seconded the motion. Commissioner Nord explained her reasons for the suspension, namely, issues involving whether the surrogate used in the handle auto locking test should be the cylinder referenced in the NPR or a hinge gauge. The Commission discussed the issue and asked questions of the staff about the test apparatus. Chairman Tenenbaum moved the Commission amend the NPR to solicit comments on whether the public knows of any other surrogates including the hinge gauge that might be used to test hand-held infant carriers. Commissioner Adler seconded the motion. Chairman Tenenbaum called for the vote on the motion. The Commission voted unanimously (3-0) to draft and adopt an amendment to the draft NPR.

Chairman Tenenbaum called for any motions. Commissioner Adler moved for publication of the amended NPR for the safety standard for hand-held carriers in the *FR*. Commissioner Nord seconded the motion. Chairman Tenenbaum called for the vote on the matter. The Commission voted unanimously (3-0) approve the publication of the amended NPR for the safety standard for hand-held infant carriers in the *FR*. Commissioner Nord submitted the attached statement regarding this matter.

Decisional Matter: Final Rule: Amendment in Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products (Briefing package dated November 6, 2012)

Chairman Tenenbaum introduced the decisional matter and asked the Commission to consider amending the regulation on testing and labeling to implement testing of representative samples for periodic testing of children's products to ensure continued compliance with the applicable rules. Randy Butturini, Project Manager, Office of Hazard Identification and Reduction, and Mary A. House, General Attorney, Office of the General Counsel, were present to respond to any questions. Chairman Tenenbaum called for any discussion or motions. Commissioner Nord moved to amend the draft final rule to edit the requirement to test representative samples for periodic testing of children's products and to remove the provision on recordkeeping. The proposed amendment was previously circulated to the other Commissioners. Chairman Adler seconded the motion. Commissioner Nord explained the purpose of the amendment regarding the burden of the recordkeeping in the final rule related to the selection of the representative sample. (The amendment is attached.) The Commission discussed the issues of the amendment and asked questions of the staff. Chairman Tenenbaum called for the question on the motion pending, Commissioner Nord's amendment. The Commission voted 2-1 to not adopt the amendment to the draft final rule. Chairman Tenenbaum and Commissioner Adler voted to not adopt the amendment. Commissioner Nord voted to adopt the amendment.

Chairman Tenenbaum called for any other motions. Hearing none, Chairman Tenenbaum called for the vote on the final rule on the amendment to the regulation on testing

and labeling pertaining to product certification regarding representative samples for periodic testing of children's products. The Commission voted 2-1 to approve publication of the final rule in the *FR*. Chairman Tenenbaum and Commissioner Adler voted to approve publication of the final rule amending the regulation regarding representative samples. Commissioner Nord voted to not approve the final rule. Commissioner Nord submitted the attached statement regarding this matter.

The Commission thanked the staff regarding all of the decisional matters. There being no further business on the agenda, Chairman Tenenbaum adjourned the meeting at 11:10 a.m.

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Todd A. Stevenson
Secretary

Attachments: Motions of Commissioner Nord
Statements of Commissioner Nord



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COMMISSIONER NANCY A. NORD

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

December 11, 2012

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.



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COMMISSIONER NANCY A. NORD

**Statement on the Commission's
vote on the final rule: amendment to regulation on testing and labeling pertaining
to product certification regarding representative samples for periodic testing of
children's products**

December 4, 2012

I voted against the final rule regarding representative samples for periodic testing of children's products (the Representative Samples Rule) because it is unclear and ambiguous in its requirements, it imposes unnecessary burdens on those required to test and certify, and it creates uncertainty with respect to compliance with the requirements of the Periodic Testing Rule, 16 C.F.R. § 1107. I do not believe that the Representative Samples Rule will provide any more protection to consumers. Instead I believe it will cause confusion in the marketplace, and, as a result, raise costs and limit consumer choice, as we have seen with other rules we have recently issued. And it is certain to impose an unnecessary burden on American businesses—particularly small businesses. As detailed below, the Commission should not have adopted this rule.

Background

The CPSIA, as originally passed, required the Commission to establish standards and protocols for the periodic testing of products subject to a children's product safety rule (those requirements are set out in the Periodic Testing Rule). The law also required that the product samples tested be selected on a random basis. The Commission initially proposed to define the term "random" in a statistically-based manner which would have imposed an excessively burdensome process for selecting samples. This led Congress to amend the law to require, instead of a random selection process, that samples be representative of the untested products.

The Commission sought comments on how to implement this change in the law. In June 2012, the Commission was briefed on the proposed final rule defining the term "representative."¹ Both then-Commissioner Northrup and I raised a number of questions

¹ That briefing illustrated the Commission's lack of clarity on the requirements of this rule. For example, one commissioner (who voted for this rule) explained its meaning thus: "if somebody were to come to me and say, 'well what does all of this mean?' I'd say 'what it means is, don't make golden samples', and if you've got a good procedure that means you're not doing golden samples, you're probably o.k. . . ." While it is likely that Congress shared this view when it changed the law and that incorporating a 'non-golden sample' definition into the rule could

and concerns about the recordkeeping requirements that were included in the proposed Representative Samples Rule. Rather than try to find a compromise that would try to address our concerns, the rule was withdrawn and resubmitted to the Commission after Commissioner Northup's term had expired and when there was an assurance that the majority could prevail without having to seek a compromise.

The scope of the rule is unclear.

The Representative Sample Rule requires that manufacturers and importers (1) establish a separate procedure for selecting representative samples to test and (2) document the basis for inferring that the procedure demonstrates the compliance of untested products. Standing alone, this is not an objectionable requirement. However, it does not stand alone. It needs to be read in the context of the other requirements of the Periodic Testing Rule, which it is amending.

The Periodic Testing Rule sets out a comprehensive and complex system for periodic testing: it states that a product manufacturer or importer must pick testing intervals and the number of samples to be tested to "ensure a high degree of assurance" that the untested products comply with applicable safety standards.² To achieve this high degree of assurance, the manufacturer or importer must have an *evidence-based* process to demonstrate the consistent performance of a product regarding compliance.³ Numerous provisions emphasize that testing intervals and the number of products selected for periodic testing must be adequate to demonstrate that the untested products also comply. Further, this information must be included in periodic or production testing plans.⁴ In other words, it would be impossible to comply with the extant Periodic Testing Rule with non-representative samples.

Yet atop the current requirements come the additional requirements of this Representative Samples Rule. Neither the rule nor my colleagues adequately explain why the existing requirements do not already assure the representativeness of testing samples. But logically, these new requirements must add something to the Periodic Testing Rule or else they would not have been adopted.

ameliorate some of the burden it imposes, the preamble of the rule indicates that this is not what the rule intends."

² I continue to believe that the Periodic Testing Rule is unwieldy and overly-burdensome. My concerns about this rule are outlined in my statement accompanying the vote on this rule. See *Statement of Commissioner Nancy Nord on the Votes to Approve the Final Rule on Testing and Certification, Component Part Testing Final Rule, Proposed Rule on Representative Sampling and Issuing Questions About Reducing the Cost of Testing*, (October 20, 2011), <http://www.cpsc.gov/pr/nord10202011.pdf>.

³ See 16 C.F.R. § 1107.2.

⁴ See 16 C.F.R. § 1107.21(b) (1) & 1107.21(c) (2).

The recordkeeping requirements are unnecessary and burdensome.

While it is not totally clear what new requirements the final rule imposes, it is clear that, whatever they are, they must be documented with records, those records must be kept for five years, and failure to have documentation that the CPSC considers adequate is a violation of the rule. The rationale for the recordkeeping requirement is that we will need this information for compliance and enforcement purposes.

The fact that the recordkeeping requirements create a burden is without question. This is what our own staff has told us about this aspect of the final sampling rule:

Although it might take a manufacturer several hours, perhaps several days to analyze its products and manufacturing processes to determine its options for selecting representative samples (and some might need to hire consultants for this purpose), the actual documentation of the procedure and basis for inferring compliance will probably take less time. On the assumption that because this document is required by regulation, manufacturers will make sure that the document is reviewed and edited properly, it could take an average of 4 hours to prepare this document, once the procedure that will be used is decided and the number of samples has been determined. Developing the sampling procedure and documenting it are managerial or professional functions

Once a sampling plan is developed and documented, manufacturers will probably not incur the full cost of documenting their sampling plans in subsequent years because the same plan and documentation should be valid. However, each year, it is expected that manufacturers will retire some product lines and introduce new ones. Moreover, some manufacturers will leave the market, and other manufacturers will enter the market. Therefore, there will be some ongoing costs associated with documenting sampling plans.⁵

The staff has made the (conservative) estimate that the document drafting process (as distinct from the work actually creating the procedures) could cost as much as \$32.5 million initially and as much as \$13 million on an ongoing basis. My colleagues may think that is a small number and so not really a burden. While this may be true for a large company, we have heard repeatedly—in this proceeding and others—that medium and small companies are finding compliance with the Periodic Testing Rule to be a large, expensive challenge. This rule with its recordkeeping requirement just adds to that challenge.

⁵ Staff Briefing Package, CPSC, Final Rule: Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products. (November 6, 2012).
<http://www.cpsc.gov/library/foia/foia13/brief/periodicamend.pdf>

The reality is that we will investigate and bring enforcement actions against only a handful of the thousands of manufacturers and importers who will be required to keep these records. In other words, *we are requiring many records to be created and maintained that no one will ever look at.* A competent regulatory agency would devise a way to get access to the needed information *when* it is needed without imposing a sweeping requirement on the universe of regulated companies. Certainly Congress did not require this. And the White House recently specifically asked agencies to reexamine their regulations to eliminate unnecessary record collections—yet another White House direction which we are ignoring in our zeal to over-regulate.⁶

Given that the required periodic and production testing plans must already include much of the information that now must be broken out (and presumably supplemented) to comply with the Periodic Testing Rule, and given that those plans must be retained, we could fulfill our enforcement responsibilities with that information alone. The plans must include information justifying the testing interval, the number of products selected for testing, and why those products demonstrate compliance of the untested population. It is unclear to me why this information does not satisfy our enforcement needs or why those needs would be appropriately furthered by creating more records on this point. The burden of the rule is not offset by its need.

The rule creates compliance uncertainty.

The un-amended Periodic Testing Rule set out a comprehensive process for periodic testing ensuring that compliance of untested products could be predicted by the chosen testing samples. This rule adds additional requirements, although it is not clear what the additional requirements are or what value they add to the existing requirements. What is clear is that the new requirements bring compliance obligations that trigger penalties if not followed.

As a matter of good administrative practice, regulations should impose clear requirements that are justified by an administrative record. Regulations that impose unclear obligations that are subject to after-the-fact second guessing when being enforced should be avoided. As the Supreme Court has explained: “If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”⁷

⁶ Office of Management and Budget , Memorandum For the Heads of Executive Departments and Agencies (June 22, 2012).

⁷*Grayned v. City of Rockford*, 408 U.S. 104, 108–9 (1972).

In this case we have fallen short in our responsibility as regulators by promulgating unclear requirements that carry with them the opportunity for “gotcha” enforcement. The public expects better.

Conclusion

Our mission is not to impose regulations that add costs or limit consumers’ choice without justification. Nor is it our mission to impose superfluous or ambiguous requirements on the regulated community. With this rule, however, we accomplish all these things. Instead, we should be accomplishing our mission—to protect consumers against unreasonable risks—by adopting necessary, well-thought-out, and well-tailored rules. This rule fails on those counts.