



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

This is a DRAFT RCA.
It will be replaced by a Final RCA.

Record of Commission Action Commissioners Voting by Ballot*

Commissioners Voting: Chairman Inez M. Tenenbaum
 Commissioner Nancy A. Nord
 Commissioner Robert S. Adler

ITEM:

Notice of Proposed Rulemaking: Safety Standard for Soft Infant and Toddler Carriers
(Briefing package dated March 13, 2013, OS No. 3735)

DECISION:

The Commission voted (2-1) to approve publication of the notice, as drafted, in the *Federal Register*. The notice of proposed rulemaking would establish a safety standard for soft infant and toddler carriers, pursuant to the Danny Keysar Child Product Safety Notification Act, section 104 of the Consumer Product Safety Improvement Act of 2008. The proposed safety standard for soft infant and toddler carriers incorporates by reference the new voluntary standard developed by ASTM International, ASTM F2236-13, "*Standard Consumer Safety Specification for Soft Infant and Toddler Carriers*," without alteration. Chairman Tenenbaum and Commissioner Adler voted to approve publication of the notice, as drafted. Commissioner Nord voted to not approve publication of the notice. Commissioner Nord submitted the attached statement regarding this matter.

For the Commission:

Todd A. Stevenson
Secretary

* Ballot vote due March 27, 2013

(By Commission agreement a decisional meeting for this matter was converted to this ballot vote due March 27, 2013.)

Attachment: Statement of Commissioner Nord



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814**

COMMISSIONER NANCY A. NORD

**Statement on the Commission's vote to issue a
Notice of Proposed Rulemaking on Soft Infant and Toddler Carriers**

March 27, 2013

Today, over my dissent, the Consumer Product Safety Commission issues a Notice of Proposed Rulemaking to set mandatory standards and testing methods for soft infant and toddler carriers. We seek to institute this rule under § 104 of the 2008 Consumer Product Safety Improvement Act. Section 104 requires us to adopt, as mandatory rules, voluntary standards for durable infant or toddler products. Recent rules we have issued under this statute include our rules on cribs, play yards, and handheld (hard-sided) infant carriers.

I believe this rule to be an inappropriate solution in search of a problem. I voted against the NPR for two reasons. First, what data we have points to the conclusion that these products are not durable infant and toddler products within the meaning of § 104. Second, the available injury data does not demonstrate an injury pattern that calls out for regulation. Finally, I have broader concerns about the way this and other recent mandatory standards have been developed under § 104.

Not durable

Soft carriers do not fit within § 104's framework, which directs us to issue mandatory rules for *durable* infant products. The Consumer Product Safety Improvement Act does not define "durable," but it does repeat the term in defining "durable infant or toddler product" as "a *durable* product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years."¹ We have not issued an official definition for "durable," either, but we have referred² to a definition from the Department of Commerce's Bureau of Economic Analysis of "[t]angible products that . . . have an average life of at least three years." Things like clothing are not sufficiently long-lived to qualify as durable.

¹ Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314 § 104, 122 Stat. 3028 (codified at 15 U.S.C. § 2056a) (emphasis added).

² *Consumer Product Safety Improvement Act of 2008 (CPSIA) Consumer Registration of Durable Nursery Products*, 2 (May 20, 2009).

Based on staff estimates, we expect that relatively few soft infant carriers will see three years of use. Our staff notes that these carriers are used primarily during an infant's first year of life, with only 25% to 50% of carriers used into the child's second year.³ The majority, then, do not see use past the infant's first year, much less three. Further, our staff estimates only 30% of carriers in use are handed down or bought second-hand. So, most soft infant carriers will not be used for the average life of three years that is the criteria for a durable infant product.

Even without these estimates, other evidence shows that soft carriers do not reach the average durability threshold of three years. According to our staff, when an earlier voluntary standard was adopted addressing one kind of fall hazard, those incidents disappeared within two years. If these products truly were durable, we would have continued to see reports of children falling out the bottoms of carriers. The cessation of those reports suggests that virtually *all* of the carriers that existed at the standard's publication were out of use two years later.

Some may argue that, because "infant carriers" are included on the list of products that Congress directed the Commission to issue rules for in § 104, the Commission is required to adopt mandatory rules for *all* infant carriers. But it is a well-accepted canon of construction that legislatures are not presumed to write surplus words, and reading the statute to require rules for products that are not durable would erase part of the statute. "Durable" must mean something, and if it does, soft infant carriers cannot fall under § 104's rubric.

Soft carriers, then, do not meet the definition of a durable good, taking them out of § 104's framework, and this is more than a nomenclature question. Our ability to regulate exists only as far as Congress authorizes it through law. I do not believe these soft carriers are within the scope of the durable infant and toddler language in § 104, so I do not believe we have the authority to regulate them under that section. If we are to issue this rule, then we should issue it under appropriate law, but, as discussed below, I do not believe any such regulation is necessary.

Not necessary

This rule is unnecessary because the data shows that soft carriers do not present an unreasonable risk of injury. Between 1999 and 2012, we received 93 incident reports about soft carriers, with 32 involving any injury to the child. Of those, our staff determined that nine occurred when the wearer bent forward and either spilled the

³ *Staff Briefing Package: Section 104 of the Consumer Product Safety Improvement Act of 2008: Safety Standard for Soft Infant and Toddler Carriers Notice of Proposed Rulemaking*, 51 (March 13, 2013).

child out of the carrier or trapped the child's limbs against the wearer's body, causing fractures, issues we have limited ability to address through regulation.

The biggest hazard, accounting for roughly 65% of estimated annual injuries,⁴ was the adult wearing the carrier falling and injuring the carrier's occupant,⁵ but this is a hazard presented by walking, not by soft carriers. Again, this hazard is not (nor could it be) addressed by the standard.

We estimate there are at least 2.6 million carriers in use and about 108 child injuries (from any cause) in any given year. That injury estimate is likely too high, since it includes estimates from before the first voluntary standard took effect in 2003 and, as noted earlier, "[n]ew reports involving the large leg opening hazard ceased."⁶ Even using that over-estimate, though, yields an injury rate of 0.004%, far lower than the rates for any of our other § 104 rules. Play yards, for example, showed a risk of 0.03%, nearly ten times higher. Hard-sided handheld carriers have a rate of 0.5%.

This injury-rate comparison is not meant to diminish the effects of those 108 injuries a year. But we have been directed to regulate unreasonable risks, not every risk, and we must portion out our efforts judiciously. We need to put our resources where they can do the most good for the greatest number of consumers, and this rule is outside that risk-based model.

Process concerns

Finally, the § 104 process is a delicate one that requires careful balancing to achieve the most effective, rational rules. We are supposed to adopt standards that are both *voluntarily* adopted by standards groups, and done so by *consensus*. Standards development groups combine the expertise of industry players large and small, consumer advocates, and government representatives. The standards adopted should represent the best thinking about the best resolutions to the most serious problems.

The idea behind § 104 is putting the force of government behind the good work that voluntary standards groups are already doing. The unique feature of the § 104 process —

⁴ These totals were calculated from consumer reports to the CPSC and data gathered from the National Electronic Injury Surveillance System, which estimates national figures based on reports from emergency room personnel. *Staff Briefing Package: Section 104 of the Consumer Product Safety Improvement Act of 2008: Safety Standard for Soft Infant and Toddler Carriers Notice of Proposed Rulemaking*, 10 (March 13, 2013).

⁵ *Staff Briefing Package: Section 104 of the Consumer Product Safety Improvement Act of 2008: Safety Standard for Soft Infant and Toddler Carriers Notice of Proposed Rulemaking*, 11 (March 13, 2013).

⁶ *Staff Briefing Package: Section 104 of the Consumer Product Safety Improvement Act of 2008: Safety Standard for Soft Infant and Toddler Carriers Notice of Proposed Rulemaking*, 10 (March 13, 2013).

that the Commission *must* adopt standards as mandatory, making them more stringent only if necessary – means that our staff must tread gingerly when participating. Everyone who participates in standards development knows that our staff can recommend more stringent requirements if they are not satisfied with the standards, and thus everyone acts accordingly when our staff makes suggestions. Recognizing that a nudge from a government representative sounds like a command in the § 104 rubric, we must take care to ensure that the standards are voluntary, that they represent a consensus, and that they address real risks, not every possible risk a fertile mind can conceive.

For soft carriers, we have improved on previous § 104 processes by ensuring that the standards group has voted on all changes before the standard was presented to the Commission. In the past, standards have come to us prematurely, with changes that the standards groups had not yet voted on. I appreciate the effort to correct this process, and hope it continues. We must also strive to ensure that we are not tipping the scales when we participate in the process, so that the best possible standard comes up to the Commission.

Conclusion

For these reasons, I cannot support issuing the NPR to make mandatory the voluntary standard for soft infant and toddler carriers. I am confident that, as it has demonstrably done over the last decade, the voluntary standards process will continue to make these products safer and, because of that, would prefer to see our scarce resources used where they can make more of a difference.