

CONSUMER PRODUCT SAFETY COMMISSION
63 Fed. Reg. 3280

**COMMENT OF DEBBIE CHALLENGER REGARDING
MANDATORY BUNK BED PERFORMANCE REQUIREMENTS**

Introduction

In its January 22, 1998, Advance Notice of Proposed Rulemaking, the Consumer Product Safety Commission (CPSC) requested comments concerning whether mandatory bunk bed performance requirements would likely result in the manufacture of more bunk beds that conform to the current voluntary entrapment safety standard. Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 3280, 3281 (Jan. 22, 1998). The CPSC believes that unreasonable risks of death and injury from entrapment are associated with bunk beds that do not conform to the current voluntary standard set forth by the American Society for Testing Materials (ASTM F 1427-92). The voluntary standard requires, among other things, that all spaces between the guardrail and bed frame and all spaces in the head and foot boards on the top bunk be less than 3.5 inches. The standard also requires that bunk beds have guardrails on both sides of the top bunk. *Id.*

If the CPSC promulgates a mandatory standard, it can adopt the voluntary standard in its present form or adopt a modified standard. The primary purpose of mandatory bunk bed performance requirements would be to reduce or eliminate deaths and injury from entrapment. Because a voluntary standard already exists, the CPSC can adopt a mandatory standard only if (1) compliance with the voluntary standard is not “likely to result in the elimination or adequate

reduction of. . . risk of injury” or (ii) it is unlikely “that there will be substantial compliance” with the voluntary standard. H.R. Conf. Rep. No. 97-208, at 873 (198 1). The CPSC has concluded that “there currently is not substantial compliance with the ASTM standard.” 63 Fed. Reg. at 3284.

Although the death or injury of any child is tragic, the CPSC should not adopt mandatory bunk bed performance requirements because (1) contrary to the CPSC’s findings, there is substantial compliance with the current voluntary standard and (2) there is no evidence to indicate that a mandatory standard will improve bunk bed compliance. Instead, the CPSC should recommend that ASTM strengthen the current voluntary standard. The CPSC should also implement a campaign to educate parents about bed safety for young children and pursue recalls of bunk beds that do not conform to tlhe current voluntary standard.

The Rationale Against a Mandatory Standard

Because there currently is substantial compliance with the voluntary ASTM standard, the CPSC should not adopt mandatory bunk bed performance requirements. The legislative history to the Consumer Product Safety Act (CPSA) indicates that “compliance generally should be measured in terms of the number of complying products rather than in terms of complying manufacturers.” H.R. Conf. Rep. No. 97-208, at 873. According to the CPSC, approximately 500,000 bunk beds are sold each year for residential use (excluding institutional sales). There are at least 106 manufacturers of wooden and metal bunk beds, which are believed to produce the bulk of annual sales. 63 Fed. Reg. at 3282. Currently, all 106 manufacturers are producing beds that conform to the voluntary bunk bed standard. *Id.* at 3283. In fact, the CPSC cannot “identify

today even one manufacturer, distributor, or retailer known to be out of compliance with the voluntary standard.” *U.S. CPSC: CPSC Votes to Begin Rulemaking to Address Bunk Bed Entrapment*, M2 Presswire, Jan. 15, 1998, available in 1998 WL 5046086 [hereinafter *US. CPSC*] (statement of the Honorable Mary Sheila Gall, Jan. 14, 1998) (voting not to issue an advance notice of rulemaking on bunk beds). The CPSC estimates that compliance with the voluntary standard is 90% or greater. In other words, at least 450,000 of the 500,000 bunk beds produced each year conform to the voluntary standard. Thus, compliance is exceptionally high whether it is measured in terms of products or manufacturers.

In addition, the Chairman of the CPSC has admitted that the voluntary standard is “working well.” *Id.* (statement of the Honorable Ann Brown, Jan. 14, 1998) (voting to issue an advance notice of proposed rulemaking on bunk beds). Indeed, the bunk bed compliance rate is higher than the compliance rate of mandatory rules in other industries. *Id.* Consequently, even mandatory rules do not produce 100% compliance rates. For example, there is a mandatory compliance rule for cribs, but the CPSC still finds products on the market that do not comply with the standard. *Id.* (statement of the Honorable Mary Sheila Gall, Jan. 14, 1998) (voting not to issue an advance notice of rulemaking on bunk beds). Thus, the bunk bed industry is in substantial compliance with the current voluntary standard and it would therefore be improper for the CPSC to promulgate a mandatory standard.

Moreover, even if the CPSC adopts a mandatory standard, it will not improve bunk bed compliance. Most of the 54 entrapment deaths identified between 1990 and 1997 occurred in “homemade beds, institutional beds, altered beds, or those manufactured prior to the current voluntary standard addressing entrapment.” *Id.* A mandatory standard would have no effect on

homemade beds, altered beds or beds made prior to the current voluntary standard and therefore would not likely increase compliance or reduce death and injury from entrapment.

Furthermore, the CPSC has not indicated how it will enforce a mandatory standard and thereby improve bunk bed compliance. Although the 106 manufacturers who produce the bulk of the bunk beds sold in the United States are all in compliance with the voluntary standard, the CPSC is concerned that small regional bunk bed manufacturers may periodically enter the marketplace and be unaware of the voluntary standard and/or the hazards associated with bunk beds. 63 Fed. Reg. at 3283. As a result, nonconforming bunk beds slip into the marketplace.

There is no evidence to indicate, however, that a mandatory standard would cause small regional manufacturers to produce conforming bunk beds. If small manufacturers do not comply with the voluntary standard because they are unaware of it and the dangers associated with bunk beds, how will they receive notice of a mandatory standard or be educated about bunk bed safety issues? As the Honorable Ann Brown, **Chairman** of the CPSC noted, small manufacturers often produce bunk beds for retail sale in their homes and garages. U.S. CPSC (statement of the Honorable Ann Brown, Jan. 14, 1998) (voting to issue an advance notice of proposed rulemaking on bunk beds). As is often the case now, the CPSC likely would be unaware that these nonconforming bunk beds exist until a child becomes entrapped and dies in one of them. Thus, a mandatory standard will not result in increased bunk bed compliance or a corresponding decrease in deaths and injuries from entrapment.

Recommendation: Strengthen Voluntary Standard, Increase Education, and Pursue

Recalls

In lieu of promulgating a mandatory standard for bunk bed performance requirements, the CPSC should request that ASTM revise the current voluntary standard in order to strengthen it, implement an educational campaign on bunk bed safety, and pursue recalls of nonconforming beds. First, most of the reported incidents involving entrapment fatalities between 1990 and 1997 involved wooden bunk beds. 63 Fed. Reg. at 3282. Consequently, the CPSC should consider asking the ASTM to recommend that bunk bed manufacturers no longer produce wooden bunk beds and instead manufacture only metal bunk beds. Because I do not have data on how such a recommendation would affect the cost of bunk beds, however, the CPSC should explore this proposed amendment to the voluntary standard and take cost into account before it makes such a recommendation to ASTM.

Second, the CPSC should recommend that the ASTM voluntary standard be amended to require guardrails that run the entire length of the top bunk and to prohibit space in the bed-end structure of the top bunk. Three of the entrapment deaths that occurred between 1990 and 1997 occurred in conforming beds that either did not have full-length guardrails on the top bunk or had a space in the bed-end structure of the bottom bunk. *Id.* Thus, even though the bunk beds involved in these three death conformed to the voluntary standard, they were not safe. The CPSC can correct these problems by recommending that ASTM revise the voluntary standard. The CPSC also should pursue recalls of conforming bunk beds that have resulted in entrapment deaths.

Third, the CPSC should consider the possibility of having an independent third party

certify compliance with the voluntary standard. Currently, each manufacturer is responsible its own compliance with the standard and no certification program exists. If an independent organization can certify that a particular bunk bed design complies with the voluntary standard, then perhaps a label or other marker can be placed on the bed in a prominent location so that consumers will know which bunk beds are safe. Consumers will be more likely to buy bunk beds that are designated as safe and correspondingly more wary of bunk beds that lack a certificate of compliance. Although independent certification will certainly have a price tag associated with it, a certification program is more likely to decrease deaths and injuries from entrapment than a mandatory standard that will be difficult, if not impossible, to enforce with regard to small bunk bed manufacturers.

Fourth, the CPSC should propose and implement an educational program on bed safety aimed at parents and other caregivers. It appears that the real reason children become entrapped and die in bunk beds is that they are too young to be placed in any kind of bed, let alone in an upper bunk. Of the 54 entrapment fatalities that occurred between 1990 and 1997, all but three of the victims were age 3 or younger. *Id.* at 328 1. Indeed, all but one of the victims was under the age of 4 and entrapment occurred most often in the upper bunk. U.S. CPSC (statement of the Honorable Mary Sheila Gall, Jan. 14, 1998) (voting not to issue an advance notice of rulemaking on bunk beds); 63 Fed. Reg. at 3282. The CPSC and furniture manufacturers have “long known that children around age two begin trying to climb out of their beds. Their newly found mobility and lack of judgment make them ideal candidates for entrapment in bunk beds.” Robert E. Gordon, *Litigating Bunk Bed Entrapment Cases*, Trial, Nov. 1, 1996, available in 1996 WL 13323229. Furthermore, the CPSC is also aware that children under six should not be placed in

upper bunks. The current warning label mandated for bunk beds under the voluntary standard specifically warns parents not to place children under 6 in upper bunks. *Id.*

Parents and other caregivers are ultimately responsible for the safety of their children. If parents are aware of the dangers associated with bunk beds and decide to place their young children in upper bunks anyway, there is little that the CPSC can do. If parents are unaware of the dangers, however, the CPSC and bunk bed manufacturers (those who have the most knowledge of the dangers associated with bunk beds) must be responsible for educating caregivers. Consequently, the CPSC should mount an educational campaign to educate caregivers, perhaps through television advertisements and brochures located in pediatricians' offices. The CPSC should also consider recommending to ASTM that a separate warning label or sticker stating in large writing that children under six should not be placed in upper bunks should be included with all bunk beds.

In addition, the CPSC should consider whether a separate warning label or sticker should warn parents not to place young children in beds at all. It is important to note that death by entrapment is not solely a bunk bed hazard--it is a bed hazard. Paul H. Rubin, *The Dangers of Overstating Safety Risks*, *The Wall St. J.*, Oct. 8, 1987, available in 1987 WL-WSJ 301258. There were approximately 212 deaths from bed entrapment between 1973 and 1986. *Id.* Of the 212 deaths, 10% occurred in bunk beds and bunk beds constitute about 10% of all beds. *Id.* Thus, bunk beds are "no more dangerous than other beds, and there is no justification for more stringent regulation, nor is there any reason to view them as especially hazardous." *Id.* Thus, nonconforming bunk beds may not be the ultimate cause of entrapment deaths and a mandatory standard would not necessarily reduce deaths and injuries from entrapment. Parents and other

caregivers must be educated about the dangers associated with placing young children in beds and take responsibility for the safety of the children in their care.

Fifth, as the Honorable Mary Sheila Gall noted, some of the entrapment deaths which occurred between 1990 and 1997 occurred in bunk beds that were manufactured prior to the current voluntary standard addressing entrapment. U.S. CPSC. A mandatory standard will not reduce the risk of entrapment associated with these bunk beds. However, the CPSC has conducted successful recalls of bunk beds in the past. The CPSC should continue to ferret out nonconforming bunk beds through the recall process. It will be more effective for the CPSC to use its limited resources to recall bunk beds that do not conform to the voluntary standard than it will be for the CPSC to promulgate and attempt to enforce a mandatory standard when there is already at least 90% compliance with the current voluntary standard.

Finally, the CPSC should not underestimate the power of tort law to correct noncompliance problems in the bunk bed market. Under strict liability law in all 50 states, juries can “award stratospheric damages against a manufacturer of an unreasonably unsafe bunk bed that causes a child casualty.” Bruce Fein, *Bunk Bed Safety Bunko*, The Wash. Times, Jan. 20, 1998, at A1 3, available in 1998 WL 34378 15. No proof of negligence is required. *Id.* Thus, “the existing legal deterrent to unsafe bunk beds concentrates the minds of manufacturers wonderfully.” *Id.*

Moreover, given the bunk bed industry’s track record, there is every reason to believe that bunk bed manufacturers will be responsive to any suggestions made by the CPSC to strengthen the current voluntary standard. In 1978, an Inter-Industry Bunk Bed Committee (IIBBC) established a voluntary Bunk Bed Safety Guideline for manufacturers and retailers, which was

embraced by several furniture associations. 63 Fed. Reg. at 328 1. In 1988, in response to a complaint from the Consumer Federation of America, the American Furniture Manufacturer's Association upgraded the IIBBC's safety standard and four years later, it again raised the safety requirements. *Id.* In 1992, 1994 and 1996, additional provisions were added to the safety standard at the CPSC's urging. *Id.* Thus, there is every reason to be optimistic that the bunk bed industry will respond favorably to an amended voluntary standard if, for no other reason, than to avoid legal liability for bunk bed entrapment deaths and injuries.

Conclusion

The CPSC should not adopt mandatory bunk bed performance requirements because (1) the bunk bed industry is already in substantial compliance with the current voluntary standard and (2) a mandatory standard will not increase bunk bed compliance or result in a corresponding decrease in deaths and injuries from entrapment. Instead, the CPSC should amend the voluntary standard to require that bunk bed manufacturers (1) cease manufacturing wooden bunk beds and (2) manufacture bunk beds with full-length guardrails on the top bunk and no space in the bed-end structure of the bottom bunk. The CPSC also should consider the possibility of implementing an educational program on bunk bed and regular bed safety aimed at parents and other caregivers. Finally, the CPSC should continue to recall nonconforming bunk beds, concentrating on those bunk beds that were manufactured prior to the current voluntary standard addressing entrapment.

Even if the CPSC decides to adopt mandatory bunk bed performance requirements, it should consider adopting a mandatory standard that includes the above-proposed amendments to

the voluntary standard. In addition, if the CPSC promulgates a mandatory standard, the standard should not apply to bunk beds intended for use by adults since none of the entrapment fatalities that occurred between 1990 and 1997 involved adults. A mandatory standard regulating adult bunk beds would represent needless regulation and its enforcement would wastefully consume limited CPSC resources.

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3-30-98

ANPR for Bunk Beds

Comment Concerning the Proposition of Mandated Bunk Bed Performance Requirements

I am a second year law student at the University of Tennessee, Knoxville. I am writing as a concerned citizen and a potential mother of children. I believe that a history of product noncompliance with voluntary standards indicates that a reliance on voluntary compliance by the bunk bed production industry will not eradicate the safety hazards that threaten small children who sleep/play in bunk beds. Although it is impossible to eliminate all potential tragedies, adopting mandatory standards would force the furniture manufacturing and retail industries to comply with standards already compiled by the manufacturing industry. Making these standards mandatory would require manufacturers to do what is possible and reasonable to prevent unnecessary accidents from occurring, at a low cost. Mandatory standards will both enable officials at the local, state, and federal levels to enforce compliance and impose sanctions. Requiring labeling of products as part of the mandatory standards will help consumers contact bunk bed manufacturers if they realize their beds do not comply with the standards or there are other safety problems that need to be addressed.

The former CPSC strategy of encouraging voluntary compliance with ASTM standards has not reduced the occurrence of children's deaths resulting from entrapment. According to CPSC's estimates, the majority of bunk bed deaths result from entrapment and number 10 per year on average. This number is not high, but most of the deaths would not have occurred on beds which complied with the current voluntary standards. Any death which can be prevented by

acting within industry approved standards at a low cost should be prevented. Because consumers cannot rely upon manufacturers to produce reasonably safe products, mandatory standards should be put in place to increase manufacturer compliance and end preventable deaths and injuries.

I agree with the Commission that mandatory standards would increase manufacturer compliance by raising bunk bed manufacturers' urgency regarding compliance. The existence of mandatory standards would compel manufacturers to become aware of, and to maintain knowledge of, the most recent standards established by the CPSC. Conformance would increase because all manufacturers would be motivated to avoid penalties through compliance. Bunk bed manufacturers have already shown that children's safety is not their highest priority with their failure to produce complying products voluntarily. By increasing the costs of noncompliance, the CPSC will force bunk bed manufactures to raise children's safety on their priority list.

Mandatory standards would actually protect main bunk bed manufacturers from the competition of small and foreign competitors. Conforming manufacturers would no longer have to fear being undercut by their nonconforming competitors. Nonconforming producers would conceivably face higher costs because of penalties that could be assessed against them if their products are illegally made. Fines and forced recalls would help to "even the playing field" between lower priced nonconformist products and higher priced, conforming products. Local, state, and federal officials would be **empowered** to act against producers who do not comply. Although officials might not have the resources to catch all offenders, fear of the consequences which could be imposed might deter manufacturers from producing illegal products.

Retailers and distributors would also be violating the law if they sold noncomplying bunk beds; consequently, they would stop buying noncomplying bunk beds.’ Retailers and manufacturers would be motivated to inform consumers about the dangers of nonconforming bunk beds in order to encourage the potential customer to buy the conforming bunk beds they sell.

Consumers would be more likely to return unsafe products if they could identify who the manufacturer of the bed was. I find it surprising that there is not a mandatory regulation in place that requires mandatory labeling of products already. Consumers need to know who to contact if there are problems with the product. If an accident or problem does occur, the consumer should be able to notify the manufacturer so that the manufacturer can address the problem or face liability if it does not. Because a labeling system is not required, manufacturers are allowed to stay in the shadows, avoiding civil liability when a consumer does not know who was ultimately responsible for producing the product they purchased.² Manufacturers can also avoid a bad reputation when consumers cannot identify that a product has originated from a specific source. The adoption of mandatory standards will motivate noncomplying producers to manufacture safe products by imposing a fear of repercussions because of noncompliance. Mandatory standards will enable officials to inspect products and enforce compliance. Consumers will be empowered because the probability that they will be informed of the dangers associated with nonconforming bunk beds and they will know who has actually produced the product they have purchased.

¹ The Suffolk County Council passed safety regulations in 1987 making it an offense to “supply, offer to supply, agree to supply, expose for supply or possess for supply bunk beds or self-assembly bunk beds that do not comply with [their] Regulations.” <http://www.suffolkcc.gov.uk/departments/trading-standards/advice/gn44.htm>. The regulations were very similar to the voluntary standards published by the AFMA. I felt that these mandatory regulations were a realistic way to approach this problem.

² This information could be obtained from the retailer or distributor. However, a lot of consumers are deterred from action by the complexity and time consumption that result from multiple steps.

The mandatory standards should include the current voluntary standards. The CPSC and the furniture manufacturing industry have agreed that all bunk bed manufacturers should follow these standards. Also, any innovations that the CPSC becomes aware of through the comment process should be taken into consideration. The fact that several deaths have occurred from entrapment in conforming beds should be considered. However, as I stated above, not all tragedies can be prevented. Extending guardrails the length of the bunk bed does not seem to be a requirement that would create a lot of cost. Industry experts should be consulted to determine how much this requirement would increase the costs of compliance with mandatory standards.

Labeling indicating the identification of the manufacturer and informing the consumer of the dangers facing children under the age of six, particularly in top bunks, should be provisions in the mandatory standards adopted by the CPSC. Consumers should be informed of the risks faced by young children, particularly in the top bunk. If purchasers of bunk beds are informed of the dangers associated with the combination of bunk beds and younger children, they will be more likely to prevent children at risk from coming into contact with those risks. Adults who buy bunk beds will also be informed of the risk. Friends of a family or relatives might not be aware of the potential dangers, particularly if they are not parents themselves. A label can be ignored, but at least the potential of an accident occurring is decreased because an opportunity for awareness is provided.

Hotel and resort owners, children's camps, and home kit buyers are potential consumers that are not addressed in the CPSC proposal. Consideration should be given to the possibility that these consumers and their clients should be warned of the dangers associated with bunk beds that do not comply with the voluntary standards now in place. Mandatory standards will not solve the potential risks faced by children if their parents are not informed of the dangers that noncomplying bunk beds could pose because they themselves are not purchasing the bunk beds.

They will not see the warning labels or be informed by their retail or distributing agent. Hotel and resort owners should be required to warn parents of the dangers, buy complying bunk beds, or simply not provide bunk beds at all. Camp owners will be more likely to be informed of the safety hazards caused by noncomplying bunk beds, but parents will have less control over the environment their children are inhabiting. This is especially true when parents do not know what questions to ask. Camp owners should also be required to warn parents, buy complying bunk beds, or not provide bunk beds at all.

The problem of already purchased noncomplying bunk beds would be partially solved by requiring the hotel, resort, and camp owners to choose a path of warning parents, replacing noncomplying bunk beds with new ones, or simply not providing bunk beds at all. I am not sure that these particular issues should be raised by this proposed rule. Another rule might be enacted to address the hospitality issues.

Education of consumers and manufacturers is key to reducing the potential of a child's death or injury.³ An education campaign through advertising would be the most effective. Retailers could be encouraged or required to post information pamphlets and/or posters in prominent places in their stores. (The most obvious places would be near children's furniture displays.) Parents would then have a chance to be informed of the potential dangers associated with young children and bunk beds and the existence of nonconforming products as they make their purchasing decisions. Retailers would also gain respect in the consumers' eyes because they "care" about children's safety and are providing conforming products.

³ The CPSC has already released a video to television stations nationwide. I do not feel that this limited strategy is sufficient. <http://www.cpsc.gov/cpsc/pub/prerel/prhtml97/97099.html>.

Advertisements should also be posted on family and furniture Internet sights and in parenting magazines. During my search on the Internet, I hit Web sights offering home building kits.⁴ A potential builder would be likely to hit this sight. Hopefully, in his search, he/she would also see the warning of the dangers associated with building a bunk bed that does not meet (mandatory) standards. The builder would be more likely to build a conforming product if he were impressed with the dangers of not building a conforming bunk bed and with the existence of mandatory standards in the industry. On the Internet and in parenting magazines, parents seek advice to help them make decisions based on other parent's experiences? The presence of advertisements would help parents make better educated decisions. Parents would be aware of the dangers associated with a used bunk bed set acquired at a yard sale or through friends.⁶

This education program would have to receive funding. The CPSC could suggest that he AFMA fund an education campaign. The AFMA would thereby increase market pressures on industry noncompliers because the market would be informed of the dangers associated with noncompliers' products. Market pressures on noncompliers would also help to "level the playing field" between compliers and noncompliers. The AFMA would appear to have a strong interest in the safety of children, garnering the good will of the market. Potential injury or loss of life would be prevented by a campaign (which might appeal to the industry's altruistic instincts). The fees collected from noncompliers could be added to the education fund, putting the money back into the community from which it was taken.

⁴ For example see: [http://www.ultranet.com/~llung/wood work/bunk/bunk.html](http://www.ultranet.com/~llung/wood%20work/bunk/bunk.html);
<http://www.uq.edu.au/~emtdunn/D.frn.html>.

⁵ For example, specifically citing bunk beds, see:
<http://rainforest.parentsplace.com/dialog/get/sleep/61.html>.

⁶ My awareness of the potential for the particular problem of second-hand furniture was raised by a program launched by Governor Engler of Michigan. His program was a safety campaign to inform people about the potential dangers arising from use of products in their home and to encourage the delivery of recalled products. This program was part of a nationwide program declared by the CPSC. It involved the distribution of the video mentioned above nationwide.

If it does not seem likely that the AFMA will voluntarily fund a program, an argument could be made that it should be required to do so because of the strong public interest. Or the government could fund a program at the federal, state, or local level.

Two rules should be issued concerning the manufacture of bunk beds, one under FHSA §2(f)(D), 15 U.S.C. 126 l(f)(D) and the other under CPSA §3(a)(1), 15 U.S.C. 2052(a)(1). Confusion arising as to which act applied to a particular bunk bed could be avoided by using precise statutory definitions. Because the potential confusion that could arise could be so easily prevented it would not be “in the public interest” both beds under the CPSA. Regulations for adult bunk beds could be narrowly tailored to adequately address the differences between adult and children’s furniture. Amendments that might need to be made at a later date would be focused on the furniture they were meant to address. I believe confusion would be greater if the regulations were promulgated under a single statute.

The existence of a voluntary standard will present the most difficult barrier to the formation of a rule imposing mandatory standards.’ I find the legislative history cited by the Commission convincing. Compliance should be measured in terms of complying products rather than complying manufacturers. The products are what cause the risk of injury. However, “an unreasonable risk of injury” is difficult to define. I agree with the Commission that the particular vulnerability of the group at risk (children cannot “choose” to purchase a complying product) and the likelihood that death can occur present an “unreasonable risk of injury”.

In conclusion, I strongly support the adoption of mandatory standards to regulate bunk bed manufacturers. I believe that the industry’s level of compliance is insufficient. Mandatory standards will increase awareness among manufacturers, retailers, and the general public. I also would recommend a larger, more encompassing education campaign aimed directly at consumers.

Increasing compliance with safety standards and heightening awareness of the dangers associated with bunk beds will save the lives of young children in the future.

Before the Consumer Product Safety Commission

Comments of Jude Santana Regarding the Advanced
Notice of Proposed Rulemaking on Bunk Bed Safety

The Consumer Product Safety Commission (the Commission) has issued an advanced notice of proposed rulemaking (ANPR) regarding bunk bed entrapment. I submit these comments primarily as a concerned third year student at the University of Tennessee College of Law. My comments are additionally shaped by my childhood. The bed I slept on for most of my childhood was a wooden bunk bed. As a child my top bunk was a place of profound security. I could hide from parents, siblings and the assorted monsters that haunted the night. I hope the perspective I bring to my analysis of this proposed rule is informative and helpful. Additionally, I hope my comments help the Commission arrive at a rule that will minimize the harm that bunk beds pose to children.

The ANPR singles out three hazards associated with bunk beds. The three hazards are responsible for the deaths of at least eighty five children between January 1990 and September 1997. (63 FR 3280, 3281). The magnitude of the problem standing alone is appalling. The Commission's decision to issue this ANPR stands on very firm ground. The need to combat the threats inherent in current bunk bed designs is apparent. Granting that the need to take action exists the next question to address is whether the proposed rule goes far enough. For the reasons set out in the next section of my comments I do not believe the scope of the proposed rule is

sufficient to remedy the problem at hand. In addition to examining the scope of the proposed rule possible alternatives to those in the proposed rule will be posited for consideration.

Scope Of The Proposed Rule

The proposed rule only seeks to address the threat posed by entrapment. Entrapment is the greatest hazard associated with bunk beds. Between 1990 and 1997 fifty four children died as the result of being trapped between parts of a bunk bed or between the bed and wall. (Id.). This statistic alone speaks volumes about the need for a mandatory set of standards in bunk bed manufacturing. Because entrapment is the leading cause of bunk bed related deaths it should be included in the proposed rule. It makes sense from both a legal and pragmatic standpoint to combat the greatest threat associated with a product.

While I agree with the Commission that the threat of entrapment needs to be eliminated I do not believe the proposed rule goes far enough. When a three sided problem emerges all three threats should be countered. The second and third hazards associated with bunk beds are hanging and falls. Between 1990 and 1997 the Commission received reports of thirty one deaths from hanging and falls. (Id.). Imperfect collection and reporting methods can cause problems to appear smaller than they actually are. It is quite possible that more than thirty one children died from these hazards. However at a minimum thirty one families were touched by tragedy

due to the two hazards that are outside the scope of the proposed rule. Is it really necessary to wait until another thirty one families are similarly harmed for a frontal assault on the entire problem to be commenced? A piecemeal solution lacks the resolve that this type of problem should generate. If the scope of the rule is not broadened in two or three years the problem will persist. Then another ANPR will have to be issued so the problem posed by these two hazards is finally laid to rest. From an administrative standpoint it is more efficient to fix the problem the first time.

The initial decision not to include these hazards in the rule is based on the Commission's conclusion that "the available information does not support a conclusion that changes to currently produced bunk beds would significantly reduce the number of fatalities due to falls and hangings." (Id. at 3283). The first issue is one of quantification. How many children must be spared for the number of fatalities to be "significantly reduced"? Secondly, I am confused how changing the design of bunk beds would not reduce the number of fatalities from falls. I vividly remember an incident involving my bunk bed. I had a dream one night that I was falling. The dream ended abruptly. I looked around and discovered I was on the floor. I apparently rolled between the mattress and rail. The next day my Dad nailed an extra rail to my bed. While I had similar dreams of falling I never again woke up on the floor. The simple addition of a rail "significantly reduced" my chances of falling from my bed and being injured. This is just one example of how the risk of falling can

be countered. If **children** are falling off either end of the bed simply make the ends taller. Improving the design of bunk beds will reduce the number of falls and consequently the number of fatalities. If a child is determined to play on the edge of safety or even jump design improvements will not prevent injury. However, to the extent that unintentional falls can be prevented they should be.

The threats posed by bunk beds should be remedied under the Consumer Product Safety Act ("CPSA"). The Federal Hazardous Substances Act ("FHSA") authorizes regulation of hazardous children's products. The injury and fatality statistics given by the Commission are limited to children under age fifteen. I was unable to find similar statistics for people over age fifteen. To the extent that there is the possibility of harm to people over fifteen it should similarly be remedied. The CPSA is flexible enough to authorize regulation of bunk beds intended for use either by children or adults. A uniform standard will prevent future confusion about the applicability of the standard. Consumers will not be confused about whether a particular bed is expected to comply with the new safety standards. Regulating all bunk beds is the most efficient course of action. If this course of action is followed safety problems that exist in both classes of bunk beds can be fixed at one time.

Alternatives

There are several possible alternative solutions for the current bunk bed safety problem. Labeling is one such solution. It offers the

possibility of strengthening compliance with the current voluntary standard. The Commission noted that the rate of compliance with the voluntary standard is “possibly 90 percent or more”. (Id. at 3284). I submit that the rate of compliance would increase substantially if complying manufacturers were told to label their product. A label such as “This bed complies with voluntary industry standards that are designed to reduce the risk of death or serious injury” would soon appear on bunk beds. Consumers would see that some beds have the label and others do not. They would be able to make an informed decision. If parents decided to pay a little more for a safer bed than noncomplying manufacturers would be compelled by economic forces to comply. If enough parents were not willing to pay more than they would have the freedom to choose a noncomplying bed. All consumers would not be forced to pay for a standard they do not agree with.

Many people in the United States want a minimum amount of governmental regulation. They argue that government should not only stay out of your personal but also professional life. Governmental regulation of business is not only unwelcome but also unwarranted. “If your personal life were as closely monitored and regulated as the vocational life of millions of Americans, you would rightly call it oppression.” [Charles Murray, *What It Means To Be A Libertarian*, at 63 (Broadway Books, 1997)]. Individuals and groups that hold fast to these beliefs would desire a labeling solution in lieu of a mandatory standard.

An education campaign has as much potential to combat the problem as labeling. Education is an important ally when combating problems that can be lessened by increasing knowledge. As a consumer T had no idea that bunk beds posed a threat to the very lives of children. Consumers are probably not aware that children under three are particularly vulnerable. Parents should be warned that bunk beds are particularly hazardous to children that are under three. The fact that children are dying on and in their bunk beds is being publicized. Articles on the safety of bunk beds have been published in some magazines. For example Parents noted that "(f)rom 1990 through 1994, 24 children-most of them age 3 or under- died in bunk-bed-related accidents." (Richard Laliberte, Are Bunk Beds Safe? Parents, Oct. 95, at 39). The article goes on to outline advice given by the Commission. Concerned parents are supposed to "(f)orbid horseplay", "(u)se a night light", and "(m)ake sure children use the ladder to get in and out of the top bed". (Id.).

Better Homes and Gardens similarly encouraged parents to prohibit horseplay on bunk beds. In addition concerned parents are told of the need to follow a checklist when buying a bunk bed. The list included but was not limited to; "(s)ide rails should be bolted on or be difficult to remove. Guardrails should require the release of a fastening device or be difficult to remove. Guardrails and end rails should be five inches higher than the top of the mattress." (Bunk Bed Safety, Better Homes and Gardens, June 1995 at SO). It is important for the information in these articles to be publicized. This

information is invaluable to readers who currently have or will buy bunk beds. However, not all bunk bed consumers read these types of articles. Consequently, for an education campaign to be effective information must be disseminated with the product.

Labeling or education standing alone could remedy part of the problems associated with bunk bed safety. However, a more effective use of these tools is to add them to the voluntary standard. Buttressing the current standard with more widespread and comprehensive labeling and educational efforts would increase compliance.

Although the voluntary standard could be improved by increasing educational and labeling efforts I believe a mandatory standard is the best alternative. Telling children not to “horseplay on the bunk bed” will not prevent kids from playing on their beds. Similarly asking bunk bed manufacturers to comply with a voluntary standard will not necessarily maximize compliance. A mandatory standard would ensure uniformity in the bunk bed industry. Manufacturers would no longer be able to gain an economic advantage through noncompliance. Instead noncompliance would be an economic liability because it would be punished through fines. There would no doubt be rogue manufacturers who would make nonconforming beds. However, the number of nonconforming beds would decline. A mandatory standard should include both labeling and educational components.

The design requirements must adequately address the problem for any standard **whether** voluntary or mandatory to be effective. Improved design requirements could help reduce the incidents of death and serious bodily injury from the three hazards. This summer I studied law at Oxford University. During the two days before the program started I stayed at The Oxford Youth Hostel. The five or six bunk beds in the room I stayed in were similarly designed and constructed. At both ends of the top bunk there was a wall approximately eighteen inches high. Both of the sides had an equally tall wall. The walls were smooth and only had one opening for the ladder. There was no space between the mattress and the four walls. Because the walls were smooth and uniform I believe the threat of accidental hanging was very low. The height of the walls minimized the chance of falling. For a child to fall out of this type of bed they would almost have to crawl over the wall using a step ladder. While my design description lacks the precision of an engineers specifications there is an important lesson. Through proper design and construction this three part problem can be grappled with and defeated.

Conclusion

The current voluntary standard is an insufficient method of solving the present hazards associated with bunk beds. Manufacturers have the option of disregarding the standard to save time or make more money. The voluntary standard could be

improved through increased labeling and education. However, even with these improvements the voluntary standard would still be voluntary. Some manufacturers have disregarded the current voluntary standard and I seriously doubt that a heightened one would receive more compliance. The Commission has several other options to consider. I believe the problem is of a sufficient magnitude to dictate one: conclusion. The Commission should adopt a mandatory standard that remedies all three hazards. That any child dies from bunk bed hazards is shocking; that the adults fail to take remedial action is unconscionable.

Before the Consumer Product Safety Commission
(63 FR 3280)
ANPR for Bunk Beds

I. Introduction

My name is Ted Burkhalter, and I am one of the unreported statistics of children who was entrapped by wooden bunk beds as a child in the 80's. Because of my personal and frightening experience with bunk beds, I want to express both my recommendations and fears concerning this ANPR for Bunk Bed safety. Bunk bed manufacturers and retailers must be held accountable for bunk bed safety and there are two foreseeable ways to do this. Although it was mentioned in the ANPR, 81 FR 3280, I think the best ways are to 1) mandate that all retailers, including second-hand stores, mail orders, charities, and people selling through the classifieds, market and offer for sale only bunk beds that conform to a new mandated standard, and 2) mandate that retailers and manufacturers put a permanent form of identification of the frame of the bunk bed. The Commission has the authority to do this under the Consumer Product Safety Act, section 3(a)(1), 15 U.S.C. 2052(a)(1).

The three areas of concern that I have involve the secondary markets, regional/small manufacturers and retailers, and the uncontrollable tendency of children to be risk-takers and thrill-seekers.

II. Personal Experience

Before I begin to discuss and rationalize my views about bunk beds, let me provide you with my own testimony. Simply, after trying to kill myself three times as a

child, my grandmother had the brilliant idea that maybe the bunk beds were too dangerous for children under 14. So, she took them apart and turned it into an extremely large single bed, with a crack in the middle that was great for sliding and hiding. Now then, you are saying, why did this child try to commit suicide three times. Well, let me ease your concerns, I am of sane mind, but I was adventurous. My parents told me, do not jump on the bed, do not squeeze your head through the bars, and never sleep with the railing down. Well, I was a child and did all those things.

A. Hanging

I thought that it would be okay to jump off the bed onto the carpeted floor. My parents only said do not jump on, never said do not jump off. So I jumped, with a bed sheet tied around my neck, and landed face first on the floor when the sheet got hung on one of the posts of the bed, nearly strangling me.

B. Entrapment

I was playing cops and robbers with my 12 year-old uncle and the bottom bunk was the jail cell. Well, I thought that I could squeeze my head and body through the slots in the footboard of the bottom bunk. I squeezed my head, and got stuck. I could not go backwards or forwards, I just had to wait. About an hour or so later, my grandfather got home and he used a saw to cut the wooden bars around my head so I could get out.

C. Falling

One night, I needed more space in the top bunk, so I removed the railing. At home, I slept on a single bed without a railing, so I thought I could sleep on the top bunk without a railing. Well, during the night I must have had a bad dream, because I rolled out of the top bunk and fell straight unto a concrete floor, with no padding or carpet. Needless to say, I scared everybody with that maneuver. I do not know what scared them more, the fact that I had a concussion from the fall or that I, at age seven, could have removed the safety railing.

After the fall, my grandmother dismantled the bunk bed and I was never allowed to sleep in a bunk bed, either top or bottom, again.

III. Mandatory Standards

Although the industry has issued its own voluntary standards, the majority of manufactures do not heed these standards. Because of the lack of compliance the Commission should pass mandatory safety guidelines for bunk bed manufactures and retailers. These mandatory standards will help reduce the risk of entrapment and death for children and will allow the citizens and government recourse against manufactures and retailers who make and distribute death beds for children. The Commission should pass at least two standards. First, mandate that all retailers, including second-hand stores, mail orders, charities, and people selling through the classifieds, market and offer for sale only bunk beds that conform to a new mandated standard. Second, mandate that retailers and manufacturers put a permanent form of identification of the frame of the bunk bed.

A. Distribution

This standard will insure that non-conforming bunk beds are stopped at wherever the product is sold to the consumer. This will act as safety net to catch small and regional companies, overlooked by the government, but who sell bunk beds through retail outlets, factory floors, and mail-order catalogs. This will also help catch the fatal beds that are imported into the United States, but that circumvent US customs.

Moreover, this will force manufacturers to build conforming bunk beds if they have any desire to sell them to the public, because no responsible retailer will represent them, unless they complied. In addition, if a manufacturer decided to market the beds through mail order or factory direct, they will become retailers.

B. Labeling

This standard will allow the Commission to keep a more accurate track of deadly bed designs and the manufacturers of those beds. By having a permanent label, the family of the dead child has a certain manufacturer to blame for the death. By also including a label concerning the retailer of the bed, the Commission will be able to track retailers and those associated with non-conforming bunk beds.

Together, these two standards allow the Commission and interest groups to track the beds, even if in compliance, with a death rate as well as those manufacturers and retailers associated with non-complying death beds.

IV. The problems and possible solutions

It sounds great to pass a rule making all bunk bed manufacturers and retailers comply to standards in order to protect children. Regardless of how well intentioned and needed these mandates are, there are a few areas that the Commission will have difficulty in touching.

A. Secondary Markets

There are currently 7-9 million bunk beds being used inside the United States. These bunk beds may or may not be in compliance with the new safety mandates because some of these beds have a life span of 13-17 years, dating back to 1980. The problem with these beds is that these older beds are sold at below market cost through the classifieds and various thrift and charity stores. Beds sold in this fashion probably neither contain a retailer's label nor a manufacturer's label.

The individuals who purchase bunk beds from these outlets are primarily concerned about price, and not necessarily quality or conformance with safety standards. In order to prevent the purchase of these secondary market beds, the government can read the classifieds of every newspaper every day (an extremely unlikely event). Two, the Commission can arrest anyone selling these beds on the secondary market (extremely hard to enforce, but permissible under CPSA, after warning them and seizing the bed). Three, issue certificates of compliance for every bunk bed and have a mass media campaign in association with bunk bed manufacturers and retailers asking people to purchase only beds that carry a certificate of approval, or bring a bunk bed that does not have a manufacturer's or retailer's label to a location that will purchase non-conforming

bunk beds from those wanting to sell them on the secondary market and receive a voucher for \$20 off the year's federal income tax payment.

B. Regional/Small Manufacturers and Retailers

The problem that exists with the secondary market is the same one that exists with the regional/small manufacturers and retailers. Because of the large volume of companies, it is hard to regulate and monitor the beds manufactured and sold. The public watchdog groups will be the best line of defense against these companies and will be vital in reporting the wrong doings to the Commission and Federal Government.

C. Adventurous Nature of Children

Regardless of the safety features put on bunk beds, children will find ways to hurt themselves. Just as in my experiences, children will be adventurous without considering the dangers. As long as there is space between one bunk and the floor, children will jump, climb, dangle, crawl, and swing from the bunk bed. The Commission cannot hope to alleviate all the deaths of children, but can substantially reduce the deaths caused by entrapment and falling (not jumping).

V. Using the CPSA over the FHSA

In section G of the ANPR, the Commission listed the CPSA and the FHSA as having statutory authority for regulating bunk beds for children, but only the CPSA for adults. Since the CPSA covers both children and adults, it makes sense to regulate the beds under one act, instead of two. As a matter of fact, the amendment to the CPSA

section 30(d), Pub. L. 94-284, sec. 16, was designed to allow the Commission to transfer regulatory activities from the FHSA to the CPSA. This transfer will allow the Commission “greater flexibility” in protecting the consumers and furthering the best for the public. In addition, the CPSA provides a “more preferable regulatory scheme.”² Although, the amendment requires a rule to be passed concerning the transfer of bunk bed safety for children from under FHSA to CPSA, the initial Senate bill, only required a majority vote of the Commission., if the transfer was in the best interest of the public. There are three supporting reasons for transferring bunk bed control to the CPSA instead of the FHSA: 1) criminal penalties, 2) private enforcement, 3) and public interest.

A. Criminal Penalties

As mentioned in Section IV (A) of the ANPR, 20-25% of the bunk beds sold are manufactured or retailed by 65+ companies. These companies, regardless if mom & pop or multi-million dollar corporations, have decided not to associate themselves with the other firms in the industry by not belonging to either the AFMA or the ASTM. It is these outsiders that the CPSA will be able deter, more so than the FHSA. Both the CPSA and the FHSA have comparable civil penalties³; they differ, however, in the criminal realm. The FHSA has a penalty of \$500 or upto 90 days imprisonment, or both for first time offenders. Second offenders and -those who intend to defraud or mislead are subject to a maximum \$3,000 or 1 year in prison or both.⁴ The CPSA, however, levels a fine on offenders, after receiving a warning of non-compliance, of no more than \$50,000 or upto

¹ S. Rep. 94-25 1, “Relationship between Consumer Product Safety Act and the Transferred Acts”.

² Id.

³ CPSA, 15 U.S.C. 2069 and FHSA, 15 U.S.C. 1264 (c).

⁴ 15 U.S.C. 1264(a).

1 year in prison, or both.⁵ Furthermore, the CPSA holds the agents, officers and directors of corporations responsible as well, subjecting them to possible fine and imprisonment, outside of the penalty placed upon the company! The FHSA has no comparable standard.

Although the FHSA imposes a fine for violating the standard the first time and the CPSA issues a warning, the \$50,000 and possible imprisonment and fining of the agents and officers of a company make the CPSA a more powerful tool for protecting children. All too often, agents of corporations producing deadly products with the mind set, the company may be fined, but nothing will happen to us. The CPSA makes sure that this mindset is not tolerated with bunk bed manufacturers and retailers.

B. Private Enforcement

The CPSA contains a section that allows concerned individuals, regardless if individual, corporation, competitor, or non-profit entity, to seek injunctive relief against manufactures and retailers violating the mandatory bunk bed standards.' The FHSA has no comparable provision. This provision will allow the bunk bed industry an opportunity to regulate itself, as well as offering concerned parent groups to seek relief against manufacturers and retailers from distributing these death traps. Because the provision allows the plaintiff to receive attorney's fees, expert witness fees, and suit costs, the only loss the concerned parties will endure is the time spent litigating the case. But what is the value of time compared to the value of child's life, smile, and giggle?

⁵ 15 U.S.C. 2070(a).

⁶ 15 U.S.C. 2070(b)

⁷ 15 U.S.C. 2073

C. Public Interest

The Commission notes in the ANPR that it would be in the public interest to regulate bunk beds, regardless of classification, under the CPSA in order to “avoid confusion as to which act applied to a particular bunk bed.”⁸ It is in the public’s interest to avoid confusion, as well as in the public’s interest to impose civil and criminal penalties against the companies and their agents, and to allow concerned individuals the right to bring suit against these rogue manufacturers and retailers without having to wait for the Federal Government to bring suit. With these thoughts in mind, the statutory authority should come from the CPSA section 3(a)(1), with transfer from section 30(d).⁹

VI. Conclusion

Bunk beds will always be in demand as long as children are born and there are not enough rooms in the house for each child. But as long as the market for bunk beds is around, the Commission should pass mandatory safety guidelines for the manufacturing and retailing of bunk beds. There will still be some deaths from bunk beds, as well as deaths caused by cars and public drinking water. The Commission can only hope to reduce the risks of death by bunk beds, which mandatory guidelines will do. Even though the industry has their own voluntary standards, when less than 40% of the known manufacturers follow the voluntary guidelines, it is clear that they are not substantially followed. Thus, mandatory safety guidelines are the only avenue open for the Commission to curb the deaths caused by these death beds.

⁸ 63 FR 3280, 3283.

⁹ 15 U.S.C 2052(a)(1); 15 U.S.C. 2079(d).

**Consumer Product Safety Commission 16 CFR Chapter II
63 Fed. Reg. 3280 (1998) Safety guidelines for bunk beds.**

Tim Rauhuff

The Issue

Bunk beds have a strongly utilitarian nature. They may be dangerous, but like most things that danger depends upon how they are used. As it stands today, the voluntary standards allow some degree of choice for consumers. Instituting mandatory safety standards would not only limit that choice, but they would, in effect, limit the possible design of future bunk beds. Government has no place in dictating bunk bed design.

When looking at the number of deaths caused by bunk beds, I am struck by how many beds there are out there, but how few deaths these cause. If most things could be as statistically safe as bunk beds, death would be virtually non-existent. Besides, deaths caused by bunk beds can just as easily be attributed to insufficient parental supervision or poor judgment. Poor judgment by a few inattentive parents is not a strong foundation for changing a rule that could possibly limit the freedom of choice for the rest of the bunk bed buying public.

Change in Use

Historically, bunk beds were utilitarian necessities of cramped life. Sailors had berths that were nothing more than bunk beds built into shipwalls. Tiny apartments slept twice the number than the floorspace allowed when bunk beds were used. This saved not only space, but finances also when a family could stuff themselves into smaller spaces or keep the same space as the family grew. Rather than knocking out a wall, beds were stacked utilizing the ample vertical space more effectively.

Bunk beds were not resting places for only children, as they tend to be today--adults frequently slept upon bunk beds as well. Why? Because bunk beds were excellent spacesavers.

In the past and often today, safety takes a backseat to the fabulous utility that bunk beds provide. Bunk beds remain an omnipresent sight in children's rooms. Approximately 500,000 bunk beds are sold each year attesting to their popularity. (63 Fed. Reg. 3280)(1998). Families that can ill-afford the extra expense of a larger home when that next child comes along can give their elder child a roommate with the purchase of bunk beds. This style of bed has stood the test of time and simple practicality underscores the bunk bed's history and popularity.

In this century, with the rise of marketing strategies by retailers, bunk beds gained much popularity in the youth market. Parents recalled their childhood days rushing to get to the "top bunk." They purchased bunk beds or found their old ones resting in grandma's attic. Not to deprive their children of fond memories they recall from their own childhood, these parents encouraged their offspring to use these beds. Retailers and manufacturers responded to these shifts in behavior. Bunk beds never lost their practicality, however--they gained a new niche. Fun became the new tool for selling bunk beds.

Colorful frames arose to attract the young. Bunk beds with cartoon characters found there way to market. Still, the bunk bed retained its utility. They save space and cost little compared to other beds. What remained unspoken in all this was the inherent attraction of the "top bunk." The risk of falling was always part of the lure. Bunk beds were essentially bedroom jungle gyms affording children the opportunity to climb, giving them the proverbial indoor treehouse. Few who have slept on a bunk bed as children can deny this simple fact--bunk beds were fun because they put you above the ground high enough that you gained an "adult" view of your room.

Having a grown-up view from the "top bunk" carries certain risks, though. Manufacturers were not blind to these concerns. Bunk beds came to have guard rails. These rails were more for the psychological benefits of parents who purchase these beds, as the rate of

falling out of bed is not all that high. Besides, children are resilient and in the aggregate a five foot fall injures a child's pride more than their body. By placing rails on bunk beds, manufacturers were responding favorably to their market; this is key for a product that has a narrow niche as bunk beds do.

Bunk Bed Design and the Market

The market plays a considerable role in determining the features of a product such as bunk beds. Viewing the history of bunk beds, the development of guardrails arose when the demand for such safety features arose. Regardless of whether the guardrails were necessary, manufacturers responded by providing the option. Bunk bed design was not altered terribly by the addition of guardrails. Prior to introducing guardrails, some enterprising owners of bunk beds fashioned their own and either bolted them to the beds or taped them in place. As before, these guardrails operated more as a psychological palliative rather than giving any measurable increase in safety. The addition of guardrails adds little to the price of a bed, so manufacturers suffered little and the price increase for the consumer was negligible. Id.

Aesthetically, bunk beds suffer little when the market demands safety. Bunk bed manufacturers retain a degree of discretion in the number of designs they can offer to the public. This situation held with the advent of voluntary safety standards. Despite the fact that only a few manufacturers follow the voluntary standards, this gives the bunk bed consumer the chance to exercise their freedom of choice. The bottom line remains, however--if purchasers want safety they can buy a bunk bed that has the safety feature they desire; if safety is secondary to price then buyers can spend less and get less. Choice still remains key to the current situation. Choice currently resides with the consumer, but if mandatory safety restrictions arise that freedom will suffer.

The present bunk bed market indicates that consumers make a choice between safety and price when buying a bed. That this choice is made for their children seems to be of no consequence. These choices are necessary in a free society. For instance, over the counter drugs pose great risks to children, who like the puzzle-type quality of opening a bottle and maybe the candy-like nature of pills, yet we allow adults to possess these potentially lethal items. At one time, all over the counter medicine came in child-proof bottles, but this gave way to the more reasoned approach of giving adults the choice between child-proof bottles and the usual twist-off variety. No one wants children harmed, but the risks we take in having a choice can cause casualties. Some children run the risk of finding a twist-off pill bottle and consuming the contents. This is unnecessary, but a reasonable risk. As callous as that may sound, it remains less harsh than sacrificing aggregate majority liberties for statistically insignificant risks to a select minority population.

The proposed mandatory rule for bunk beds would operate to protect people from the stupid choices they make in their consumer lives. Government should not be Big Brother protecting us from our mistakes. Government does have a role in preventing fraud upon us, as this is a crime. However, making a poor choice when buying a bed has yet to be declared a crime. Some bunk bed manufacturers have responded to the safety concerns of parents; others have not. This mixed response gives us a choice as long as we use our critical powers to evaluate the possibilities. We love to savor the benefits of our good choices, but along with that, we must accept the consequences of our poor ones.

Voluntary Standards a Good Compromise

Voluntary standards should stand as they are. They provide discretionary safety guidelines for manufacturers to follow when designing bunk beds. These standards also serve as a check-list for the buying public's use when comparing various beds. Setting government

recommended minimums hurts no one as long as they remain recommended only. In fact, they provide the consumers with a means to educate themselves about the safety of possible bunk bed purchases. Consumers can choose bunk beds with greater safety features or whether safety is secondary to price. The current situation allows purchasers to evaluate their own needs and then to make their own choices. With mandatory standards, government would make that choice for the consumer.

Historically, bunk beds were not limited to only a child market. Only recently did the market for bunk beds shift that way. Instituting mandatory safety requirements based on child standards could possibly limit bunk beds to only this market. Adults that would still buy bunk beds for themselves may choose another option when buying if limited to bunk beds designed with only children in mind. The adult-only market for bunk beds may now be small, but it remains a market that should not be forgotten. Mandating minimum requirements based on standards developed for children fairly ignores possible adult consumers.

Mandating minimum requirements would, in effect, dictate the aesthetics of future bunk bed design--an area scarcely within the purview of government. Aside from interfering with consumer choice, government safety requirements push into the realm of privacy concerns. Where do we draw the line between government interference in a parent's child-rearing practices? Should not parent's decide what is safe for their children and what is not?

Some parents abnegate their responsibility, yet we cannot allow these few bad apples to ruin it for the rest of the bunk bed buying public. The statistics of bunk bed-related deaths indicates that most victims were very young children. Id. One 22 month old child died from getting his head stuck and subsequently strangling himself. Id. This incident occurred on the bottom bunk, however. Id. Such an incident sounds more like inadequate parental supervision rather than poor bunk bed design. Id. The inadequate parental supervision of a few should not

dictate the standards for the entire bunk bed industry; this would, in essence, give power over an entire industry to a statistically insignificant minority. Maybe the unfortunate 22 month old's parents should accept responsibility for their loss. Although the death of a 22 month old child in such a stupid manner is a tragedy,, it scarcely rises to a level warranting mandatory safety guidelines that do not address the specific reasons for that child's untimely demise.

Ultimately, parenting responsibility rests upon the parents and not the government. The number of bunk bed-related deaths seems to indicate that only a small number of children die when the bunk bed is the fatal agent. Id. It fairly reaches the absurd to think that all bunk bed deaths can be eliminated by placing more safety features on the bed. Bunk beds are not inherently dangerous. Like most things, they can be dangerous in the wrong context. It falls to the parents to define a safe context for their children. Voluntary standards allows the government to specify what it thinks is a minimum safety requirement, but the choice of context and how a product will be used in that context remains with the consumer. In the end, government cannot mitigate poor parental buying choices without denying parents the right to make a choice in the first place.

Emotion Forms a Weak Foundation

Emotional reasoning makes a poor justification for regulating an industry. No person in their right mind wants children harmed, but by the same token, children should not be the excuse for denying to the rest of society the freedom of choice that undergirds our market. Children have become the new justification for curtailing freedom because children are seen as vulnerable and anyone that opposes protecting a child is deemed something akin to an ogre. Indeed, what scarcely enters the mind of those hiding behind "the children" is that at one time the battle cry for public involvement was patriotism. Not long ago "for mom and apple pie" or "for home and country" motivated change, but that no longer tugs at the heart so well. Now, those wanting

government intervention in their favor swing a “protect the children” club. Somehow this cloaks the cause with nobility. Without looking at the statistics, these people justify a seemingly Orwellian involvement for government on the basis of scant factual, but strongly emotional reasons. Protecting the children may be noble, but it should not be pretext for curtailing our freedom of choice, regardless of how ogish that sounds.

Children should be protected, but instituting mandatory safety standards for bunk beds-- an instrument that rarely causes harm in the aggregate--protects children from the consequences of their behavior. What message does it send to our children when responsibility for their parent’s poor choices is placed elsewhere? Should we teach our young that blame always belongs to someone else? One tenet of choice is the possibility of making a wrong one. Making a poor choice entails paying the consequences. Can we afford to take away the brunt of those consequences away from those who buy a bed that happens to cause harm? Mandatory regulations give those who favor a paternalistic government club with which to beat non-complying manufacturers. We should allow those making an uninformed choice to suffer the consequences of their lassitude; what else will motivate self- education if the consequences of their actions are denied them? Infantilizing parents, by shifting potential blame for their poor choices serves no useful purpose except to send the wrong message to our young.

Statistically, the rate of injury to children is insignificant. For total bunk bed-related fatalities from 1990 through 1997 the numbers are rather small considering the total number of bunk beds available for use. Id. Specifically, 85 total fatalities were reported for the years mentioned. Id. By industry estimates, approximately 7-9 million bunk beds are available for use. Id. Simple math shows that 85 fatalities out of a conservative 7 million possible beds that can cause such deaths is ridiculously low. For instance, if 85 different beds out a possible 7 million caused the reported fatalities over an eight (8) year period then only 0.0012% of the beds have

caused a fatality! That is an extremely small percentage of dangerous bunk beds. Can such a small percentage be the foundation upon which to impose mandatory safety requirements? Any death is cause for concern, but realistically, all fatalities cannot be eliminated. When the averages are this low, I would declare the current standards a success.

According to the supplementary information provided in the advance notice, one of the reasons for proposing a mandatory rule is that bunk bed manufacturers come and go. Id. This indicates that these manufacturers may be on the periphery of public awareness. Looking at the numbers of manufacturers (106), one is left with the distinct impression that this industry has little political muscle. Id. Adopting mandatory rules for these manufacturers smacks of bullying. Bunk bed makers, already a small group within a tight market, operate in a niche that remains highly susceptible to minimal changes. Imposing standards industry-wide may affect irreparably this market and for what--to prevent what amounts to an almost insignificant number of child deaths that are easily attributable to parental irresponsibility.

Just because an agency can find cause for imposing safety standards, no matter how strained, it does not follow that exercising that power is necessary, especially when the justifications are at best strained and at worst pretextual.

Alternatives

Currently, voluntary standards allow consumers some degree of choice when buying a bunk bed. Some makers adhere to these standards while others do not. Often those manufacturers that fail to follow the guidelines are foreign. Id. As is the case with many imported products, these beds probably fall in the lower price ranges. This allows buyers to make conscious decisions between price and safety features. With the possible advent of across the board requirements, all bunk beds would basically have the same features. Actual choice

would suffer a reduction. A number of alternatives to mandatory industry standards may be more favorable.

Warning labels have proven effective in many areas. Bunk beds, being rather large items, require assembly and warnings could be prominently placed in the assembly instructions. Along with this, purchasers could be given the option of attaching the safety features during the assembly process or they could choose not to.

The tort system has ways of dealing with faulty designs. Products liability may not bring a child back from death, but it can prevent future fatalities by sending a clear signal to the industry that certain designs may carry liability. Sometimes, dangers are difficult to predict without some person suffering the consequences. The tort system serves to highlight those dangers, albeit after the fact.

Parents necessarily hold a key position in this issue. Parents usually purchase the bunk beds. Parents make the buying decisions and it falls to them to exercise their capacity for weighing the price versus the safety of a bunk bed. Safety features invariably cost that extra dollar. Besides, children have ways of finding trouble and if bunk beds did not hurt them, surely some other instrumentality would. Our children should not live in a protective cocoon all their lives. The world has dangers and to deal effectively with those ills it is necessary to experience some bumps and bruises.

Conclusion

Voluntary safety standards as they currently exist provide consumers with a choice when buying a bunk bed. Consumers can pay for safety features or choose a less expensive bed. Such a situation gives bunk beds a market for both adults and children. Instituting mandatory safety standards where children set the paradigm might harm the adult market, since adults may have less need for these safety features and may be unwilling to pay the extra expense.

Statistically speaking, the number of deaths caused by bunk beds is so small that it scarcely warrants attention. The number of deaths could just as easily be attributed to poor parental supervision or random chance. Limiting consumer choice for statistically insignificant reasons amounts to an encroachment upon consumer freedom that cannot be tolerated. Waving the “protect the children” banner is an emotional appeal more pretextual than a legitimate.

The voluntary standards as they exist today have elicited some compliance. Consumers reap the rewards of that partial compliance, when they exercise their critical capacities to comparison shop. The proposed rule may protect the lazy consumer, but at what cost? The vigilant buyer needs no protection. Keeping the rules as they are today rewards the vigilant buyer. Changing the rules to protect the lazy encourages only more of the same by catering to the lowest common denominator. Therefore, the proposed rule should not be passed.

**COMMENT OF JOSHUA-B. LAWHEAD REGARDING GUIDELINES AND
REQUIREMENTS FOR THE MANUFACTURE OF BUNK BEDS-- 63 FR 3280**

Introduction

This comment is in response to an Advance Notice of Proposed Rulemaking (ANPR), found at Federal Register Volume 63 No.3280, regarding guidelines for the manufacture of bunk beds and the possibility of the Consumer Product Safety Commission (CPSC) procuring a rule which would mandate compliance with bunk bed performance requirements. Notice of Proposed Rulemaking, 63 FR 3280 (January 22, 1998). Presently, the manufacture of bunk beds is regulated only by a voluntary standard procured by the ASTM which address falls from the upper bunk, entrapment in the upper bunk structure or between the bunk and a wall, security of the foundation support system, the need for warning labels on bunk beds and instructions to accompany the bed.

Standard Consumer Safety Specification for Bunk Beds, ASTM F1427-92 (October 1992, revised September 1996). The incident data provided in the ANPR supports the conclusion that compliance with the voluntary rule would not eliminate or adequately reduce the risks of falls and hangings associated with bunk beds; therefore, the CPSC has the authority to procure a mandatory rule which addresses such risks. See Noticed of Proposed Rulemaking at 328 1. I believe that a mandatory rule should be enacted to safeguard against the injuries and deaths which continue to occur despite a high rate of compliance with the voluntary standard. However, the proposed rulemaking by the CPSC addresses only the risk of entrapment as it currently stands with the voluntary rule. The omission in the proposed rule of requirements that address the risks of falling and

hanging associated with bunk beds is a cause of concern and could prove to be fatal to the enactment of the proposed rule. The rulemaking process should be continued for this proposed rule only if the CPSC is attacking the dangers of bunk beds piecemeal and will continue to enact mandatory rules once the CPSC has determined how to effectively regulate against the risks of hangings and falls. However, if the agency takes the position that the proposed rule is an exhaustive display of the risks that it is willing to address, then I believe that to make a rule mandating the compliance with guidelines for bunk bed design would be premature and insufficient to remedy the “unreasonable risk of injury” (FHSA section 2(f)(D), 15 U.S.C. 1261(f)(D), cited in Advance Notice of Proposed Rulemaking at 3283) that exists today with the use of bunk beds. Therefore, if the proposed rule is to be enacted by the CPSC, the agency should state along with the publication of the proposed rule that the proposed rule, if enacted, shall be augmented by further rule(s) procured by the CPSC once the agency has determined how to “adequately reduce [] [the] unreasonable risk. of injury” (H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 873 (1981), cited in Advance Notice of Proposed Rulemaking at 3284) by hanging or falling from a bunk bed.

History of the Voluntary Standard: the Voluntary Standard Obstacle

The voluntary standard in effect today is a result of the combined efforts of several interest groups including the American Furniture Manufacturer’s Association (AFMA), the Inter-Industry Bunk Bed Committee (IIBBC), the Consumer Federation of America (CFA), and the Consumer Product Safety Commission (CPSC), to name a few. Since 1978 these and other groups have pushed for stricter regulation of the bunk bed

industry in order to protect consumers and the end-user of the beds. The efforts of these groups has culminated thus far in the voluntary standard promulgated by the ASTM. See Standard Consumer Safety Specification for bunk Beds, ASTM F 1427-92 (October 1992, revised in June 1994, revised in September 1996). The existence of this voluntary standard is an obstacle to the passage by the CPSC of the proposed rulemaking, because “[t]he Commission may not issue a standard under either the CPSA or the FHSA if [the bunk bed] industry has adopted and implemented a voluntary standard to address the risk, unless the Commission finds that ‘(1) compliance with such voluntary standard is not likely to result in the elimination or adequate reduction of such risk of injury; or (2) it is unlikely that there will be substantial compliance with such voluntary standard.’” Notice of Proposed Rulemaking at 3283. Therefore an issue exists as to whether the CPSC may promulgate a rulemaking since there already exists a voluntary rule. From the standard quoted above it seems unnecessary and duplicative to have the second prong of the standard because if “compliance with such voluntary standard is not likely to result in the elimination or adequate reduction of such risk of injury”, it is appears irrelevant whether there is “substantial compliance with such voluntary standard.” Id. That is, if the voluntary standard when complied with does not eliminate or adequately reduce the risk(s) the standard is attempting to address, then what difference does it make whether the standard is “substantially compl[ied]” with? Thus, in my opinion the reasoning applied in the ANPR to justify the promulgating of a mandatory rule by the CPSC is flawed and unnecessary. I believe that the issue is simply whether compliance with the voluntary standard is likely to eliminate or adequately reduce the risks the voluntary standard attempts to address. If compliance is likely to eliminate or adequately reduce

the risk of injury or death addressed by the voluntary standard, then the voluntary standard must stand and the CPSC may not continue with the rulemaking procedure. However, if compliance does not lead to the elimination or adequate reduction of the risk of such injury or death, then the CPSC may continue with the rulemaking process and procure a rule which *will be effective* in eliminating or adequately reducing such risk of injury or death.

The CPSC may enact a Mandatory Rule

The ANPR states that “it appears that a high percentage (possibly 90 percent or more) comply with ASTM F1427-92.” Id. at 3284. I assume this to be a very high rate for a voluntary standard. Despite such a high rate of compliance, there have been 85 bunk-bed-related deaths of children under age 15 from January 1990 through September 1997. Id. at 328 1. The ANPR states that all but 3 of the *entrapment-related* deaths during that time period involved bunk beds whose designs did not meet the voluntary standard. See Id. at 3282. In other words, only 3 deaths caused by entrapment over 7 years occurred in bunk beds which complied with the voluntary standard. A strong argument could be made that compliance with the voluntary standard does, or would, adequately reduce the risk of *entrapment* pursuant to the standard and that, therefore, the CPSC must stick with the voluntary standard. However, the ANPR supplies no information on the likelihood of death by fall or by hanging if bunk bed manufacturers complied with the voluntary standard. Thus, one cannot say with any certainty that compliance with the voluntary standard would adequately reduce the risks of falling or hanging. In fact, the information gathered by the CPSC pursuant to the proposed rulemaking “does not

support a conclusion that changes to currently produced bunk beds would significantly reduce the number of fatalities due to falls and hangings.” Id. at 3284. So, if *changes* in bunk bed design are unable to reduce the risk of injury due to falls or hangings, then the voluntary standard in its current state must not be “likely to result in the elimination or adequate reduction” of the risks of falls or hangings. Therefore, the standard the CPSC must follow to have the right to enact a mandatory rule has been met; the CPSC has the right to procure a mandatory rule despite the existence of a voluntary standard that addresses the same risks. However, the CPSC should procure such a rule only if it is *effective* in eliminating or adequately reducing the risks associated with bunk bed deaths.

Flaws of the Proposed Rule

While the CPSC may make a mandatory rule for the manufacture of bunk beds, the proposed mandatory rule on its face would be ineffective in eliminating or adequately reducing all risk of injury associated with bunk beds. The ANPR states that “the available information does not support a conclusion that changes to currently produced bunk beds would significantly reduce the number of fatalities due to falls and hangings.” Id. at 3284. From January 1990 through September 1997, 31 children (36 percent) of the deaths were caused by falling from or being hanged by bunk beds. Yet, the proposed rulemaking does not address the risks associated with bunk beds as they relate to potential falls or hangings. The number of deaths caused by falls or hangings is too high for the CPSC not to address the risks in its proposed rulemaking. If the CPSC is satisfied with remedying only the risks of entrapment by end-users of bunk beds, the proposed

rulemaking should not go forward because the agency's work in making bunk beds safe for its users will not be complete.

However, if the CPSC has decided to procure rules addressing bunk-bed safety in a piecemeal fashion as it develops solutions to design quandaries of bunk beds, the rulemaking procedure for the proposed rule should continue. That is, if the CPSC is merely waiting to procure a rule which addresses the risks of falls from and hangings by bunk beds until the agency has obtained sufficient industry data to make effective guidelines which address those risks, then the omission by the CPSC in the proposed rule of solutions to the problems of falls and hangings with bunk beds should not be fatal to the proposed rulemaking. If the CPSC does so intend it should be commended for taking action against one facet of unsafe bunk bed designs while not making hasty determinations about other facets of unsafe bunk bed design.

Nothing in the ANPR states to the effect that the CPSC has intended to act in such a piecemeal fashion; in fact, the ANPR is silent on whether the CPSC will ever address in a mandatory rule the risks of falls and hangings associated with bunk beds; therefore, in the next stage of the proposed rulemaking the CPSC should state its intention to supplement the mandatory rule, should it go into effect, with a rule to come at a later date which remedies the design defects of bunk beds which allow for a person to fall from or be hanged by a bunk bed. Only if the CPSC so notifies should the proposed rulemaking go into effect. Otherwise, the CPSC should discontinue the proposed rulemaking as the proposed rule now stands until the CPSC has developed effective guidelines to remedy injuries caused by entrapment in, falls from, and hangings by bunk beds.

Fact-Finding; Cost-Benefit Analyses

For the CPSC to effectively eliminate or adequately reduce all risks of injuries and deaths associated with bunk beds pursuant to the standard, I believe that the CPSC should conduct a fact-finding of the following:

- 1) A cost-benefit analysis of banning tubular metal bunk beds. Such beds, with relatively thin metal tubes supporting the top bunk, seem to be especially conducive to inadvertent hangings or related injuries. I personally used such a bed in my youth and realize now how dangerous the beds are.
- 2) A cost-benefit analysis of requiring wooden bunk beds to have one wooden support for the upper bunk which would cover the entire mattress of the top bunk. Such a design would effectively eliminate the risk of hanging that exists when several thinner wooden slats are used for support for the upper bunk.
- 3) A cost-benefit analysis of requiring all bunk bed manufacturers to be accredited and recognized by the CPSC (or other appropriate agency), which would require all manufacturers to meet the requirements of a mandatory rule which addresses falls and hangings. Such a requirement would deter small businesses, who may be unaware of any rules or guidelines, or may be willing to circumvent such rules if they thought that they would not be punished, from entering the market undetected and unsupervised. Such a requirement would also subject any wrongdoer to punishment from the CPSC.
- 4) A cost-benefit analysis of banning “structural members” of a bunk bed which are sufficiently close to the top-bunk-foundation that hangings could occur if a child’s head were to be trapped between the structure and the foundation.

Conclusion

I believe that bunk beds have been proven to be sufficiently dangerous to warrant mandatory rules regulating bunk bed design. Despite a very high percentage of compliance with the voluntary standard currently in effect, the risks of injury or death associated with bunk beds have not been adequately reduced pursuant to the standard the Commission must follow. Therefore, the CPSC may and should enact a mandatory rule which addresses *all* risks of injury or death associated with bunk beds. However, the proposed rule, if drafted, will not address the risks of falls or hangings from bunk beds. The information obtained by the CPSC demonstrates that such risks are too prevalent to be ignored in a mandatory rule. Only if (1) the CPSC intends to enact rules at a later date which address such risks and (2) publishes such intentions if and when it publishes the proposed rule should the rulemaking procedure continue for this proposed rule. I am confident that the CPSC, a very responsible body, would have such intentions and would do everything in its power to ensure that the guidelines which govern bunk bed designers and manufacturers will eliminate or adequately reduce all risks of injury or death associated with bunk beds.

Consumer Product Safety Commission
16 CFR Chapter II
COMMENT ON THE ADVANCE NOTICE FOR PROPOSED
RULEMAKING FOR BUNKBEDS

The Consumer Product Safety Commission has issued an advance notice for proposed rulemaking for **bunkbed** performance and/or construction requirements. The proposed rule is in response to the Commission’s asserted belief that, at present, **bunkbeds** present an unreasonable risk to children who may become entrapped in or around the structure of the **bunkbeds**.¹ The proposed rule would change the existing “voluntary standards” to mandatory and would possibly modify the existing standards in order to make **bunkbeds** more accident proof.² It is undeniably true that a child dying as a result of a mishap on a **bunkbed** is both tragic and, for the most part, avoidable under most circumstances. The Consumer Product Safety Commission has endeavored to eliminate the continuing threat of **bunkbed** related deaths through regulations. But is mandatory rulemaking the proper means to achieve the end of eliminating **bunkbed** dangers? This comment addresses the proposed **bunkbed** rulemaking and argues that the mandatory rule proposed would create more problems in the area of consumer safety than it would solve. This comment further argues that the current voluntary standards are the more appropriate way of dealing with **bunkbed** risks.

When an administrative agency propounds regulations with which an industry must comply, often times the regulation, initially meant to provide nothing more than a mandatory minimum, creates the so called “state of the art” in the industry. This state of the art is created because incentive for manufacturers to continue striving progressively towards better products, in

¹ 62 FR 3280.

² Id. At 3283, 3284.

large part, is stifled. The mandatory minimum in the industry, then, effectively becomes the industry standard. Thereafter, the industry, as a whole, waits for another administrative requirement before implementing anything new into their products. Since administrative policy making and rulemaking is anything but efficient, the manufacture of more advanced alternative, perhaps safer, designs takes often times much longer than without the regulations.

The automobile industry is a good example of what can occur when regulations are imposed mandatorily. The National Highway Transportation Safety Administration, through Federal Motor Vehicle Safety Standards, began imposing seat belt (shoulder belt) regulations in the 1970's. This had the effect of establishing a mandatory regulation with which automobile manufacturers complied. However, few manufacturers, if any, implemented safety mechanisms into their cars that went beyond those mandated by NHTSA. In the early eighties, NHTSA began recognizing the need for more advanced safety mechanisms such as air bag restraints. In 1984, NHTSA finally required a phase-in of "automatic occupant protection." This technology had been available for years to the automobile manufacturers but had not been implemented because that technology had yet to be required by the NHTSA.³

The automobile industry, then, is a good example of how a mandatory regulation, imposed in the name of the consumer, actually can have an opposite effect than that intended. The manufacturers tend to see the regulations as creating a ceiling for their necessary commitment to technological or safety progress. They, therefore, implement into their products only the safety mechanisms that are required by the regulations and nothing more. And they are,

³ See "Effectiveness of Occupant Protection Systems and Their Use"; National Highway Safety Administration; U.S. Dept. Of Transportation; 1st, 2nd, and 3rd Reports to Congress.

in large part, shielded from liability because they have done “everything that the government says is necessary.”

The mandatory regulation takes much incentive away from the manufacture to incessantly continue to better their products and make them safer for consumers. When this incentive is stripped from the manufacturer, then it becomes incumbent on another entity, in this case an administrative agency, to determine when a danger is so great as to require an industry-wide regulation. The manufacturers, as experts in their own field, simply sit back and wait on the regulations to be imposed by an agency which is in a much poorer position than the manufacturer to make such a decision.

A more appropriate way of dealing with a potentially dangerous situation like that posed by bunkbeds is to forewarn manufacturers who choose to enter into the market that the *voluntary* standards exist. Any harm that results from a non-complying product is, thereafter, foreseeable to the extent that the harm is related to the risks sought to be reduced by the voluntary standard. The non-complying manufacturer would properly be seen as having accepted those risks and would properly be held liable for the resulting harm. In this manner, *products liability*, working in conjunction with the voluntary standards, provides the manufacturers with the incentive to implement better, more safer, designs. An examination of present product liability laws reveals that the voluntary standard is the more appropriate means to meet the Commission’s objectives.

Some states have enacted products liability laws which create a presumption that a product is not defective, or not unreasonably dangerous, when the product is found to comply

with governmental or administrative regulations.⁴ In a case arising in Tennessee, a plaintiff injured by a bunkbed (assuming the Commission's mandatory regulations are imposed) would be forced to present proof sufficient to persuade a jury of a product's defectiveness despite a direct instruction from the presiding judge that the product is presumptively non-defective. This could, and in all likelihood probably would, effectively eliminate the plaintiffs cause of action altogether.

What this means is that an injured plaintiff might well be better off without the proposed mandatory regulation. First, the manufacturer would continue to have incentive to develop its product in accordance with the available technical and scientific knowledge. This is so because of the pressure exerted by products liability. Second, the potentially injured consumer would not be forced to surmount the seemingly insurmountable defense of a presumption of non-defectiveness.

The voluntary rule does not pose the same problems that the mandatory regulation does. The voluntary standard can set an appropriate minimal level of structural and protective integrity for both children and adults--as, for the most part, it has done. If the Commission would simply monitor those manufacturers who enter into the market, then those manufacturers could be put on notice that the voluntary standards exist. Those manufacturers who choose not to comply with the voluntary standards can then be seen as having accepted the risk that an injury would occur as a result of their non-compliance. This, in turn, creates the minimal standard against which non-

⁴ See, ex. Tennessee Code Annotated Sec. 29-28-104. ("Compliance by a manufacturer with any federal or state or administrative regulation existing at the time a product was manufactured shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.")

conforming manufacturers can be held in the event of an injury. In this way, the industry continues to better itself and injured plaintiffs are compensated to the greatest extent possible. This analysis holds true even in jurisdictions which lack the equivalent of Tennessee's "presumption of non-defectiveness."

Even in jurisdictions that do not impose a presumption that a product is not defective when a manufacturer complies with a regulation,⁵ the Plaintiff is still faced with a more difficult position than he or she would be without the mandatory regulation. Invariably a defendant will argue that the comprehensiveness of a particular administrative regulation merits dismissal of a plaintiff's case or, worse, pre-empts a plaintiff from bringing his or her suit. In Tebbetts v. Ford Motor Co.,⁶ suit was brought against Ford in a wrongful death case alleging that Ford had designed defective airbags for a particular model. The defendant alleged that NHTSA regulations pre-empted the Plaintiffs claim. The trial court agreed. The decision was eventually overturned, but the Appeals Court noted that compliance with a federal law creates a very difficult burden for the Plaintiff to overcome.⁷ The point is that the "mandatory minimum" creates a ceiling for manufacturers and the loser is the consumer. The manufacturer's compliance with the mandatory standard creates a very difficult burden for the Plaintiff to overcome--even if he or she is not pre-empted from bringing their claim. Newly proposed product liability laws may more adequately deal with this problem and, thus in the future, may

⁵ See Restatement of the Law Second, Torts 2nd Sec. 288C.

⁶ 140 N.H. 203, 665 A.2d 345, 348.

⁷ Id. At 348.

make a mandatory bunkbed regulation appropriate.

The proposed Restatement 3rd might eliminate some of the negative aspects of mandatory federal regulations, like the proposed bunkbed regulation, with respect to Plaintiffs. The Restatement 3rd proposes that “a product’s noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation”⁸ Therefore, a product which does not comply with a mandatory regulation is, ipso fa.cto, defective. The statute further notes that compliance with federal regulations is to be “properly considered” but is not preclusive of the Plaintiffs case.’ Still if and until such a proposal is passed, the negativity aforementioned with regard to administrative regulations, like the proposed bunkbed regulations, will continue. Therefore, in the absence of a general subscription by states to product liability laws similar to the Restatement 3rd, the bunkbed regulation proposed would be detrimental to the consumer. An analysis of the Commission’s stated policy reasons for the regulations supports this contention.

Many of the reasons stated for implementing a mandatory rule could likely be better met by alternative means. The Commission notes that manufacturers are, perhaps, not aware of the existing standards.” The breadth of the Consumer Product Safety Act would seemingly allow the Commission to promulgate “registration” requirements for those manufacturers who wish to enter the market and manufacture bunkbeds. For example, the Commission could simply require

⁸ Restatement of the Law Third, Torts: Products Liability s 4(a).

⁹ Id. At 4(b).

¹⁰ 63 FR at 3283.

manufacturers to register their corporate names and sign documents indicating their knowledge of voluntary standards. This registration process could also be used to “track” fleeting companies that are also mentioned as a concern in the Notice.¹¹

The Commission also suggests that the mandatory standard would allow the Commission to seek penalties for violators.¹² However, it is highly unlikely that, even if such penalties could be sought, an injured plaintiff would see anywhere near what might suffice to compensate for their loss. This reality is yet another reason why product liability represents the most effective means of safeguarding the public.

The writer would like to make one comment on the Commission’s jurisdiction over this matter. The Commission’s jurisdiction rests upon a finding that industry has not “substantially complied” with the voluntary standard.¹³ This determination, in turn, rests upon a finding that an “unreasonable risk” is still posed by the remaining non-complying products.¹⁴ Although purporting to offer assistance in reaching a decision of whether an unreasonable risk exists, neither the legislative history nor the Commission’s notice provides guidance which offers a guarantee of anything close to neutrality.

“Unreasonable risk” is simply another term for the Restatement 2nd of Torts existing “unreasonably dangerous” language. However, there are substantial differences in the way the two terms are applied. The unreasonably dangerous condition determination is left to a neutral

¹¹ Id.

¹² Id.

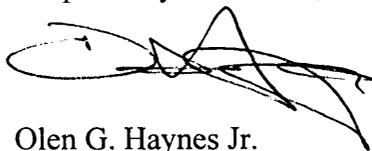
¹³ H.R. Conf. Rep. 97-208 at 486.

¹⁴ Id.

jury to consider based upon a weighing of evidence presented by two opposing sides. This is not so with regard to the unreasonable risk determination. The Commission is poised to make the same judgment a neutral jury makes in products liability cases. Yet the Commission's determination will be based upon its own accumulated facts and its own notions of reasonableness, applied to a general set of criteria rather than specific facts on a case-by-case basis. This writer feels adamantly that the determination of unreasonableness should be made by a neutral jury rather than an interested agency. This is so at least until products liability laws, such as the Restatement 3rd's proposal, are enacted.

Since undoubtedly the consumer's safety should be the focus of any proposed rule by the Consumer Product Safety Commission, no rule should be enacted if it, in totality, negatively affects the consumer's overall safety and security in the event of an injury. A voluntary standard provides this safety while allowing for the consumer to be compensated if injured. A mandatory standard stands squarely in the way of a Plaintiff's right to recovery while stripping manufacturers of incentive to make their products better and safer for consumers. Until appropriate legislation is passed which will eliminate these effects, the proposed bunkbed regulation should not be enacted.

Respectfully Submitted,



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**Before The Consumer Product Safety Commission
1.6 CFR Chapter II
63 FR 3280**

**COMMENT REGARDING PROPOSED
MANDATORY SAFETY STANDARD FOR ADULT
AND/OR CHILD BUNK BEDS**

This comment addresses the proposal to establish a mandatory safety standard for bunk beds under the Consumer Product Safety Act (CPSA) or under the Federal Hazardous Substances Act (FHSA). I believe the following **five** factors provide sufficient evidence that the current voluntary standard should be modified and promulgated as a mandatory standard for the manufacture of bunk beds: 1) the historical failure of self-imposed standards, 2) the inconsistent compliance with the **voluntary** bunk bed standards, 3) the relatively few obstacles and costs associated with imposition of a mandatory standard, 4) the benefits to the bunk bed industry from a mandatory standard, and 5) the current lack of public awareness and interest in bunk bed safety. In addition, I believe the rule should be instituted under the CPSA for both adult and child bunk beds to ensure that all bunk beds meet the standard.

Failure of Voluntary Standards

Although the bunk bed industry has responded admirably to the need for bunk bed guidelines since 1978, history suggests that no industry can be expected to be truly self-regulated. We have seen other instances in which industry was allowed to discipline itself in the implementation of safety rules. Two examples of the unsuccessful and tragic consequences of self-regulation can be found in the all **terrain** vehicle (ATV) industry and the American airline

industry- In each of these industries companies have opposed and avoided mandatory safety guidelines while consumers were being injured or killed.

In 1984, the Consumer Product Safety Commission (CPSC) instituted a four year investigation and rulemaking process **relative** to the safety of three and four-wheel **ATV's**.¹ Prior to the **CPSC's** action, the manufacturers had refused to respond to suggestions by the CPSC, other safety organizations, inter-industry accident data and proposed redesigns. They ignored what amounted to voluntary standards proposed for changes in the design, warnings and training relative to ATV's. During the same period, the ATV companies fiercely litigated both the claims of injured persons as well as the imposition of mandatory guidelines by the CPSC. The manufacturers' failure to resolve the safety issues voluntarily led to the filing of formal charges by the Department of Justice. Injury and death rates only decreased after the litigation by the CPSC and a consent decree requiring a ban of three wheel ATV's, age use recommendations, warning labels, **free** training, a public safety campaign and development of a new voluntary standard relative to future vehicle designs.*

A second example of the failure of an industry to take voluntary measures to enhance safety is the American airline industry. History is replete with allegations and/or examples of the industry's complacency relative to certain **safety** issues and the FAA's reluctance to impose formal regulations based on cost to the industry and to consumers. The best example is the ongoing struggle to reduce risk of aircraft fire both in the air and on the ground after a crash.

¹The investigation was prompted by 156 deaths and 78,300 injuries resulting from the use of ATV's by 1984. 17 *Int 'l Rev. L. & Econ.*, 379.

²*Id.* at 384.

This issue of course was raised to the top of the list with the crash of a **ValueJet** flight in the Everglades due to a fire in the plane's cargo hold. However, only the public interest in this issue is new. The issue of how to decrease the instance of death from aircraft fire began as early as 1961, came to the forefront as a **safety** issue for the FAA only in 1983 and continues today without significant changes in fire safety measures on commercial airlines? The FAA had only made suggestions for increased safety on the fire issue until late 1997 when it finally required the future installation of sprinklers in the cargo holds of commercial airliners. Of course the additional suggestion of the FAA to voluntarily install sprinklers in the cabin area of commercial airliners is all but dead as the **industry** analyzes the weight and **fuel** requirements of **carrying** such devices onboard.'

These industries may seem facially incomparable to the bunk bed industry. But the point of the comparison is to show that compliance with voluntary standards can be slow and inconsistent, and that the bunk bed industry is without the traditional rulemaking obstacles found in some industries.

Inconsistent Compliance in the Bunk Bed Industry

Although the bunk bed industry is smaller and less complex than the industries cited above, it also has been unsuccessful in bringing all competitors in compliance with the voluntary

³ In 1961 an aircraft fire on the ground in Denver claimed 16 lives only because of smoke inhalation from the flammable materials in the passenger cabin. In 1983 an Air Canada crash killed 23 people most of which would have survived in the presence of a sprinkler system or less flammable cabin materials. The latter brought the issue of survivable aircraft incidents in the absence of fire to the forefront of FAA safety concerns. *Id.* at 369,371.

⁴ Although the FAA has required installation of the cargo sprinklers, the airline industry continues to litigate and to lobby for reversal of the rule or at least an extension of the deadline by which they are to be installed.

standard. The problem is not that the voluntary standard is insufficient. The problem is that the adherence to the standard is inconsistent within the industry and apparently within company product lines. The CPSC intimates that the 106 identified manufacturers are making beds in compliance while the small regional and transient companies may be unaware they are the ones producing non-complying beds. But, in February of 1997, the CPSC tested 77 beds from 35 of the 106 identified manufacturers finding 12 non-complying beds, each produced by a **different** manufacturer. Those calculations reveal that as many as 1 in 3 manufacturers are producing at least one bed in their product line that does not comply. Whether this non-compliance is inadvertent or a result of needing a **bed** that can compete with other low end products by non-complying companies is unclear. But what is clear, as the CPSC has stated, is that the pattern of non-compliance is continuous and that under the voluntary standard these bunk beds will continue to cause injuries and deaths. This is unnecessary in an industry where the traditional obstacles to imposition of mandatory standards are basically absent.

Why The Mandatory Standard ?

Absence of Traditional Obstacles and Benefits of a Mandatory Standards

The traditional obstacles that seem to delay voluntary or mandatory rules include industries with many companies that wish to avoid government regulation, strong industry organization and lobbying efforts, industries with large investments in complex, inflexible products lines or processes, competitive disadvantages with non-complying companies, and tenuous cost-benefit analyses relative to increased safety. Both the ATV and airline industries have been able to defer rules indefinitely using these obstacles. With the exception of having manufacturers that would like to avoid government imposition of mandatory rules, the bunk bed

industry is absent these obstacles. And the imposition of the **mandatory** standard actually offers attractive benefits to the manufacturers currently in compliance with the voluntary standard.

The only traditional obstacle that the bunk bed industry maintains is the argument that they should not be subjected to mandatory standards in light of past cooperation and success in bunk bed safety standards. First, let me say that I am quite certain that the organized companies within the bunk bed industry would like to be left to the voluntary standard. I am a proponent of *laissez faire*, but I also believe that the market and well-meaning companies are imperfect. The argument for less government and fewer regulations rings untrue in the face of deaths to children caused by companies that fail to comply with **safe** bunk bed designs. The industry has proven that it cares about the safety of bunk beds. Its Inter-Industry Bunk Bed Committee has worked closely with the CPSC since 1978 to develop and improve the current voluntary **ASTM** standard. To suggest now that the mandatory rule would adversely **affect** the companies in compliance brings into question the very motivation for development of the voluntary standard. Safety or ideology? The organization of the industry and its lobbying effort should assist in the development of the best standard and assist the CPSC in the enforcement of the standard. In turn, the CPSC should focus its concern in alleviating the burdens of a mandatory standard first on the consumer, then on the companies that are in compliance and lastly on those companies not in compliance. With this obstacle or argument refuted, it is more important to consider the obstacles that the CPSC and the industry do not face and the benefits gained by imposing the mandatory standard.

First, the industry does not have to change inflexible processes and make costly product changes to increase safety. The components of bunk beds and the processes by which they are made are relatively simple. In fact, the ease of manufacture has been cited as one reason for the

low barriers to entry into this market. And since most companies are already at least partially in compliance, the number of affected firms should be small. Any firm that would be bankrupted or deterred from entering the market due to compliance with a voluntary or mandatory standard should consider another business opportunity. In the end, using the standard as a new barrier to entry would decrease competition, increase the relative market share of existing firms and raise the general safety level of the products.

Secondly, imposition of the mandatory standard would not create a competitive disadvantage for firms that are already in compliance. This obstacle has traditionally been suggested by American manufacturers competing against foreign exporters exempted from U.S. regulations. It does not apply to bunk beds. Firms in compliance are not prejudiced by the current standard nor would they be harmed by a mandatory standard. Firms in compliance are currently prejudiced by the failure of anyone to enforce the voluntary standard against domestic and foreign companies selling cheaper, non-complying beds. Once the standard becomes enforceable, the CPSC, state agencies, consumers, and the industry can **identify** and help eliminate those that violate the standard. In effect, the competitive advantage then shifts to the manufacturers in compliance, strengthening the barriers to entry for the market.

Finally, the cost-benefit analysis offered by the CPSC cannot be construed as prohibitive to either the manufacturer or to the consumer. The fear would be that bunk beds would increase in price so much that consumers would switch to an alternative bed product. However, with the additional cost at the retail level ranging **from \$15-40** per unit, consumers will be able to absorb the increase in manufacturing costs which, based on normal markup rates of 50-100%, would be about 7-\$20 per bed. Further, with the low end, non-compliance producers gradually out of the

picture, the market should see greater **stability** and organization within the pricing structure.

Lack of Public Awareness

But despite the lack of obstacles and the apparent benefits of the mandatory standard, there will be opposition. I would implore the CPSC to impose the standard because bunk beds will not likely ever garner the public's attention like **ATV's** or airlines. And so it is possible that, in the absence of such a public outcry, the voluntary standards and unreasonable death rates due to bunk beds could continue. Unfortunately, **20/20**, Dateline and 60 minutes can only do so much. And the average citizen is not likely to read the Federal Register. Therefore, these comments may be the last line of defense for the next bunk bed victim.

Conclusion

In conclusion, I urge the CPSC to adopt a mandatory standard that embodies the current voluntary standard with necessary modifications to address any perceived inadequacies. The final standard should be able to handle minimum design standards, product tracking for recall purposes, enforcement for non-compliance and possible allocation of liability for retailers, manufacturers and third-party users of bunk bed units. The rule should be instituted under the CPSA since it is entirely feasible and likely that consumers will purchase units intended for adults for children. One rule under the CPSA would ensure that all beds were covered and eliminate any potential confusion on which rule to use for enforcement or for civil litigation.

Respectfully submitted,



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