UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Memorandum

Date: July 19, 2013

TO : The Commission
Todd A. Stevenson, Secretary

THROUGH: Stephanie Tsacoumis, General Counsel
Kenneth R. Hinson, Executive Director
Robert J. Howell, Deputy Executive Director – Safety Operations

FROM : Andrew G. Stadnik, P.E.
Associate Executive Director
Directorate for Laboratory Sciences

Gregory K. Rea, Director
Division of Mechanical Engineering
Directorate for Laboratory Sciences

SUBJECT : Staff's Response to Commissioner Nord's Questions for the Record, Final Rule for Play Yard Bassinet Accessory Misassembly under Consumer Product Safety Improvement Act § 104(b)

On July 11, 2013, two questions posed by Commissioner Nancy Nord were shared with the play yard rulemaking team. The commissioner's questions and staff's answers are given below.

Question 1:

Laundering. Staff seemed to acknowledge at the July 9th hearing that there could be some difficulty in laundering bassinet accessory mattresses or related components due to this amendment but that these difficulties were offset by the safety benefits.

a. Please describe more fully any detrimental effect on cleanliness.
b. Is there any reason to believe that other hazards may be created by any difficulty in cleaning compliant products? In particular, is mold or other microbial growth likely?

Question 1 Staff Response:

A. *Please describe more fully any detrimental effect on cleanliness.*

The discussion on laundering bassinet accessories that occurred at the Commission Play Yard Hearing on July 9, 2013 was prompted by a comment received in response to the Play Yard Amendment notice of proposed rulemaking, published by the Commission on August 29, 2012. The commenter is a play yard manufacturer whose product line includes play yards with bassinet accessories. Some of the commenter's products are unique, however, in that the shell of the bassinet accessory is made of a cotton-blend textile, rather than a nylon-based material (which is easily washed by hand). If the commenter permanently attaches rigid accessory attachment components to the shell, it will be difficult, or impossible, to wash the shell in an automatic washing machine.

However, the bassinet accessory misassembly requirement would not alter the current ability to launder **most** bassinet accessories on the market because the typical play yard bassinet accessory has a shell that is made with materials, such as nylon, that do not require machine washing. These products were meant to be hand washed. Manufacturers typically recommend cleaning the shell with a mild household soap or detergent, followed by air drying.

Staff examined the commenter's product line in light of the comment. Staff knows that the commenter produces other similar products in which the bassinet shell is not intended to be removable and is made of material that is easier to clean. Therefore, if the commenter chooses to permanently affix the bassinet accessory attachment components to the shell (instead of choosing to comply with the requirement by passing the catastrophic failure test), it is reasonable to expect the commenter to change the product to allow the bassinet shell to be hand cleaned more easily, *e.g.*, by constructing the shell from a nylon-based material instead of cotton-blend textiles.

B. *Is there any reason to believe that other hazards may be created by any difficulty in cleaning compliant products? In particular, is mold or other microbial growth likely?*

For the majority of play yard bassinet accessories known to CPSC staff, there is no difficulty in cleaning the products – the pad and the shell are made of materials that are cleaned easily by hand. However, staff did review the incident data for play yard bassinets and did not find any hazard patterns involving mold or microbial growth that might arise from cleaning difficulties.

Question 2:

Direct and Indirect Costs. Staff suggested that analyzing solely the costs of redesigning products to comply with this rule—versus the total related costs of compliance, including testing, certification, and recordkeeping—was appropriate because the former are the "direct costs" of the rule, while the latter are "indirect costs" and outside the scope of the required analyses.

a. Why does staff consider "indirect costs" beyond the scope of analysis?
b. Where, if at all, are the costs deemed to be indirect above considered and addressed?

Question 2 Staff Response:

A. *Why does staff consider "indirect costs" beyond the scope of analysis?*

First, to clarify, the staff reviewed the draft rule amending the play yard standard in accordance with the Regulatory Flexibility Act (RFA) to assess the economic impact of the rule on small entities. When conducting any analysis under the RFA, staff follows the guidelines established by the U.S. Small Business Administration (SBA) in SBA's "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act."

In our overall evaluation of play yards, we described the costs associated with the requirements of the play yard standard (and the misassembly amendment) to be "the direct costs of the play yard standard" because they emanate directly from the play yard rule. We described the testing and certification costs as indirect costs because they emanate from the testing and certification rule (16 C.F.R. part 1107), a rule which was completed under a separate and distinct regulatory proceeding. While the testing and certification costs do not emanate from the play yard rule, they are triggered by it. Both are real costs that must be borne by manufacturers.

In conducting a regulatory flexibility analysis, the staff distinguishes between direct and indirect costs, but the analysis accounts for both types of costs. The regulatory flexibility analysis for the final rule on play yards described the possible impact of both the direct and indirect costs of the play yard standard on small businesses. After describing the direct impact of the rule, the regulatory flexibility analysis described costs associated with the testing and certification rule, which would go into effect with the play yard rule, as follows (p. 27 of the June 6, 2012 briefing package):

> Although the direct impact of the staff-recommended final rule should not be significant for most small manufacturers, there are indirect impacts as well. These impacts are considered indirect because they do not arise directly as a consequence of the play yard rule's requirements. Nonetheless, they could be significant. Once the final rule becomes effective and the notice of requirements is in effect, all manufacturers will be subject to the additional costs associated with the third party testing and certification requirements.

This will include lead and phthalates testing, in addition to the physical and mechanical test requirements specified in the staff-recommended final rule. Based on information provided by a play yard manufacturer, additional industry input, and confidential business information obtained when staff was developing the third party testing rule, total third party testing costs for play yards could amount to $3,520–$8,670 per sample, depending primarily upon the number of accessible components. If lead content can be tested using X-ray fluorescence (XRF) technology (rather than "wet chemistry," which is significantly more expensive), the cost per sample could fall to $1,710–$2,270. Testing overseas could potentially reduce some third party testing costs, but that may not always be practical.

On average, each small domestic play yard manufacturer supplies 14 models of play yards to the U.S. market annually. Therefore, if third party testing was conducted every year, third party testing costs for each manufacturer could range from $49,300 to $121,300 annually. Based on a review of firm revenues, the impact of third party testing could be significant for some small manufacturers, even if only one play yard sample per model is required for testing. If more than one sample per model would be needed to meet the testing requirements, third party testing costs could have a significant impact on many of the manufacturers.

The staff briefing package did not suggest that these costs were beyond the scope of the regulatory flexibility analysis or that they should not be considered by the Commission in the promulgation of the rule. In fact, we pointed out that these indirect costs could be significant for some small manufacturers.

B. *Where, if at all, are the costs deemed to be indirect above considered and addressed?*

As shown above, the indirect costs were considered and addressed in the final regulatory flexibility analysis for play yards, in the June 6, 2012, briefing package.

These costs were not, however, considered in the review of the potential impact on small entities for the bassinet misassembly amendment to the play yard standard (see the June 19, 2013 briefing package). The Commission is currently considering an amendment to the existing play yard standard. Testing and certification costs were already triggered by the play yard standard when it went into effect on February 28, 2013. Any additional testing costs from the new requirements are likely to be minimal. Consequently, because the testing and certification requirements, and hence their costs, had already gone into effect, they were not relevant to the economic evaluation of the play yard amendment; that is, the testing and certification costs will be borne by play yard manufacturers regardless of the Commission decision on the play yard amendment.