U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

MINUTES OF COMMISSION MEETING
December 2, 1999
4330 East West Highway
Bethesda, Maryland

The December 2, 1999, meeting of the U. S. Consumer Product Safety Commission was convened in open session by Chairman Ann Brown. Commissioner Mary Sheila Gall and Commissioner Thomas H. Moore were present.

Agenda Item: Bunk Beds

The Commission considered whether to issue a final rule addressing entrapment of children in the structure of bunk beds. The Commission was briefed on this matter by the staff at the Commission meeting of November 18, 1999. (Ref: staff briefing package dated November 3, 1999.)

Commissioner Gall moved that the bunk bed rulemaking be postponed to allow ASTM additional time to complete its consideration of changes to the existing voluntary standard. The motion directs staff to work with ASTM as they continue their deliberations on the proposed changes. Additionally, if staff believe that ASTM is not making adequate progress, staff will report back to the Commission with their justification for proceeding with rulemaking. This motion failed by vote of 1-2, with Commissioner Gall voting in favor and Chairman Brown and Commissioner Moore voting against.

Chairman Brown moved that the staff prepare a draft Federal Register notice to issue a final rule for bunk beds and base the discussion of the Commission's position on what constitutes substantial compliance on the relevant points made in Commissioner Moore's formal statement. (Copy attached) The draft Federal Register notice is to be submitted for Commission consideration as soon as possible by ballot, with a response time to be coordinated by the Office of the Secretary. This motion was approved by vote of 2-1, with Chairman Brown and Commissioner Moore voting in favor. Commissioner Gall voted in dissent.

Chairman Brown, Commissioner Moore, and Commissioner Gall each filed a statement concerning the bunk bed rule, copies of which are attached.

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

For the Commission:

Sadye E. Dunn

Sadye E. Dunn
Secretary

Attachments

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Statement of Chairman Ann Brown
Decision on Bunk Bed Rule
December 2, 1999

I voted today to issue a final rule to require bunk bed manufacturers to make bunk beds that will not entrap and strangle young children. About ten children die every year due to entrapment on bunk beds that do not meet current voluntary safety standards. I believe that the new rule the Commission approved today will help reduce the number of these unnecessary tragedies.

Despite the years of efforts and the dollars we have invested in bringing bunk beds into conformance with the voluntary safety standard, we continue to find many bunk beds that do not conform to the voluntary standard. And every nonconforming bunk bed we find has the potential to cause the death of a child. Due to the particular circumstances of the bunk bed industry, I believe a mandatory rule will make a difference in preventing future deaths.

In recommending a final entrapment rule on bunk beds, the staff has demonstrated careful thought and analysis and has assembled convincing evidence. I have also concluded that the staff and the General Counsel have presented a persuasive case that there has not been substantial conformance with the current voluntary standard.

Moreover, the mandatory rule will result in a safer bunk bed than the current voluntary standard. The new rule will also help us to keep defective bunk beds off the market. Because of the ease of entering this market, and the exponential expansion of the Internet market, it appears that there are frequent new entrants, and it is impossible for our staff to determine just how many manufacturers there are at a given time.

The new rule will enable the Commission to seek civil penalties for bunk bed conformance violations in cases where it could not with the current voluntary standard, and will deter others from manufacturing or importing non-conforming beds. The rule will provide the Commission and the U.S. Customs Service with legal authority to keep foreign made defective bunk beds from entering the U.S. and will make it illegal for retailers to sell defective bunk beds.

As Chairman, I have spoken often of the safety triangle. Parents are at one corner of the triangle and must take responsibility for the safety of their children. But I have never accepted the proposition that if somehow this first line of defense fails, it is acceptable for the innocent child to pay with his or her life.

Industry is at another corner of that triangle. I am grateful for the hard work of industry getting manufacturers to comply with the voluntary standard, for the industry's decision not to oppose this rule and for the enthusiastic support for the rule by some industry members.

The Commission stands at the third corner of the triangle. I believe our action today properly discharges the weighty responsibility that Congress and the American public have placed upon us. I would particularly like to thank John Preston, Marc Schoem Ron Medford, and Jeff Bromme for their exemplary and hard work on this rule.

I believe the Commission's final decision on this issue demonstrates we were able to reach a consensus -- and go the extra mile to fulfill our mission of saving the lives of children -- even when presented with difficult questions of fact and law.

And now -- Lynn Starks. We owe her so much.

Through her tireless advocacy, Lynn Starks was instrumental in the successful enactment of the mandatory bunk bed statute in Oklahoma, the "Whitney Starks Act." While the staff continued to identify nonconforming beds, this mother, along with others in her state, worked to pass the law in Oklahoma, the first mandatory state bunk bed statute. Today all bunk beds sold in that state must conform with the ASTM standard, thanks to the brave efforts of this grieving mother. Following Oklahoma's lead, the State of California passed a similar law on bunk bed safety.

In April 1998, when the Commission was in the fact finding stage on the proposed bunk bed rule, Lynn Starks appeared on Good Morning America with me to tell her story on national television and to help the agency with our Recall Round-Up activities. And then, Lynn used her own personal time and resources to appear before the Commission at a public hearing in April 1999 where she told the story of Whitney's tragic death and shared the importance of having a Federal mandatory standard. She is here again today at her own expense.

I read Whitney's In-Depth Investigation. I was horrified, shocked, saddened and determined. Too often the Washington bureaucracy gets caught up in deal cutting, machinations, political maneuvering. We, here at CPSC, cannot afford abstruse arguments and political deal making. We are here to save kid's lives. We see ten deaths a year, like Whitney's. We cannot address these deaths by sitting back and simply saying, "too bad, how sad."

This is our mission -- to see that no other child dies how Whitney died. Our agency takes action.

Therefore, I am dedicating this rule in honor of Whitney Starks -- the "Whitney Starks Bunk Bed Rule."

We can do no less.

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STATEMENT OF COMMISSIONER THOMAS HILL MOORE
ON THE ISSUANCE OF A FINAL RULE ON BUNK BEDS
DECEMBER 1, 1999

I am voting to approve the Final Rule on Bunk Beds. In approving this Rule, the Commission has to consider the impact of section 9(f)(3)(D) of the CPSA and section 3(i)(2)(A) of the FHSA on its ability to issue a regulation in this case. I believe that the Commission could base its decision to go forward solely on the lack of an **adopted and implemented** adequate voluntary standard, thus avoiding the issue of what constitutes "substantial compliance" with such a standard. At the Notice of Proposed Rulemaking stage, I suggested this would be the easiest avenue if the Commission decided to approve a final rule. While it may still be the easiest avenue, after having listened to and read the statements in response to the Commission's request for comments on this issue, I believe it would be remiss of the Commission not to discuss substantial compliance in the bunk bed context. And I would be remiss if I did not say that despite my decision today, I think the voluntary standards subcommittee has worked diligently over the years to respond to the changing requests of our staff to alter the standard to meet new incident scenarios.

While I respect the General Counsel's attempt to find some definitive test upon which to decide the issue of what constitutes substantial compliance with a voluntary standard, I must reject the proposition that it should be determined principally by comparing the current level of compliance with that standard to some guesstimate of what could be achieved under a mandatory standard. In theory, one could argue that in most cases compliance with a mandatory standard would be at least marginally higher than with a voluntary one. If Congress had intended to direct us to prefer mandatory standards whenever they could make even a marginal difference, they would have written the statutory requirement quite differently and would have chosen a more precise term than "substantial" for the type of compliance rate they deemed acceptable.

The only guidance Congress gave on the meaning of "substantial compliance" is that we should consider whether compliance is sufficient to eliminate or adequately reduce the risk of injury in a timely fashion and that, generally, compliance should be measured in terms of the number of complying products, rather than the number of manufacturers who are in compliance. This is not to say that I believe that there is any one magic percentage of conforming products that can be used across the board to

define "substantial compliance." Given the Congressional guidance we do have, it makes sense to look at the number of conforming products as our initial starting point for analysis. On its own, however, the number is not particularly enlightening. Whatever the number may be, it has to be reviewed in the context of the hazard the product presents. Thus, as has been the practice since the Commission's inception, I believe we must examine what constitutes substantial compliance with a voluntary standard on a case-by-case basis.

If you look just at the number of conforming products, bunk beds is a close call. The overall compliance rate of bunk beds currently being manufactured is impressive (although staff has at various times expressed some uncertainty about the accuracy of their estimate which is based largely on industry figures). I do appreciate that the compliance rate is impressive, to some extent, because of the aggressive work done by our Office of Compliance to bring nonconforming beds into compliance over the last several years.

I believe that a 90% product compliance rate with a voluntary standard could be considered substantial under our statutory framework and past agency actions. But each product requires examination to determine whether deferring to such a compliance rate meets our obligation to safeguard the American consumer. There are certain factors the agency considers before it initiates regulatory action, such as the severity of the potential injury, whether there is a vulnerable population at risk, and the risk of injury. These and other factors can also inform our decision as to whether a certain level of nonconformance with a voluntary standard is acceptable.

In this case, we are dealing with the severest of risks --death--to one of the most vulnerable segments of our population--infants and young children. While the risk of death is not high, it exists whenever a young child is in a residence with a nonconforming bunk bed. The near misses, many of which, but for the intervention of an adult, could have been fatal, make the risk even higher.

Additionally, while some products, such as hairdryers without safety plugs, require some intervening action (dropping the hair dryer into water) to create the hazard, deaths in bunk beds occur during the intended use of the product--a child rolling over in bed or climbing in or out of it--without any intervening action. Bunk beds are often made and bought for the use of children. We hold products made for children to a higher standard than we do other products. Some bed designs emphasize the play nature of the product. For example, one has canvas flaps with windows that hang down the side to simulate a playhouse. Even bunk beds that have no clear design or size characteristics aimed at children are to my mind close to being "attractive nuisances." They have ladders, they resemble jungle gyms to youngsters--they are built for climbing. The in-depth investigations show young children are drawn to them whether they were bought for their use

or not.

We must also consider that bunk beds have a very long product life, not infrequently being passed on to several families before being discarded. Thus any number of children may be exposed to a bed during its useful life. Every noncomplying bed that poses an entrapment hazard presents the potential risk of death to any young child in the house. It is a risk that is hard for a parent to protect against, as children find their way onto these beds even if they are not put to sleep in them. We are contemplating the prospect of 50,000 nonconforming beds a year (or more) entering the marketplace, with each bed being in use for perhaps twenty years or longer. Under these circumstances, a 10% rate of noncompliance is too high--it is not an adequate reduction of the risk of death.

Bunk beds are products that can be made relatively easily by very small companies, even by a single individual. The Office of Compliance believes smaller entities will always present a compliance problem, because new manufacturers can enter and exit the marketplace relatively easily and seemingly need little expertise to make a wooden bunk bed.

Compliance believes, and the evidence seems to support, that there will always be an irreducible number of new bunk bed manufacturers who will not follow the voluntary standard. I have to wonder how much of this is due to a misunderstanding (and a natural one) about the meaning of "voluntary" standards. A new business entrant may think it means that they can follow it or not, as they choose, rather than understanding the term to reflect how the standard came into being--through an industry standard-setting process, as opposed to government fiat. If this is the case, perhaps CPSC needs to do a better job of getting out the word on voluntary standards and on our expectations with regard to them.

What constitutes substantial compliance is also a function of what point in time the issue is examined. In 1989, the Commission denied a petition for a mandatory bunk bed rule. At that time industry was predicting that by April of 1989, 90% of all beds being manufactured would comply with the voluntary guidelines, a rate the Commission was willing to consider as substantial compliance. But that was in the context of years of steadily increasing conformance and, I suspect, the hope that conformance would continue to grow and deaths and near-misses would begin to decline. But the conformance level never got beyond the projection for 1989 and deaths and near-misses have not dropped: An indication perhaps of the irreducible core of new, small manufacturers who do not follow the voluntary standard. It is now clear that the bunk bed voluntary standard has not achieved an adequate reduction of the unreasonable risk of death to infants and young children in a timely fashion, nor is it likely to do so.

I can imagine industry wondering how they can ever be sure that

CPSC won't encourage them to achieve a certain level of compliance as a way to avoid a mandatory rule, and then raise the bar. To that I would say, the bar may always be high with certain products and while we prefer that industry be self-policing, we always reserve the right to take another look to see if the results of the projected conformance rate are sufficient to permit a continued deferral to the voluntary standard. The bottom line must always be: How are we doing in reducing deaths and injuries? That is our ultimate mandate.

Products that rarely or never cause death, or cause less severe injuries; products in which the deaths or injuries are not visited principally on a vulnerable population; products which are not intended for children or which have no special attraction for children; products that have a relatively short life span; products that are made by a few stable manufacturers or which can only be made by specialized manufacturers needing a significant manufacturing investment to produce the product; products where the voluntary standard continues to capture an increasing amount of noncomplying manufacturers; or products that require some additional intervening action to be hazardous, might not be held to as strict a substantial compliance analysis as one which presents all or some of these factors. And in analyzing another product there could be other factors that would have to be taken into consideration in determining what level of compliance is adequate to protect the public. Our tolerance for nonconformance levels has to bear some relationship to the magnitude and manageability of the hazard we are trying to eliminate.

My decision is not based on the argument that a mandatory rule gives us better enforcement tools, as that is always the case between a voluntary standard and a mandatory regulation. Reliance on this factor would tend to make the statutory directive a nullity. Also, the fact that we would have better enforcement mechanisms under a future mandatory regulation, provides no answer to the question of whether there is currently substantial compliance under the voluntary one. It only tells you how you would hope to achieve an even higher compliance rate.

How do you get at the irreducible core of nonconforming producers? Will a mandatory standard make a difference in the compliance rate given the already high level of compliance and the types of manufacturers that we will be trying to reach? This is not asked in the context of using it as a measure of when there is substantial compliance with a voluntary standard. Rather it is asked in the very practical sense of can we, given who we are trying to reach and why, thus far, we have been unable to reach them, really achieve a result that is worth the agency effort of promulgating and enforcing a mandatory regulation?

Mandatory standards are no panacea--they still require staff enforcement, often vigilant staff enforcement. I do have doubts as to whether making the voluntary standard a mandatory one will make a significant difference in our ability to reach those small

domestic manufacturers (especially the garage-based ones) which are primarily responsible for the noncomplying beds. But at least the necessity of complying with a mandatory federal regulation will be understandable to small manufacturers. State and local government will have no doubt about their ability to help us in our efforts to locate these manufacturers. Given the potential consequences of a company's failure to abide by the entrapment provisions of the voluntary standard, I will give our staff the benefit of the doubt.

I will watch any post-mandatory standard recalls closely to see if the mandatory standard is indeed able to reach the new, small entrants into this industry in any greater degree than the voluntary standard did. If it does not, I will consider this practical limitation on the efficacy of our regulatory powers the next time a similar case comes before the Commission. I expect staff to report to the Commission periodically on the overall compliance rate and on any future deaths and near-misses from bunk bed entrapment.

STATEMENT OF THE HONORABLE MARY SHEILA GALL ON PUBLICATION OF A FINAL RULE ADDRESSING ENTRAPMENT OF CHILDREN IN BUNK BEDS

December 2, 1999

Today I voted against the publication of a Final Rule establishing a mandatory safety standard for addressing certain entrapment hazards in bunk beds. In my opinion, to proceed with such a ***mandatory*** rule would be inconsistent with both the provisions of the Consumer Product Safety Act (CPSA) and the Commission's long established approach for addressing voluntary safety standards.

Before discussing this in detail, however, I first find it necessary to register my deep concern that recent events, including this particular rulemaking process, present some deeply troubling implications regarding our commitment to the voluntary standards process. Specifically, as the Commission affirmed in its 2001 Budget request:

> In recent years, the Commission has ***placed additional emphasis*** on working more cooperatively with industry and standards setting organizations to develop voluntary standards and ***reduce reliance*** on government imposed mandatory standards. (Emphasis added).

That is a direct quote. Yet, the Agency's proposals before us today, spurred on by certain erroneous interpretations of the law by our General Counsel on substantial compliance, directly contradict this pledge.

This growing trend to retreat from the primacy of voluntary standards is further illustrated in the context of some recent adverse publicity concerning Underwriters Laboratories, Inc. (UL), contained in the November 24, 1999 edition of the Washington Post. Here, the Post reporter has chosen a few examples, from the more than 700 safety standards UL has developed to test 17,000 different kinds of products, which did not fully meet expectations. In doing so, she has cast doubt on the integrity and reliability of one of our nation's premier voluntary safety organizations; one that has helped our nation in achieving the best product safety record in the world. This represents a gross disservice to the American public.

Clearly, if this rulemaking is an example, there would appear to be those in this Agency who would welcome a retreat from our long term cooperative relationships with voluntary standards setting institutions.

Our statute provides that the "Commission shall not promulgate" a mandatory rule unless an existing voluntary standard: 1) is "not likely to result in the elimination or adequate reduction of such risk of injury" or 2) is "not likely" to have "substantial compliance". The definition of substantial compliance is a critical matter that goes to the very heart of this Agency's deliberative process. Specifically, the CPSA codifies a strong Congressional statement of preference and encouragement for industry voluntary safety standards. Indeed, in the legislative history of the 1981 amendments to this Act, Congress strongly admonished the Commission for its failure to "encourage or support voluntary efforts by industry groups".

In our vote today, there was no definitive resolution of the application of substantial compliance. It is critical that this be resolved. I was encouraged, however, by the statements of both Commissioner Moore and Chairman Brown that this issue will be addressed appropriately in the Federal Register notice. Hopefully, that will end this controversy. My detailed position on how this question should be resolved already has been placed on the record in my earlier statements. It is encapsulated again below.

Congress intended the Commission to exercise broad discretion and apply considerable flexibility in determining whether "substantial compliance" has been demonstrated in any given case. This is most critical. Staff suggests an extraordinarily narrow and proscriptive interpretation for applying substantial compliance that would render meaningless this strong Congressional intent. Specifically, staff has proposed the following:

> When determining whether there has been or will be "substantial compliance" with a voluntary standard, the Commission should compare the compliance rate of the standard to that expected with a mandatory rule. Where the relevant provisions of the proposed voluntary standard and the adopted and implemented voluntary standard are materially the same, and the mandatory rule would achieve a higher degree of compliance, it may supercede the voluntary standard.

This is absurd! This interpretation turns clear Congressional intent on its head. Rather than injecting encouragement for the promotion of voluntary standards, such an interpretation would discourage and trivialize efforts by industry to use its expertise and innovative capacity to develop and improve voluntary standards. Incredulously, it explicitly creates a preference for mandatory standards over voluntary standards – in direct contradiction to Congress's affirmative embrace of voluntary efforts.

Staff's proposed comparative analysis is ***relevant*** as part of a broad and inclusive review as to whether there is substantial compliance in any particular instance. In this case, for example, staff has repeatedly noted that there exists over 90% compliance with

the voluntary standard. This may not be conclusive but, in my mind at least, it appears presumptive of substantial compliance. In addition, it is recognized that the nature of the bunk bed industry is likely to result in some residual non-compliance. And this too is relevant, as may be other factors, in evaluating the existence of substantial industry compliance in a specific instance. My approach is to weigh ***all*** relevant information. My expectation is that such a broad test will be presented in the Federal Register notice.

In the case of bunk beds, it is my determination that industry has been in substantial compliance. Yes, there has been some non-compliance. Yes, there have been recalls. But this occurs where we have mandatory rules as well. Indeed, we have instances – such as with fireworks – where there is a dramatically lower industry compliance rate under a mandatory rule than we are experiencing here with bunk beds. That is why this Commission has a Section 15 process geared to address such problems. And I would submit that the significant number of recalled products that we have witnessed demonstrates that this process works and that it works well.

In addressing the other prong of the statute, it is my conclusion that the voluntary safety standard for bunk beds has evolved in a manner that has proven to be quite adequate in addressing an entrapment hazard. And I emphasize that this has been, and continues to be, an ***evolutionary*** process. Since industry originally created this standard, in 1979, it has been modified several times in response to the recommendations of staff. This affirms the singular advantage of the voluntary process. It has proven to be most responsive to newly identified hazards. And it has lent itself to incorporating such modifications far more rapidly than would have been possible under our lengthy statutory rulemaking procedures.

In this rulemaking, the staff has proposed new changes to the existing standard. Unfortunately, staff made these proposals in the context of this rulemaking endeavor first, without presenting the new recommendations to the ASTM committee. There is every good reason to believe, based upon our prior experience, that had staff elected to bring their recommendations initially to ASTM, in all likelihood a modified standard would already be in place addressing the new entrapment hazard.

Nonetheless, the ASTM committee has cooperated fully with staff in addressing these newly identified hazards. With one minor difference, at this time, the members of this committee have indicated their desire to act upon the recommended modifications.

Yet, today, the Commission voted against my motion to grant the ASTM committee a reasonable period of time to attempt to resolve this matter before a final vote by the Commission. Why? The only reason given has been a ***preference*** for a mandatory bunk bed standard over a voluntary standard in enforcing compliance. In the past, we have granted just such an extension in order to finalize a modified voluntary standard. For example, just to cite two recent illustrations, this was done for baby walkers and crib slats. I am quite disappointed that my colleagues have thus repudiated this Commission's long standing commitment to accommodate the voluntary standards process by failing to take this very reasonable action.

Based upon the evidence before us, I believe that it would have been most appropriate, consistent with the Commission's historic proceedings, to postpone a final vote on the promulgation of a mandatory safety standard for bunk beds in order to provide the ASTM committee with a reasonable period of time to address the remaining issue before it.