United States
CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

MEMORANDUM

DATE: January 15, 1999

TO: Commissioner Mary Sheila Gall

FROM: Jeffrey S. Bromme, General Counsel
Harleigh Ewell, Attorney, OGC

SUBJECT: "Follow-up Questions to the Bunk Bed Briefing Submitted by Commissioner Mary Sheila Gall" (Jan. 8, 1999)

Thank you for the opportunity to respond to your January 8, 1999, memorandum. Your questions and our answers follow.

Question 1(A): You suggest in the briefing materials that since several of the staff's recommendations for a mandatory rule go beyond the existing ASTM voluntary standards, that it may not be necessary even to address the issue of "substantial compliance". Staff then proceeds with an elaborate and detailed presentation on the question of "substantial compliance". Could you explain this apparent incongruity?

Response to Question 1(A): The Commission could promulgate a final bunk bed rule without making any findings on "substantial compliance" if it were to conclude, as the staff has, that the existing voluntary standard is not substantively adequate. CPSA § 9(f)(3)(D)(i); FHSA § 3(i)(2)(A)(i); Memorandum from J. Bromme & H. Ewell to the Commission & Sadye Dunn, pp. 4-5 (Dec. 16, 1998) ("OGC Memorandum").[1] Our memorandum nevertheless discusses "substantial compliance" for two reasons. First, the Commission could accept the staff recommendation to adopt the voluntary standard, while rejecting the staff recommendation to amend the standard; alternatively, if the Commission issues the NPR, the industry could adopt the additional requirements in the proposed rule before the Commission considers a final rule. In either case, the Commission would squarely face the "substantial compliance" issue.

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[1] The Commission could, of course, publish the Notice of Proposed Rulemaking without making findings of any sort, but the OGC Memorandum proceeded on the assumption that the Commission would not want to publish the NPR without having a strong sense that it would be able to make the findings required for a final rule.

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Second, the "substantial compliance" issue was of considerable interest to the Commission at the ANPR briefing, which suggested to us that, notwithstanding the legality of doing so, the Commission perhaps would not feel comfortable proceeding exclusively on CPSA § 9(f)(3)(D)(i) and FHSA § 3(i)(2)(A)(i) grounds, but would also want assurance that there was no "substantial compliance" with the voluntary standard in its current form, within the meaning of our statutes.

Question 1(B): In the past, hasn't the Commission allowed the voluntary standards community the opportunity to address such revisions and adopt appropriate modifications prior to proceeding with rulemaking?

Response to Question 1(B): In at least some instances, yes.

Question 1(C): Would that approach be permissible here?

Response to Question 1(C): Yes, even where the Commission is legally permitted to regulate (as here), it is under no general legal obligation to regulate. On the other hand, the Commission is not legally required to suspend action while the voluntary standard is improved. Our statutes require deferral only to voluntary standards that are "adopted and implemented," and no voluntary standard has been "adopted and implemented" that incorporates all the features the staff believes are important.

Question 2: Based upon your review of the statutory requirements and legislative history related to the issue of deferring to voluntary standards, would you not agree that Congress expressed a preference for having the Commission "encourage and support" voluntary standards?

Response to Question 2: Yes -- unless compliance with an adopted and implemented voluntary standard "is not likely to result in the elimination or adequate reduction" of an injury risk or "it is unlikely that there will be substantial compliance" with the standard. See generally OGC Memorandum, pp. 22-23.

Question 3: In your review of congressional intent with regard to "substantial compliance", did you not conclude that there was no precise definition and that Congress appears to have urged a "flexible" approach to determining whether there has been "substantial compliance" with a voluntary standard?

Response to Question 3: Our conclusions regarding the meaning of substantial compliance are set forth at length in the OGC Memorandum. The specific portions of that memorandum particularly responsive to your query are pages 5, 22 and 23. For example, on page five we state, "In the absence of clear and definitive guidance from Congress -- embodied in the statute's

language -- the Commission has a generous degree of discretion in making its 'substantial compliance' finding." Similarly, on page 23 we state, "[T]he cryptic generality of the statutory language, which the legislative history indicates was deliberate, leaves the Commission a generous degree of discretion in making its 'substantial compliance' finding."

We caution that the Commission does not have unlimited flexibility in the selection of the test to govern its "substantial compliance" analysis. That test must be selected through a searching examination of the statutory language and structure[2] and the statutes' legislative history. The Commission ought not employ some unarticulated or intuitive process to determine whether there is "substantial compliance." Once a test is articulated, however, the Commission would have discretion in its application, as stated in the OGC Memorandum.

*Question 4: Is it your conclusion that comparing the level of voluntary compliance with the level of mandatory compliance is the **only** permissible approach the Commission could adopt in evaluating "substantial compliance"?*

Response to Question 4: Two other approaches have occurred to us: a test based strictly on percentages; and a test that is based on cost/benefit considerations and which would permit a mandatory standard whenever the benefits of eliminating the residuum of risk remaining after the voluntary standard is

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[2] It is not uncommon for Congress to leave important statutory terms undefined. In such instances (and often even when the language seems clear), courts seek interpretive guidance from the structure of the statute. See, e.g., Crandon v. United States, 110 S. Ct. 997, 1001 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549, 1555 (1987) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy")(quoting earlier Supreme Court cases); National Labor Relations Bd. v. Lion Oil Co., 77 S. Ct. 330, 334 (1957) (same); In re Arizona Appetito's Stores, Inc., 893 F.2d 216, 219 (9th Cir. 1990) ("We look first to the language of the statute itself to determine legislative intent. However, if the statutory language gives rise to several different interpretations, we must adopt the interpretation which 'can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'") (Citations omitted).

implemented exceed the costs of doing so.[3] For the reasons set forth in our memorandum, we do not advocate either of these approaches. See OGC Memorandum, pp. 13, 18-20.

We do not exclude the possibility that some approach other than those analyzed in our memorandum might be articulated.[4] We emphasize, however, that the test the Commission ultimately applies should be consistent with the statutory language and structure and the statutes' legislative history.

Question 5: If your answer to Question #5 is no, please respond to the following: In the briefing materials, staff suggests "several theoretically plausible" ways to evaluate "substantial compliance". In your opinion, would it be ***permissible*** *for the Commission to combine these factors -- and others in addition -- as a means of evaluating "substantial compliance" -- particularly given Congress' preference for a "flexible" approach?*

Response to Question 5: See our responses to Questions 4 and 9.

Question 6: Has the staff ever ***explicitly*** *recommended the use of this comparative approach for evaluating "substantial compliance" in previous cases that involve deferring to a voluntary standard? If so, where?*

Response to Question 6: To our knowledge, the OGC Memorandum presents both (i) the most comprehensive staff analysis of the meaning of "substantial compliance"; and (ii) the most direct staff statement of the definition of "substantial compliance" since 1981. However, staff endorsement of a comparative approach is not new. In fact, what we believe to be the first OGC memorandum after the 1981 amendments to discuss the impact of voluntary standards on the Commission's rulemaking powers advised that "the industry standard will have to be evaluated and findings made as to its expected potential injury reduction, in comparison to the expected results that could be achieved by a mandatory standard." See OGC Memorandum, p. 7 (quoting 1981 memorandum). Our description of past incidents where the staff and the Commission have grappled with

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[3] Under this cost/benefit approach, the Commission could easily conclude that there is no "substantial compliance" in the case of bunk beds, because it is clearly cost-beneficial to promulgate the rule.

[4] The January 7, 1999, "Statement of the Honorable Mary Sheila Gall on a Draft Notice of Proposed Rulemaking (NPR) on Bunk Beds" (the "Statement") sets forth an alternative approach. We comment on that approach in our response to Question 9.

"substantial compliance" or related concepts is set forth on pages 6 through 13 of the OGC Memorandum. The definition that we have presented is firmly rooted in, and consistent with, those past actions, and the rationale for those actions, where stated.

Question 7: Would I be correct in concluding that it is the staff's position that comparing the level of voluntary compliance with the level of mandatory compliance is a ***permissible*** *approach as opposed to a* ***mandatory*** *approach?*

Response to Question 7: We have concluded that the test we recommend is most consistent with the statutes' structure and language and their legislative history. We also believe the test is consistent with the Commission's past actions. For these reasons, and those articulated in the OGC Memorandum, we have recommended this definition of "substantial compliance" to the Commission. The final decision for selecting and applying a definition of "substantial compliance" rests with the Commission; if it were to identify and apply some alternative definition for "substantial compliance," that definition should be consistent with the statutes' structure and language and their legislative history. See also our responses to Questions 3, 4 and 9.

Question 8(A): Is it generally the case that there is greater compliance with a mandatory rule than with a voluntary standard?

Response to Question 8(A): We do not have enough information to respond to your specific query. However, we do not believe that a mandatory standard would necessarily be more effective simply because it is mandatory. For example, if the failure to comply with a voluntary standard arose from insuperable quality control problems in the manufacturing process, a mandatory standard might well have no effect at all. Also, as in the case of gas appliances (and some of the examples provided in the OGC Memorandum), a product can have virtually 100 percent (or even complete) compliance with a voluntary standard.

Question 8(B): Staff states, on page 22 of your memo, that in order for the Commission to defer to a voluntary standard, it ***must*** *find that voluntary compliance* ***equals*** *mandatory compliance. How then could the Commission ever defer to a voluntary standard?*

Response to Question 8(B): This question does not accurately restate the test articulated in the OGC Memorandum. Instead, the question assumes that the Commission must carry some burden, or make some finding, in order to justify not regulating, which is not the case. The issue of "substantial compliance" determines when the Commission is prevented from issuing a mandatory standard. Even when a rule is not barred, the Commission can take the existence of a voluntary standard into account and decide not to regulate.

If the question also implies -- through use of the precise word "equals" -- that the application of the test articulated in the OGC Memorandum is a quantitative exercise, we disagree, for we were careful to describe the Commission's task as qualitative. OGC Memorandum, p. 23. Moreover, the question seems to assume that voluntary standards will always have lower compliance rates than the analogous mandatory standards, and we do not necessarily agree with that assumption either. See our responses to Questions 1(C) and 8(A).

We do not believe that the "substantial compliance" test articulated in the OGC Memorandum will lead to the wholesale and indiscriminate replacement of voluntary standards with mandatory standards. The Commission has very judiciously exercised its rulemaking powers in the past when a voluntary standard has been present, and we expect that to continue.

Question 8(C): On page 21 of your memo, you quote Congressman Ritter as stating that: "Voluntary standards ***can*** *usually be developed much more rapidly than can consumer product safety rules, and be just as effective in addressing potential product safety hazards." Staff then contends that Ritter conditioned deferral to voluntary standards "on the assumption that they* ***would*** *be 'just as effective' as rules." (Emphasis added) This does not follow logically. Please explain this inconsistency.*

Response to Question 8(C). It appears to us from this question and from the first three paragraphs of page 5 of the Statement that there has been a misunderstanding of our citation to Congressman Ritter's brief floor remarks on October 23, 1990. We cited his remarks to demonstrate that, notwithstanding the criticisms in the 1990 legislative history of the Commission's implementation of the 1981 amendments, Congress (or at least one leadership figure) continued to place importance on voluntary standards in 1990. We do believe -- and here it appears we differ with you -- that his remarks supporting reliance on voluntary standards were made on the assumption that the standards would be developed more rapidly than and be as effective as mandatory standards. But our analysis does not rest upon his remarks, however interpreted.

Question 8(D): Staff opines on page 22 that: "If a voluntary standard is to substitute for a rule, it first must be substantively adequate and, second, manufacturers ***must*** *follow it." (Emphasis added). Clearly, this also is inconsistent with Congressman Ritter's statement. What is the basis for this opinion?*

Response to Question 8(D): The sentence from the OGC Memorandum that you have quoted is our shorthand summary of the

two findings required in FHSA § 3(i)(2)(A). However, that particular sentence does not state the *degree* to which manufacturers must follow the standard in order to block the Commission from promulgating a mandatory standard. Instead, that question is discussed (among other places) in the next paragraph on page 22 of the OGC Memorandum:

> [I]t is our opinion that "substantial compliance" properly is measured by a comparison of the mandatory and voluntary standards, rather than by an absolute measurement of compliance with the voluntary standard. The compliance level expected with a mandatory rule should be compared to the compliance level expected or experienced with the voluntary standard. Where there is some reasonable basis for concluding that a mandatory rule would achieve a higher degree of compliance, i.e., a greater reduction of injury, it may supersede the voluntary standard.

OGC Memorandum, pp. 22-23 (emphasis in original; footnote omitted).

As stated above, we believe Congressman Ritter's floor remarks are consistent with this test; but our analysis does not rest upon Congressman Ritter's remarks.

Question 8(E): In applying staff's suggested formula for determining "substantial compliance", wouldn't this enhance the voluntary compliance rate and effectively result in a lower threshold compliance rate to satisfy substantial compliance?

For example, if 900 out of 1000 products are in compliance with a voluntary standard, that would result in a compliance rate of 90%. If one estimated that under a mandatory rule there would be a 95% compliance rate, then under your comparative formula we would be comparing the 90% rate of voluntary compliance against a 95% rate of mandatory compliance. That is, we would be comparing 900 actual complying products against the 950 products estimated to be in compliance under a mandatory regime. This would result in a comparative compliance level of 94.7%. A higher comparative compliance rate (sic). Please comment on this apparent anomaly?

Response to Question 8(E): We do not fully understand this question. For example, we do not know the antecedent object for "this" in the first sentence, nor do we know what is meant by the phrase "lower threshold compliance rate." However, the hypothetical facts that you set out suggest that the Commission might be able to find there was no "substantial compliance" with the voluntary standard, depending also on its analysis of factors other than percentages that might be pertinent. The Commission's analysis would not require the mathematical exercise of dividing the percentage of voluntary compliance (90%) by the percentage of

mandatory compliance (95%) to yield 94.7%. However, we agree that doing so suggests -- on the very sketchy and limited facts you have provided -- that the voluntary standard might well be less effective at reducing deaths and injuries than a mandatory standard would be. If you wish us to comment further, please clarify the question and supply additional facts.

Question 9: Please provide us with any commentary, not covered in your responses to the above questions, that you might have in response to my 1/7/99 statement addressing the issue of "substantial compliance".

Response to Question 9: As we understand the Statement, it advocates an approach for determining "substantial compliance" that would "weigh and balance and apply" a number of factors, including (but not necessarily limited to): (i) percentage of products conforming to voluntary standard; (ii) risk reduction; (iii) comparing the compliance rates of the voluntary and mandatory standard; (iv) the effectiveness of the voluntary standard in reducing the risk of injury; and (v) the Congressional preference for voluntary standards. See Statement, p. 4.

Like the Statement, the OGC Memorandum identifies several factors that may be pertinent to the "substantial compliance" inquiry, including some specifically identified in the Statement. OGC Memorandum, p. 22 n.14 (percentages); p. 23 (reduction of risk; speed of risk reduction). We then said that "additional factors" may be pertinent and that the "extent and nature of evidence bearing on this inquiry doubtless will continue to vary from case to case." Id. at 23.[5]

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[5] Thus, we do not understand the Statement's characterization of the OGC test as "extraordinarily narrow and proscriptive." Statement, p. 2. Particularly in view of our comments that "difficult issues of proof may arise," but that the Commission has a "generous degree of discretion," we also do not understand the Statement's characterization of the OGC test as a "simple formula." Statement, pp. 3, 5.

The Statement asserts that the OGC memorandum "cites odd sections of Congressional history" and "pulls remarks made in the context of CPSC rulemaking out of context." Statement, p. 3. We note, however, that the Statement cites only two pieces of legislative history, both of which are also cited in the OGC Memorandum. Statement, p. 3. The Statement identifies no pertinent legislative history omitted from the OGC Memorandum, nor does it specifically identify anything "odd" about our use of any particular piece of legislative history. The Statement also does not identify any specific instance in which our discussion of past Commission actions was "out of context." Consequently,

So far as we can tell, the only difference between the approach articulated in the Statement and that articulated in the OGC Memorandum is that we believe the identified factors inform the Commission's judgment in assessing the comparative compliance of the mandatory and voluntary standards.[6] By contrast, the Statement would make this comparison simply one of the factors, but does not supply a definition of "substantial compliance" towards which its multi-factor analysis would be focused.[7] Consequently, we believe that the Statement's approach would require further development before the Commission could consistently apply it to measure or define "substantial compliance." However, as noted, the Statement shares much common ground with the OGC Memorandum.[8]

That common ground is somewhat difficult to discern through the thicket of vigorous criticism that the Statement levels at the OGC Memorandum. There are two specific criticisms to which we would like to respond briefly: First, that the OGC Memorandum articulates a test that is inconsistent with Congressional

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we are unable to more specifically respond to these particular criticisms.

[6] This comparison cannot be made "with scientific precision." Instead, "[t]he inquiry is a qualitative assessment of the relative efficacies of the voluntary and mandatory standards in achieving timely injury reduction." OGC Memorandum, p. 23. The Commission must have some "reasonable basis" for concluding that the mandatory standard would be more efficacious in the circumstances than the voluntary standard. Id. at 22-23. The factors identified in the Statement bear on the determination of whether the voluntary standard will be as effective as the mandatory one.

[7] We would be pleased to comment further on any definition of "substantial compliance" that you might propose. We urge that the development of that definition be consistent with the statutes' language and structure and the legislative history.

[8] We also note that the Statement's approach might well bear upon the larger policy question of whether to regulate bunk beds, even though, in our view, it falls short of a test for defining "substantial compliance." As noted earlier, even where the Commission is legally permitted to regulate (as here), it is under no general legal obligation to regulate; even if there is no "substantial compliance" with a voluntary standard, the Commission can take the existence of that standard into account in determining whether to regulate.

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intent;[9] second, that the OGC test would cause deaths and injuries.[10]

On the first point, we carefully canvassed the House, Senate and Conference committee reports for the 1981 legislation, together with floor statements, as recorded in the Congressional Record. We have cited and discussed all pertinent references in the OGC Memorandum. We did the same for the 1990 legislation, to the extent its legislative history casts light on the 1981 legislation. The test we have articulated is faithful to the legislative intent, including the Congressional preference for voluntary standards in certain circumstances. We respectfully question whether the Statement can describe our legal position as contrary to Congressional intent without first offering a competing definition for "substantial compliance."

On the second point, we do not expect the test articulated in the OGC Memorandum to adversely impact development of voluntary standards to any greater extent than has been the case since the 1981 legislation. The test is not a departure from past Commission practice, nor will it lead to a wholesale replacement of voluntary standards with mandatory standards. We discussed during the January 7, 1999, hearing, particularly in response to Chairman Brown's questions, why the application of this test to the bunk bed proceeding will not "open the floodgates."

cc: Chairman Ann Brown
Commissioner Thomas H. Moore

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[9] The Statement asserts that the OGC test "[would] render meaningless . . . Congressional intent," "[would] turn clear Congressional intent on its head," "clearly contradicts Congressional intent," "flies in the face of" Congressional intent, "[would] neuter the very strong Congressional preference for voluntary standards," and "explicitly would violate Congressional intent." Statement, pp. 2-4.

[10] The Statement asserts that application of the OGC test would "frustrate," "discourage," and "trivialize" the voluntary standards process. This, in turn, would "increase injuries and deaths" and thus represents a "shortsighted and hazardous approach." Statement, pp. 2, 4.