U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING
July 7, 2010

Vice Chairman Robert S. Adler convened the July 7, 2010, meeting of the U. S. Consumer Product Safety Commission at 10:00 a.m. in open session. Commissioners Thomas H. Moore and Nancy A. Nord were also in attendance. Chairman Tenenbaum and Commissioner Anne M. Northup were not present.

1. Accreditation for Third Party Conformity Assessment Bodies for Testing for Children's Products; Carpets and Rugs and 2. Accreditation for Third Party Conformity Assessment Bodies for Testing for Children's Products; Vinyl Plastic Film

The Commission considered the issuance of *Federal Register* ("*FR*") notices that would establish the accreditation requirements for third party conformity assessment bodies to test children's products pursuant to the following regulations: 16 C.F.R. part 1630, *Standard for the Surface Flammability of Carpets and Rugs (FF 1-70)*; 16 C.F.R. part 1631, *Standard for the Surface Flammability of Small Carpets and Rugs (FF 2-70)*; and 16 C.F.R. part 1611, *Standard for the Flammability of Vinyl Plastic Film.* The Commission was briefed by the staff at the Commission meeting of June 30, 2010. (Ref: staff briefing packages dated June 10 and 16, 2010.)

Commissioner Moore moved that the Commission approve the publication of the final draft document in the *FR* that would establish accreditation requirements of third party conformity assessment bodies to test youth carpets and rugs without change. Vice Chairman Adler seconded the motion. After the motion, Commissioner Nord moved that the motion made by Commissioner Moore be amended to postpone consideration of this matter until after the final interpretative rule on the definition of children's products as used in the Consumer Products Safety Improvements Act is finally issued by the Commission. Vice Chairman Adler seconded the motion. The vote of the Commissioners present at the meeting was 2-1 to not adopt the motion by Commissioner Nord. Vice Chairman Adler and Commissioner Moore voted to not adopt the motion. Commissioner Nord voted to adopt the motion. The Commission discussed with General Counsel Cheryl Falvey the procedures regarding the voting process until the votes on the motion by Commissioner Nord were received by the Commissioners not present. After the meeting Chairman Tenenbaum voted to not adopt the motion and Commissioner Northup voted to adopt the motion. The Commission voted (3-2) to not adopt the motion to amend by Commissioner Nord.

Commissioner Moore moved that the Commission approve the publication of the draft document in the *FR* without change regarding the accreditation of third party conformity assessment bodies for vinyl plastic film, Commissioner Adler seconded the motion. After the

motion to approve, Commissioner Nord moved that the matter be considered at the same time as the requirements for the accreditation for the third party conformity assessment bodies for articles subject to 16 CFR 1610, *Standards for the Flammability for Clothing Textiles*. The vote of the Commissioners present at the meeting was 2-1 to not adopt the motion by Commissioner Nord. Vice Chairman Adler and Commissioner Moore voted to not adopt the motion. Commissioner Nord voted to adopt the motion. After the meeting Chairman Tenenbaum voted to not adopt the motion and Commissioner Northup voted to adopt the motion. The Commission voted (3-2) to not adopt the motion to amend by Commissioner Nord.

Chairman Tenenbaum and Commissioners Nord and Northup issued statements regarding these matters.

2. Proposed Standards for Full-Size and Non-Full-Size Cribs under Section 104 of the Consumer Product Safety Improvement Act ("CPSIA") - Notice of Proposed Rulemaking ("NPR")

Chairman Tenenbaum participated in this part of the meeting by telephone. Patricia M. Pollitzer, General Attorney, Office of General Counsel, briefed the Commission on requirements of section 104(b) of the CPSIA, which directs the Commission to issue safety standards for durable infant or toddler products. Patricia L. Edwards, General Engineer, and Jacob J. Miller, Mechanical Engineer, Division of Mechanical Engineering, Directorate for Engineering Sciences, briefed the Commission on staff recommendations that the Commission issue a NPR that would propose: (1) a standard for full-size cribs that is substantially the same as ASTM F 1169-10, with one modification, and (2) a standard for non-full-size cribs that is substantially the same as ASTM F 406-10, with certain modifications. The recommendations include an NPR revoking the Commission's existing crib regulations at 16 C.F.R. parts 1508 and 1509 (those requirements are incorporated into ASTM F 1169-10 and ASTM 406-10) and a notice withdrawing an advance notice of proposed rulemaking ("ANPR") published in 1996 concerning the disengagement of crib slats (a hazard addressed by the proposed standards).

The Commissioners discussed the issues and asked questions of the staff. The Commissioners also discussed the call to develop public information and education campaign to promote crib safety to include day care centers and hotels and the campaign to educate the public about the hazards of soft bedding.

No decisions were made in this part of the meeting.

There being no further business, Vice Chairman Adler adjourned the meeting at 11:45 a.m.

For the Commission:

Todd A. Stevenson
Secretary to the Commission

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July 7, 2010

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE COMMISSION DECISION REGARDING THE ISSUANCE OF NOTICE OF ACCREDITATION REQUIREMENTS FOR THIRD PARTY TESTING OF CHILDREN'S CARPETS AND RUGS, AND CHILDREN'S PRODUCTS WITH VINYL PLASTIC FILM

I am pleased to vote today to approve the notice of accreditation for third party flammability testing for children's carpets and rugs and children's products with vinyl plastic film. By approving these two notices, the Commission has started the process of accrediting laboratories to conduct testing and ensure that children's products subject to the underlying regulations comply with the applicable flammability requirements.

The Commission promulgated its regulations pertaining to the flammability of vinyl plastic film and carpet and rugs under the Flammable Fabrics Act (FFA). The FFA empowers the Commission to create flammability standards or other requirements where they "may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury." Today, the Commission is acting to further ensure the safety of children from such hazards, as was envisioned and required by Congress through the testing and certification requirements contained in the Consumer Product Safety Improvement Act (CPSIA).

Through passage of the CPSIA, Congress mandated third party testing for regulated children's products and directed the Commission to establish lab accreditation requirements to serve as the basis for a system of third party testing for children's products. Congress mandated third party testing of children's products to ensure compliance with the rules and regulations enforced by the Commission even where the rules and regulations have general applicability, and not solely for rules that only address specific harms or risks unique to children. In carrying out this congressional mandate, the Commission already has approved a number of accreditation requirements that are similar to the requirements approved by the Commission today. The Commission will continue to consider these requirements in order to fully establish the system of third party testing contemplated by the CPSIA for children's products.

There has been some debate on whether rules of general applicability, such as the flammability regulations applicable to carpets, rugs, and vinyl plastic film products, constitute "children's product safety rules." I do not view this as an open question. Section 14(f)(1) of the CPSA defines a "children's product safety rule" as "a consumer product safety rule under this Act or similar, rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance." By providing this

explicit and expansive definition of "children's product safety rule," Congress spoke in plain and unambiguous language on this issue.

Congress created these mandates at a time when consumers had experienced a crisis in confidence of the safety of children's products, and the need for further protections for our nation's children was abundantly clear. Today's vote provides the public with reassurance that a third party, other than the manufacturer, will test and verify that children's carpets, rugs, and vinyl plastic film products comply with the flammability rules and regulations applicable to them. I believe that today's vote brings us one step closer to fulfilling our congressional mandate under the CPSIA and will help to give consumers increased confidence in the safety of children's products subject to these flammability requirements.

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STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE THIRD PARTY TESTING FOR CARPETS AND RUGS; REQUIREMENTS FOR ACCREDITATION OF THIRD PARTY CONFORMITY ASSESSMENT BODIES

July 12, 2010

I oppose issuing the accreditation requirements for third party laboratories to test youth carpets and rugs for compliance with the flammability regulations for three reasons. First, the CPSIA does not require third party testing for this class of product. Second, consideration of this issue is premature. Third, we have discretion under the CPSIA and our general enforcement authority to forego regulating especially since we have no indication of a safety issue involving these products. In short, we are regulating merely for the sake of regulation, with absurd results.

What is Being Proposed?

Longstanding CPSC regulations (16 CFR 1630 and 1631) require that carpets and rugs either meet our flammability standards or, in the case of small non-complying rugs, be labeled as "flammable" and stating that they do not comply with our regulations. Our regulations do not distinguish between children's rugs and other rugs, but apply to all carpets and rugs. The problem comes about because of the CPSIA requirement that children's products subject to a "children's product safety rule" be tested by a third party testing laboratory accredited by the CPSC. The ballot before us is to accredit labs to do that third party testing.

Is the Carpet and Rug Rule a Children's Product Safety Rule?

The answer to this question determines whether third party testing is required. A reading of the rule and the CPSIA does not indicate that this is a children's product safety rule but instead applies to all carpets and rugs across the board. The CPSIA calls for third party testing for compliance with "children's product safety rules" and states that a "children's product safety rule" is a consumer product safety rule issued under section 7 of the CPSA or similar rule under other acts enforced by the commission.[1] Section 7 (and 9) of the CPSA and corresponding sections of the Flammable Fabrics Act, require that we specifically identify the product being regulated and the risk of injury being addressed. There are several instances where the Flammable Fabrics Act has regulated identified children's products. See for example, the regulation covering children's sleepwear – clearly a "children's product safety rule." In its mattress flammability standard, the commission specifically stated that the regulation covers "adult mattresses, youth mattresses, crib mattresses..."[2] In other words, the commission knows

[1] I submit that the definition of "children's product safety rule" in Section 14 of the CPSA is included not to broaden the meaning of the term but to make clear that the third party testing requirement applies not only to rules issued under the CPSA but also to rules issued under our other acts. There was ambiguity on this point prior to the enactment of the CPSIA and similar attempts at clarity are found throughout the statute.

[2] The Federal Hazardous Substances Act also provides specifically for the regulation of children's products in Section 2(q)(1)(A) and presumably regulations issued pursuant to this section would be "children's product safety

how to define what rules apply to children's products but did not do so in the case with carpets and rugs. Our regulation does not identify "youth carpets" and their flammability characteristics as being regulated.[3] To somehow find that there is a category of so-called "youth carpets" that turns a regulation of general applicability into a children's product safety rule is nothing but bootstrapping big time.

The CPSIA also leads to the conclusion that not all consumer product safety rules are children's product safety rules. The requirement for third party testing applies only to those children's products subject to a children's product safety rule, not to every rule of general applicability (CPSA, Sec 14(a)(2)). In setting out the schedule for implementing the third party testing requirements, Congress gives examples of children's product safety rules. These examples include lead paint, cribs, pacifiers, small parts in toys, children's metal jewelry, and baby bouncers, walkers and jumpers. These are all products for which the Commission has issued regulations that are clearly and well-understood to be children's product safety rules, not regulations with general applicability. Further, we were given very little time to publish these accreditation requirements. While I realize that the CPSIA is full of unrealistic deadlines, to think within 10 months of CPSIA enactment that we could somehow accredit labs to test for all the standards we have ever issued that could somehow implicate a product used by a child is so unrealistic that Congress could not have meant such a result. [4]

Section 14 (h), added to the act by the CPSIA, also leads to the conclusion that rules of general applicability are not necessarily children's product safety rules. In this section, Congress explicitly states that general conformity certificates (GCC), as well as certificates based on third party testing, may apply to children's products. If all children's products (as opposed to those subject to a children's product safety rule) needed third party testing, then this provision would have been worded differently and would not have included a reference to a children's product subject to a GCC. Finally, if all children's products were meant to be third party tested no matter what the consumer product safety rule, then why did Congress choose to define which products are subject to third party testing for phthalates?

What is a Youth Carpet?

My second reason for opposing this decision is that it is premature. Even if one erroneously assumes that a general safety standard is a children's product safety standard, on a process level, we have not yet issued a final rule defining what is a child's product. How are rug manufacturers to know how we are defining what is a youth carpet and hence when third party testing is required? Since it will be illegal to manufacture untested rugs 90 days after the accreditation requirements are issued, it is important that manufacturers know whether their

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rules." Even in regulations issued under that section, the agency has looked specifically at the class of products being regulated. See, for example, Forester v. CPSC, 559 F.2d.774, where the court said, "the Commission found that bicycles intended for children...include all bicycles except those specifically excepted..."

[3] 16 CFR 1630 defines carpets as "a floor covering which is exposed to traffic in homes, offices and other places of assembly..." There is nothing in this definition or the rest of the rule that indicates that a particular harm to children was being contemplated with this rule.

[4] The Forester Case cited above makes a similar point that not all safety rules that may affect children in a general way are children's safety rules, quoting from the legislative history of the CPSA stating, "In no event...were (the terms 'children' and 'children's articles') so broad as to give the Secretary...authority to prescribe design criteria for all products to which children have access." S.Rep. 91-237. 91st Cong., 1st Sess.5 (1969).

products are covered. Requiring testing before we have defined what is to be tested is not responsible regulating.

Our proposed regulation defining a children's product is not very clear on a number of points including what is a youth carpet. A pastel pink or blue carpet in a child's room is not necessarily a child's rug; a cartoon character woven into it rather than a stripe may or may not turn the rug into a child's product (even though there is no difference in the rug's flammability characteristics); if the rug has a puzzle on it inviting play, then it might be a child's rug (or perhaps a toy). I recently bought a small area rug for my family room with a checkerboard pattern woven into it, with checker pieces included. Here's an example of this lack of clarity hitting home. While CPSC regulators may disagree, with no small children at home, I don't think that I bought a child's product. Did I?

The regulations that apply to small carpets also show the nonsensical nature of applying a third party testing requirement to this category of products. If a small carpet does not meet the flammability requirements of the rule, it must be marked as "flammable" and state that it fails our test. Given this, exactly what are we requiring here? Are we saying that a manufacturer must actually do a third party test, get test results that show a failure and then may sell the rug anyway? What happens if the manufacturer decides to bypass the test and just marks the rug flammable? What happens if a manufacturer marks a rug flammable but it actually passes the test (remember the label must have the statement that the rug fails the test)? Are we saying if a small rug is marked flammable, the label has to be third party tested under the FFA? In December, 2009, we said in our last stay of enforcement that we would not require third party testing of labels under the FHSA but we said nothing about the FFA. We need to resolve these issues before rolling out regulations.

Efficient Enforcement Does Not Require this Result

Third, we have ample authority under Section 3 of the CPSIA and our general enforcement discretion to foregoing regulation of this class of products at this time. Efficient enforcement of the Act does not require this regulation; nor does safety. We have had very few rug recalls for flammability failures over the many years this regulation has been on the books. None of those few recalls have involved rugs that could in any way be classified as a "youth" rug.

In the case at hand, we are spending public resources and requiring the expenditure of private resources to address a non-existent problem. We are requiring third party testing for the sake of testing with absurd results. The public deserves better.

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STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE THIRD PARTY TESTING FOR VINYL PLASTIC FILM REQUIREMENTS FOR ACCREDITATION OF THIRD PARTY CONFORMITY ASSESSMENT BODIES

July 12, 2010

The CPSIA requires that children's products subject to a "children's product safety rule" be tested for compliance by an independent third party testing laboratory. The agency is required to issue laboratory accreditation requirements and testing must be done for all covered products manufactured 90 days after these lab accreditation requirements are issued. I oppose issuing laboratory accreditation requirements for compliance with flammability rules relating to vinyl plastic film for the following reasons.

The vinyl film flammability regulation is a standard designed to provide minimum protection to individuals from highly flammable fabrics, in this case fabric coated with vinyl film to enhance durability and moisture resistance. Unlike, for example, the children's sleepwear standard, this is a minimum standard that applies with equal force to all such fabrics and apparel made with such fabrics. In this respect, it is akin to the general wearing apparel flammability standard.

It is an over-expansive reading of the CPSIA to say that a standard of general applicability becomes a "children's product safety rule" just because children may use products regulated under that general standard. Instead, I believe that the Congress wanted this agency to be directing its attention toward products which present special harms to children and which we have regulated through safety rules addressing these harms. Indeed, in the CPSIA, the Congress gave us a list of products that are subject to children's product safety rules. All are rules (issued under the Federal Hazardous Substances Act) addressing identified risks specific to children. Had Congress intended that third party testing apply to every children's product arguably covered by a rule of general applicability, then Congress would not have used the term "children's product safety rule."

In my statement to the carpet and rug laboratory accreditation requirements, I discussed my concerns over the Commission's misguided and, I believe, incorrect decision to turn rules of general applicability into children's product safety rules. Therefore, I will not further repeat those concerns here.

In addition to believing that our action is legally questionable, I also believe that consideration of this matter is premature. The vinyl film rule is very similar to the general wearing apparel rule. Both should be considered at the same time. It makes no sense to proceed in a piecemeal manner since these rules are interrelated. It would make more sense to consider them together so that labs are not burdened with multiple applications, and manufacturers, and our accrediting staff, are not scrambling to keep up.

The vinyl film flammability regulations have been in place since the mid-1950's. Since the CPSC was established more than 35 years ago, there have been 4 recalls for alleged violations. One can take from this that the current safety system for testing vinyl film is working well. I question our focus and use of staff resources to mandate unnecessary third party testing. Regulating for its own sake is in no one's interest.

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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THIRD-PARTY TESTING FOR FLAMMABILITY OF CARPETS & RUGS, SMALL CARPETS & RUGS, AND VINYL PLASTIC FILM: REQUIREMENTS FOR ACCREDITATION OF THIRD-PARTY CONFORMITY ASSESSMENT BODIES

July 12, 2010

The Consumer Product Safety Commission (CPSC) has a proud history of assessing risk and protecting consumers from injury by setting risk-based standards, requiring companies to test their products to ensure compliance with those standards, and negotiating orderly recalls when a violative or defective product reaches the market. For decades, the CPSC used its flexibility to build a system on which the ever-changing consumer market could depend, ensuring both the vibrancy of new products and the reliability of the regulatory framework.

The Consumer Product Safety Improvement Act changed this tradition, setting arbitrary new standards on children's products without regard to risk. In addition, the law required expensive third-party testing for every component of a children's product[1] subject to a children's product safety rule, certification of the item based on those tests, and tracking labels to determine the source of each component and lab test. The costs associated with re-engineering and onerous third-party testing have already caused untold disruption to children's product markets: closing businesses, eliminating jobs, destroying livelihoods, removing perfectly safe products from store shelves, and restricting consumer choice.

In this case, the Commission (on a 3-2 vote along party lines) is setting a troubling precedent by broadly construing the term "children's product safety rule" [2] to encompass all "consumer product safety rules." The majority's decision to issue notices of accreditation for the flammability of carpets and rugs, small carpets and rugs, and vinyl plastic film employs bad legal interpretation to produce even worse policy results.[3] This decision expands the statute's costly third-party testing requirements and compounds the unintended destructive consequences of the law for no good reason. Although the law's earlier effects mainly resulted from statutory mandates outside the Commission's control, the same is not true here. The heavy costs this decision will impose for little or no consumer protection are entirely the agency's own fault.

Particularly where no significant safety benefits accrue, we should not expand the CPSIA's burdensome third-party testing regime. Based on the CPSC's longstanding authority to address risk, the agency can require third-party testing of children's products affected by consumer product safety rules if it is warranted. Until then, we should focus on issuing notices of accreditation only for ***children's*** product safety

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[1] "The term 'children's product' means a consumer product designed or intended ***primarily*** for children 12 years of age or younger." CPSA § 3(a)(2); CPSIA § 235(a) (emphasis added).

[2] "The term 'children's product safety rule' means a consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance." CPSA §14(f)(1); CPSIA § 102(b).

[3] 16 CFR § 1630 Standard for the surface flammability of carpets and rugs; 16 CFR § 1631 Standard for the surface flammability of small carpets and rugs; 16 CFR § 1611 Standard for the flammability of vinyl plastic film.

rules—as Congress directed. Because I believe the three rules involved here are not children's product safety rules, I oppose issuing notices of accreditation that force unnecessary additional third-party testing.

Why These Rules Are Not "Other Children's Product Safety Rules"

Section 102(a)(3)(B)(vi) of the CPSIA instructs the Commission to "publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with other children's product safety rules... ." No one asked what constitutes a "children's product safety rule" when issuing previous notices of accreditation. Prior notices either dealt with rules that were specifically listed in the statute's timeline for notices of accreditation (*e.g.*, lead paint, small parts, children's metal jewelry) or else with rules that obviously related to children's product hazards (*e.g.*, children's bunk beds, rattles, electrically operated toys intended for use by children). All of these notices passed unanimously. The carpets and rugs rule, in contrast, presents the clearest example to date of a notice involving a general consumer product safety rule. Flammable carpets pose the same hazard to children as they pose to adults. Treating this rule as a "children's product safety rule" would mean that all product safety rules (including any new rules created) will be treated that way going forward and will require third-party testing of any children's products subject to them.

But construing ***children's*** product safety rules and ***consumer*** product safety rules to mean the same thing makes no sense for several reasons. First, treating the two terms as synonymous disregards the statute's creation of the separate new term "children's product safety rule" in § 102(a)(2). There was no reason for Congress to create a brand new term unless that term contains meaning different from "consumer product safety rule." Had Congress meant to require all children's products to be third-party tested and certified to all of the agency's applicable consumer product safety rules, it would have had no need to create a separate term. The statute would have just required any children's product to be third-party tested and certified to all applicable consumer product safety rules. By instead crafting a new term, Congress clearly distinguished between the testing requirements mandated for consumer product safety rules receiving general conformity certificates in § 102(a)(1) and the third-party testing and certification requirements mandated for children's product safety rules in § 102(a)(2).

Moreover, defining a children's product safety rule to mean exactly the same thing as a consumer product safety rule ignores the plain text contained in § 102(b)'s rule of construction paragraph. The rule of construction provision there begins, "Compliance of any children's product with third party testing and certification ***or general conformity certification*** requirements under this section..." (emphasis added).[4] That phrase indicates that some children's products will have general conformity certifications while other products will be certified based on third-party tests. Some products might even have both a certificate based on third-party testing for some rules (*e.g.*, for lead, phthalates, small parts, surface coatings, etc.) and a general conformity certificate for all other consumer product safety rules. But neither outcome is possible under a definition whereby all children's products under any applicable consumer product safety standard have to be third-party tested for everything. The rule of construction language only makes sense if Congress anticipated that some consumer product safety standards could cover children's products without themselves becoming children's product safety standards. Such children's products falling under general consumer product safety rules would only carry general conformity certifications. So-called youth carpets and rugs and vinyl plastic film are examples of these.

[4] CPSA § 14(h); CPSIA § 102(b).

Next, the timeline for accreditation strongly suggests that the statute did not intend for notices of accreditation to be issued for every existing regulation that might apply to some children's products. The catch-all provision requires the Commission to "publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with other children's product safety rules at the earliest practicable date, ***but in no case later than 10 months after the date of enactment***[.]"[5] (emphasis added). Thus, the timeline placed about a 300-day deadline on issuing notices of accreditation for children's product safety rules other than the ones listed. Given that the timeline allowed 210 days for issuing the first 9 notices, it only left 90 additional days for any more notices. Assuming about the same amount of time for each notice, the timeline only left room for about four more notices to be issued during the 10-month window. This provision could not have meant to require the agency to issue notices of accreditation for every single consumer product safety rule that contains some children's products, or else 10 months would have been an utterly impossible timeline for the agency to meet.

The timeline excludes treating the carpets and rugs and vinyl plastic film rules as children's product safety rules for another reason as well. Applying the statutory rule of construction known as "*ejusdem generis*"—which translates as "of the same kind, class or nature"—general words that follow specific words in a statutory enumeration are to be construed to only cover items similar to the specifically enumerated items. Thus the "other children's product safety rules" referred to in § 102(a)(3)(B)(vi) must be rules that are similar to the ones mentioned by name. For example, a notice of accreditation for rattles or infant bath seats would make sense, because those are both children's product safety rules that are akin to the listed rules for pacifiers and infant walkers. In contrast, the standards for surface flammability of carpets and rugs and for flammability of vinyl plastic film are not akin to any of the specific children's product safety rules listed.

Interpreting the Definition of "Children's Product Safety Rule"

Those Commissioners supporting this decision argue that the "plain language" definition of children's product safety rule in § 14(f)(1) of the Consumer Product Safety Act settles the question. That provision defines the term to mean "a consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, ..." There are at least three major problems with reading that language to mean that every consumer product safety rule is a children's product safety rule. First, one can just as easily read that language to mean that a children's product safety rule *can be* any one of those types of regulations, but that does not make the reverse true. In other words, just because each children's product safety rule is a consumer product safety rule of some kind does not mean that every consumer product safety rule is thereby a children's product safety rule. The conclusion that Congress was just clarifying that a children's product safety rule can exist under any statute enforced by the Commission is strengthened by the fact that the statute provides the same clarification regarding the meaning of a consumer product safety rule. In both cases the clarification was needed because there have been past instances challenging the agency's authority to regulate particular products under particular statutes within its jurisdiction.

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[5] CPSIA § 102(a)(3)(B)(vi). This provision also mentions "children's product safety rules established or revised 1 year or more after such date of enactment..." which refers to the mandatory durable nursery product standards called for under the CPSIA. The fact that those standards are allotted more time for notices of accreditation to be issued further underscores that the 10-month time limit could not have meant to encompass all CPSC rules. Those nursery standards—unlike carpets and rugs—also are children's product safety rules similar to the specifically listed ones (such as cribs).

Second, this Commission decision is inconsistent with our previous decisions, which undermines any claim that a "plain language reading" of the definition requires this regulation. A literal reading would treat every substantive agency regulation as a children's product safety rule, but we have already decided that certain rules of general application are not children's product safety rules even though children use products covered by those rules. The Commission did not previously construe the statute to require third-party testing for fireworks, swimming pool slides, or FHSA labeling requirements. Nor does it now offer a consistent rationale for excluding those rules from such testing—though there is one. Just as the safety considerations that pertain to those items are not uniquely (or predominantly) hazards for children, so too the safety considerations inherent in flammable carpets or rugs are no different for children. Thus, the carpets and rugs standards (and the vinyl plastic film standard) are consumer product safety rules of general application—not children's product safety rules.[6]

Last, even interpreting the definition of a children's product safety rule literally does not resolve whether these rules count, because the question remains whether or not they are ***similar*** rules, regulations, standards, or bans. And the answer to that question should be no. For example, perhaps the best reason not to consider the small carpets and rugs standard similar to a consumer product safety standard is that a carpet that fails the flammability standard—unlike products that fail other standards—can still be sold. The rule simply requires that a failing product carry a label noting that the carpet or rug is flammable. In this respect, the standard is essentially a labeling requirement. Since the CPSC has already determined that an FHSA labeling requirement is not a "similar rule, regulation, standard, or ban" for third-party testing purposes, it follows that this Flammable Fabrics Act labeling requirement is likewise not similar to a consumer product safety rule. Because the Commission's decision neither adheres to a plain language reading nor articulates any principle for having previously excluded certain rules, it offers little justification for issuing these notices beyond one's policy preferences.

Policy Consequences of this Precedent

Treating every consumer product safety rule as a children's product safety rule opens a Pandora's Box of regulatory mischief. For starters, it undoes much of the good work achieved with the agency's lead determinations rule. Before this decision, a small rug manufacturer could make a 100% cotton children's rug and avoid third-party testing entirely. Now, a rug exempt from lead or phthalate testing has to be third-party tested and certified to the surface flammability standard. And that is only the beginning. If the Commission is going to be consistent, a rug that has to be third-party tested to the carpet flammability standard would also require third-party testing for cyanide content, formaldehyde content, butyl nitrite, and a host of other general consumer product safety standards and bans. If the Commission stays down the path of saying that virtually every CPSC rule is a "children's product safety rule," then children's products would have to be third-party tested at tremendous cost to dozens of additional standards or bans never meant to require such testing, and small-scale production of children's products will cease.

Even for larger-scale manufacturers, this new approach throws a wrench in the works of commerce. The same labs that test for lead paint, lead content, and phthalates may not be the same ones that test for surface flammability of carpets. After all, only a few such carpets exist and it will not be economical for very many test labs to seek accreditation for this standard. By the time a manufacturer has supplied sufficient samples to enough different labs operating on different schedules to third-party test a children's

[6]Formally recognizing that not all consumer product safety rules are children's product safety rules provides a general principle that helps to rationalize this agency's prior decisions in implementing the CPSIA.

product line to an entire battery of standards and bans, staying in the children's product business or offering parents a wide variety of rugs or carpets for their children's rooms may not seem worth the price. The children will not have safer rugs (no one even bothers to claim third-party testing to the flammability standard will actually makes rugs safer), just less interesting ones.

This decision does not represent good policy for carpets or vinyl film, and the problems it creates for these rules foretell the wider policy consequences to come. These three rules have been in place for decades and have done an effective job without third-party testing. For example, there have been no recalls of youth carpets and rugs in the last 36 years of the agency's existence. There is absolutely no reason to now mess with a system that has worked. Carpets already have to meet the flammability standard, they already get tested in house, and they can obtain general conformity certificates on that basis. Third-party testing will not improve children's safety. Nor does it make sense to treat so-called youth carpets differently. No child stays entirely in his own room and crawls or plays exclusively on his own rug. Children's rugs do not need different flammability protection than adult rugs. Indeed, every other rug in the house is more likely to have a cigarette dropped or candle tipped onto it than the carpet in a child's room. If this testing made sense, why would we not also require third-party testing for all carpets being laid in elementary schools or in babies' rooms? If a wall-to-wall carpet installer arrives at a job to find a crib set up in the room and a mother far along in pregnancy, why should third-party testing turn on whether the carpet has a juvenile design or not? Such criteria would make absolutely no sense if children did need greater flammability protection than other consumers.

Conclusion

This decision results from bad policymaking, not legal necessity. The CPSIA requires third-party testing and certification of "any children's product that is subject to a children's product safety rule,"[7] but it does ***not*** require third-party testing of children's products for compliance with the Commission's numerous general consumer product safety rules that are not primarily concerned with hazards posed to children. The Flammable Fabrics Act regulations at issue here are not similar to the product safety rules specified for third-party testing in the CPSIA. Forcing third-party testing to general consumer product standards that are not similar to children's product safety standards will not increase safety, and the Commission never should have issued these notices.

While the legal argument can be made for these two notices, it unravels upon close examination. Such an interpretation of the law would not explain why Congress created a separate new term in the first place, and it does not reconcile the definition of a "children's product safety rule" with the distinct testing rules in § 14(a)(1) and (a)(2), the reference to some children's products having general conformity certificates in § 14(h), nor the timeline for accreditation provided in the 10-month rule of § 14(a)(3)(B)(vi). Furthermore, § 3 of the CPSIA provides the agency with more than enough policy discretion to implement this part of the statute without wreaking havoc on existing regulatory frameworks that work.[8]

The majority's unwillingness to use our policy discretion points up a basic difference that exists among the Commissioners. Whereas the majority is willing to go out of its way to increase regulation, I believe we should only opt for more regulation where there is a concrete safety benefit to be had. No one can make that argument for carpets and rugs or vinyl plastic film. Of course we all support issuing the

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[7] CPSIA § 102(a)(2).

[8] "The Commission may issue regulations, as necessary, to implement this Act and the amendments made by this Act." § 3 CPSIA.

regulations that the law requires, but we should not create more regulation than necessary when no increase in children's safety will result. Nor should we operate in a fashion that is oblivious to the economic condition around us. Especially given the difficult circumstances that many children's product manufacturers find themselves in today, it serves no good purpose to foist extra regulatory burdens on them.

By recognizing that Congress meant something more specific by "children's product safety rules" than all the agency's rules, the agency could have maintained flexibility to mandate more sensible testing in the future on a case-by-case basis. Instead, this vote will steer us on a course of excessive regulation. Public comments on this decision are due in 30 days. It is my hope that affected parties will comment on whether these notices should even have issued, as well as on why FFA rules are not similar to consumer product safety rules like those in the timeline for accreditation. Such input might help us to reverse this unfortunate decision.