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

MINUTES OF COMMISSION MEETING
June 16, 2011

Chairman Inez M. Tenenbaum convened the June 16, 2011 meeting of the U. S. Consumer Product Safety Commission at 9:00 a.m. in open session. Commissioners Nancy A. Nord, Robert S. Adler and Anne M. Northup were also in attendance. Commissioner Thomas H. Moore was not present. Chairman Tenenbaum made welcoming remarks and introduced the decisional matter.

Briefing and Decisional Matter: Extension of Compliance Date for Rental and Retail Sale of Cribs to Meet the Commission's Mandatory Standards for Full-Size and Non-Full-Size Cribs

Neal S. Cohen, the Commission's Small Business Ombudsman ("SBO"), and Robert J. Howell, Director of the Office of Hazard Identification and Reduction ("EXHR"), briefed the Commission about the requests from crib rental companies and retailers and related trade associations to the SBO and the Commission some of which were seeking and some of which were opposing an extension of the compliance date of June 28, 2011 for the Commission's mandatory standards for full-size and non-full-size cribs (75 Fed. Reg. 81766 (Dec. 28, 2010) on retailers and crib rental companies. (Ref: staff briefing package dated June 15, 2011.) Mr. Cohen summarized the requests by the companies and groups. The Commission discussed the issue and asked questions of Messrs. Cohen and Howell.

After further Commission deliberation and statements, Chairman Tenenbaum moved to allow the retail sale of cribs that do not meet the mandatory crib standards (Final Rule on the Mandatory Safety Standards for Full-Size and Non-Full-Size Cribs, 75 Fed. Reg. 81766 (Dec. 28, 2010), for some specified time period after the June 28, 2011 compliance date. The Commission voted 3-2 against allowing the retail sale of cribs that do not meet the mandatory crib standards for some specified time period after the June 28, 2011 compliance date. Chairman Tenenbaum and Commissioners Adler and Moore voted against extension of the compliance date. (Commissioner Moore submitted his vote by written ballot.) Commissioners Nord and Northup voted in favor of extension of the compliance date.

Chairman Tenenbaum called for the vote on the before the Commission to allow the short-term rental by crib rental companies of cribs (terms of rent not to exceed 120 days and not to result in the transfer of crib ownership) that do not meet the mandatory crib standards (Final Rule on the Mandatory Safety Standards for Full-Size and Non-Full-Size Cribs, 75 Fed. Reg. 81766 (December 28, 2010) until December 28, 2012. Commissioner Adler made a statement about proposed extension date. The Commission asked the staff questions and inquired about staff recommendations. After a discussion on the issue, the Chairman called the question. The Commission voted 4-0-1 to allow the short-term rental by crib rental companies of cribs (terms of rent not to exceed 120 days and not to result in the transfer of crib ownership) that do not meet the mandatory crib standards until December 28, 2012. Chairman Tenenbaum and Commissioners Moore, Nord and Northup voted in favor of this item. (Commissioner Moore submitted his vote by written ballot.) Commissioner Adler abstained from voting.

There being no further business on the agenda, Chairman Tenenbaum adjourned the meeting at 10:50 a.m.

Chairman Tenenbaum and Commissioners Moore, Nord, Adler and Northup issued statements about the matter. Copies of the statements are attached.

For the Commission:

Todd A. Stevenson
Secretary to the Commission

Attachments: Statement of Chairman Tenenbaum
Statement of Commissioner Moore
Statement of Commissioner Nord
Statement of Commissioner Adler
Statement of Commissioner Northup

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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BETHESDA, MD 20814

CHAIRMAN INEZ M. TENENBAUM

June 16, 2011

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE VOTE TO REAFFIRM THE RETAILER COMPLIANCE DATE FOR THE NEW MANDATORY SAFETY STANDARDS FOR FULL-SIZE AND NON-FULL SIZE CRIBS AND TO GRANT ADDITIONAL TIME FOR COMPLIANCE WITH THOSE STANDARDS TO COMPANIES WHO PROVIDE SHORT-TERM CRIB RENTALS

Under my leadership, the Commission voted on December 15, 2010, to adopt mandatory and highly protective safety standards for full-size and non-full-size cribs—establishing some of the strongest crib standards in the world. The efforts undertaken by this Commission to create the mandatory crib standards, particularly by CPSC staff in conjunction with ASTM, consumer groups, and other stakeholders, resulted in a tremendous success for American families.

From the beginning of this process, I emphasized the importance of issuing this final rule, which is designed not only to stop the manufacture and sale of dangerous traditional drop-side cribs, but also to vastly improve the structural integrity of cribs, a vital protection that was lacking in even some of the most recent versions of the ASTM voluntary standard. All of these improvements will bring about a new generation of safer cribs to consumers and America's children.

During the rulemaking process, I recognized the potential impact of this Congressionally-mandated rule on smaller entities, particularly child care facilities and places of public accommodation. Concerns were raised that child care facilities, in particular, would not be able to obtain cribs that meet the new standards immediately after it becomes effective. We also recognized the demand likely to be generated by places of public accommodation and estimated that these facilities would create a demand of approximately 935,000 cribs, which would amount to nearly $467 million in replaced crib costs altogether.

Responsible implementation of this rule required that we carefully consider how quickly affected entities likely would be able to comply. In order to ensure sufficient availability of compliant cribs and ensure an orderly and successful transition to the use of complaint cribs by child care providers and places of public accommodation, the Commission adopted a two-step phase in of the rule.

For all manufacturers, distributors, and retailers of full-size and non-full-size cribs, it was unanimously decided that the final rule would become effective six months from the publication date in the *Federal Register*. The final rule was published on December 28, 2010, and the compliance date of June 28, 2011, for these entities is close at hand. Alternatively, child care facilities and places of public accommodation were given an additional eighteen months to comply. For these entities, compliance with the new mandatory standards must begin on December 28, 2012.

At my direction, Commission staff has engaged in vigorous outreach and monitoring of the market for unforeseen circumstances. As I monitored the implementation of this rule, I became aware of the concerns shared with me and with other members of the Commission, particularly by some smaller retailers, who claimed they would suffer significant losses if they were unable to sell off noncompliant cribs in their inventory stock before June 28, 2011.

I am, however, also aware of concerns of smaller retailers who expect to suffer great losses if other retailers are permitted to continue selling noncompliant cribs at seriously discounted prices after the Commission's original compliance deadline for retailers. These are small businesses that have acted responsibly in advance of the June 28, 2011 compliance date, and have sold or removed noncompliant cribs from their inventory. These businesses stated that they often sold their cribs at an economic loss—and now only have cribs on hand that are compliant with the new stronger mandatory standard. They undoubtedly will face substantial economic harm and will not be able to compete if other retailers are allowed to sell off heavily discounted cribs that do not comply with the mandatory crib standard after June 28, 2011.

While the economic losses that some retailers may suffer are unfortunate, and I have sympathy for those businesses, it was not completely unexpected that some businesses might fail to take the steps necessary to come into compliance. This behavior cannot be rewarded to the economic detriment of those businesses that did take these steps and will successfully meet the original deadline set by the Commission. For these reasons, I cannot support an extension of the compliance date and continue to allow sales of cribs that do not comply with the more protective mandatory standard. Such an extension would unfairly punish the most responsible business actors who prepared in advance for the compliance date and are ready to provide families with cribs that meet the strongest crib safety standards in the world on June 28, 2011.

I also voted today to support the CPSC staff recommendation to impose compliance requirements for crib rental businesses that are consistent with the requirements that the Commission previously imposed for childcare centers, hotels, motels, and places of public accommodation. As staff recognized at today's hearing, these businesses are similarly situated to childcare centers and places of public accommodation. Furthermore, many of these rental companies provide cribs that are used in hotels, motels, and vacation rental homes. We also have learned that there appears to be an insufficient supply of the specific type of compliant crib primarily used by businesses in this segment of the market.

I believe, therefore, that an extension of the compliance date for crib rental companies until December 28, 2012, is warranted because it will allow these companies the same amount of time to purchase cribs that are compliant with the new mandatory standards that we have afforded child care facilities and places of public accommodation. I also believe it is imperative to avoid the potential for parents and caregivers traveling with infants and small children to place their children in less safe sleep environments in the event that these businesses are unable to purchase and provide compliant cribs for consumers to use.

Although some have argued that our treatment of childcare facilities, places of public accommodation, and now rental companies is inconsistent with the Commission's decision to not allow retailers more time to sell noncompliant inventory, this argument ignores a clear distinction between these two groups that was key in my decision to allow these service providers an extended compliance date. On December 28, 2012, cribs currently used in child care facilities, places of public accommodation, and by crib rental companies will no longer be allowed to be used by these service providers, and cannot be sold secondhand or even given away. In direct contrast, the noncompliant cribs that would be purchased by consumers at retail, many of which lack the important structural integrity safeguards contained in the new mandatory rule, would be used in consumers' homes for many years to come, perhaps even for decades. This is not a result that I am willing to accept.

I am very pleased that the new mandatory crib standards will stop the manufacture and sale of dangerous traditional drop-side cribs and will vastly improve the structural integrity of cribs. Today the Commission reaffirmed our commitment that only cribs that are a part of the new, much safer generation of cribs will be permitted to be sold in the United States beginning on June 28, 2011. Through this decision, we continue to honor Tyler Witte, Liam Johns, Bobby Cirigliano, and all of the other children who have died or suffered injury in tragic crib incidents.

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

STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE VOTE TO REAFFIRM THE RETAILER COMPLIANCE DATE FOR THE NEW MANDATORY SAFETY STANDARDS FOR FULL-SIZE AND NON-FULL-SIZE CRIBS AND TO GRANT ADDITIONAL TIME FOR COMPLIANCE WITH THOSE STANDARDS TO COMPANIES WHO PROVIDE SHORT-TERM CRIB RENTALS

June 16, 2011

In July of last year, the Commission issued proposed rules on full-size and non-full-size cribs. The proposed compliance date for manufacturers and retailers was six months after the date of publication of the final rules in the *Federal Register*. Six months is the typical amount of time the Commission gives companies to come into compliance unless any of the affected parties make a case during the comment period for a longer or a shorter compliance period. Neither the manufacturers nor the retailers raised concerns about the compliance date and when the rule became final in December of last year, it contained the six-month compliance date.

We expect companies to comply with the Commission's rules. Each affected party must plan accordingly. In this case it appears that the vast majority of retailers did plan and are ready to comply by the June 28th date. In a rule of this magnitude, it is expected that there will be some market disruption and that some companies will experience economic loss. We have heard from a few retailers who have noncomplying cribs left in inventory and want to continue selling them. There is little that we know about the noncomplying cribs these retailers want to sell or about the reasons the retailers find themselves with noncompliant inventory. However, there is much that we don't know. When were these cribs made? Who made them and where? Who tested them and when? What standard were they tested to? When were they ordered? Did the quantity ordered take into account the looming effective date of the new crib standards? Were retailers buying imported noncomplying cribs at fire sale prices to try to make a profit before they had to start buying more expensive cribs that met the new standards? Will retrofit kits be available to bring the cribs into compliance? We simply do not know.

Moreover, we have heard from retailers who have taken steps (often at significant financial cost) to eliminate noncomplying cribs from their inventory and are anxiously awaiting June 28th so they can begin selling cribs that fully comply with the new standards. The Commission should not visit further economic harm on these retailers. They did what was expected of them and many have already suffered financially to accomplish that. The Commission should not risk visiting further economic harm on these retailers by granting certain of their competitors the ability to sell noncomplying cribs at reduced prices after June 28th.

Congress felt so strongly about the need for infants to be in the safest cribs that can be made that it took the <u>extraordinary step</u> of prohibiting the sale of cribs that did not meet the mandatory crib standard after the compliance date in the standard. Normally, the Commission's rules only apply prospectively to products made after a standard becomes effective, but in this instance there can be no selling of new noncomplying cribs after the compliance date, even if they were compliant with the voluntary standards in effect when they were manufactured. Congress also had us bypass the normal rulemaking process, which can be very time-consuming and which would have required the Commission to do a cost/benefit analysis. These congressionally-dictated changes to the normal rulemaking process, in and of themselves, should give us tremendous pause in allowing cribs that do not meet the new mandatory crib standards to continue to be sold. In any event, I do not believe that the record supports an across-the-board change to the compliance date that would apply to all retailers and our staff is not recommending such a result.

Staff has, however, recommended that we grant relief to the short-term rental companies who typically provide non-full-size, folding cribs to travelers. It does appear more logical to group them with the hotels and motels and other places of public accommodation that were granted extra time to replace their existing crib inventory in the final rule given that they are similarly situated. In fact these rental companies often supply the cribs for some of these hotels and motels. These are not new cribs that are being put into the stream of commerce to be used in homes for years, perhaps even for decades. These are existing cribs that will **all** have to be replaced with new compliant cribs by the end of next year.

For all of these reasons I have voted not to extend the compliance date for retailers, but have voted to extend the compliance date for short-term crib rental companies.

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STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO EXTEND THE COMPLIANCE DATE FOR THE NEW CRIB STANDARD

June 27, 2011

In December 2010, the CPSC unanimously approved a new safety standard for cribs. The standard, in large part, builds on a voluntary standard that was updated in 2009 and for which there is significant compliance. The new CPSC standard goes into effect tomorrow, June 28, 2011 and (as required by the CPSIA) is retroactive, impacting all cribs being sold in the US regardless of when manufactured.

All of the Commissioners are committed to assuring a safe sleep environment for infants and the technical aspects of the new standard demonstrate this commitment. Having said that, I believe that the Commission also has an obligation to roll out standards in such a way as to minimize disruption in the marketplace. In that, we have again fallen down on our responsibilities. As the issue that precipitated this vote shows, the roll-out of the new crib standard has been unnecessarily chaotic.

The crib standard is only the second major rule issued by this agency in its entire history. (A major rule has an impact on the economy of over $100 million. The only other CPSC major rule dealt with the flammability of mattresses.) In spite of the crib rule's significance, no cost-benefit analysis was done so we did not know about the safety benefits of the rule compared to the economic impact of the rule, much less how to appropriately minimize that impact.

The day care industry did protest that the rule, as proposed, would result in approximately a $1/2 billion impact to a group that could not immediately absorb costs of such magnitude, especially on the heels of many having just bought new cribs to meet the 2009 voluntary standards. As a result, at the last minute just before finalizing the rule, the Commission agreed to amend the proposed rule to delay the effective date for child care centers and hotels/motels by 18 months. There was no analysis behind this date; basically, it was pulled out of a hat. Then, just two weeks before the rule was scheduled to go into effect, we heard from the rental industry who cannot get cribs that comply with the new standard and asked that we delay the effective date as it applies to them.

We also heard from small retailers who are stuck with stranded inventory that they cannot sell, also asking for a delay. In many instances, the retailers were promised a retrofit kit from the crib manufacturers but kits were not forthcoming. We heard that a significant number of small retailers will be facing substantial losses because of the retroactive nature of the rule. This is even though last December's briefing documents, on which the Commission relied in voting on this rule, stated that there would be no significant impact on retailers. I was told that, in reaching this conclusion, no analysis was done on the impact of the rule on this segment of the market.

It is clear that we do not know the true state of the marketplace. We heard that some small retailers have been able to accommodate themselves to the effective date of the standard and that a number have not. (It appears from reading the letters from some of those who believe they are in compliance that their beliefs may be somewhat misinformed.) The magnitude of the problem is unknown. An internal survey of 5 retailers found that those companies had at least 100,000 non-complying cribs in inventory. A survey done by a trade association representing one part of the small retailer community found that 35 companies had 17,500 cribs that cannot legally be sold. Together these snapshots represent only a tiny portion of the marketplace and we do not know how representative they are. The question of whether any of those cribs can be retrofitted is also unclear. Only two weeks before the effective date of the rule did we finally post some guidance on that subject but the letters we are getting into the agency also show that there continues to be much confusion out there in the marketplace.

I have no sympathy for those businesses who did not take the steps needed to get ready to comply with this new standard. However, I have heard from many companies who have tried to comply but still find themselves with inventory valued in the thousands of dollars that is now worthless. Consequently I believe that some relief is warranted. A brief delay in the effective date of 60 to 90 days for cribs that meet the 2009 standard would alleviate the burden without impacting safety.

The whole crib standard saga is a good illustration of how not to regulate. We rushed the standard out without doing the hard work upfront to understand the impact of the regulation. A cost-benefit analysis would have shown us how to get the maximum safety impact at the lowest cost. At the time we finalized the rule, we applied a band aid to stop the bleeding of two groups – child care centers and places of public accommodation. With this vote, we applied another band aid for those who rent out cribs. We declined to staunch the bleeding of small retailers. Our actions may have the result of driving some retailers selling perfectly safe cribs out of business. We will never know because we will never bother to find out. This is no way to regulate and the public deserves better.

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CHAIRMAN INEZ M. TENENBAUM

JUNE 30, 2011

SUPPLEMENTAL STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE VOTE TO REAFFIRM THE RETAILER COMPLIANCE DATE FOR THE NEW MANDATORY SAFETY STANDARDS FOR FULL-SIZE AND NON-FULL-SIZE CRIBS AND TO GRANT ADDITIONAL TIME FOR COMPLIANCE WITH THOSE STANDARDS TO COMPANIES WHO PROVIDE SHORT-TERM CRIB RENTALS

> *"I do not want to see more time in phase in for when these cribs have to reach the market. In fact, I wish it could be tomorrow. And when that's the only crib you could buy if you were a parent going into the store today. I wish it were sooner than six months."*[1] (CPSC Commissioner Anne Northup, December 8, 2010)

Two weeks ago, the Commission reaffirmed its commitment that only the new safer generation of cribs would be permitted to be sold in the United States after June 28, 2011. After 30 years of having outdated standards, CPSC delivered on my promise to significantly strengthen its old, woefully inadequate crib safety standards, and voted unanimously to enact the toughest crib safety standards in the world. Now parents and grandparents can shop for a crib with confidence, which is extremely important because a safe crib is the safest place for a baby to sleep. From the beginning of this initiative, my goal has been to prevent deaths and injuries to babies in cribs. This day has come and now only stronger, safer cribs are available for consumers to purchase.

Unfortunately, rather than marking such a great day with celebration, one of my colleagues released a public statement that needlessly injected callous political rhetoric into what truly represents a momentous victory for consumers, babies, safety advocates, and the crib industry.[2] I am happy this milestone was not overshadowed by this and the spotlight shined in the right direction: on CPSC's efforts to put safety first and to provide some measure of comfort to the parents who have suffered unspeakable tragedy and dedicated their lives to making these strong crib safety standards a reality. I firmly believe that June 28, 2011 was a day that commemorated all CPSC stakeholders coming together—government, manufacturers, retailers, and safety advocates joining forces to do something right in memory of those babies taken too soon, and to prevent more babies and families from suffering similar tragedies.

I am overjoyed that the day has arrived when families can shop for a crib with confidence. Nevertheless, I feel compelled to supplement my prior statement[3] to address some of the misleading assertions recently made by Commissioner Northup. Although I reluctantly tolerated past mischaracterizations of me, my intentions, and the work of this agency's dedicated professional staff, I feel that these false and damaging statements can no longer go unaddressed. This statement

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[1] http://www.cpsc.gov/vnr/asfroot/cm12082010.asx at 1:16:43.
[2] See http://www.cpsc.gov/pr/northup06272011.pdf (June 27, 2011).
[3] See http://www.cpsc.gov/pr/tenenbaum06162011.pdf (June 16, 2011).

briefly addresses some of the claims recently leveled concerning the Commission's vote on the crib retailer compliance date.

A Shameful Display Not in Furtherance of Safety

Before addressing some of the more egregious inaccuracies advanced by one of my colleagues who opposed the safer crib standard from going into effect this month, it important to set the record straight on the overarching theme embodied in Commissioners Northup's statement: namely that the Commission ignored the issue and failed to dedicate the resources necessary to gather the data she demanded. First, although our professional staff had already engaged in the normal notice and comment rulemaking process, I directed the staff to continue their outreach and monitoring of the market for unforeseen circumstances following the Commission's unanimous approval of the new mandatory standards. Neither staff nor the Commission ignored any of the information learned from retailers or other stakeholders during this time period and instead considered all such data in moving forward with the implementation of the original compliance date for manufacturers and retailers. Second, the amount of staff work required to address the Commissioner's inquiry in the manner she was advocating was not insubstantial. In fact, it would have redirected the efforts of a number of professional career staff members away from vital safety projects for many months. While making a series of baseless accusations, however, Commissioner Northup fails to mention that if staff were to have stopped what they were doing in order to satisfy her demands, there would have been a high price to pay in terms of the agency's ability to complete ongoing safety related projects—all on behalf of a small group of retailers who did not utilize their opportunity to participate in the rulemaking process and whose request was actively opposed by another group of similarly situated retailers. She is absolutely correct that staff was not going to do that; it would have been completely irresponsible if they had.

The Claim that 100,000 Cribs May Have Been Destroyed is Unfounded

The claim has been made that as many as 100,000 cribs may have faced destruction on June 28, 2011. This assertion is based on data received by the Commission regarding the status of the national crib inventories of five major retailers a month prior to the compliance deadline. An inquiry into the retail industry by CPSC staff showed that, a month prior to the compliance deadline, five of the largest U.S. retailers selling cribs had roughly 100,000 noncompliant cribs in their nationwide inventories. Contrary to Commissioner Northup's claim[4] that only four of these retailers submitted data in response to our inquiry a fifth retailer, while not providing numbers, did report that they had taken a proactive approach to clear out old inventory and that most of their inventory was compliant.

While the claim that all 100,000 of these cribs potentially faced destruction defies common sense given the time remaining for retailers to sell them from the date of staff's inquiry, the claim also ignores many other important considerations. According to CPSC staff estimates, about 2.4 million new cribs are sold every year.[5] This estimate translates into about 200,000 new cribs that are purchased every month in the United States. Given that the CPSC staff inquiry into the retail industry involved five very large retailers, it is not surprising that 100,000 cribs remained in the national inventories of these major retailers a month prior to the compliance deadline. In fact, many

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[4] http://www.cpsc.gov/pr/northup06272011.pdf at 4.
[5] See http://www.cpsc.gov/library/foia/foia11/brief/104cribs.pdf at 113.

of these cribs most likely were sold prior to the deadline in the normal course of business. Unlike some of the small independent retailers we also heard from, many larger retailers use a "just in time" inventory system and therefore probably sold many of their noncompliant cribs and received compliant cribs somewhat close in time with the compliance deadline. For any of the remaining noncompliant cribs that were not sold prior to the deadline, many retailers have been able to bring these cribs into compliance using the retrofit kits being provided throughout the retail industry by crib manufacturers. This is a critical point omitted by Commissioner Northup in her calculations.

In addition to these considerations, another good indicator the agency could reference that these 100,000 cribs likely did not face destruction was the fact that after being contacted by staff who inquired how many noncompliant cribs remained in their inventory, not even one of the five retailers requested an extension of the compliance deadline. The lack of even *one* request for an extension from similarly situated retailers or any trade associations representing them is indicative of the fact that there was not a widespread concern for these types of retailers. One major crib retailer publicly stated, "[w]e expect to be fully compliant by the deadline, with a broad offering of cribs for our customers."[6] and publicly supported CPSC's actions on the day that the new safety requirements became effective.[7]

Thus, although Commissioner Northup disagrees with my assertion that this issue really was only about the 17,000 noncompliant crib estimate provided by NINFRA, the record reflects that this was actually the case. This was the only evidence provided by those retailers requesting relief. No other retailers requested relief, even those that Commissioner Northup claims potentially had to destroy as many as 100,000 cribs. As detailed in my prior statement, I could not have supported an extension for the entire retail industry because a small segment of that industry sought relief to continue selling noncompliant cribs, especially when confronted with the fact that a similar group of small independent crib retailers had taken all of the necessary steps to come into compliance and would face economic harm if the Commission would have granted an extension.

Retailers were Adequately Informed and Prepared for the Six Month Compliance Date

The Commission published a proposed rule on the mandatory crib standards on July 23, 2010.[8] During the 75 day comment period for this rule, the Commission sought input from affected parties, including retailers. The Commission proposed, instead of the 30 day minimum effective date, to set an effective date for this rule that was six months after publication. The Commission specifically requested comments on "whether a 6-month effective date allows sufficient time for firms to come into compliance with the crib standards."[9] Despite the Commission's request, CPSC did not receive any comments seeking a longer effective date from any retailers of any size, or from organizations representing retailers of cribs.[10]

In the analysis conducted under the Regulatory Flexibility Act in the proposed rule, the Commission stated that "CPSC staff believes that most retailers, particularly small retailers, do not keep large inventories of cribs. With an effective date six months after publication of the final rule, retailers of

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6 http://www.theconsumerchronicle.com/2011/06/17/the-new-crib-rules-what-you-need-to-know/.

7 http://www.toysrusinc.com/press-room/releases/general/2011/toysrus-inc.-applauds-nations-tough-new-crib-safety-standards/

8 http://www.cpsc.gov/businfo/frnotices/fr10/cribstd.pdf at 43308.

9 *Id.* at 43321.

10 http://www.cpsc.gov/library/foia/foia11/brief/cribext.pdf at 6.

new products should have sufficient time and notification to make this adjustment with little difficulty."[11] Although Commissioner Northup has accused the agency's professional staff of "glossing over the issue with a conclusory opinion,"[12] the record reflects that our staff's conclusion was appropriate. Of all the retailers selling cribs in this country, only a small group that claimed to possess 17,000 noncompliant cribs (nearly six weeks prior to the compliance deadline) asked the agency for relief. Further indication that their request for an additional six months to sell noncompliant cribs should not have been granted is found in the record, which reflects that another group of similarly situated retailers worked extensively with their members and were prepared for the June 28 deadline.[13]

A Fundamental Difference Exists between Places of Public Accommodations/Short-Term Crib Rental Companies/Child Care Facilities and Crib Retailers

Although some have argued that the Commission's treatment of child care facilities, places of public accommodation, and short-term crib rental companies is inconsistent with the Commission's decision not to allow retailers more time to sell noncompliant inventory to consumers, this argument ignores a clear distinction between these two groups that was key in the decision to allow these service providers an extended compliance date. On December 28, 2012, cribs currently used in child care facilities, places of public accommodation, and by short-term crib rental companies will no longer be allowed to be used by these service providers and cannot be resold in the secondary market. In direct contrast, the noncompliant cribs that would be purchased by consumers at retail, many of which lack the important structural integrity safeguards contained in the new mandatory rules, would be used in consumers' homes for many years to come, perhaps even for decades.

Despite such a clear distinction between these two groups, Commissioner Northup claims that "the Commission's perception of the safety impact of the continued use of cribs that predate the new standard is implicit in its decision to permit child care facilities, family child homes, short-term crib rental companies, and places of public accommodation affecting commerce to continue using such cribs until the end of 2012."[14] She further asserts that "it is not even clear that a newly purchased crib would necessarily be in use for more time than was granted to day care centers in the Final Rule, and to crib-rental companies by last week's vote."[15]

Although it is nearly universally accepted and well understood that cribs likely remain in homes for years and sometimes even decades, Commissioner Northup's assertion completely contradicts her previous public statements on this subject. During the Commission's December 8, 2010, public briefing meeting on the final rule for the new crib standards, Commissioner Northup firmly stated "*[m]ost parents that bring home a baby today are not going to replace their crib in six months.*

[11] http://www.cpsc.gov/businfo/frnotices/fr10/cribstd.pdf at 43116.
[12] http://www.cpsc.gov/pr/northup07142010.pdf at 2.
[13] See http://www.cpsc.gov/library/foia/foia11/brief/cribext.pdf (Exhibit E). Commissioner Northup has pointed to an email contained in this exhibit to make the specious allegation that my office was focused on establishing the culpability of the retailers seeking an extension and therefore encouraged BFPA to support that position by providing evidence that it had kept its members apprised of the new requirements (http://www.cpsc.gov/pr/northup06272011.pdf at 8). Such an allegation is not only completely without merit but also entirely puzzling given that it is the common practice of Commissioners and their staffs to ensure that pertinent new information provided to them is also provided to the other Commissioners. It is not my office's practice to actively withhold this kind of information from agency staff and other Commissioners until a hearing, where it could be strategically introduced as a surprise tactic.
[14] http://www.cpsc.gov/pr/northup06272011.pdf at 3.
[15] *Id.*

That crib is going to be used for the life of that baby."[16] In the same meeting she also stated "*[f]ull size cribs are the things that last the longest, they're the 10 year, they're the most likely to have replacement mattresses.*"[17] In fact, Commissioner Northup apparently held this view as far back as the July 14, 2010, public decisional meeting on the proposed crib standards, where she unequivocally stated "*[a]nd for many people, the crib is just a staggering investment. It's extremely costly. There are many, many families that would never consider going and buying a new crib.*"[18]

It appears that from July through December of last year, Commissioner Northup and I were in agreement with the widely accepted view that cribs purchased today would be used in consumers' homes for a significant number of years to come, likely well beyond December 28, 2012. But, it appears that now, in an attempt to cast the Commission's recent decision as contradictory to our treatment of service providers, she has disavowed her previous position and claims that "it is not even clear that a newly purchased crib would necessarily be in use for more time than was granted to day care centers in the Final Rule."

Certainly, if one accepts the commonly held belief that cribs' remain in the homes of consumers for many years, then the distinction between the compliance dates for those companies that provide cribs for temporary use and the retailers that sell cribs directly to consumers for permanent use in a home is easy to see. It is unfortunate that Commissioner Northup has chosen to abandon her prior public positions on this well accepted understanding concerning the longevity of cribs in consumers' homes in order to further her attempts to secure an extension of time for the few retailers that have failed to come into compliance prior to the compliance deadline of the rule.

I would also note that Commissioner Northup is on record as of December 8, 2010, as showing full support of the original compliance date set for retailers. At the public briefing meeting on the final rule for the new crib standards, during a question and answer period between Commission Northup and CPSC staff, she stated:

> *I do not want to see more time in phase in for when these cribs have to reach the market. In fact, I wish it could be tomorrow. And when that's the only crib you could buy if you were a parent going into the store today. I wish it were sooner than six months.*[19]

Furthermore, at the public decisional meeting on the final rule for the new crib standards, Commissioner Northup stated "[w]e want the most pressure for change while we have a reasonable deadline."[20] Based on the information available to us and relying upon the complete silence of the vast majority of crib retailers concerning the original compliance deadline, I believe we realized that goal for American consumers on June 28, 2011.

<u>*CPSC's Rulemaking Significantly Strengthened the 2009 and 2010 ASTM Voluntary Standards*</u>

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[16] http://www.cpsc.gov/vnr/asfroot/cm12082010.asx at 1:17:44.
[17] http://www.cpsc.gov/vnr/asfroot/cm12082010.asx at 1:11:59.
[18] http://www.cpsc.gov/vnr/asfroot/cm07142010.asx at 15:26.
[19] http://www.cpsc.gov/vnr/asfroot/cm12082010.asx at 1:16:43.
[20] http://www.cpsc.gov/vnr/asfroot/cm12082010.asx at 1:21:36.

Although the 2009 ASTM crib standard was a step forward in crib safety because it outlawed the traditional drop-side crib design, this voluntary standard was published in December of 2009, prior to the agency initiating its rulemaking on the new mandatory crib standards. Under the Consumer Product Safety Improvement Act (CPSIA), Congress charged the CPSC with creating standards for durable infant nursery products that are more stringent than voluntary standards "if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products." [21]

I am proud to say that CPSC fulfilled its responsibility under the CPSIA. The CPSC's mandatory standards for cribs provide many more significant protections for America's babies than offered by the 2009 ASTM crib standards. Some of these protections include: (1) making mattress supports stronger and more durable (2) making crib slats stronger and more durable; (3) making crib hardware more durable; and (4) making safety testing more rigorous. Given the large number of cribs previously recalled due to defects associated with these issues, this was a truly significant advancement in crib safety from the 2009 ASTM voluntary standard.

Rather than acknowledge the serious deficiencies in the 2009 ASTM standard when compared to the current mandatory standards, Commissioner Northup stated "[t]he Commission's decision to set a two year effective date [for public accommodations, short-term crib rental companies, and child care facilities] reflects its view that cribs meeting the 2009 or 2010 ASTM standards do not present a safety risk."[22] Nothing could be further from the truth. CPSC staff and the Commission itself unanimously recognized that the 2009 ASTM standards were inadequate and therefore made significant revisions to the standards during the Commission's mandatory rulemaking process. While many of the changes recommended by staff and unanimously adopted by the Commission were incorporated into the 2010 ASTM voluntary standard, that standard still lacked the very important requirements contained in the mandatory rules for much more rigorous safety testing of cribs.

Let me make one point perfectly clear: the Commission would never have adopted the new mandatory standards for cribs had it believed that "cribs meeting the 2009 [or] 2010 ASTM standards [did] not present a safety risk" as Commissioner Northup has asserted.[23] In fact, the agency's charge under the CPSIA was to adopt more stringent standards than the 2009 and 2010 ASTM voluntary standards if the Commission determined "*that more stringent standards would further reduce the risk of injury*" associated with cribs. CPSC staff and the Commission unanimously determined that more stringent safety standards for cribs were necessary and adopted the more stringent standards, thus making it clear that neither the 2009 nor the 2010 ASTM crib standards provided a sufficient level of safety.

Again, the decision to allow companies providing cribs for short-term use additional time to comply with the new mandatory crib standards was not an implicit endorsement of the safety of the cribs currently being used by these service providers or cribs that meet the 2009 or 2010 ASTM voluntary crib standards. Indeed, the only Commission endorsement of safer cribs is the agency's promulgation of the new mandatory standards unanimously adopted by the Commission last December. The decision to allow service providers additional time does not reflect the

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[21] § 104(b)(1)(B)(ii) of the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016.
[22] http://www.cpsc.gov/pr/northup06272011.pdf at 3.
[23] *Id.*

Commission's view of the safety of any cribs predating the mandatory standards, but rather the reality that the cribs that are currently used by these companies will no longer be used by anyone after December 28, 2012, whereas cribs sold directly to consumers for permanent use in a home will be used for many years to come, perhaps even for decades.

BFPA Clearly Opposed an Extension of the Original Compliance Deadline for Retailers

Commissioner Northup also incorrectly claims that some of the correspondence from BFPA members indicates that BFPA and their membership were confused about the status of their cribs and uncertain in their opposition to an extension of the compliance deadline for retailers.[24] She also states that their opposition is "uncertain" in light of their membership in an umbrella organization, All Baby and Child (ABC), which supported the extension.[25] However, based on the letters in the record and a letter received by my office from BFPA's Executive Director, it was clear that the only way BFPA would change its position was if CPSC stated that it would not allow retrofit kits to bring cribs into compliance. In an email submitted to my office through the general email contact form on the CPSC website, BFPA's Executive Director stated:

> Our biggest concern today is that stores have prepared with "retro fit kits" that the manufacturers have supplied and tested to bring product to the compliancy standards of 16 CFR 1219. I ask that you please send out a ruling on this immediately regarding clarification as to whether the CPSC has deemed these kits allowable. *If the kits are allowed, then there is no reason to extend the sell through period being petitioned, as all retailers should have planned accordingly understanding the severity of the pending regulations.*[26]

A few days later, the Commission cleared and published guidance clearly stating that crib models tested with retrofit kits could be sold after June 28, 2011 so long as they were put through the complete test regimen and passed all required tests.[27] Based on this, it is clear BFPA was not confused whatsoever in their stance on this issue. Once CPSC's guidance concerning retrofit kits was released, BFPA's position was clear—they adamantly opposed any extension of the original compliance deadline for retailers.

In addition, BFPA's Executive Director stated in the same email "*[a]lthough Baby Furniture Plus Association holds a seat on the All Baby & Child Board who is petitioning the extension, we as a group are not in favor of this.*"[28] Also, another individual BFPA member acknowledged that ABC had contacted CPSC requesting an extension of the deadline and in an email to the agency and all of BFPA's and ABC's membership, the BFPA member strongly voiced her objection to any extension based on the fact that such an extension would "put all of us who are compliant out of business."[29] Thus, despite any assertions to the contrary, BFPA and its members were not confused and, as a group, recognized ABC's request for an extension of the original compliance deadline for retailers and openly opposed any such extension.

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[24] http://www.cpsc.gov/pr/northup06272011.pdf at 6.
[25] *Id.*
[26] (emphasis added)
[27] http://www.cpsc.gov/onsafety/2011/06/the-new-crib-standard-questions-and-answers/.
[28] (emphasis added)
[29] http://www.cpsc.gov/library/foia/foia11/brief/cribext.pdf at 71.

Conclusion

My colleague has set forth a scenario that never occurred. This issue has been portrayed as an action by the Commission to recklessly move forward with a mandate that cribs sold in this country meet the strongest standards in the world. The Commission's actions are characterized as those of unthinking regulators pressing ahead, determined to drive forward an agenda without regard to any resulting impact on business—particularly small ones. This simply is not the case.

CPSC's mandate for cribs and other durable infant products is to "provide the highest level of safety for such products that is feasible," as Congress legislated through the CPSIA. I take this mandate seriously. The Commission could have, as Commissioner Northup sought, paralyzed Commission action by delaying the original compliance date and ordering months of unnecessary staff work. Indeed, the Commission also could have capitulated to her requests and granted an extension of time for retailers to sell noncompliant cribs to the detriment of those retailers that stood ready to sell compliant cribs. In light of the facts that were presented for our consideration, I am proud of the Commission's actions. After dozens of babies had tragically been entrapped and died, and millions of defective cribs had been recalled, the actions of this Commission to ensure the swift movement to market of only safer cribs undoubtedly was justified and honors the expectation of families across the nation. It is for this reason that I am so disappointed with my colleague's attempt to disparage my actions, those of my Democratic colleagues, and our professional staff, in a quest to advance the business interests of a few, over the greater interests of protecting the safety of our most vulnerable consumers.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF COMMISSIONER ROBERT S. ADLER REGARDING THE PROPOSED EXTENSION OF THE COMPLIANCE DATE OF THE NEW MANDATORY FULL SIZE AND NON-FULL-SIZE CRIBS STANDARDS UNDER SECTION 104 OF THE CPSIA

JUNE 16, 2011

On December 28, 2010, I was proud to join a unanimous Consumer Product Safety Commission in adopting new mandatory performance standards for full-size and non-full size cribs. As I wrote then,[1] I believe the requirement in the Consumer Product Safety Improvement Act of 2008 (CPSIA) to update and make mandatory a number of voluntary safety standards for durable infant or toddler products was a long overdue and necessary step for the safety of our most involuntary risk-takers: infants. These new, mandatory standards go into effect on June 28, 2011.[2] Today, after a public Commission meeting to consider a late request by a few crib retailers to extend the June deadline, I joined a majority of my colleagues in choosing not to allow the retail sale of cribs that do not meet the new crib standards after the mandatory compliance date.[3]

Beginning a few weeks ago, the Commission started receiving letters from a few crib retailers asking for the compliance date of the rule to be extended because these stores possessed an excess of what will become non-compliant (and therefore unsalable) cribs on June 28.

However, beginning at around the same time, the Commission also started receiving letters from a number of other small, independent similarly situated crib

[1] See statement at: http://www.cpsc.gov/pr/adler12152010.pdf (Dec. 15, 2010). While I disagreed with my colleagues as to the compliance date for child care facilities and public accommodations, I joined the 5-0 Commission in the setting the effective date for manufacturers and retailers at six months from passage: June 28, 2011.

[2] More specifically, the new standards go into effect for all parties with the exception of child care facilities and public accommodations who have been granted an extension until December 28, 2012 to comply with the new rules. My rationale for dissenting from this extension can be found in my December statement.

[3] On a second vote to allow for the short-term rental of cribs by crib rental companies that do not meet the mandatory crib standards until December 28, 2012, I abstained. While I recognize that it appears there is a shortage of compliant cribs available from manufacturers for this segment of the market, and I am convinced some extension may be required, I am not convinced that the shortage necessitates an eighteen month extension.

retailers. These small businesses begged the Commission to leave the compliance date alone because they had gone out of their way, suffering great expense, to liquidate their non-compliant merchandise so they would have only compliant cribs in stock by the end of June. These small retailers expressed great fear that if their competition were allowed to sell non-compliant merchandise after June 28, at what was sure to be a deep discount, it would put many of these small companies out of business. What would be particularly distressing about such a turn of events is that this second group of merchants have, at no small cost, unquestionably done the right thing and, if we granted an extension of the compliance date, they would be punished in the marketplace for following the rules.

Although I am not without sympathy for those retailers who, for whatever reason, have ended up with noncompliant inventory, I have to balance their concerns against the Congressionally mandated retroactive application of the crib rule and the special circumstances surrounding cribs as a consumer product. Cribs have been treated specially by Congress and this agency for good reason. A crib is the one place that infants are placed for hours all alone with no adult or other protective presence. Children are at their most vulnerable in a crib so the crib should be the safest place in the house both when they sleep and when they are moving about, shaking the crib's side, or exploring its every nook and cranny.

It is clear that Congress recognized the unique safety challenge that cribs present by enacting extremely broad provisions in the CPSIA. These provisions streamline agency rulemaking, require third party testing by independent labs, extend the scope of the rule beyond traditional parties to include child care facilities and family child care homes, and make any crib rule retroactive. In short, Congress expected extra safety efforts and quick action from the Commission, and anyone who would ask us to allow less safe cribs to be sold to consumers any longer than is absolutely necessary bears a heavy burden to persuade me to do so. I do not believe that burden has been met today.

When originally setting the June 28 compliance date, the Commission, with the help of its economists, attorneys, compliance officers, and other experts estimated how long it would take for the marketplace to produce enough compliant cribs so that consumers could be sure they would have access to the safest cribs available. Based on the information provided to us at the time, we chose six months from the date of the publication of the rule because it appeared to be the appropriate time frame needed to make sure there was an adequate supply of compliant cribs available for consumers. In retrospect, it appears that judgment was an accurate one.

In fact, most of those retailers who have suggested the June 28 date be extended have not contended six months was insufficient for compliant cribs to get to market. We also have not heard from consumers or consumer groups that there will be a lack of compliant cribs available for purchase on that date. If that were the case, it would surely be a concern worth addressing. Instead, the concerns expressed by a small segment of the retail crib industry have been exclusively their unhappiness at the prospect, whether through bad luck or bad planning, of having unsold noncompliant cribs in inventory once the standard's compliance date arrives.

Yet, the alternative being suggested is not compelling. Any type of extension of the effective date for this rule would be patently unfair to the many retailers, both small and large, that have planned ahead, worked hard, played by the rules and prepared themselves to sell only compliant cribs on June 28. What message would it send to the regulated community if we turned our back on those that do the right thing at the right time? What message would it send to consumers that these economic concerns for only a segment of the crib marketplace were placed above the interests of stopping the sale of cribs that no longer meet the minimum federal safety standard?

Our primary statutory mission is to protect the American public against unreasonable risks of injury associated with consumer products. Accordingly, it is our responsibility to be sure that parents and caregivers can be confident that the cribs they buy are the safest ones available. It is important to remember when addressing this issue that Congressional passage of this mandatory safety standard was a result of the deaths of dozens of infants in their cribs.

I continue to urge the Commission to engage in a robust and comprehensive education and information campaign through traditional and non-traditional media that alerts the public, the child care industry, state and local licensing agencies, manufacturers, retailers, and all other concerned stakeholders that the rules have changed and all cribs must be compliant with the new federal safety standard.

I also urge the manufacturing community to make good on their promised retrofit kits that would allow retailers to use the kits to bring their applicable inventory up to the new standard. June 28, 2011 should be a day for all to celebrate – and if the Commission, the manufacturers, and the retailers continue to work together, we can do the right thing for all concerned.

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

COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE VOTE AGAINST EXTENDING BY ANY SPECIFIED AMOUNT THE TIME PERIOD DURING WHICH RETAILERS MAY LAWFULLY SELL NEW, NON-DROP-SIDE CRIBS THAT SATISFY THE MOST RECENT VOLUNTARY ASTM STANDARD

June 27, 2011

The economy is growing painfully slowly, with high unemployment, minimal job creation, and a crushing national debt due in part to the reduced tax revenues associated with a weak economy. Among the central factors economists attribute to the reluctance of private sector employers to hire employees and invest capital are the costs and uncertainty of complying with new regulations. The Consumer Product Safety Commission had an opportunity to address the impending economic harm that one of our regulations will cause. Instead, the Commission's initial analysis that this regulation would not cause economic harm to retailers, it's failure to quantify the extent of the damage when initial concerns arose, and finally, its 3-2 vote against extending by any specified amount – even 30 days -- the time period during which retailers may lawfully sell new, non-drop-side cribs that satisfy the most recent voluntary ASTM standards, is emblematic of the job-killing, regulatory overreach that is characteristic of the current Commission.

The seeds for the majority's decision were planted last fall when a six-month effective date for the new mandatory crib standard was set with insufficient consideration of its impact on retailers. The likelihood that retailers would be left with substantial unsellable stock at the end of the six months was increased when the Commission's outreach efforts subsequent to the rulemaking failed to target retailers. Significant losses to retailers became almost inevitable when, in response to appeals for relief from the effective date, the Commission's leadership failed to take adequate action to address the impending harm. Finally, the unjustifiable economic waste was assured when, after a bare majority of Commissioners agreed to hold a public briefing and vote on the issue, the Commission's leadership directed insufficient resources toward understanding the scope of the problem. Simply put, the Democratic majority of this Commission is unmoved by economic harm to retailers.

Congress Mandated a Retrospective Rule for the First Time

As with much of the Commission's recent regulatory overreach, the roots of today's vote extend back to Congressional passage of the Consumer Product Safety Improvement Act of 2008 (CPSIA). The CPSIA required the CPSC, for the first time in its history, to promulgate a *retrospective* safety standard for a product. The CPSC routinely mandates new safety standards and testing methods for particular products, as warranted by changes in testing and manufacturing technologies and procedures. For example, this April the Commission issued new standards for toddler beds intended to make safer all toddler beds manufactured after the effective date of the new standards. But the issuance of updated standards does not imply that toddler beds manufactured to prior standards are *unsafe*; and, the sale of such older models, both new and used, is not prohibited. If the Commission determines that a product is unsafe, it is removed from commerce by a recall. With respect to cribs, although neither Congress nor the CPSC has ever found those manufactured to recent voluntary standards to be unsafe or sought to recall them, Congress mandated in the CPSIA that only cribs engineered to the new mandatory crib standard, and then third-party tested and certified to the standard, could be sold after its effective date.

The Commission Set the Effective Date without Adequately Considering Its Impact on Crib Retailers

Congress required that the CPSC's new crib standard apply retrospectively, but Congress did not dictate to the CPSC how much time the Commission could provide to the regulated industry to prepare for compliance with the new standard. As reflected in the Commission's Safety Standards for Full-Size Baby Cribs and Non-Full Size Baby Cribs; Final Rule (75 FR 81766), "[t]he Commission has the discretion to set the effective date for the crib standards, and could set an effective date longer than six months for all entities that are subject to the standards." 75 FR at 81722.

The Federal Register notice accompanying the publication of the rule indicates that the Commission considered several factors in establishing a six-month effective date for the new mandatory crib standard. These were: (1) the time necessary for manufacturers to build and third-party test to the new standards sufficient cribs to ensure an adequate market supply upon the effective date; (2) the time necessary for retailers to sell off non-compliant stock to avoid economic loss; (3) the burden compliance with the new standards would impose on day care centers and the hospitality industry; and (4) any safety impact associated with the continued sale of cribs not satisfying the most recent ASTM voluntary standard, but not the new mandatory standard.

The Commission sought to ensure that manufacturers would have sufficient time to redesign their cribs to meet the new standard, to locate a CPSC approved lab to test and certify the new cribs, and to ship them to distributors and retailers. Manufacturers informed the Commission that they could achieve these goals in six months, and the Commission unanimously extended the effective date from the Administrative Procedure Act's 30-day minimum to six months.

With respect to retailers, Commission staff glossed over the issue with the conclusory opinion that "most retailers, particularly small retailers, do not keep large inventories of cribs. With an effective date six months after publication of the final rule, retailers of new products should have sufficient notification and time to make this adjustment with little difficulty." 75 FR at 81783 (full-size cribs) and 81785 (non-full-size cribs). A Commission package is required to contain all the underlying data and analysis supporting a conclusion. Given the absence of any support for the conclusion that crib retailers would have "little difficulty" adjusting to the six month effective date, I must therefore conclude that the Commission obtained little, if any input from crib retailers in reaching that conclusion.

The Commission provided day care centers and other places of public accommodation twenty four months – until December 28, 2012 -- to comply with the new crib standard. It did so to permit such entities to spread out over a longer time period the cost of replacing their cribs, and to prevent the replacement of a large number of cribs in a short time period from reducing to a level below consumer demand the number of cribs available in the market.

Finally, the safety of cribs that predate the new standard is implicit in the Commission's decision to permit child care facilities, family child care homes, short-term crib rental companies, and places of public accommodation affecting commerce to continue using such cribs until the end of 2012. The Commission's decision to set a two-year effective date reflects its view that cribs meeting the 2009 or 2010 ASTM standards do not present a safety risk. Importantly, drop side cribs, the dangers of which are well known and understood, were banned by the ASTM voluntary standard in 2009. 75 FR at 81769.

The Chair has argued that the continued retail sale of a crib model presents a greater risk than its continued use in day care, because the day care use will end in late 2012, whereas a newly purchased crib could potentially be used for a far greater time. *See* Statement of Chairman Inez M. Tenenbaum on the Vote to Reaffirm the Retailer Compliance Date for the new Mandatory Safety Standards for Full-Size and Non-Full-Size Cribs and to Grant Additional Time for Compliance with those Standards to Companies Who Provide Short-Term Crib Rentals (Tenenbaum Statement) at 3. But the fact remains that if the Chair considered the cribs currently in use at day care centers to be dangerous, she would not have voted to permit their use for another two years. Moreover, once a current retail purchaser has used a crib that does not satisfy the new standards, she would also be barred from selling it second hand or giving it away. *Id.* So it is not even clear that a newly purchased crib would necessarily be in use for more time than was granted to day care centers in the Final Rule, and to crib-rental companies by last week's vote.

The Commission Learned that Six Months Was Insufficient For Many Retailers

I voted in favor of the new crib standard and the 6-month effective date for retailers, in reliance upon the conclusion of Commission staff that "retailers of new products should have sufficient notification and time to make this adjustment with little difficulty." In hindsight, considering the chain of commerce, it was not logical to set the same effective date for both manufacturers and retailers. If the Commission believed it was reasonable and safe to permit manufacturers to sell and deliver cribs not compliant with the new standard until June 28, 2011, then it should also have provided some additional time beyond that date for the retailers to whom the cribs were delivered to sell them.

The Chair contends that she directed Commission staff to "engag[e] in vigorous outreach and monitoring of the market for unforeseen circumstances." Tenenbaum Statement at 2. Staff reports reflect that the Commission monitored the progress of lab accreditation, the numbers of compliant crib models available on the market, and other factors impacting the likely sufficiency of supply after June 28. I have seen no indication that any effort was directed toward monitoring the retail market to gauge how retailers were maintaining stock in order to remain in business during the six months pending the effective date, and there appears to have been little effort made by the Commission to ascertain whether retailers would be able to sell their stock of noncompliant cribs in time, or the economic impact of their failure to do so. Indeed the *only* retailer information solicited by the Commission was a survey of five retailers out of an unknown potential variously estimated to be between approximately 500 and 2000. That survey, in response to which only four retailers provided data, was not presented to the Commission until May 31, 2011 – barely a month before the rule would become effective. Notably, this minimal number of retailers reported holding an aggregate of 100,000 cribs that would be unsellable on June 28. As for outreach to retailers, the June 15, 2011, report prepared by the Commission's Small Business Ombudsman, concedes that "retailers were not specifically targeted in [the Commission's] outreach." Impact of June 28, 2011, Compliance Date for Crib Safety Standards on Small, Independent Retailers and Small, Crib Rental Companies (Impact Report) at 6.

Notwithstanding the Commission's lack of outreach to the retailer community, in late April, we began receiving *unsolicited* requests for an extension in the crib rule effective date. In addition to over a dozen requests from individual retailers, we also received requests from two trade associations. These were the National Independent Nursery Furniture Retailers Association (NINFRA), which represents approximately 100 independent crib retailers; and, All Baby & Child, Inc. (ABC), which represents hundreds of locally owned crib retailers. All of these requests explained that confusion in the marketplace due to inadequate guidance from manufacturers and the CPSC, delays in the manufacture and testing of compliant cribs, and worse than anticipated economic conditions had left the retailers with large numbers of new cribs that could not be lawfully sold after June 28. These concerns were consistent with the facts the Commission had learned from monitoring crib manufacturers and labs. The pace at which labs were accredited to test to the new standards was slower than had been anticipated. In addition, preexisting crib models were discovered to have failed compliance testing following modifications in greater numbers than manufacturers had led retailers to believe would occur.

The following excerpts from a few of the letters are illustrative of the retailers' rationale for seeking an extension:

- "How this ruling would impact cribs without dropsides was unclear [in December 2010] and no official document has been published since that provides clarity in regard to allowable modifications, upgrades or retrofits. Information obtained from suppliers was initially verbal and varied widely depending on which supplier you were talking to. Only now are we beginning to get information from suppliers that address specifics in regard to revisions in hardware and labeling that can be adapted to existing models."
- "[O]ne relatively large manufacturer waited until June 3, 2011 before providing any communication in regard to compliance. That statement informed retailers that any crib they produced and which was shipped prior to 5/15/11 *may* not be compliant to 16 CFR 1219. They further stated that no retrofit kits would be made available. They added that some existing models are in the process of being tested at BV-Buffalo, while others would no longer be produced and therefore, would not be re-tested to the new regulation.

There are additional suppliers that have yet to make any announcement regarding the compliance status of their inventory."

- "Unfortunately, testing is expensive and models that are being phased out will not be retested to compliance."
- "The unintended consequences however have been the lack of testing facilities and the ability for manufacturers to know or communicate if the merchandise they continued to sell to our stores would eventually be compliant. We've been forced to continue to run our business under the blind faith of the manufacturers that have only been able to test product as of 4/1/11. Now with the ability to test and gather results, manufacturers have left us with less than 90 days to liquidate soon to be obsolete inventory."
- "Keeping merchandise on hand that will be literally worthless in a matter of weeks has put us at risk of losing precious capital on so many levels. Instead of selling customers full price cribs to cover our cost and overhead, we're pushing cribs that are at or below our cost with no margin for freight, overhead, and all of the expenses incurred by running sales. We've only sold approximately 20 of the 120 non-compliant cribs that we have in stock and on our floors. This means we have less than a month to sell off a hundred non-compliant cribs and replace them with compliant models between 2 small store locations. We may very well have paid for 100 cribs that we will never be able to sell which will result in a loss of tens of thousands of dollars in addition to the profits already lost in selling items below our cost."
- "We have been diligent in depleting our stock but the economy has been hard on small specialty retailers."
- "[M]any of the cribs being shipped by suppliers will be rendered unsellable on 6/29. Without merchandise on hand to sell, we're going to lose sales. Keeping merchandise on hand that will be 100% worthless in a matter of weeks puts us at risk of losing precious capital."
- "We have recently learned that most of our crib inventory is not compliant and we have been left with an extremely small window of time to sell off what we can, before literally being forced to throw them in the dumpster. At an average cost of over $300 per crib this will result in losses for us of tens of thousands of dollars."
- "These are tough times for everyone and this ordeal is not only crippling us, but could potentially undo us. So many more jobs across the country will be put in jeopardy."

In addition to the anecdotal accounts contained in these letters, NINFRA surveyed its members and 37 provided data on their numbers of noncompliant cribs in stock. Those 37 crib retailers had a total of 17,800 noncompliant cribs as of late May 2011. NINFRA's representative also reported that their average wholesale cost was approximately $275 per crib.

Then, in early June, the Executive Director of another trade association, Baby Furniture Plus (BFP), representing approximately 75 members, wrote to the Commission in opposition to extending the effective date. Letters from several individual members of the association also supported that request. They argued that they had already suffered economic harm by having to sell their stock of noncompliant cribs at a loss during the six month period pending the effective date, and should not be required to suffer additional losses by continuing to compete with retailers still discounting noncompliant cribs after June 28.

However, unlike with respect to the letters from ABC and the NINFRA members, who were seeking an extension, several members of BFP purportedly opposing the extension were clearly confused about the status of their cribs and uncertain in their opposition to an extension. The extent of opposition among rank-and-file BFP members is also uncertain in light of their membership in the umbrella group ABC, which sought an extension. The following comments from several BFP members are illustrative:

- "Even though we knew about this for some time now, we still have a few cribs that haven't sold yet. I think an extension of 3 months would suffice to get rid of all floor samples . . . Most manufacturers have still failed to supply us with kits to make compliant cribs meet the new laws."
- "Another factor contributing to our hardships has been the confusion regarding what the regulations actually require and whether or not compliance kits will be accepted. . . . If in the 11th hour (only 3 weeks prior to June 28), the CPSC now deems these retrofit kits insufficient, I'm in support of the 180 day extension and feel that it is warranted so we can close out this additional inventory. There is NO WAY we could clear out the stock in our warehouse in 3 weeks and we'd be forced to throw out thousands of dollars in good product."
- "We are captive of the manufacturers by virtue of their regulations to comply with, and yet we have no clear way of knowing if they are themselves compliant. I have worked through refit kits, have little inventory, and don't have a certainty that what comes off the truck from my suppliers is compliant. This morning I received a box from one of my manufacturers with a packet of lock washers, no signage, updates, labels, or instructions other than to put a lock washer on every screw. And that is supposed to make my cribs compliant? I can buy lock washers at the local hardware store. We need to have faith in our manufacturers that they have done their part. I have received no letters of certification at this point; it seems the manufacturers themselves each have a different idea of what that means."
- "I was wondering if the CPSC has actually approved the use of any 'fix kits' for non-complaint cribs. A number of my vendors have provided 'kits' mainly consisting of lock washers and additional sticker labels that they claim will make my current stock compliant. However, the way that the law seems to be written (at least the way I read it), it does not allow for this and clearly states that only products that have been fully tested to the new standards will be compliant and eligible for sale after 6/30/11. A couple of my vendors have cited this and have chosen not to create kits because the CPSC has not approved them, telling me to sell off all displays and stock before the deadline (which is very costly for a small independent business like mine). While in theory these kits should make the cribs compliant . . . those cribs made on prior production runs have not been officially tested so there is no way to know for sure that they would pass the new standards. . . . Can you please clarify for me whether the displays and stock that we have put a kit on is or is not officially compliant according to the CPSC, and will these retro-fitted cribs be legal to sell after the deadline."

Thus, during the period between approximately eight and three weeks before the effective date of the new crib rule, the evidence showed that most retailers that were surveyed had noncompliant cribs. It was also apparent, given the 117,800 noncompliant cribs remaining in the inventory of the few retailers that were surveyed, that many retailers would suffer substantial economic harm if the date was not extended. By early June, the Commission had also heard from other retailers who claimed they would suffer economic harm if the deadline was extended, but these retailers had not provided any data to quantify or substantiate their claims. It was also clear during this period that retailers on both sides of the issue were uncertain and confused concerning which of their cribs could be made compliant with "retrofit kits" and which would need to be thrown out on June 28.

The Commission Initially Ignored the Problem

Beginning in early May, I therefore sought the support of a majority of Commissioners to direct staff to undertake a more thorough examination to both quantify and clarify the problem. I believed a quantification of the problem was necessary in order to determine whether or not the balance of economic harm favored extending the deadline for retailers to comply with the new crib standard. In addition, it was clear that because many retailers were confused about whether their cribs were compliant, the Commission needed to clarify the scope of the problem by canvassing retailers *after* providing them with the information necessary to assess which of their cribs were compliant or likely to be made so, and which could not be sold after the deadline.

On June 14, a third Commissioner agreed to vote in support of holding a public briefing to discuss the evidence and to vote on whether to permit retailers to continue to sell for any specified amount of time new, non-drop-side cribs that satisfy the 2009 ASTM standard.

Notably, also on June 14 – a scant two weeks before the effective date of the new crib rule -- the Commission finally issued official written guidance to manufacturers and retailers with regard to the circumstances under which cribs not manufactured to the new standards would be deemed compliant after being "retrofitted." That guidance explains that even after being retrofitted, a crib still may not be sold until the model is tested to all the new crib standards in an accredited third party lab and then issued a certificate of compliance. *See* http://www.cpsc.gov/onsafety/2011/06/the-new-crib-standard-questions-and-answers/. And as we had learned from many retailers, manufacturers were unwilling to incur the expense of doing so for a substantial number of crib models that remained in retailer inventory.

The Public Briefing Inadequately Addressed the Problem

Unfortunately, the public briefing did not include an effort to further quantify the economic harm to the retail community. It instead created the impression that there was an unsolvable balance of harms between two sets of retailers on either side of the issue. The Impact Report omitted the data obtained by the Commission showing that as of May 2011, a small fraction of the total retailer community still had at least 117,800 noncompliant cribs in inventory. Had I not asked during the hearing to have the data presented, it would not have been discussed. Incredibly, even after the data was introduced, the Chair asserted that she could not support an extension for "only 17,000 cribs" – completely ignoring both the Commission's own survey, and the fact that our data was unquestionably incomplete.

The Impact Report and oral staff presentation also failed to provide any estimate of the economic harm that would be suffered by the retailers maintaining noncompliant stock. Yet, I elicited through questioning the fact that staff was aware that the average wholesale cost of the cribs in inventory was $275. While I recognize that the Commission's anecdotal data could not support a statistically significant extrapolation of the total potential loss, and that some number of additional cribs would likely be sold in the short time between when our data was obtained and the effective date of the rule, it would have been a simple matter to calculate the *known* potential losses: 117,800 X $275 = $32,395,000.

The Impact Report's discussion of the retailers who purportedly opposed the extension was also incomplete. It is only common sense that crib retailers who were able to sell off all of their noncompliant stock would seek to avoid continued lower priced competition from those who did not. And I understand that it is not the Commission's role to arbitrarily select economic winners and losers when faced with competing claims of harm. But I also believe that the Commission has an obligation to look beyond the competitively motivated positions of both sides to reach the outcome that is the least harmful to the economy, when there are significant differences.

That did not happen in this case. Indeed, the briefing package reveals that no effort was made to quantify the harm that would be suffered by the retailers opposing an extension. While the delay in seeking retailer input precluded performing a thorough analysis of the question, there was certainly time to canvas the retailers opposing the extension to determine whether they were similarly situated to those seeking the extension, in terms of the numbers of cribs they kept in stock and the specific losses they claimed to have suffered. Instead, as reflected in the emails included in the record, a representative from the Chair's office encouraged BFP to support its position by providing evidence that it had kept its members apprised of the new requirements and strategies for complying. *See* June 14, 2011 email from beth@babyfurnitureplus.com to Neal Cohen (included in public briefing package). Thus, it appears that the Chair was focused on establishing the culpability of the retailers seeking an extension, in order to defeat it, rather than on understanding the scope of the problem, in order to minimize the harm to the economy. Consistent with this strategy, the Chair's stated rationale for not granting the extension is to avoid "reward[ing]" businesses that "fail[ed] to take the steps necessary to come into compliance" and "punish[ing] the most responsible business actors." Tenenbaum Statement at 2. But as even the Impact Report makes clear, there is *no evidence* to support the supposition that any retailers are to blame for their inability to sell their stock of noncompliant cribs by June 28. *See* Impact Statement at 13. Rather, the Chair merely repeats as fact the speculation of certain retailers who opposed the extension. *See* Impact Statement at 10.

The Impact Report also deemphasized the confusion among both the retailers seeking an extension and the BFP members regarding whether "retrofit kits" will permit their otherwise noncompliant cribs to be lawfully sold after June 28. And given that the Commission did not even provide official written guidance on the question until two days before the briefing, there was clearly insufficient time to determine whether the guidance increased or decreased the number of cribs retailers would be unable to sell.

Also lost in the Impact Report's analysis was the simple fact that no matter what the Commission's appropriate policy response should be now, it conspicuously failed last year to assess accurately the economic harm retailers would suffer from a six-month effective date. The retailers that are unable to sell their noncompliant cribs by June 28 will suffer the loss of their unrecoverable wholesale cost. Those retailers who are able to sell their noncompliant cribs within the permitted time period, will have done so by already suffering the substantial losses associated with heavily discounted sales, and by not replenishing their stock to maintain it at a level supportive of their overhead commitments during the interim period. All of this economic waste could have been avoided if the staff had been directed to conduct a thorough analysis of the potential impact of the effective date from the start. Had the Commission known the facts, it could have set a more reasonable effective date for all retailers in the first place, thus eliminating the huge losses suffered both by the retailers who sold their stock at a loss and by those now stuck with unsellable inventory.

Conclusion

The Commission was required by Congress to promulgate new prospective safety standards for cribs, and was given discretion to set an effective date that balanced the risk of economic harm to retailers against any potential safety impact of delay. The Commission announced without any apparent basis that six months was sufficient time for retailers to sell noncompliant cribs, and signaled the absence of a substantial safety issue by providing day care centers with twenty-four months to replace their cribs. The Commission then failed to target its outreach to retailers, engaged in no proactive monitoring to determine whether retailers were on track to sell their noncompliant cribs within the six month period at a fair market price, and did not provide official written guidance regarding the retrofitting of noncompliant cribs until two weeks before the effective date. Meanwhile, fewer labs were available to test during the period than was anticipated, and manufacturers and suppliers were slow to apprise retailers of the compliance status of their in-stock cribs. Two months before the effective date, the Commission learned that these circumstances had resulted in a substantial number of retailers having a large number of noncompliant cribs that they would be unable to sell. But the Commission failed to direct staff to quantify and clarify the problem. Nonetheless, an incidental survey of five retailers demonstrated in late May that the problem was much larger than had been reported to the Commission by NINFRA. The record also shows that by early June, rather than direct the staff to quantify and clarify the problem, the Chair's office was encouraging another group of retailers' that opposed the extension to provide evidence, apparently to support the argument that a balance of potential harm counseled against any action. However, no effort was made to ascertain the scope of the relative harm to be suffered by each group, the circumstances that might distinguish among the groups, or the extent to which even the oppositional group was unaware of their own exposure to noncompliant cribs, as some of their letters suggested. When a single Democratic Commissioner agreed to permit a public briefing on the subject, the omissions and lack of data and analysis so skewed the package against the granting an extension, that the outcome was a foregone conclusion. The Chair, with the support of the Democratic majority of Commissioners, then portrayed the matter as an evenly balanced economic dispute among retailers, introduced speculative accusations of culpability against the retailers seeking an extension, and then voted against providing relief to the only group that quantified its harm.

I am truly at a loss to understand the motivation behind these actions. At a time when small businesses are struggling to survive, this Commission has refused to throw even a short lifeline to retailers that will now suffer at least tens of millions of dollars of losses. Perhaps more troubling, no effort was made to obtain sufficient information to better understand the scope of the problem. It is as if the majority of this Commission simply does not care about the impact of regulation on businesses or the economy. While I was once hopeful that we could agree upon reasonable regulations to tackle the unforeseen consequences of the mandates imposed on the Commission by Congress, I now question whether this Commission will ever awaken to the fact that it is complicit in destroying jobs and strangling the economy.