



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

STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE THE NOTICE OF REQUIREMENTS FOR THE TOY STANDARD, ASTM F-963

July 20, 2011

I voted today to issue notice of requirements (NOR) for testing toys to the current standards of the American Society for Testing and Materials (ASTM standard F 963), which Congress directed in the CPSIA to be a mandatory standard. My vote is not without reservation.

I joined in the majority's vote only because of a negotiated agreement that we would stay enforcement of the testing mandate through December 31, 2011. Had we not reached this compromise, the testing requirement would have landed in the market's lap in mid-October, just as stores are making their final preparations for the holiday season and small toy manufacturers are at the peak of filling orders. While I am relieved that companies will now have some time to find their way through the maze we have created, I have major concerns about why we are rushing to impose testing requirements to a standard we know is about to change.

The ASTM F 963 has become a mandatory safety standard by operation of law. According to the CPSIA, as ASTM updates the standard, those changes become mandatory in 180 days unless the CPSC, within 90 days, determines that they should not. Also under the CPSIA, third-party testing requirements to children's product safety standards become mandatory 90 days after we issue notice of requirements. We are able to issue this NOR without following the Administrative Procedures Act (APA), with its notice and comment requirement, because the CPSIA allows avoiding the APA until August 14, 2011. After that, we must ask for and consider public input. Therefore, by putting out the NOR today, (1) we did not need to ask for and consider public comment, but (2) we did need to stay enforcement to prevent an unnecessary economic train wreck for the toy industry immediately prior to the holidays.

To be clear, I certainly support the goal of making sure toys are as safe as they can be and I have no problem with the principle of giving industry a clear standard with a deadline to further that goal. The problem I have is that we today required industry to test to one standard, knowing the standard is about to be revised. When the stay of enforcement is lifted on January 1, 2012, most likely we will be requiring testing to an outdated standard. This puts manufacturers and retailers potentially in the situation of having to do redundant or perhaps irrelevant testing – testing mandated by the CPSC to the old standard and testing mandated by the marketplace to the new standard. Because we are taking the position that these testing requirements are rules and can only be changed (after August, 2011) by notice and comment rulemaking, there is virtually no way to get the new notice of requirements in place and labs accredited before the standard becomes effective. This puts toy manufacturers in an untenable position. Our response is that we will address these problems as they come up but, of course, in the real world, this is no response at all to the potential for confusion we are creating.

While the statute itself creates this timing problem for future updates of the toy standard (and therefore should be amended to address this issue), the choice to create the initial confusion was ours. ASTM has told us they are almost done with a comprehensive revision of their standard. This revision is expected out before year's end. Our notice of requirements could have been timed to correspond to this update. Had we done this, we would be putting out one testing requirement in early January, rather than putting out a soon-to-be-obsolete requirement now, staying its enforcement until January, and initiating rulemaking on a new NOR which will be next-to-impossible to finish before the requirements of the revised F 963 go into effect.

However, if we waited, as sound regulatory policy would direct, we would have had to seek comments from the public. Apparently this public input process is too much of a burden for the agency, so if we have the opportunity to skirt the requirement we are more than happy to do that. Like a teenager with dad's car keys, we want to squeeze in as much joy-riding as we can before the curfew hits. Our hasty decision does not achieve a net safety benefit, but it unfortunately does make things much more difficult than they need to be for the companies that are trying to understand and follow the law.

In a very slight nod to good administrative practice, the majority did accept my request that we at least consider comments to the NOR. I recognize that this is totally outside the administrative process but the expectation is that if substantive comments indicate that a mid-course correction to the convoluted path we have built is called for, the staff will present these corrections for consideration. I am also pleased that the staff is working on an outreach plan to try to minimize the inevitable confusion we are creating and I look forward to hearing from the public on this issue as well.

With its vote today, the CPSC has once again opted for rash action over rational action, to the quick and easy over the thoughtful and transparent. We know how to do better rulemaking; unfortunately, the majority today decided to push the 'quick' button instead of the 'pause and think' button.