U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE COMMISSION DECISION REGARDING THE ISSUANCE OF NOTICES OF ACCREDITATION REQUIREMENTS FOR THIRD PARTY TESTING OF YOUTH ALL-TERRAIN VEHICLES, CHILDREN'S WEARING APPAREL, AND YOUTH MATTRESS PRODUCTS

This week I voted to approve laboratory accreditation requirements for testing compliance with four children's product safety rules applicable to all-terrain vehicles, clothing textiles, mattresses, mattress pads, and mattress sets designed or intended primarily for children twelve years of age or younger.[1] The Commission has been consistent in issuing these notices of requirements, yet some continue to debate whether rules of general applicability, particularly the flammability regulations, constitute "children's product safety rules" and therefore require third party testing. As I have stated previously, I do not view this as an open question.

The phrase "children's product safety rule" is clearly defined by Congress and has been consistently interpreted by the Commission to include rules of general applicability as well as those rules that specifically address hazards unique to children. Substituting the actual definition of "children's product safety rule" into the language of section 14(a)(2) of the Consumer Product Safety Act (CPSA) best demonstrates Congress' unambiguous direction to the Commission. When read with the definition of "children's product safety rule" inserted, section 14(a)(2) reads:

> [B]efore importing for consumption or warehousing or distributing in commerce any children's product that is subject to '*a consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance*,' every manufacturer of such children's product . . . shall submit sufficient samples of the children's product . . . to a third party conformity assessment body . . . to be tested."

By providing this explicit and expansive definition of "children's product safety rule" and referencing that definition in section 14(a)(2) of the CPSA, Congress spoke in plain and unambiguous language on whether third party testing is required for children's products covered by a consumer product safety standard.

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[1] The Flammable Fabrics Act (FFA) empowers the Commission to create flammability standards or other requirements where they "may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury." The three regulations pertaining to clothing textiles and mattresses are 16 CFR §1610, *Standard for the Flammability of Clothing Textiles;* 16 CFR §1632, *Standard for the Flammability of Mattresses and Mattress Pads;* 16 CFR §1633, *Standard for the Flammability of Mattress Sets.* The regulation pertaining to all-terrain vehicles is 16 CFR §1420, *Requirements for All-terrain Vehicles*.

Despite the plain and unambiguous language of section 14(a)(2), it has been argued that some of the flammability standards (specifically those applicable to clothing textiles, mattresses, carpets, rugs and vinyl plastic film products) can never be "children's product safety rules" because they do not address specific harms or risk unique to children. This position, however, is wholly inconsistent with the Commission's unanimous decisions to issue notices of requirements for third party testing of all-terrain vehicles, bicycles, and bicycle helmets.[2] These three regulations are clearly rules of general applicability,[3] yet the Commission has voted to approve issuing these notices of requirements without as much as a single dissent.

I find it impossible to reconcile the position that certain rules of general applicability constitute children's product safety rules while other rules of general applicability do not. Indeed, to date, no adequate rationale has been offered that could reconcile the support of issuing notices of requirements for general standards pertaining to all-terrain vehicles, bicycles, and bicycle helmets with the recurring opposition to issuing notices of requirements for the general standards pertaining to flammability.

It has also been argued that the "rule of construction" found in Section 14(h) of the CPSA recognizes that Congress intended that some children's products would not be subject to third party testing. Reading section 14 of the CPSA as a whole, however, makes it clear that this section recognizes no such congressional intent. Rather, the "rule of construction" simply establishes that all children's products must be in conformity with applicable children's product safety rules regardless of whether the manufacturer is in compliance with the "third party testing and certification *or* general conformity certification requirements" of Sections 14(a)(1) and (a)(2).[4]

As I read the statute, which was intended to be implemented over time, the reference to both forms of certification (3PT or GCC) in section 14(h) simply recognizes that one or the other might apply depending on whether the statute has been fully implemented. More specifically, I understand section 14(a)(1) of the CPSA to require GCCs for all products, *including children's products*, until such time as the Commission publishes notices of requirements for accreditation of third party labs to test a product for conformity with applicable rules, regulations, standards, or bans in accordance with section 14(a)(2). In fact, the Commission unanimously adopted this position but stayed the GCC requirement for children's products in the December 16, 2009 stay vote. As a part of that vote, the Commission decided that "a general certificate of conformity (GCC) is not required for [the stayed] categories of children's products pending the requirement to begin third party testing and certification."[5] Thus, consistent with the Commission's unanimous past interpretation, section 14(h) simply recognizes that the third party testing regime was meant to be implemented over time and

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[2] Available at http://www.cpsc.gov/library/foia/ballot/ballot09/accreditation.pdf

[3] *See* 16 CFR §1420.2(a) (stating that the standard applies to "any motorized, off-highway vehicle designed to travel on 3 or 4 wheels, having a seat designed to be straddled by the operator and handlebars for steering control."). *See also* 16 CFR §1203.4(b) (stating that the standard applies to "any headgear that either is marketed as, or implied through marketing or promotion to be, a device intended to provide protection from head injuries while riding a bicycle."). *See also* 16 CFR §1512(a)(1) (stating that the regulation applies to "two or three wheeled vehicle[s] having a rear drive wheel that is solely human powered.").

[4] CPSA §14(h) (emphasis added).

[5] *See* http://www.cpsc.gov/cpscpub/prerel/prhtml10/10083.html.

that during this implementation period, manufacturers were required to comply with applicable children's product safety rules regardless of whether they were subject to the GCC or 3PT requirements of section 14(a) of the CPSA.

Congress created the mandate for third party testing at a time when consumers had experienced a crisis in confidence of the safety of children's products, and the need for further protections for our nation's children was abundantly clear. This week's votes provide the public with reassurance that a third party, other than the manufacturer, will test and verify that children's all-terrain vehicles, wearing apparel and youth mattress products comply with the rules and regulations applicable to them. I believe that these votes bring us one step closer to fulfilling our congressional mandate and giving consumers increased confidence in the safety of children's products that are required to meet these federal standards.