UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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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, its 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.