U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

MINUTES OF COMMISSION MEETING
January 14, 1998
4330 East West Highway
Bethesda, Maryland

The January 14, 1998, meeting of the U. S. Consumer Product Safety Commission was convened in open session by Chairman Ann Brown. Commissioner Mary Sheila Gall and Commissioner Thomas H. Moore were present.

Agenda Item: Bunk Beds

The Commission considered options for addressing the hazard of children's entrapment in bunk beds. The Commission was briefed by the staff at the Commission meeting of January 8, 1998, on the options, including the staff's recommendation that the Commission issue an advance notice of proposed rulemaking (ANPR) to begin a proceeding that could result in a mandatory rule. (Ref: staff briefing package dated November 26, 1997.) The Commission also received supplemental information from the staff by memoranda dated January 13, 1998, in response to questions raised by Commissioners following the briefing.

Chairman Brown moved that the Commission initiate a rulemaking proceeding by publishing an ANPR in the Federal Register to solicit additional information and public comment on whether to promulgate a mandatory entrapment standard for bunk beds; and that the ANPR presented in the November 26, 1997, briefing package be changed by deleting the sentence beginning at the bottom of page 9 of the draft notice, concerning the likely market share of an unknown number of unidentified manufacturers or importers of bunk beds, to avoid any inconsistency with the rest of the notice.

After discussion, the Commission decided to consider Chairman Brown's motion in two parts and to vote first on whether to consider the ANPR as drafted or with change. By unanimous vote (3-0), the Commission voted to consider the ANPR as drafted.

Voting then on motion of Chairman Brown, the Commission voted 2-1 to initiate a rulemaking proceeding to solicit additional information and public comment on whether to promulgate a mandatory entrapment standard for bunk beds. This would be accomplished by publishing an ANPR in the Federal Register. Chairman Brown and Commissioner Moore voted in favor; Commissioner Gall voted against.

Chairman Brown, Commissioner Moore, and Commissioner Gall filed separate statements concerning the bunk bed matter, copies of which are attached.

There being no further business on the agenda, Chairman Brown adjourned the meeting.

For the Commission:

Sadye E. Dunn

Sadye E. Dunn
Secretary

Attachments

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

Statement of the Honorable Ann Brown
Chairman, U.S. Consumer Product Safety Commission
January 14, 1998

Bunk Bed Decision Meeting

The question facing us today is whether the Commission should publish an Advance Notice of Proposed Rulemaking (ANPR) on bunk beds. Its purpose would be to solicit additional information and public comment on whether to promulgate a mandatory entrapment standard for bunk beds. The ANPR would also solicit information about additional entrapment provisions that may be needed beyond those currently in the voluntary ASTM standard, or those recently identified by the staff.

I am voting to issue the ANPR because I believe, based on the information assembled to date, that it is essential to obtain additional information on whether a mandatory rule would likely result in more bunk beds conforming to the entrapment safety standard, a difference that could mean life or death to children.

The staff's work has provided information that supports the issuance of an ANPR.

First, the staff estimates that 10 bunk bed entrapment deaths occur each year, with almost all fatal entrapment incidents occurring in beds not meeting the voluntary standard's entrapment provisions. The recent death of a 3-year-old child from Oklahoma that occurred in the upper bunk of a non-conforming bed is a vivid example of how non-conforming beds can kill. This demonstrates how important it is that bunk beds conform to the current standard.

Second, most bunk bed manufacturers are doing a responsible job and are complying with the voluntary standard. It appears that all AFMA and ASTM members comply with the standard, as do other manufacturers.
But it is clear from the eight bunk bed recalls since 1994 -- involving 41 manufacturers and more than 500,000 bunk beds -- that non-conformance is a continuing problem that can have catastrophic consequences. Each of these non-conforming beds has the potential to kill a child.

As I stated during the bunk bed briefing, I have no intention of establishing a general policy of considering a mandatory standard when there is a voluntary standard that is working well. Here, the primary issue is not a matter of changing the quality or content of the voluntary standard. Instead, it is a matter of increasing conformance to the standard.

The information presented to the Commission to date strongly suggests to me that certain characteristics of the bunk bed industry set it apart from others where there are voluntary standards.

Many manufacturers are small, and some bunk beds are produced for retail sale in homes and garages. These companies, along with larger more reputable retailers, may not know about the existing voluntary standard, or think that because it is voluntary there are no serious consequences if they do not comply with the standard.

Some people hold the view that the problem will go away by itself and no changes are needed.

The staff's work, however, suggests that the Commission's Section 15 activities are not enough. Our bunk bed recalls have treated only the symptoms, not the cause. Unlike other products and industries, the more bunk beds we recall, the more non-conforming bunk beds we find.

The staff's work also suggests that the current level of conformance is not enough. If there is substantial evidence that a rule would make a difference, we should do more -- even if the compliance rate here exceeds the compliance rate of mandatory rules in other industries.

Moreover, the fact that a mandatory rule would not have an immediate impact -- due to the time it would take for non-conforming bunk beds to cycle out -- is no reason for delay. If we do not act now, then when?

Finally, a mandatory standard would in no way impede the development of improvements to the current voluntary bunk bed standard -- which is the case with any consumer product.

The staff's information suggests that a mandatory standard would make a difference because it would:

-- create a sense of urgency for all manufacturers to make bunk beds that conform to the entrapment requirement;

-- give the Commission authority to impose civil penalties on manufacturers who violate the standard, which would deter others from making non-complying beds;

-- make retailers and wholesalers subject to civil penalties for selling non-conforming beds, and

-- allow state and local governments to more aggressively help CPSC discover non-complying beds; and

-- provide U.S. Customs with the legal and regulatory tools to help keep foreign non-conforming beds out of this country.

In the final analysis, I cannot accept the argument that the current rate is good enough to protect our children against bunk bed entrapment deaths. This means that as many as 50,000 beds could be produced each year that have the potential to entrap and kill a young child.

We can do better. And we can start by further investigating the extent to which a mandatory standard would resolve this problem.

Our mission is to protect all consumers -- especially children -- from deaths from consumer products. And this mission makes our work on bunk beds vitally important.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

STATEMENT OF COMMISSIONER THOMAS H. MOORE ON THE OPTIONS PACKAGE FOR BUNK BEDS

JANUARY 14, 1998

THE ISSUE OF BUNK BED FATALITIES DUE TO ENTRAPMENT POSES A DIFFICULT QUESTION FOR THE COMMISSION: WHAT DEGREE OF INDUSTRY COMPLIANCE WITH AN ADMITTEDLY SATISFACTORY VOLUNTARY STANDARD REQUIRES THE COMMISSION TO DEFER TO THAT STANDARD? IT HAS BEEN SUGGESTED BY STAFF THAT NO DEGREE OF COMPLIANCE IS HIGH ENOUGH IF A MANDATORY STANDARD COULD MAKE A POSITIVE DIFFERENCE.

VARIOUS OTHER FACTORS HAVE BEEN RAISED BY STAFF EITHER TO DIFFERENTIATE THE BUNK BED INDUSTRY FROM OTHER INDUSTRIES, OR TO EXPLAIN WHY A MANDATORY STANDARD IS NECESSARY IN THIS PARTICULAR CASE. TOO MUCH RELIANCE ON THOSE LATTER FACTORS WOULD MAKE IT ALMOST IMPOSSIBLE TO EVER DEFER TO A VOLUNTARY STANDARD AS THERE WILL ALWAYS BE ENFORCEMENT ADVANTAGES TO A MANDATORY STANDARD OVER A VOLUNTARY ONE.

THE COMMISSION HAS BEEN PROUD OF ITS COMMITMENT TO DEPEND, WHENEVER POSSIBLE, UPON VOLUNTARY STANDARDS (WHICH HAVE IN MANY CASES, OF COURSE, BEEN SHAPED BY THE EXPERT HANDS OF CPSC STAFF). WHEN WE ARE IN THE RULEMAKING CONTEXT,

HOWEVER, THAT COMMITMENT IS STATUTORY, NOT JUST PHILOSOPHICAL. WE MUST BE EXTREMELY CAREFUL NOT TO IMPOSE GLOSS ON THE STATUTORY LANGUAGE WHICH IS UNSUPPORTED EITHER BY PAST COMMISSION ACTIONS OR A COMMONSENSE READING OF THE STATUTE.

WHILE I HAVE SOME RESERVATIONS ABOUT THE PACKAGE, I AM NEVERTHELESS WILLING TO ISSUE THE ANPR TO SEE WHAT ADDITIONAL INFORMATION CONSUMERS, INDUSTRY OR OTHERS MAY WISH TO SHARE WITH US ABOUT ANY OF THE ISSUES RAISED EITHER IN THE PACKAGE OR THE ORAL BRIEFING.

NO ONE WOULD DENY THAT A CHILD DYING FROM ENTRAPMENT IN A BUNK BED IS A TRAGEDY. WHEN IT IS RESPONSIBLY ASSERTED THAT PREVENTING A CHILD'S DEATH FROM ENTRAPMENT COULD BE FURTHER ADDRESSED, THIS COMMISSION SHOULD CLOSELY INVESTIGATE WHAT STEPS REMAIN TO BE TAKEN, IF ANY, THAT WOULD HELP TO PREVENT THESE DEATHS.

WHETHER, GIVEN THE ACTIONS ALREADY TAKEN BY INDUSTRY TO ELIMINATE THESE ENTRAPMENT HAZARDS, A MANDATORY RULE IS NECESSARY, REMAINS TO BE SEEN. HOWEVER, CONSIDERING THE CONSEQUENCES OF SUCH ENTRAPMENTS, I AM WILLING TO INVESTIGATE WHETHER MORE COULD, AND SHOULD, BE DONE.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

January 14, 1998

STATEMENT OF THE HONORABLE MARY SHEILA GALL ON VOTE NOT TO ISSUE AN ANPR ON BUNK BEDS

Today I voted against issuing an Advance Notice of Proposed Rulemaking (ANPR) for mandatory regulations for bunk beds. I did so because I believe that the record developed by the staff is so unlikely to support a mandatory rule that further action is unwarranted. An ANPR is the beginning of rulemaking. If there is a high probability that the Commission cannot make the findings required for a rule, then the Commission should not proceed with an ANPR.

I believe that the existence of a voluntary standard, coupled with a minimum 90% rate of compliance, along with the ability of the Compliance staff to pursue recalls of non-complying bunk beds, mean that the Commission cannot make the findings to support a mandatory rule. Commission Compliance staff will have to continue their vigilance in pursuing recalls of non-complying bunk beds as they do in pursuing recalls of non-complying cribs. Even though there is a mandatory rule on cribs, we still find products on the market that do not comply. With both of these products, the potential tragic consequence to innocent young children may be death.

Children under 6 should not be placed in upper bunks. Parents and caregivers must exercise their responsibility by not placing infants and young children in upper bunks. In the 54 incident reports on entrapment deaths identified by the staff, all but one of the victims were under four years old. I also found that most of these deaths occurred in homemade beds, institutional beds, altered beds, or those manufactured prior to the current voluntary standard addressing entrapment. Industry has tried to "design out" entrapment hazards, as seen in the current voluntary standards.

The statutory criteria governing when the Commission should publish an ANPR require the Commission to consider the existence of any current standard which may be relevant, together with a summary of the reasons why the Commission believes preliminarily that the standard does not eliminate or adequately reduce the risk of injury. Other parts of the statute instruct the Commission not to promulgate a mandatory standard if there is a voluntary standard, unless the Commission finds: (1) that compliance with the voluntary standard is not likely to result in the elimination or adequate reduction of the risk of injury; or (2) it is unlikely that there will be substantial compliance with the voluntary standard.

In the case of bunk beds there is both a voluntary standard and no question that it is likely to result in the elimination or adequate reduction of the risk of entrapment deaths and injuries. The staff contends, however, that there is not substantial compliance with the voluntary standard. I believe that the following facts establish that there is, in fact, substantial compliance with the voluntary standard: (1) the Commission staff is unable to identify today even one manufacturer, distributor, or retailer known to be out of compliance with the voluntary standard; (2) the past examples of non-compliance that the Commission staff have encountered appear to be manufacturers who are either unaware of the voluntary standard or

unaware of its safety aspects; and (3) the Commission staff has conducted a number of successful recalls of bunk beds and could probably seek civil penalties against repeat violators for failure to report a substantial product hazard under Section 15 of the Consumer Product Safety Act.

I do not accept the argument that a mandatory standard necessarily will lead to better compliance for bunk beds. This Commission has conducted numerous recalls of products subject to our mandatory regulations, including cribs, a product made by an industry with numerous similarities to the bunk bed industry. In light of these facts, I find that a mandatory standard will not make a substantial difference in the rate of compliance.