



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Inez M. Tenenbaum
 Commissioner Thomas H. Moore
 Commissioner Nancy A. Nord
 Commissioner Anne M. Northup
 Commissioner Robert S. Adler

ITEM:

Third Party Testing for Certain Children's Products; Clothing Textiles: Requirements for Accreditation of Third Party Conformity Assessment Bodies
(Briefing package dated July 28, 2010, OS number 4868)

DECISION:

The Commission voted (3-2) to approve the publication of the draft document in the *Federal Register* ("FR"). The notice would establish the accreditation requirements for third party conformity assessment bodies to test youth clothing textiles pursuant to 16 CFR 1610, *Standard for the Flammability of Clothing Textiles*. Chairman Tenenbaum and Commissioners Moore and Adler voted to approve the publication in the *FR*. Commissioners Nord and Northup voted to not approve the publication of the draft document. Chairman Tenenbaum and Commissioners Nord and Northup issued the attached statements with their votes.

For the Commission:

Todd A. Stevenson
Secretary

* Ballot vote due August 9, 2010



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

August 12, 2010

**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.

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

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/cpsc/pub/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.



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

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON TESTING THE FLAMMABILITY
OF CLOTHING TEXTILES, MATTRESSES AND MATTRESS PADS, AND/OR MATTRESS SETS:
REQUIREMENTS FOR ACCREDITATION OF THIRD-PARTY CONFORMITY ASSESSMENT BODIES

August 9, 2010

The Consumer Product Safety Commission today voted to issue notices of accreditation for the flammability of clothing textiles, mattresses and mattress pads, and mattress sets.¹ When the agency first embarked down the path of construing general product safety standards as “children’s product safety rules” with its carpets and rugs decision last month, I predicted that vote would “steer us on a course of excessive regulation.” And now, once again, this agency’s decision is mandating third-party testing that the law does not require, that will not reduce risk, and that will ultimately cost jobs in affected industries.

One cannot pick up a newspaper today without reading about the stalled economic recovery. The unemployment rate hovers near 10 percent, and the number is actually much higher than that if one includes those who are underemployed or who have given up looking for work for the time being. Yet this agency’s rulemaking continues without regard to the economic environment, erecting regulatory barriers to American competitiveness and productivity that produce no demonstrable increase in consumer product safety. In this time of economic crisis, I believe rules that do not reduce risk are a luxury that we cannot afford.

The clothing textiles and mattress rules at issue here are not children’s product safety rules for the same reasons that the carpets and rugs and vinyl plastic film rules are not children’s product rules. I will summarize here the reasons that I explained more fully in my prior statement on carpets and vinyl film. First, treating all “consumer product safety rules” as though they are “children’s product safety rules” disregards the statute’s creation of a separate new term. Next, treating longstanding, general product safety rules as children’s rules ignores the plain text of the rule of construction provision in the CPSIA that refers to children’s products that comply with a “general conformity certification.”² This language specifically anticipates that some children’s products will comply with broad consumer product safety rules via a general conformity certificate (GCC). Since GCC’s do not require third-party testing, the statute apparently did not intend for children’s products to have to be third-party tested to all applicable standards. In addition, given the numerous general consumer product safety standards the agency oversees, the statute would have provided more than 10 months to issue notices of accreditation for “other children’s product safety rules” if that term meant to encompass every general consumer product safety rule that applies to some children’s products.³ Nor are the clothing textile and mattress rules similar to the other rules specifically listed in the timeline for accreditation, as ordinary rules of statutory construction demand.

¹ 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 (open flame) of mattress sets.

² CPSA § 14(h); CPSIA § 102(b).

³ Today’s decision ignores the plain language of the statutory deadline, which states, “The Commission shall publish notice of the requirements for accreditation ... *in no case* later than 10 months after the date of enactment...” (emphasis added). CPSIA §

Even if one accepts the definition that a children's product safety rule includes every "consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission," I do not believe that clothing textile and mattress regulations promulgated under the Flammable Fabrics Act are in fact "similar" rules. For starters, the clothing textile rule involves a long-standing and successful guarantee program that is unlike any of the rules promulgated under the CPSA. That regime effectively splits responsibility for determining the compliance of certain fabrics in a way that is not readily amenable to third-party testing.

In particular, the agency recently revised the mattress rule in a painstaking process that carefully weighed the benefits and costs entailed in that regulation. As part of that process, the agency determined that the rule would have an impact of greater than \$100 million on the economy, making it the rule with the single greatest economic impact in the history of the agency up to that time. Requiring third-party testing based on an overly literal interpretation of a part of the CPSIA—for which there is absolutely no evidence to suggest it applies to the mattress rule—upsets the careful balance that the mattress rule's design struck. The oddity of overlaying third-party testing and certification on this rule can be seen from the fact that the rule will now require the burning of a queen-sized prototype mattress in an accredited third-party lab to prove the inflammability of a crib mattress several times smaller.⁴ Hence, this rule adopted in the name of vindicating a "children's" product safety rule neither requires testing child-sized mattresses, nor even testing the final children's product.

To accept that the CPSIA has this effect, one must believe that Congress not only disregarded all consideration of risk in areas like lead content, where it expressed clear disagreement with the agency's past decision-making, but that it also overturned all previous risk assessments conducted by the agency's nonpartisan professional staff (and impliedly repealed corresponding regulations in part) in areas where Congress was completely silent. On this theory, even a rule like the mattress rule that was crafted very carefully, over an extended period of time, and adopted by the Commission on a bi-partisan basis becomes insufficient. According to this view, every rule in the agency's history—including these general flammability rules whose requirements have always applied the same to adult and child products alike—is now superseded. Since there exists an alternative explanation that makes so much more sense, I am simply not prepared to accept an interpretation of the CPSIA that generates such negative consequences.

I do not believe we have to rely on the discretionary implementing authority given the agency in § 3 of the CPSIA to avoid today's result.⁵ However, assuming the statute would demand a different result otherwise, both of these rules present strong cases for invoking that discretion. For clothing textiles, this rule overturns a long-standing fabric guarantee program. As with carpets, there is no reason to now change a system that has worked. For mattresses, the carefully conceived new regulatory framework should not upset an already well-thought-out scheme. Third-party testing will not improve children's safety, and it makes no sense to treat youth mattresses differently from adult ones.

102(a)(3)(B)(vi). Since the other deadlines in the timeline all say "Not later than . . .," the agency could construe the "in no case" admonition to be an absolute bar that excludes, for example, the case of issuing notices of accreditation for general consumer product safety rules like clothing textiles and mattresses that are never mentioned in the text or legislative history of the statute.

⁴ Note that twin-sized mattresses would not require third-party testing, because they are not primarily designed or intended for children 12 years of age or younger. As clarified in the definition of a children's product, a twin-sized mattress is an example of a product typically purchased for a child under 12 but that would continue to be used all through the teenage years and even beyond.

⁵ "The Commission may issue regulations, as necessary, to implement this Act and the amendments made by this Act." § 3 CPSIA.

Of course the CPSC can and should issue rules requiring third-party testing when such rules provide the best means to reduce risk to children. But the safety considerations that pertain to clothing textiles and mattresses are no greater for children than they are for adults. In fact, the risks to children quite possibly could be less. Neither the staff of the agency nor anyone else has provided data to the Commission demonstrating, for example, that more mattress fires occur with crib mattresses or youth-sized mattresses than occur with adult mattresses. For instance, none of the crib deaths that the agency's safe sleep team has identified in recent years resulted from a mattress fire. Given that adults are far more likely to smoke in bed than children (let alone babies), this might even be a case where the hazard to *adults* is uniquely greater.

And so, imposing more regulation without a corresponding improvement in product safety, the Commission continues down a path of overregulation that our economy cannot sustain. Public comments are welcome on this decision for the next 30 days. I continue to hope that affected parties will convince my colleagues to change course before we add further to what are now six notices of accreditation that we never should have issued.



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STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE THIRD
PARTY TESTING FOR CLOTHING TEXTILES REQUIREMENTS FOR ACCREDITATION
OF THIRD PARTY CONFORMITY ASSESSMENT BODIES

August 9, 2010

I voted against issuing laboratory accreditation requirements for compliance with flammability rules relating to clothing textiles because this regulation is not a children's product safety rule. Instead it is a standard of general applicability. As such, the third party testing requirements of the CPSIA do not apply.

The general wearing apparel standard provides minimum protection to prohibit the use in all wearing apparel of the most dangerously flammable textiles. Unlike other standards, such as the children's sleepwear standard, aimed specifically at children, this standard provides the same level of protection for everyone. It does not differentiate children's wearing apparel from that of adults.

My rationale against issuing these requirements for accreditation is consistent with the concerns I raised in my previous statements explaining my votes opposing the vinyl plastic film and the carpet and rug laboratory accreditation requirements. To summarize, I believe third party testing is meant to apply to regulations that address products that present special risks to children and have been enacted to protect children from these specific risks.

An issue that I do not believe the Commission has adequately addressed is the impact of third party testing on the guarantee programs established under the Flammable Fabrics Act. These programs have been working well and do not need to be displaced by a third party testing program that does not provide additional protection but does impose additional requirements. There is no indication that Congress meant to supplant programs that are providing guarantees of safety. Consequently, I believe that my colleagues are unnecessarily over-reading the statute and requiring a result that safety does not require.

As a practical matter, staff notes in the briefing package that under the requirements of the act, so many fabrics are exempt from testing that most children's wearing apparel will not require third party testing. This appears to me to be another example of regulating just to regulate.