



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: Revisions to Terms of Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to Commission's Acceptance of Accreditation
(Briefing package dated April 6, 2011)

DECISION:

The Commission voted (4-0-1) to approve publication of the draft notice in the *Federal Register* that will revise the terms of acceptance of children's product certifications based on third party conformity assessment body testing of clothing textiles pursuant to 16 C.F.R. part 1610, "Standard for the Flammability of Clothing Textiles," before the Commission's acceptance of accreditation. Chairman Tenenbaum and Commissioners Moore, Adler and Northup voted to approve the publication. Commissioner Nord abstained from voting. Commissioners Nord and Northup issued the attached statements regarding the matter.

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson".

Todd A. Stevenson
Secretary

* Ballot vote due April 15, 2011

Attachment: Statement of Commissioner Nord
 Statement of Commissioner Northup



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STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE REVISIONS
TO TERMS OF ACCEPTANCE OF CHILDREN'S PRODUCT CERTIFICATIONS BASED ON
THIRD PARTY CONFORMITY ASSESSMENT BODY TESTING OF CLOTHING TEXTILES

April 15, 2011

Last August I voted against issuing laboratory accreditation requirements relating to the Flammable Fabrics Act's (FFA) general wearing apparel standard because, in my view, this regulation is not a children's product safety rule. As such, the third party testing requirements of CPSIA do not apply. Unlike the children's sleepwear standard, aimed specifically at children and designed to protect them from a defined and documented risk, this standard provides the same level of protection to everyone and does not differentiate children's wearing apparel from that of adults. The majority's decision to require third party testing for fabrics that may (or may not) find their way into children's garments over-reads the CPSIA, and it is not required either by the statute or to further safety. While I am pleased to see some limited relief being recommended, it would be inappropriate for me to vote for staff-recommended revisions to the terms of requirements for third party testing certifications that I do not agree apply.

The majority's misinterpretation of the statute has resulted in the potential for wasteful and redundant testing. To alleviate some of the unproductive and burdensome results, the apparel industry has asked that we grandfather testing that was done up to a year prior to the imposition of this testing requirement. The staff agrees with this request. I believe that this is a useful correction.

The apparel industry also raised capacity issues stating that too few of the accredited testing facilities were located in the countries where clothing is designed and sourced and where fabric is procured. The statute allows us to extend the date for testing by 60 days when we find an availability issue. In this case that would have extended the required testing date into early 2011. The staff dismisses this portion of the industry request merely by stating that because there are at least 67 laboratories worldwide accredited to do this testing, there is not an availability issue and, besides, the issue is moot since the testing extension has passed. I am troubled that no real analysis was done of the lab availability issue. In addition, by not addressing the request until after the time deadline passed, we mooted the issue. Agency inaction is not a proper way to respond to a request for relief.

A related concern to me is the impact of the testing and certification requirements under Section 14 of CPSA on the guarantee programs established under the FFA. As the staff analysis indicates, these guarantee programs are based on reasonable and representative tests and have been working well for many years. Imposing additional requirements will not provide additional protection. I do not believe Congress meant to supplant programs that are providing guarantees of safety. When the Section 14 final rule comes before the Commission later this year, I will urge my colleagues to carefully consider its effect on FFA's guarantees.



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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THIRD PARTY TESTING FOR CERTAIN CHILDREN'S PRODUCTS; CLOTHING TEXTILES; REVISIONS TO TERMS OF ACCEPTANCE OF CHILDREN'S PRODUCT CERTIFICATIONS BASED ON THIRD PARTY CONFORMITY ASSESSMENT BODY TESTING PRIOR TO COMMISSION'S ACCEPTANCE OF ACCREDITATION

April 15, 2011

I voted with the Commission's majority today to amend the terms under which we will accept certifications for children's products based on third party conformity assessment body (laboratory) testing to the Standard for the Flammability of Clothing Textiles, 16 CFR Part 1610 ("the Standard"). Under these revised terms, the Commission has extended the period during which it will accept "retrospective" testing in support of a certificate of compliance with the Standard. The original rule recognized certificates of compliance with the Standard based on testing performed by an accredited laboratory, prior to the Commission's acceptance of its accreditation, provided, among other conditions, that the testing took place on or after August 18, 2010. The Commission will now recognize certificates of compliance with the Standard based on testing that was performed by an accredited laboratory on or after August 18, 2009.

Increasing by one year the window during which tests previously performed by a newly accredited lab can be used to support a certification of compliance with the Standard will reduce the number of products required to be retested. This will ameliorate to a small extent the burden imposed by the Commission when it incorrectly characterized the Standard as a children's product safety rule. But my support for doing so should not be misinterpreted as an endorsement of the Majority's underlying decision to characterize the Standard as a children's product safety rule.

As discussed in my August 9, 2010, statement¹ explaining my vote opposing the issuance of notices of accreditation for the flammability of clothing textiles, there are both legal and policy reasons for not characterizing the rules governing the flammability of clothing textiles as children's products rules subject to laboratory accreditation under the CPSIA.

As a legal matter, 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. In addition, 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). Because GCC's do not require third-party testing, the statute could not have intended children's products to be third-party tested to all applicable standards, including consumer product safety rules such as that governing the flammability of clothing textiles. Moreover, the CPSIA provided

¹ <http://www.cpsc.gov/pr/northup08092010.pdf>

² CPSA § 14(h); CPSIA § 102(b).

only 10 months to issue notices of accreditation for all “other children’s product safety rules.”³ The Commission should not construe the statute to intend the absurd result of mandating the unattainable goal of accrediting labs to all of the numerous general consumer product safety standards the agency oversees, within such a short time period. Finally, the clothing textile rules are not similar to the other rules specifically listed in the timeline for accreditation.⁴ Well accepted rules of statutory construction therefore dictate that the authority to issue requirements for accreditation to assess conformity to “other children’s product safety rules” was not intended to include clothing textile flammability rules or any other rules not intended to ensure the safety of a product intended for use *solely* by children.

There is thus compelling textual evidence that demonstrates Congress’ intent not to require the third party testing of general consumer products – such as clothing textiles – simply because they may also be encountered by children. But there are also important policy reasons not to do so. Clothing textiles pose no greater risk to children than to adults, and the agency’s longstanding approach to enforcing its clothing textile flammability rules has been effective. There is therefore no safety justification for imposing on manufacturer’s the tremendous burden of third-party testing to the Standard. With the economy still struggling and real unemployment remaining over 15%,⁵ the Commission should refrain from unnecessarily increasing the costs of job-creating businesses.

The Commission’s failure to recognize the legal and policy reasons supporting the exercise of its discretion to distinguish between “children’s product safety rules” and “consumer product safety rules” is likely among the reasons there is today broad agreement in both houses of Congress that the CPSIA needs to be amended in areas where the law’s mandates are unrelated to risk. Such amendments would certainly reduce the cost and complexity of compliance, while allowing the Commission to focus its enforcement resources on genuine hazards. Unfortunately, the treatment of all “consumer product safety rules” as “children’s product safety rules” is one area where the Commission could have taken advantage of the law’s flexibility to avoid such unnecessary, costly testing requirements on manufacturers, but chose not to do so.

³ CPSIA § 102(a)(3)(B)(vi).

⁴ CPSIA § 102(a)(3)(B)(i)-(vi).

⁵ <http://www.bls.gov/news.release/empst.t15.htm>