



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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CHAIRMAN INEZ M. TENENBAUM

JUNE 30, 2011

**SUPPLEMENTAL 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**

*"I do not want to see more time in phase in for when these cribs have to reach the market. In fact, I wish it could be tomorrow. And when that's the only crib you could buy if you were a parent going into the store today. I wish it were sooner than six months."*¹ (CPSC Commissioner Anne Northup, December 8, 2010)

Two weeks ago, the Commission reaffirmed its commitment that only the new safer generation of cribs would be permitted to be sold in the United States after June 28, 2011. After 30 years of having outdated standards, CPSC delivered on my promise to significantly strengthen its old, woefully inadequate crib safety standards, and voted unanimously to enact the toughest crib safety standards in the world. Now parents and grandparents can shop for a crib with confidence, which is extremely important because a safe crib is the safest place for a baby to sleep. From the beginning of this initiative, my goal has been to prevent deaths and injuries to babies in cribs. This day has come and now only stronger, safer cribs are available for consumers to purchase.

Unfortunately, rather than marking such a great day with celebration, one of my colleagues released a public statement that needlessly injected callous political rhetoric into what truly represents a momentous victory for consumers, babies, safety advocates, and the crib industry.² I am happy this milestone was not overshadowed by this and the spotlight shined in the right direction: on CPSC's efforts to put safety first and to provide some measure of comfort to the parents who have suffered unspeakable tragedy and dedicated their lives to making these strong crib safety standards a reality. I firmly believe that June 28, 2011 was a day that commemorated all CPSC stakeholders coming together—government, manufacturers, retailers, and safety advocates joining forces to do something right in memory of those babies taken too soon, and to prevent more babies and families from suffering similar tragedies.

I am overjoyed that the day has arrived when families can shop for a crib with confidence. Nevertheless, I feel compelled to supplement my prior statement³ to address some of the misleading assertions recently made by Commissioner Northup. Although I reluctantly tolerated past mischaracterizations of me, my intentions, and the work of this agency's dedicated professional staff, I feel that these false and damaging statements can no longer go unaddressed. This statement

¹ <http://www.cpsc.gov/vnr/asfroot/cm12082010.aspx> at 1:16:43.

² See <http://www.cpsc.gov/pr/northup06272011.pdf> (June 27, 2011).

³ See <http://www.cpsc.gov/pr/tenenbaum06162011.pdf> (June 16, 2011).

briefly addresses some of the claims recently leveled concerning the Commission's vote on the crib retailer compliance date.

A Shameful Display Not in Furtherance of Safety

Before addressing some of the more egregious inaccuracies advanced by one of my colleagues who opposed the safer crib standard from going into effect this month, it is important to set the record straight on the overarching theme embodied in Commissioner Northup's statement: namely that the Commission ignored the issue and failed to dedicate the resources necessary to gather the data she demanded. First, although our professional staff had already engaged in the normal notice and comment rulemaking process, I directed the staff to continue their outreach and monitoring of the market for unforeseen circumstances following the Commission's unanimous approval of the new mandatory standards. Neither staff nor the Commission ignored any of the information learned from retailers or other stakeholders during this time period and instead considered all such data in moving forward with the implementation of the original compliance date for manufacturers and retailers. Second, the amount of staff work required to address the Commissioner's inquiry in the manner she was advocating was not insubstantial. In fact, it would have redirected the efforts of a number of professional career staff members away from vital safety projects for many months. While making a series of baseless accusations, however, Commissioner Northup fails to mention that if staff were to have stopped what they were doing in order to satisfy her demands, there would have been a high price to pay in terms of the agency's ability to complete ongoing safety related projects—all on behalf of a small group of retailers who did not utilize their opportunity to participate in the rulemaking process and whose request was actively opposed by another group of similarly situated retailers. She is absolutely correct that staff was not going to do that; it would have been completely irresponsible if they had.

The Claim that 100,000 Cribs May Have Been Destroyed is Unfounded

The claim has been made that as many as 100,000 cribs may have faced destruction on June 28, 2011. This assertion is based on data received by the Commission regarding the status of the national crib inventories of five major retailers a month prior to the compliance deadline. An inquiry into the retail industry by CPSC staff showed that, a month prior to the compliance deadline, five of the largest U.S. retailers selling cribs had roughly 100,000 noncompliant cribs in their nationwide inventories. Contrary to Commissioner Northup's claim⁴ that only four of these retailers submitted data in response to our inquiry a fifth retailer, while not providing numbers, did report that they had taken a proactive approach to clear out old inventory and that most of their inventory was compliant.

While the claim that all 100,000 of these cribs potentially faced destruction defies common sense given the time remaining for retailers to sell them from the date of staff's inquiry, the claim also ignores many other important considerations. According to CPSC staff estimates, about 2.4 million new cribs are sold every year.⁵ This estimate translates into about 200,000 new cribs that are purchased every month in the United States. Given that the CPSC staff inquiry into the retail industry involved five very large retailers, it is not surprising that 100,000 cribs remained in the national inventories of these major retailers a month prior to the compliance deadline. In fact, many

⁴ <http://www.cpsc.gov/pr/northup06272011.pdf> at 4.

⁵ See <http://www.cpsc.gov/library/foia/foia11/brief/104cribs.pdf> at 113.

of these cribs most likely were sold prior to the deadline in the normal course of business. Unlike some of the small independent retailers we also heard from, many larger retailers use a “just in time” inventory system and therefore probably sold many of their noncompliant cribs and received compliant cribs somewhat close in time with the compliance deadline. For any of the remaining noncompliant cribs that were not sold prior to the deadline, many retailers have been able to bring these cribs into compliance using the retrofit kits being provided throughout the retail industry by crib manufacturers. This is a critical point omitted by Commissioner Northup in her calculations.

In addition to these considerations, another good indicator the agency could reference that these 100,000 cribs likely did not face destruction was the fact that after being contacted by staff who inquired how many noncompliant cribs remained in their inventory, not even one of the five retailers requested an extension of the compliance deadline. The lack of even *one* request for an extension from similarly situated retailers or any trade associations representing them is indicative of the fact that there was not a widespread concern for these types of retailers. One major crib retailer publicly stated, “[w]e expect to be fully compliant by the deadline, with a broad offering of cribs for our customers.”⁶ and publicly supported CPSC’s actions on the day that the new safety requirements became effective.⁷

Thus, although Commissioner Northup disagrees with my assertion that this issue really was only about the 17,000 noncompliant crib estimate provided by NINFRA, the record reflects that this was actually the case. This was the only evidence provided by those retailers requesting relief. No other retailers requested relief, even those that Commissioner Northup claims potentially had to destroy as many as 100,000 cribs. As detailed in my prior statement, I could not have supported an extension for the entire retail industry because a small segment of that industry sought relief to continue selling noncompliant cribs, especially when confronted with the fact that a similar group of small independent crib retailers had taken all of the necessary steps to come into compliance and would face economic harm if the Commission would have granted an extension.

Retailers were Adequately Informed and Prepared for the Six Month Compliance Date

The Commission published a proposed rule on the mandatory crib standards on July 23, 2010.⁸ During the 75 day comment period for this rule, the Commission sought input from affected parties, including retailers. The Commission proposed, instead of the 30 day minimum effective date, to set an effective date for this rule that was six months after publication. The Commission specifically requested comments on “whether a 6-month effective date allows sufficient time for firms to come into compliance with the crib standards.”⁹ Despite the Commission’s request, CPSC did not receive any comments seeking a longer effective date from any retailers of any size, or from organizations representing retailers of cribs.¹⁰

In the analysis conducted under the Regulatory Flexibility Act in the proposed rule, the Commission stated that “CPSC staff believes 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

⁶ <http://www.theconsumerchronicle.com/2011/06/17/the-new-crib-rules-what-you-need-to-know/>.

⁷ <http://www.toysrusinc.com/press-room/releases/general/2011/toysrus-inc.-applauds-nations-tough-new-crib-safety-standards/>

⁸ <http://www.cpsc.gov/businfo/frnotices/fr10/cribstd.pdf> at 43308.

⁹ *Id.* at 43321.

¹⁰ <http://www.cpsc.gov/library/foia/foia11/brief/cribext.pdf> at 6.

new products should have sufficient time and notification to make this adjustment with little difficulty.”¹¹ Although Commissioner Northup has accused the agency’s professional staff of “glossing over the issue with a conclusory opinion,”¹² the record reflects that our staff’s conclusion was appropriate. Of all the retailers selling cribs in this country, only a small group that claimed to possess 17,000 noncompliant cribs (nearly six weeks prior to the compliance deadline) asked the agency for relief. Further indication that their request for an additional six months to sell noncompliant cribs should not have been granted is found in the record, which reflects that another group of similarly situated retailers worked extensively with their members and were prepared for the June 28 deadline.¹³

A Fundamental Difference Exists between Places of Public Accommodations/Short-Term Crib Rental Companies/Child Care Facilities and Crib Retailers

Although some have argued that the Commission’s treatment of child care facilities, places of public accommodation, and short-term crib rental companies is inconsistent with the Commission’s decision not to allow retailers more time to sell noncompliant inventory to consumers, this argument ignores a clear distinction between these two groups that was key in the decision to allow these service providers an extended compliance date. On December 28, 2012, cribs currently used in child care facilities, places of public accommodation, and by short-term crib rental companies will no longer be allowed to be used by these service providers and cannot be resold in the secondary market. In direct contrast, the noncompliant cribs that would be purchased by consumers at retail, many of which lack the important structural integrity safeguards contained in the new mandatory rules, would be used in consumers’ homes for many years to come, perhaps even for decades.

Despite such a clear distinction between these two groups, Commissioner Northup claims that “the Commission’s perception of the safety impact of the continued use of cribs that predate the new standard is implicit in its decision to permit child care facilities, family child homes, short-term crib rental companies, and places of public accommodation affecting commerce to continue using such cribs until the end of 2012.”¹⁴ She further asserts that “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.”¹⁵

Although it is nearly universally accepted and well understood that cribs likely remain in homes for years and sometimes even decades, Commissioner Northup’s assertion completely contradicts her previous public statements on this subject. During the Commission’s December 8, 2010, public briefing meeting on the final rule for the new crib standards, Commissioner Northup firmly stated “[m]ost parents that bring home a baby today are not going to replace their crib in six months.

¹¹ <http://www.cpsc.gov/businfo/frnotices/fr10/cribstd.pdf> at 43116.

¹² <http://www.cpsc.gov/pr/northup07142010.pdf> at 2.

¹³ See <http://www.cpsc.gov/library/foia/foia11/brief/cribext.pdf> (Exhibit E). Commissioner Northup has pointed to an email contained in this exhibit to make the specious allegation that my office was focused on establishing the culpability of the retailers seeking an extension and therefore encouraged BFPA to support that position by providing evidence that it had kept its members apprised of the new requirements (<http://www.cpsc.gov/pr/northup06272011.pdf> at 8). Such an allegation is not only completely without merit but also entirely puzzling given that it is the common practice of Commissioners and their staffs to ensure that pertinent new information provided to them is also provided to the other Commissioners. It is not my office’s practice to actively withhold this kind of information from agency staff and other Commissioners until a hearing, where it could be strategically introduced as a surprise tactic.

¹⁴ <http://www.cpsc.gov/pr/northup06272011.pdf> at 3.

¹⁵ *Id.*

That crib is going to be used for the life of that baby.”¹⁶ In the same meeting she also stated “[f]ull size cribs are the things that last the longest, they’re the 10 year, they’re the most likely to have replacement mattresses.”¹⁷ In fact, Commissioner Northup apparently held this view as far back as the July 14, 2010, public decisional meeting on the proposed crib standards, where she unequivocally stated “[a]nd for many people, the crib is just a staggering investment. It’s extremely costly. There are many, many families that would never consider going and buying a new crib.”¹⁸

It appears that from July through December of last year, Commissioner Northup and I were in agreement with the widely accepted view that cribs purchased today would be used in consumers’ homes for a significant number of years to come, likely well beyond December 28, 2012. But, it appears that now, in an attempt to cast the Commission’s recent decision as contradictory to our treatment of service providers, she has disavowed her previous position and claims that “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.”

Certainly, if one accepts the commonly held belief that cribs’ remain in the homes of consumers for many years, then the distinction between the compliance dates for those companies that provide cribs for temporary use and the retailers that sell cribs directly to consumers for permanent use in a home is easy to see. It is unfortunate that Commissioner Northup has chosen to abandon her prior public positions on this well accepted understanding concerning the longevity of cribs in consumers’ homes in order to further her attempts to secure an extension of time for the few retailers that have failed to come into compliance prior to the compliance deadline of the rule.

I would also note that Commissioner Northup is on record as of December 8, 2010, as showing full support of the original compliance date set for retailers. At the public briefing meeting on the final rule for the new crib standards, during a question and answer period between Commission Northup and CPSC staff, she stated:

I do not want to see more time in phase in for when these cribs have to reach the market. In fact, I wish it could be tomorrow. And when that’s the only crib you could buy if you were a parent going into the store today. I wish it were sooner than six months.¹⁹

Furthermore, at the public decisional meeting on the final rule for the new crib standards, Commissioner Northup stated “[w]e want the most pressure for change while we have a reasonable deadline.”²⁰ Based on the information available to us and relying upon the complete silence of the vast majority of crib retailers concerning the original compliance deadline, I believe we realized that goal for American consumers on June 28, 2011.

CPSC’s Rulemaking Significantly Strengthened the 2009 and 2010 ASTM Voluntary Standards

¹⁶ <http://www.cpsc.gov/vnr/asfroot/cm12082010.aspx> at 1:17:44.

¹⁷ <http://www.cpsc.gov/vnr/asfroot/cm12082010.aspx> at 1:11:59.

¹⁸ <http://www.cpsc.gov/vnr/asfroot/cm07142010.aspx> at 15:26.

¹⁹ <http://www.cpsc.gov/vnr/asfroot/cm12082010.aspx> at 1:16:43.

²⁰ <http://www.cpsc.gov/vnr/asfroot/cm12082010.aspx> at 1:21:36.

Although the 2009 ASTM crib standard was a step forward in crib safety because it outlawed the traditional drop-side crib design, this voluntary standard was published in December of 2009, prior to the agency initiating its rulemaking on the new mandatory crib standards. Under the Consumer Product Safety Improvement Act (CPSIA), Congress charged the CPSC with creating standards for durable infant nursery products that are more stringent than voluntary standards “if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products.”²¹

I am proud to say that CPSC fulfilled its responsibility under the CPSIA. The CPSC’s mandatory standards for cribs provide many more significant protections for America’s babies than offered by the 2009 ASTM crib standards. Some of these protections include: (1) making mattress supports stronger and more durable (2) making crib slats stronger and more durable; (3) making crib hardware more durable; and (4) making safety testing more rigorous. Given the large number of cribs previously recalled due to defects associated with these issues, this was a truly significant advancement in crib safety from the 2009 ASTM voluntary standard.

Rather than acknowledge the serious deficiencies in the 2009 ASTM standard when compared to the current mandatory standards, Commissioner Northup stated “[t]he Commission’s decision to set a two year effective date [for public accommodations, short-term crib rental companies, and child care facilities] reflects its view that cribs meeting the 2009 or 2010 ASTM standards do not present a safety risk.”²² Nothing could be further from the truth. CPSC staff and the Commission itself unanimously recognized that the 2009 ASTM standards were inadequate and therefore made significant revisions to the standards during the Commission’s mandatory rulemaking process. While many of the changes recommended by staff and unanimously adopted by the Commission were incorporated into the 2010 ASTM voluntary standard, that standard still lacked the very important requirements contained in the mandatory rules for much more rigorous safety testing of cribs.

Let me make one point perfectly clear: the Commission would never have adopted the new mandatory standards for cribs had it believed that “cribs meeting the 2009 [or] 2010 ASTM standards [did] not present a safety risk” as Commissioner Northup has asserted.²³ In fact, the agency’s charge under the CPSIA was to adopt more stringent standards than the 2009 and 2010 ASTM voluntary standards if the Commission determined “*that more stringent standards would further reduce the risk of injury*” associated with cribs. CPSC staff and the Commission unanimously determined that more stringent safety standards for cribs were necessary and adopted the more stringent standards, thus making it clear that neither the 2009 nor the 2010 ASTM crib standards provided a sufficient level of safety.

Again, the decision to allow companies providing cribs for short-term use additional time to comply with the new mandatory crib standards was not an implicit endorsement of the safety of the cribs currently being used by these service providers or cribs that meet the 2009 or 2010 ASTM voluntary crib standards. Indeed, the only Commission endorsement of safer cribs is the agency’s promulgation of the new mandatory standards unanimously adopted by the Commission last December. The decision to allow service providers additional time does not reflect the

²¹ § 104(b)(1)(B)(ii) of the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016.

²² <http://www.cpsc.gov/pr/northup06272011.pdf> at 3.

²³ *Id.*

Commission's view of the safety of any cribs predating the mandatory standards, but rather the reality that the cribs that are currently used by these companies will no longer be used by anyone after December 28, 2012, whereas cribs sold directly to consumers for permanent use in a home will be used for many years to come, perhaps even for decades.

BFPA Clearly Opposed an Extension of the Original Compliance Deadline for Retailers

Commissioner Northup also incorrectly claims that some of the correspondence from BFPA members indicates that BFPA and their membership were confused about the status of their cribs and uncertain in their opposition to an extension of the compliance deadline for retailers.²⁴ She also states that their opposition is "uncertain" in light of their membership in an umbrella organization, All Baby and Child (ABC), which supported the extension.²⁵ However, based on the letters in the record and a letter received by my office from BFPA's Executive Director, it was clear that the only way BFPA would change its position was if CPSC stated that it would not allow retrofit kits to bring cribs into compliance. In an email submitted to my office through the general email contact form on the CPSC website, BFPA's Executive Director stated:

Our biggest concern today is that stores have prepared with "retro fit kits" that the manufacturers have supplied and tested to bring product to the compliancy standards of 16 CFR 1219. I ask that you please send out a ruling on this immediately regarding clarification as to whether the CPSC has deemed these kits allowable. *If the kits are allowed, then there is no reason to extend the sell through period being petitioned, as all retailers should have planned accordingly understanding the severity of the pending regulations.*²⁶

A few days later, the Commission cleared and published guidance clearly stating that crib models tested with retrofit kits could be sold after June 28, 2011 so long as they were put through the complete test regimen and passed all required tests.²⁷ Based on this, it is clear BFPA was not confused whatsoever in their stance on this issue. Once CPSC's guidance concerning retrofit kits was released, BFPA's position was clear—they adamantly opposed any extension of the original compliance deadline for retailers.

In addition, BFPA's Executive Director stated in the same email "[a]lthough Baby Furniture Plus Association holds a seat on the All Baby & Child Board who is petitioning the extension, we as a group are not in favor of this."²⁸ Also, another individual BFPA member acknowledged that ABC had contacted CPSC requesting an extension of the deadline and in an email to the agency and all of BFPA's and ABC's membership, the BFPA member strongly voiced her objection to any extension based on the fact that such an extension would "put all of us who are compliant out of business."²⁹ Thus, despite any assertions to the contrary, BFPA and its members were not confused and, as a group, recognized ABC's request for an extension of the original compliance deadline for retailers and openly opposed any such extension.

²⁴ <http://www.cpsc.gov/pr/northup06272011.pdf> at 6.

²⁵ *Id.*

²⁶ (emphasis added)

²⁷ <http://www.cpsc.gov/onsafety/2011/06/the-new-crib-standard-questions-and-answers/>.

²⁸ (emphasis added)

²⁹ <http://www.cpsc.gov/library/foia/foia11/brief/cribext.pdf> at 71.

Conclusion

My colleague has set forth a scenario that never occurred. This issue has been portrayed as an action by the Commission to recklessly move forward with a mandate that cribs sold in this country meet the strongest standards in the world. The Commission's actions are characterized as those of unthinking regulators pressing ahead, determined to drive forward an agenda without regard to any resulting impact on business—particularly small ones. This simply is not the case.

CPSC's mandate for cribs and other durable infant products is to "provide the highest level of safety for such products that is feasible," as Congress legislated through the CPSIA. I take this mandate seriously. The Commission could have, as Commissioner Northup sought, paralyzed Commission action by delaying the original compliance date and ordering months of unnecessary staff work. Indeed, the Commission also could have capitulated to her requests and granted an extension of time for retailers to sell noncompliant cribs to the detriment of those retailers that stood ready to sell compliant cribs. In light of the facts that were presented for our consideration, I am proud of the Commission's actions. After dozens of babies had tragically been entrapped and died, and millions of defective cribs had been recalled, the actions of this Commission to ensure the swift movement to market of only safer cribs undoubtedly was justified and honors the expectation of families across the nation. It is for this reason that I am so disappointed with my colleague's attempt to disparage my actions, those of my Democratic colleagues, and our professional staff, in a quest to advance the business interests of a few, over the greater interests of protecting the safety of our most vulnerable consumers.