

The Honorable Michael C. Burgess, M.D
Chairman
Subcommittee on Commerce, Manufacturing, and Trade
2125 Rayburn House Office Building
Washington, DC 20515



Thank you Chairman Burgess for the opportunity to testify before the Subcommittee on Commerce, Manufacturing, and Trade on Wednesday, February 10, 2016 for the hearing entitled "Industry Perspectives on the Consumer Product Safety Commission."

Our Association was grateful for the opportunity to provide our insights and assist the Committee in its evaluation of the Consumer Product Safety Commission. In response to Congressman Gregg Harper's questions for the record, I submit the following attached responses. Please do not hesitate to contact me via email at mfellin@jpma.org or phone at 202-429-0436 if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "M. S. Fellin", enclosed within a thin black rectangular border.

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1. The Commission recently updated its rules regarding staff participation in the voluntary standards process. During the update, the Commission acknowledged that a mixture of voluntary and mandatory standards “can increase product safety better than either mandatory or voluntary standards alone.” Do you agree with that statement and do you believe that view is held throughout the Commission?

In 2008, Congress passed the Consumer Product Safety Improvement Act (“CPSIA”), most notably Section 104, often referred to as “Danny’s Law” which requires the CPSC to study and develop safety standards for more than 20 “durable” infant and toddler products. Additionally, the Commission is required to either make the existing voluntary safety standards for these products mandatory or provide for a stricter safety standard. To further enhance this law, the CPSC is required to promulgate two rules every six months until all products have a mandatory safety standard promulgated subject to rulemaking under administrative procedural requirements pursuant to CPSIA.¹ We believe that this process **would not be achievable** if it were not for the work conducted by ASTM and the various stakeholders of the Juvenile Products Subcommittee of F15.

An important part of the ASTM F15 Consumer Products Subcommittee’s effectiveness has been its ability to address emerging issues – and CPSC staff participation in such efforts, as well as the consideration of CPSC-collected injury and incident data, have been critical to enhancing the subcommittee’s effectiveness as well. We appreciate the work conducted by CPSC technical staff over the years and their professional expertise, and valued input in the development of such standards.

We agree with the CPSC’s decision that career technical staff can serve as voting members of voluntary standards development organizations and committees for consumer products,² but believe that given the required rulemaking process mandated by congressional statute that staff cannot lead such committees or act in a manner that abrogates or overwhelms the consensus process for setting such Standards at ASTM. The Commission’s responsibility should be to proceed as required by statute in a reasonable manner. Further, the Commission should continue to consider other merit based dynamic performance requirements and promote global alignment of safety standards.

¹ Public Law 110-314, August 14, 2008 Consumer Product Safety Improvement Act of 2008, Section 104 as amended by HR2715, Section 3.

² 16 C.F.R.1031

From a regulatory standpoint, we continue to urge the Commission that the Standard setting process at ASTM should be adhered to by Commission staff and mandatory requirements should not substantially deviate from such requirements adopted within ASTM. We continue to remind the Commission of the statutory requirement that the Commission fairly examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products and adhere to the requirements of 553 of title 5, United States Code in promulgating consumer product safety standards. Being an “Agency based on sound science,” we continue to advocate that the Commission only makes changes based upon evidence before it, and that more stringent standards would further reduce the risk of injury associated with such products.

In adhering to such requirement, the Commission should not delegate such responsibility to its staff. Additionally, obligations that conflict with ASTM requirements should not arbitrarily be imposed by staff without an adequate justification based upon a preponderance of evidence. We hope that the input provided will allow for more transparency as well as collaboration moving forward.

From a Commission standpoint, it is my opinion that the consensus belief is that collaborative rulemaking is the best method to achieve safety standards.

2. How fundamental are the new changes for Commission staff participation in the voluntary standards process for your industry?

From our standpoint, the changes for Commission staff to participate in voluntary standards negligible due to current staff involvement in the process. Our concerns, which are further illustrated below, relate to the potential that could exist for backdoor rulemaking and career staff acting on behalf of the Commission without a sufficient evidentiary justification.

JPMA and its members believe CPSC career technical staff plays a vital role in the development and improvement of *consensus based* ASTM standards. As you may be aware, the ASTM process rests on developing a standard that has been established within the consensus principles of the organization and which meets the requirements of ASTM procedures and regulations.³

Given the vote by the Commission to permit staff to assume a voting role in such standard setting process, JPMA believes that CPSC staff should be required to adhere to ASTM principles and the consensus standard setting process. Active agency participation in voluntary consensus standards development generally leads to more robust and comprehensive standards. However, we continue to have significant concerns that CPSC staff

³ <http://www.astm.org/ABOUT/faqs.html>

could view their vote as being more important than other members of the Subcommittee or as an opportunity to mandate specific requirements be included in the standard without adequate vetting and approval of the Commission on the record per prescribed rulemaking procedures. The CPSC is aware that ASTM:

[s]tandards development work begins when members of an ASTM technical committee identify a need or other interested parties approach the committee. Task group members prepare a draft standard or work item, which is reviewed by its parent subcommittee through an electronic balloting system. After the subcommittee approves the document, it is submitted concurrently to the main committee and the entire membership of ASTM.⁴

We believe that this process, with required periodic review and updates required for such rules, is the most efficient and effective way to update and enhance standards. If CPSC staff participants do not agree with recommendations made by specific subcommittees that they have the opportunity to cast negative votes during the balloting process. As is the case with all members, we believe it is the responsibility of the individual(s) who submitted their negative vote to convince their fellow subcommittee members of their rationale for the negative in order to change the standard. In such an event, the unsubstantiated, rejected recommendation should not be included in the final mandatory standard.

We believe that the integrity of the ASTM consensus standard setting process must be maintained. As this decision gets incorporated into practice, we continue to have concerns that unless proper procedures are adopted to safeguard required Commission consideration and action on the record, arbitrary backdoor rulemaking could result. In this respect deference to ASTM standards, unless a preponderance of evidence on the record indicates otherwise, should be required.

⁴ Ibid.