



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
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**DISSENTING OPINION OF COMMISSIONERS ROBERT S. ADLER AND
ELLIOT F. KAYE ON MOTION TO ADD A PROJECT ON CHILDREN'S FURNITURE
TIPOVER TO FY 2020 PERFORMANCE BUDGET REQUEST TO CONGRESS**

MARCH 20, 2019

On March 13, 2019, we proposed an amendment to the FY 2020 Budget Request to Congress that would have added the drafting of a Notice of Proposed Rulemaking (NPR) for Children's Clothing Storage Units (CSU)¹ under section 104 of the Consumer Product Safety Improvement Act (CPSIA).² To our great disappointment, the Commission, by a vote of 3-2, opposed our amendment.

Injuries and Deaths

Our reason for proposing such an amendment is our grave concern for the safety and welfare of young children who face severe risks from CSUs toppling over on them. We believe the need for prompt action to protect vulnerable kids from death and injury is overwhelming. Even a brief review of tipover fatalities and injuries to young children shows that clothing storage units constitute one of the most tragic and compelling safety issues at CPSC.

- From January 2, 2000 to December 31, 2016, roughly 75 children 5 years of age or younger died from tipovers of chests, bureaus, or dressers.
- From January 1, 2006 to December 31, 2016, roughly 39,600 children 6 years of age or younger went to emergency rooms for injuries sustained when a chest, bureau, or dresser fell on them.
- In fact, the majority (approximately 80%) of all furniture tipover deaths involve children 5 years or younger, and this percentage has not changed over time.

¹ We use the term Clothing Storage Unit (CSU) as a broad term to describe chests, bureaus, and dressers.

² 15 USC §2056a.

What We Proposed – and What We Didn't Propose

We think it important to state precisely what we proposed and what we did not propose. Here is what we proposed: a simple, quick development of a proposed safety rule for Commission consideration under section 104 of CPSIA – a time-tested and efficient approach to protecting children. Here is what we did NOT propose – to halt or slow ongoing work on the development of a broader rule under sections 7 and 9 of CPSA³ to address furniture tipovers. To the contrary, we fully understand that our proposal is limited to a subset – children's CSUs. We think it is a substantial subset, but a subset nonetheless, of the clothing storage units that present a hazard to children. But, just because we can't protect all kids immediately doesn't mean that we shouldn't protect as many as we can as quickly as we can.⁴

Inadequacies of the Current Voluntary Standard

We offered an amendment to take an ASTM voluntary standard, F2057-17, for clothing storage units as a foundation, under section 104 of the CPSIA, to draft a proposed standard for children's clothing storage units. At the moment, ASTM F2057-17 is under review and revision.⁵ Regrettably, we see little progress and much foot-dragging in current deliberations towards a meaningful upgrade in safety. Among the problems with the current standard –

- The test weight for stability is a specially-configured 50 pound weight hung gently on an open drawer to see if the clothing storage unit will tip over. Unfortunately, this requirement fails to account for the recent increase in size of children in recent years, which means that many fewer children are being protected by this standard.
- Equally disturbing is the unrealistic nature of the test protocol. Alas, children do not gently hang from open drawers. In fact, they climb up quickly and often swing from open drawers, thereby exerting stronger downward pressure and enhanced stability challenges to dressers and other CSUs.
- Another shortcoming in the current standard is the height restriction. ASTM F2057-17 covers only dressers 30 inches or higher while current fatality data show that children have died under dressers shorter than 30 inches.

³ 15 USC §2056 and 15 USC §2058.

⁴ On that point, we acknowledge work in the Congress that is currently underway to pass what is known as the STURDY Act. If enacted, the STURDY Act will authorize the Commission to promulgate, under the streamlined procedures of section 553 of the Administrative Procedure Act (APA), a broad-based consumer product safety standard for clothing storage units beyond those specifically intended for children. To say the least, passage of the STURDY Act would cover a larger group of furniture while permitting the Commission to use procedures currently available to the agency only for children's products under section 104 of CPSA.

⁵ ASTM F2057 was first approved in 2000 and has been revised several times, with the most recent revision published on October 1, 2017.

- Yet another shortcoming is the failure of the test protocol to replicate real-world conditions in homes where furniture is often placed on top of carpeting and carpet tack strips. These conditions present different risks than the hard, flat, level surfaces called for in the ASTM test protocol.

CPSC staff has shared these and other concerns with the ASTM working group currently working on revising ASTM F2057-17. Unfortunately, we have little reassurance that these concerns are being addressed. To the contrary, we have the strong impression that the working group simply will not take meaningful safety steps unless and until they are convinced that CPSC will take mandatory action. To us, that is unacceptable.

Advantages of Section 104 Rulemaking Versus Sections 7 and 9 Rulemaking

Our motion would apply the technical and engineering research currently underway for a rule under sections 7 and 9 of the CPSA to protect children under 104 rulemaking because the latter is demonstrably faster and more efficient than the extremely cumbersome procedures required by sections 7/9.⁶ We note, for example, in the ten years that section 104 has been part of the CPSA, the agency has drafted roughly 20 safety standards under this section to protect our youngest and most vulnerable consumers. In sharp contrast, CPSC has drafted precisely one standard under sections 7 and 9.

Even a quick glance at the procedures and findings required to undertake rulemaking under a 7/9 approach versus those under section 104 dramatically illustrates the burdens of rulemaking under sections 7 and 9. By our count, the Commission has to make well over a dozen statutorily mandated findings in the course of taking numerous separate regulatory steps in order to promulgate a safety standard when we write 7/9 rules. And, any slip or technical violation of these requirements exposes the rule to legal challenge – which almost inevitably follows when we write such rules. And, frankly, we have yet to see a single standard that has been improved by following these extra steps.

In sharp contrast, drafting a 104 rule requires only that the Commission follow the traditional informal requirements of section 553 of APA with one additional step (consulting with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts to examine the efficacy of existing voluntary standards) and one additional finding (that the requirements of a 104 rule be substantially similar to the voluntary standard or be more stringent if the Commission determines that a more stringent standard would further reduce the risk of injury). And, we note, to date, the Commission has faced no legal challenges to our 104 rules.

⁶ We reiterate that our approach should not slow or delay the Commission's work on developing a rule under sections 7 and 9 since the engineering and technical approaches will be the same for both rulemaking efforts.

Conclusion

We believe that the time for more decisive action is before us. In making this point, we continue to hold out the hope that the ASTM process will quickly and effectively produce a good voluntary standard that is substantially complied with.

If CPSC is to carry out our critical mandate to protect our most vulnerable consumers, we believe it essential that the Commission declare now our intention to use the full panoply of tools available to us to meet this mandate.