



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
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## SUPPLEMENTAL STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE THE NOTICE OF REQUIREMENTS FOR THE TOY STANDARD, ASTM F-963

July 29, 2011

In the past, it has been the general practice for Commissioners to explain the reasoning behind their votes in written statements. However, those written statements were not generally used as opportunities to either rebut or attack the written statements of other Commissioners. There is a good reason for our practice. Without this understanding, obviously the Commissioner writing last has the last word, and the public will be forced to navigate a potentially endless merry-go-round of statements as one responds to the other.

Commissioner Adler used his statement on our vote on laboratory accreditation requirements for ASTM F963 to specifically and directly rebut my written statement in which I explained my vote. What is especially extraordinary about this is that he and I voted the same way. Nevertheless, he disagrees with my reasoning for my vote and wanted to let the world know why. Because his statement is so off-base, both in practice and as to the substance, I am issuing this supplemental statement addressing his arguments as they relate to my statement.

With respect to the issuance of the NOR triggering testing to the ASTM toy standard, Commissioner Adler apparently thinks that I am merely seeking delay for the sake of delay to the detriment of safety. He makes the unsupported statement that “a number of manufacturers have ignored this important safety standard” and that they have “gambled” they will not get caught, implying that somehow I agree with this result. Of course, the toy standard has been in place as a mandatory standard since 2009. Of course it is illegal to violate that standard. Commissioner Adler has cited no evidence to support his allegation of widespread violations of the standard. Since some at the agency have asserted that a high level of compliance translates into lower recalls, take note the number of toy recalls is down. And lofty motives do not turn gratuitous attacks on an industry into the truth; that is beneath a CPSC Commissioner.

My motivation in arguing for tying our notice of testing requirements to the most current standard is *not* to give a break to industry. It is to minimize confusion and cost—which will result in a better safety outcome. Nevertheless, he argues that ASTM is always changing its standards and those currently under consideration are “routine.” According to both our staff and ASTM, while some of the proposed changes are indeed routine, that is not true of all and some (such as that for yo yo balls) change the required test method. However, regardless of the magnitude of the changes, since we are now mandating testing to a standard that we think will be revised this fall, the fact remains that we are potentially requiring testing to an outmoded standard.

While Commissioner Adler dismisses the problems with doing this, those problems do remain. The reality is that once a new ASTM standard is issued, the marketplace will require testing to that standard.

This has nothing to do with “jumping the gun” but everything to do with retailer demands. The end result is the same. Retailers will require testing to a new standard and the CPSC will require testing to the old one. If the standards perfectly overlap there is no problem; if they do not, then there necessarily will be redundant testing. Commissioner Adler’s discussion of our ability to “grandfather” testing does not address this concern.

The problem is exacerbated in the future by the statutory requirement that revisions to the NOR initiated after August 14, 2011, be done with notice and comment rulemaking which, as was described to the Commission during the staff briefing, will make it very difficult for the statutory requirements to synchronize with the established ASTM process. While Commissioner Adler is correct that this timing problem will occur again and again in the future, the one time when we could have made it work relatively smoothly would have been with the currently proposed F 963 revisions, assuming they come out this fall. Had we waited and issued the NOR to reference the new standard, while we would have had to put this out for notice and comment, we would be ready to make the required testing to the updated standard effective in early 2012. If ASTM, in fact, did not amend their standard, then we would be in the same place with testing to the unrevised F 963 standard beginning also in early 2012.

What we did instead was to issue the NOR to a standard everyone anticipates will be revised shortly, making it out of date before testing even begins. While that means we did not have to put it out for APA-type notice and comment now, it appears we will need to start that process in the fall. It is clear that there is a net cost to this approach in terms of CPSC staff work, and confusion in the marketplace.

Since my colleague asserted that I am making a “tail wagging the dog” argument, he really ought to check the size of the tail and the size of the dog.