

Cooley

AHFA Regulatory Summit

“STURDY & CPSC’s
Furniture Stability NPR”

September 2, 2021

What Would STURDY Do?

- Federal Standard – Directs CPSC to develop a final rule within one year of enactment that:
 - Defines Clothing Storage Unit – “any freestanding item manufactured in the US or imported for use in the US that is intended for the storage of clothing, typical of bedroom furniture.”
 - Simulates weight of children up to 60 pounds (or 95th percentile weight of children 72 months of age)
 - Accounts for carpeted surfaces, drawers with items in them, multiple open drawers, OR dynamic force
 - Eliminates the current 27” height distinction & Considers enhancements to warning requirements
 - Assesses voluntary standards for CSUs in consultation with wide range of stakeholders
- Testing and Certification – Would require a “reasonable testing program” for non-children’s CSUs and third-party testing for children’s CSUs – and certification of compliance for both.
- Allow “Informal” CPSC Rulemaking Process – Allows CPSC to proceed down the 553 rulemaking path, including for subsequent rulemaking.
- Mandatory Nonconformance Reporting – Violations of the final rule would trigger a mandatory Section 15(b) reporting obligation

What Would STURDY Not Do?

- No adoption of ASTM F2057-19
- No mechanism to automatically consider updates to ASTM F2057
- No preemption of state or local laws
- No prescribed test methods other than requiring them to be “objective, repeatable, and measurable”
- No absolute requirement to take into account dynamic force, carpeted surfaces, loaded drawers, or multiple open drawers (CPSC only required to choose one)
- Does not circumscribe OMB review or responses to substantive comments
- Questionable whether injury or death data would be required for the agency to regulate in new spaces (“to protect children from tip-over related death or injury” and “reasonably necessary to protect children from tip-over related death or injury”)

The CPSC's Notice of Proposed Rulemaking

- Staff briefing package released on July 14, 2021 (~1,200 pgs.)
- Not yet scheduled for Commission briefing/vote
 - Temporary Republican majority at CPSC with Kaye's departure
 - Three pending nominees (Hoehn-Saric, Boyle, and Trumpka)
 - Expected that the rule will "await" confirmation of new nominees (Oct/Nov)
- NPR is likely to pass "as is"
- 75 day comment period (possibly extended)
- Rule Composed of Stability, Labeling, and Hangtag Reqs.

The CPSC's Notice of Proposed Rulemaking

- Stability requirements in the NPR utilize CPSC's analysis regarding the effect of the following for furniture tip-over:
 - Multiple Open Drawers/Doors
 - Filled Drawers
 - Pulling Drawers
 - Children Climbing
 - Flooring (carpet)
 - Does not include more than one child
- Enhanced Warnings
- Hangtag goes from 1 to 5 where "1" means compliant with the rule

553 vs. Section 7/9 Rulemaking

- CPSC has historically struggled with the requirements of Section 7/9 Rulemaking
- Section 7/9 = Very few CPSC rulemakings and not unusual to be overturned
- Section 553 = Many CPSC rulemakings and almost never challenged or overturned
- What does Section 7/9 Require? (Similar to Clinton's Executive Order 12866 for significant rules)
 - Formal Notice/Comment and Hearings
 - Assessment of whether voluntary standard will be substantially complied with and is likely to result in elimination or adequate reduction of the risk
 - Cost Benefit Analysis (benefits bear a reasonable relationship to the costs)
 - Reasonable alternatives analysis
 - "Least burdensome" requirements that prevent or adequately reduce the risk of injury
- What does Section 553 require?
 - Informal notice/comment and Regulatory Flexibility Analysis (RFA)
 - Rule requirements must not be "arbitrary and capricious" – "failure to examine relevant data and articulate a satisfactory explanation for the requirements including a rational connection between the facts found and the requirement" – there must be a clear error of judgment, otherwise "a court must not substitute its judgment for that of the agency")

Definition of CSU – STURDY

(a) CLOTHING STORAGE UNIT DEFINED.—In this section, the term “clothing storage unit” means any free-standing furniture item manufactured in the United States or imported for use in the United States that is intended for the storage of clothing, typical of bedroom furniture.

- This definition has some requirements for the CPSC implementation (“freestanding,” “intended for the storage of clothing,” “typical of bedroom furniture”) but ultimately the agency will have wide discretion to determine what’s “in” and what’s “out”

Definition of CSU – Section 9

- Clothing Storage Unit – “A freestanding furniture item, with drawer(s) and/or door(s), that may be reasonably expected to be used for storing clothing, and that is greater than or equal to 27 inches in height”
 - Features of CSU: typically used for clothing storage, has closed storage within drawers/doors sufficient to hold multiple clothing items, is freestanding.
 - “The determination of whether or not a product is in in scope should be based on whether a reasonable consumer would perceive the product to be a CSU, regardless of marketing.”
- Does not include shelving units, office furniture, dining room furniture, laundry hampers, built-in closets, and storage chests

Timeline for a Final Rule and Compliance – STURDY or Section 9

- CPSC's NPR promulgated under Section 9 likely will be published in October/November 2021
 - Under Section 9 rulemaking, a final rule realistically would be another 2-3 years away (at best)
 - There is a higher likelihood of a judicial challenge that could further delay or overturn the rule under Section 9
- STURDY requires a final rule 1 year after enactment
 - CPSC typically takes more than 1 year to finalize a rule – even under 553 rulemaking
 - Aspirational deadlines provide grounds for a lawsuit compelling rule completion
- Reproposal of NPR if STURDY Passes? – STURDY passing is unlikely to greatly affect the overall rule timeline because CPSC likely would only need to repropose small portions of the existing NPR
- Prospective Effective Date – As part of the final rule under either scenario, the CPSC must set a prospective effective date (typically ranges from 180 days to 1 year)

Testing and Certification – STURDY or Section 9

- Non-Childrens Products – For non-children’s CSUs, in-house testing would be acceptable so long as it is considered a reasonable testing program.
- Childrens CSUs – For children’s CSUs, third party testing at a recognized lab would be required and compliance with 16 CFR 1107
- Certificate of Compliance – The certificate of compliance (typically called a GCC for non-children’s products) could incorporate STURDY compliance with the already existing lead in surface coating requirements for furniture on the same certificate (as applicable).

CPSC Implementation – STURDY or Section 9

- CPSC will continue to aggressively enforce ASTM F2057-19 regardless of the status of a final rule
- CPSC relying on some testing and analysis from outside researchers (University of Michigan, Fors Marsh, etc.) – no requirement for peer review
- Democratic majority very likely to control Commission during promulgation of rulemaking (three pending Democratic nominees)
- There is bipartisan support for strong rulemaking and enforcement on this issue

Background Criticism of Anchoring

- CPSC's NPR is Critical of ASTM F3096-14
 - “Staff did not evaluate the tip restraint device standard, ASTM F3096-14, in this briefing package, but has concerns about its adequacy related to the force and attachment to the CSU and wall.”
 - CPSC “recommends considering forces beyond those of younger children ascending, potentially including more extreme interactions such as bouncing, yanking, jumping, as well as forces from older, heavier, and stronger children.”
- Consumer Use Surveys – Low Rates of Anchoring
- Multiple Press Stories Focusing on “Anchor Failure”