

STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE VOTE TO INSTRUCT THE STAFF TO PREPARE A FEDERAL
REGISTER NOTICE IN WHICH THE COMMISSION EXPRESSES ITS INTENT TO
RELY ON THE *STANDARD CONSUMER SAFETY SPECIFICATION FOR LIGHTERS*,
ASTM F-400
February 1, 2008

In November 2001, the Lighter Association, Inc., petitioned the agency to adopt the voluntary "Standard Consumer Safety Specification for Lighters" (ASTM F-400) as a mandatory standard. The petition was docketed and our staff analyzed the request, along with incident data relating to injuries and deaths from lighter malfunction. In their briefing package of May 2004, staff concluded that they did not believe that the available data supported a rulemaking proceeding because the risk of death or injury was low in relation to the number of lighters on the market and they were unable to determine whether or not the lighters involved in the incidents conformed to the voluntary standard. They recommended that the Commission deny the petition. While I was inclined to agree with them, I thought we should take one more look at the data just to make sure we were not missing anything. Certainly anyone who knows my record on consumer safety knows that I would rather err on the side of caution than put consumers at risk.

Thus I voted in November 2004 to grant the petition and proceed to the Advance Notice of Proposed Rulemaking stage, solely for the purpose of gathering additional information. I said at the time, "unless additional death and injury data changes the hazard analysis picture substantially, it will be hard to argue with our technical staff's assessment that lighters do not appear to present an unreasonable risk of injury." At that time I was also worried about the resource implications of having to enforce another mandatory lighter standard. Our staff was already having resource issues with enforcing the two mandatory child-resistant lighter standards that were on the books. In fact, since then staff has initiated a rule review proceeding to see if there is a way to streamline the enforcement procedures of the two child-resistant lighter standards, in part, for that very reason.

In October 2006, staff submitted to the Commission updated incident data and information relating to the level of conformance of lighters with the voluntary standard. Staff's assessment with regard to the need to make the ASTM voluntary standard a mandatory one had not changed and no action was taken by the Commission.

Subsequently, Acting Chairman Nord began to articulate her interpretation of the reliance provision of the Consumer Product Safety Act. She has argued that the provision can be used to allow the Commission to terminate the lighter rulemaking proceeding, rely on the ASTM voluntary standard and that reliance allows the Commission to enforce the voluntary as if it were mandatory. I rejected that interpretation of our statute when it was urged upon me last year and I continue to reject it. As I said in a statement provided to the Congress when I was asked to comment on

Acting Chairman Nord's legislative proposals: "The ability to too easily transform voluntary standards into mandatory ones could remove any incentive manufacturers have to develop voluntary standards to avoid federal regulation (there would likely be no effective voluntary baby walker standard today had there not been the real threat of mandatory regulation). Given the success the Commission has had over the years in getting various industries to adopt effective voluntary standards in order to avoid federal regulation, we would not want to lose the leverage we currently have in that regard."

On January 4th of this year, staff sent the Commission a ballot to extend the time to issue a proposed rule on lighters to September 30, 2008, pursuant to section 9(c) of the CPSA which requires us to extend the time if we have not issued a proposed rule within one year of publishing the ANPR. The time had already been extended once in April of 2006 and had expired on December 31, 2007. I voted to extend the time and indicated that I was willing for the staff to go forward and actually do the work necessary to either adopt the ASTM standard as a mandatory one, if they found its provisions adequate to reduce the risk, or to make whatever changes they felt might be necessary to it, including correcting certain deficiencies they had identified in their October 2006 report. While I still expressed doubts as to whether the risk from nonconforming lighters was unreasonable, a finding required by our statute, I noted that Congress may eventually require us to proceed with the rulemaking and that staff should start evaluating the voluntary standard's provisions in anticipation of that. Acting Chairman Nord voted to extend the time to March 31, 2008. The only action that could be taken in furtherance of a cigarette lighter standard in that time frame would be a termination of the rulemaking in reliance upon the voluntary standard. Thus, because the votes were not in agreement, the ballot was not approved and no extension was granted. The existence of that vote has not been made public as yet, but my statement on it can be found under "Commissioners' Statements" on our web site. The fact that the time has not been extended also raises doubts about the efficacy of this ballot. Our statute requires a vote, transmission of notice of such extension to the House and Senate Commerce Committees and publication of a notice of extension in the *Federal Register*. None of which has been done.

The current ballot simply chooses to ignore the fact that the time for concluding this rulemaking was not extended and instructs the staff to prepare an FR notice stating the Commission's intention to formally rely on the ASTM standard and seeking comments on that decision. The issue of what effect such reliance has, beyond the reporting requirement of section 15 of the CPSA, is not addressed, but it hangs over the rulemaking, as it will over any future attempts to formally rely on a voluntary standard.

Comments will not change the facts of this situation. No new death or injury data is presented. The risk of injury remains 0.9 per million lighters sold. The staff still cannot tie the injuries to lighters that do not comply with the voluntary standard. Nor does the staff have any idea whether greater conformance with the voluntary standard would have any impact on reducing the number of injuries. In order to formally rely on this voluntary standard the Commission would need to find that:

- 0.9 injuries per million lighters sold (less than 6% of which required hospital admission) constitute an unreasonable risk of injury;
- Hypothetical assumptions are sufficient upon which to pass judgment about the adequacy of the voluntary standard to reduce the risk; and
- Enforcement of the section 15 reporting requirement through the imposition of civil or criminal penalties will lead to substantial compliance.

Those are not assumptions I am willing to make.

Despite my concerns about the unreasonable risk finding and the question as to whether staff can make the other necessary findings, I am willing (as evidenced by my vote earlier this month) to go forward with a rulemaking that could lead to a possible mandatory standard. That is, after all what the petitioners have asked for, not a reliance on the voluntary standard which only triggers a reporting obligation. Congress has given us major new resources, which allay my concern about devoting precious Commission resources to this project. Both the House and Senate have signaled that it may want us to issue a mandatory standard in this area. The Senate legislation states: "The Consumer Product Safety Commission shall issue a final rule mandating general safety standards for cigarette lighters in its proceedings entitled 'Safety Standard for cigarette Lighters' for which the commission issued an advance notice of proposed rulemaking on April 11, 2005...." The House Commerce Committee Report states: "The Committee also directs the CPSC to issue a final rule in its proceeding entitled 'Safety Standard for Cigarette Lighters' for which the Commission issued an advance notice of proposed rulemaking on April 11, 2005...." While it would have been preferable for the Congress to relieve us of having to make certain findings that it may be difficult for us to make in this proceeding, I believe that we should, nevertheless attempt to gather the information necessary to promulgate a final rule.