

# Comment on Safety Standard for Infant Bath Tubs

## Manifest

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## 1. Introduction and Statement of Purpose

*They were given one year in which to promulgate the laws so that the plebeians would have the same knowledge of the laws as previously only the patricians had. Only the patricians had the knowledge of the law, the knowledge of legal procedures, and so on. So the plebeians were at a great disadvantage as a result therefrom.*

*Byrd on Rome 2*

This is a comment by Public.Resource.Org (“Public Resource”) on the Notice of Proposed Rulemaking (NPRM) on Safety Standards for Infant Bath Tubs ([80 FR 48769](#)). Public Resource is a non-profit corporation based in California. Our mission is to make government information—such as laws, regulations, court opinions and other [edicts of government](#)—available on the Internet for people to use.

We wish to state at that outset that we are fully supportive of the mission of the CPSC and greatly admire the dedication and public service of those who work at the organization. As Chairman Elliot F. Kaye recently stated before the U.S. Senate:

*CPSC’s vital health and safety mission touches us all in some way, each and every day. From the parent of the baby who gently moves his or her child throughout the day from crib, to baby bouncer to stroller and back again to the crib; or the self-employed millennial who, on a warm spring day, relies on a room fan to stay cool and an extension cord to power a computer; to the baby boomer who purchased adult bed rails to help care for an aging parent who needed to move in, the products in CPSC’s jurisdiction are inseparable from our lives. [1]*

We heartily agree with Chairman Kaye. However, it is precisely because the work of the CPSC is so important that the binding rules and regulations promulgated by the agency must be broadly available. This comment focuses on the lack of availability and accessibility of the document proposed to be incorporated by reference in the present rulemaking, as well as other durable infant products that are already the subject of mandatory rules or will be soon.

## 2. The Present Rulemaking: Infant Bath Tubs

Households with children under six own an estimated 8.9 million infant bath tubs, and approximately 4.4 million of those are in use. [2] CPSC provides two types of estimates of the extent of infant bath tub injuries. First, the CPSC has detailed information on 202 incidents between January 1, 2004, through May 20, 2015, of which 31 were fatal and 171 nonfatal. Drowning was the cause of death for 30 of the 31 fatalities. Of the 202 reported incidents, 102 were submitted by retailers and manufacturers through the CPSC Retailer Reporting System. The remaining 100 incidents came to the CPSC from hotlines, Internet reports, newspaper clippings, reports from medical examiners, and other sources. [3]

The second source of CPSC data is from the National Electronic Injury Surveillance System (NEISS), which pull reports from a statistically-significant sample of U.S. hospitals with emergency data. Based on this system, CPSC estimates a total of 2,200 injuries related to infant bath tubs were treated in U.S. hospital emergency departments over the eleven-year period from 2004-2014.

To make these infant bath tubs safer, the NPRM proposes to incorporate ASTM standard F2670-13, Standard Consumer Safety Specification for Infant Bath Tubs. This document occupies six pieces of paper and the actual standard is less than five pages long. The document is very similar to other ASTM infant standards developed for CPSC use.

For example, seven of the 10 definitions in section 3 (“Terminology”) are identical to those in [ASTM F1967-13](#), the safety standard for Infant Bath Seats which is mandated in [16 CFR 1215](#). Likewise, [Section 4](#) (Calibration and Standardization) of F1967 is identical to the standard being proposed. For example, both standards share an identical clause 4.2:

*4.2. The product to be tested shall be in a room with an ambient temperature of  $73 \pm 9^{\circ}\text{F}$  ( $23 \pm 5^{\circ}\text{C}$ ) for at least 1 h prior to testing. Testing then shall be conducted within this temperature range.*

That the sections are identical in multiple standards is not at all surprising, as these standards are meant to be precise descriptions of rules that will become the law. The purpose of a standard is that there is a definition that everybody can agree upon, and

that means once consensus has been reached and the standard has been given legal status, there is only one way to state the law.

The present rulemaking is not a simple incorporation, however. Rather than simply incorporate the entire standard by reference, the proposed rule incorporates the standard, but specifies a series of nine modifications to the 5-page standard in the proposed rule. We've attempted to describe those nine modifications:

1. Section 7.1.2 specifies the test method for latching or locking mechanism durability. CPSC replaces that paragraph with [§ 1234.2\(b\)\(2\)\(i\)](#) of the proposed rule, which specifies a different test.
2. A new appendix is added. ASTM uses appendices starting with the letter "X" to explain the reasons for sections in the main standard. While these are non-normative sections when used as a private, voluntary standard, the proposed incorporation by reference into federal law would make it mandatory. CPSC specifies in [§ 1234.2\(b\)\(2\)\(i\)](#) of the proposed rule a new § X1.2 with a paragraph that explains the reason for the replacement in § 7.1.2.
3. Section 7.4.2 specifies a static load test, essentially placing a weight on the device to see if it collapses. CPSC replaces that paragraph with [§ 1234.2\(b\)\(3\)\(i\)](#) of the proposed rule, which specifies a slightly different test.
4. Section 8.4 specifies that a warning shall be displayed if suction cups are used as an attachment mechanism. CPSC replaces that paragraph with [§ 1234.2\(b\)\(4\)](#) of the proposed rule with a new § 8.4 and §§ 8.4.1 through 8.4.7.
5. Section 8.5 specifies the placement of warnings on the product's retail package principal display panel. CPSC replaces that paragraph with [§ 1234.2\(b\)\(5\)](#) of the proposed rule, which has alternate text.
6. Section 9 of the standard specifies instructional literature requirements. CPSC replaces the entire section with [§ 1234.2\(b\)\(6\)](#) of the proposed rule, which has 12 paragraphs of replacement text.
7. CPSC adds a new Figure 2 in [§ 1234.2\(b\)\(7\)](#) of the proposed rule, which is an example of the warning label required in the new § 8.4.1. The file is rendered in color in CPSC briefing materials but is a black-and-white GIF file in the Federal Register. Much more appropriate than a GIF file would be some

simple HTML code, which would specify the colors, lines, and text in a way that could be easily imported into word processing programs and would be accessible to people who are visually impaired.

8. CPSC adds a new Figure 3 in [§ 1234.2\(b\)\(8\)](#) of the proposed rule, which has two examples of the warning labels for drowning hazard warning and fall hazard warning as required in the replacement § 9.2.3.
9. CPSC adds a new Figure 4 in [§ 1234.2\(b\)\(9\)](#) of the proposed rule, which is an example of a combined drowning hazard and fall hazard label. However, CPSC forgot to call the figure out in the text, so it is unclear where it applies.

Confused? Neither CPSC nor ASTM provides a redline as to how the standard being incorporated and the changes to that standard would appear when combined. It is a ridiculously difficult puzzle to piece together what the actual rule will say.

ASTM made its original standard—not as modified by the proposed CPSC rule—available in a [special read-only system](#) created especially for viewing standards proposed to be or already incorporated by reference in CPSC rules. Before being allowed to access a file, the reader is presented with this warning:

*These are read only files. It is unlawful to download or print these files. Any other reproduction or use of these documents, in full or in part, without the expressed written permission of ASTM International is strictly prohibited.*

Once in the file, the viewer can scroll through the pages, but it is impossible to copy any of the text in order to understand how the combination of the original ASTM standard and the proposed CPSC rule interact. In the course of attempting to protect the document, ASTM also makes it extremely difficult for people with visual impairments to use. While the system does allow screenreaders to access the document, there are no navigation controls or other mechanisms for people with visual impairments to read.

The staff briefing packet prepared for the Commission does include a March 31, 2015, letter to Mr. Paul Ware, Chairman of the [ASTM F15.20 Subcommittee on Infant Bath Tubs](#), has redlines outlining proposed changes against the text of portions of the standard; however, that material was not made readily available to the public in the rulemaking docket. In addition, the changes proposed in the March 31 letter are different from those that in the proposed rulemaking notice. [4]

### 3. The Danny Keysar Product Safety Notification Act

The present rulemaking is part of a series of mandatory standards that are required by Congress as part of the Danny Keysar Child Product Safety Notification Act ([Pub. Law 110-314](#)). As Congress stated in a report accompanying the legislation:

*Children have died when parents unknowingly continued to use a nursery product had been identified as unsafe. One tragic case involved Danny Keyser, a 16-month-old child who died from strangulation when the portable crib in which he was napping collapsed. The crib had been recalled five years earlier for the very defect that led to the collapse, but Danny’s parents and caregiver were unaware of the recall.*

*Incidents involving these products are especially tragic because parents employ products such as cribs, playpens, and high chairs for the express purpose of restricting a child’s movement to keep them safe. [5]*

The key point of the act was notification of the public in the case of unsafe durable infant products. Twelve such products were specifically mentioned in the act. The CPSC was charged with creating mandatory safety standards for those twelve products and was given the authority to add additional durable infant products to the list. The CPSC took up this banner and issued an impressive set of rulemakings, which are listed in [Table 1](#). [6] [7]

**Table 1: Major Rulemaking by the CPSC on Durable Infant Products**

Rulemaking	Federal Register	Date
Proposed rule on “Safety Standard for Infant Bath Tubs”	<a href="#">80 FR 48769</a>	August 14, 2015
Proposed rule on “Safety Standard for Portable Hook-On Chairs”	<a href="#">80 FR 38041</a>	July 2, 2015
Final rule on “Safety Standard for Frame Child Carriers”	<a href="#">80 FR 11113</a>	March 2, 2015
Final rule on “Safety Standard for Soft Infant and Toddler Carriers”	<a href="#">79 FR 17422</a>	March 28, 2014
Final rule on “Safety Standard for Carriages and Strollers”	<a href="#">79 FR 13208</a>	March 10, 2014
Final rule on “Safety Standard for Bedside Sleepers”	<a href="#">79 FR 2581</a>	January 15, 2014
Revisions to Safety Standards for Infant Bath Seats, Toddler Beds, and Full-Size Cribs,	<a href="#">78 FR 73692</a>	December 9, 2013
Final rule on “Safety Standard for Hand-Held Infant Carriers”	<a href="#">78 FR 73415</a>	December 6, 2013

Table 1: Major Rulemaking by the CPSC on Durable Infant Products

Rulemaking	Federal Register	Date
Final rule on "Safety Standard for Bassinets and Cradles" Correction notice: <a href="#">78 FR 77574</a> (December 24, 2013)	<a href="#">78 FR 63019</a>	October 23, 2013
Final rule on "Safety Standard for Play Yards"	<a href="#">78 FR 50328</a>	August 19, 2013
Revisions to "Safety Standards for Infant Walkers and Infant Swings"	<a href="#">78 FR 37706</a>	June 24, 2013
Final Rule on "Safety Standard for Infant Swings"	<a href="#">77 FR 66703</a>	November 7, 2012
Final Rule on "Safety Standard for Play Yards"	<a href="#">77 FR 52220</a>	August 29, 2012
Final Rule on "Revisions to Safety Standards for Durable Infant or Toddler Products: Infant Bath Seats and Full-Size Cribs"	<a href="#">77 FR 45242</a>	July 31, 2012)
Final Rule on "Requirements for Consumer Registration of Durable Infant or Toddler Products"	<a href="#">77 FR 9522</a>	February 17, 2012
Final Rule on "Safety Standard for Toddler Beds"	<a href="#">76 FR 22019</a>	April 20, 2011
Final Rule on "Revocation of Requirements for Full-Size Baby Cribs and Non-Full-Size Baby Cribs"	<a href="#">75 FR 81766</a>	December 28, 2010
Final Rule on "Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs"	<a href="#">75 FR 81766</a>	December 28, 2010
Final Rule on "Interpretation of Children's Product"	<a href="#">75 FR 63067</a>	October 14, 2010
Final Rule on "Safety Standard for Infant Walkers"	<a href="#">75 FR 35266</a>	June 21, 2010
Final Rule on "Revocation of Regulations Banning Certain Baby Walkers"	<a href="#">75 FR 35279</a>	June 21, 2010
Final Rule on "Safety Standard for Infant Bath Seats: Final Rule"	<a href="#">75 FR 31691</a>	June 4, 2010
Final Rule on "Requirements for Consumer Registration of Durable Infant or Toddler Products"	<a href="#">74 FR 68668</a>	December 29, 2009

In each of the rulemakings noted in [Table 1](#), an ASTM standard was incorporated by reference into law as a mandatory standard. It is particularly noteworthy that once a standard has been selected for incorporation by reference as a mandatory rule, it does not follow the usual pattern used by other agencies.

Under the Office of the Federal Register rules for incorporation by reference specified in [1 CFR 51.1\(f\)](#), "Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included." However, in the case of durable infant products, once a standard is selected, if it is upgraded by the standards development organization, the new version

automatically becomes law unless the CPSC formally rejects it. This provision comes from the 2011 extension of CPSC authority and is codified in [15 U.S.C. § 2056a](#):

***Commission Action on Revised Voluntary Standard***

*If an organization revises a standard that has been adopted, in whole or in part, as a consumer product safety standard under this subsection, it shall notify the Commission. The revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 9 of the Consumer Product Safety Act ([15 U.S.C. § 2058](#)), effective 180 days after the date on which the organization notifies the Commission (or such later date specified by the Commission in the Federal Register) unless, within 90 days after receiving that notice, the Commission notifies the organization that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard and that the Commission is retaining the existing consumer product safety standard. [8]*

## 4. The Current Status of Durable Infant Product Rulemaking

CPSC has taken the charge from Congress seriously. In addition to the 12 named product categories in the act, CPSC has added several more. It is the intent of CPSC to issue mandatory rules for each of these products.

In [Table 2](#), the current list of durable infant products is shown. Of the 25 products listed, 14 have gone through the full rulemaking process, and in each case an ASTM standard was selected for mandatory status. The table includes links to each of the relevant CFR sections, to the ASTM web site, and where applicable, links to the Public Resource web site where a version of these mandatory standards may be viewed by the public.

**Table 2: Current Status of CPSC Durable Infant or Toddler Products**

No.	Category	Final Rule	ASTM Standard (ASTM Site)	Publicly Viewable (Public Resource)
1	Bassinets and Cradles*	<a href="#">16 CFR 1218</a>	<a href="#">ASTM F2194-13</a>	<a href="#">ASTM F2194-13</a>
2	Bedside Sleepers	<a href="#">16 CFR 1222</a>	<a href="#">ASTM F2906-13</a>	
3	Booster Seats*			
4	Carriages and Strollers*	<a href="#">16 CFR 1227</a>	<a href="#">ASTM F833-13b</a>	<a href="#">ASTM F833-13b</a>
5	Changing Tables			

Table 2: Current Status of CPSC Durable Infant or Toddler Products

No.	Category	Final Rule	ASTM Standard (ASTM Site)	Publically Viewable (Public Resource)
6	Children's Chairs and Stools			
7	Cribs (Full-Size)*	<a href="#">16 CFR 1219</a>	<a href="#">ASTM F1169-13</a>	<a href="#">ASTM F1169-13</a>
8	Cribs (Non Full-Size)*	<a href="#">16 CFR 1220</a>	<a href="#">ASTM F406-13</a>	<a href="#">ASTM F406-13</a>
9	Expansion Gates and Expandable Enclosures*			
10	Frame Child Carriers	<a href="#">16 CFR 1230</a>	<a href="#">ASTM F2549-14a</a>	<a href="#">ASTM F2549-14a</a>
11	Hand-Held Infant Carriers	<a href="#">16 CFR 1225</a>	<a href="#">ASTM F2050-13a</a>	<a href="#">ASTM F2050-13a</a>
12	High Chairs*			
13	Infant Bath Seats*	<a href="#">16 CFR 1215</a>	<a href="#">ASTM F1967-13</a>	<a href="#">ASTM F1967-13</a>
14	Infant Bath Tubs			
15	Infant Bouncer Seats			
16	Infant Inclined Sleep Products			
17	Infant Swings*	<a href="#">16 CFR 1223</a>	<a href="#">ASTM F2088-13</a>	<a href="#">ASTM F2088-13</a>
18	Infant Walkers*	<a href="#">16 CFR 1216</a>	<a href="#">ASTM F977-12</a>	<a href="#">ASTM F977-12</a>
19	Play Yards*	<a href="#">16 CFR 1221</a>	<a href="#">ASTM F406-13</a>	<a href="#">ASTM F406-13</a>
20	Portable Bed Rails	<a href="#">16 CFR 1224</a>	<a href="#">ASTM F2085-12</a>	
21	Portable Hook-On Chairs*			
22	Sling Carriers			
23	Soft Infant and Toddler Carriers	<a href="#">16 CFR 1226</a>	<a href="#">ASTM F2236-14</a>	<a href="#">ASTM F2236-14</a>
24	Stationary Activity Centers*			
25	Toddler Beds*	<a href="#">16 CFR 1217</a>	<a href="#">ASTM F1821-13</a>	

\* Product specifically named in original act. Other categories were added in subsequent rulemakings.

The charge from the U.S. Congress to aggressively pursue mandatory rules for durable infant products has led to a very rapid pace of rulemaking. Because each of these categories will be the subject of a mandatory rule, the CPSC has played an aggressive role in making sure that appropriate standards are available on their timetable to meet the requirements set by Congress. Commissioner Nancy A. Nord commented on the implications of this process in her 2012 comments on the hand-held infant carriers standard:

*Importantly, § 104 requires the agency to promulgate two rules every six months. This is a very fast pace for the agency, and in combination with the*

*requirement that the agency adopt mandatory standards, I am concerned that the timeline appears to be warping the standards development process. While our staff has always participated in developing standards, our staff now has a special seat at the drafting table. That is, CPSC staff's suggestions drive a substantial portion of the discussion. And their suggestions are backed by the staff's power to include any preferred provision in the draft that ultimately is presented to the Commission. [9]*

Former Chairman Inez M. Tenenbaum described how that process worked in practice in an interview she gave to the ASTM newsletter:

*Early in 2010, I met with the subcommittee members during a meeting at CPSC's headquarters and spelled out clear and ambitious expectations for revising the voluntary standard. The subcommittee responded. Working closely with CPSC's senior mechanical engineer Patty Edwards, the [F15.18 Subcommittee](#) incorporated requirements for more durable crib hardware and stronger mattress supports and a prohibition of the deadly traditional drop-sides into the ASTM standards. The ASTM standards served as the foundation for our final mandatory crib safety standards.*

*As an integral part of this process, ASTM's juvenile product subcommittees must endeavor to quickly establish the strongest and most effective voluntary standards feasible for CPSC's technical staff to utilize in our mandatory rulemakings. I believe that if we continue to work as partners, we will most effectively fulfill our joint responsibility to provide American families with additional peace of mind about the safety of children's products. [10]*

## 5. The Risk to Infants from Durable Infant Products is Very Real

The sense of urgency in developing these standards is well-deserved. The problem is serious, as described in the 2014 edition of the annual CPSC study on injuries and deaths associated with nursery products among children younger than age five:

- *In 2013, there were an estimated 74,900 emergency department-treated injuries associated with, but not necessarily caused by, nursery products among children younger than age 5 years.*
- *Infant carriers/car seat carriers, cribs/mattresses, strollers/carriages, and high chairs were associated with about 66 percent of the injuries. Falls were the leading cause of injury, and the head, followed by the face, were the body parts injured most frequently. Internal organ injuries, contusions/abrasions, and lacerations accounted for 71 percent of the injuries.*
- *Annual estimates of injuries associated with nursery products do not display a statistically significant trend over the 5-year period 2009-2013.*
- *For the 3-year period 2009-2011, CPSC staff has reports of 336 deaths—an annual average of 112 deaths—associated with, but not necessarily caused by, nursery products among children younger than age 5.*
- *Cribs/mattresses, bassinets/cradles, playpens/play yards, infant carriers/car seat carriers, and baby baths/bath seats/bathinettes were associated with 87 percent of the fatalities reported.*
- *Causes of death included positional asphyxia, strangulation, and drowning, among others. [11]*

The seriousness of the problem with durable infant products can be readily seen in the CPSC press releases whenever a new rule is adopted. In each case, the CPSC includes a statement about the number of incidents related to each particular product, as illustrated in [Table 3](#).

The need for these mandatory rules can be seen in the enforcement actions that CPSC takes. [Table 4](#) is a small sampling of the enforcement efforts that CPSC has successfully undertaken to protect infants and toddlers from defective durable products and toys.

Table 3: Press Releases from CPSC on Adoption of Rules

Date	CPSC Release	CPSC Headline	CPSC Incidents Statement
2015-02-24	<a href="#">No. 15-085</a>	CPSC Approves New Federal Safety Standard for Frame Child Carriers	CPSC has received nearly 50 incident reports related to frame child carriers that occurred from January 1, 2003 through September 4, 2014. Thirty-four of those incidents resulted in injuries.
2014-04-15	<a href="#">No. 14-147</a>	CPSC Approves New Federal Safety Standard for Soft Infant and Toddler Carriers	CPSC has received about 125 incident reports related to soft infant and toddler carriers that occurred from January 1, 1999 through July 15, 2013. Four of those incidents resulted in fatalities.
2014-03-05	<a href="#">No. 14-123</a>	CPSC Approves New Federal Safety Standard for Carriages and Strollers.	CPSC has received about 1,300 incident reports related to strollers reported from January 1, 2008 through June 30, 2013. Four of those incidents involved a fatality.
2014-01-13	<a href="#">No. 14-078</a>	CPSC Approves New Federal Safety Standard for Infant Bedside Sleepers	CPSC has received a total of 27 product-related safety incident reports associated with bedside sleepers dating from January 2001 to May 2013. These incident reports include four fatalities that occurred between 2007 and 2009, which were associated with fabric-sided openings on the products.
2013-12-16	<a href="#">No. 14-060</a>	CPSC Approves New Federal Safety Standard for Hand-Held Infant Carriers	CPSC has received a total of 43 fatalities from 2007 through June of 2013. In addition CPSC estimates there were about 66,000 hospital emergency room-treated injuries between 2007 and 2013 related to hand-held infant carriers. The majority of the injuries occurred from falls.
2013-11-13	<a href="#">No. 13-037</a>	CPSC Approves New Federal Safety Standard for Infant Swings	Between May 2011 and May 2012, CPSC received reports of 351 infant swing-related incidents that occurred between 2009 and 2012. Two of the 351 incidents resulted in fatalities, and 349 incidents were nonfatal; 24 of the nonfatal incidents resulted in injuries.
2013-09-30	<a href="#">No. 13-204</a>	CPSC Approves New Federal Safety Standard for Bassinets and Cradles	CPSC received notice of 426 incidents involving bassinet/ cradles, including 132 fatalities from November 2007 through March 2013.
2013-05-10	<a href="#">No. 13-188</a>	CPSC Approves Proposed Rule Aimed at Making Strollers Safer	CPSC staff reviewed more than 1,200 stroller-related incidents, including four fatalities and nearly 360 injuries that occurred from 2008 through 2012.
2012-06-29	<a href="#">No. 12-214</a>	CPSC Approves New Federal Safety Standard for Play Yards	There were more than 2,100 incidents with play yards reported to CPSC, including 60 fatalities and 170 injuries, between November 2007 and December 2011.
2012-02-22	<a href="#">No. 12-114</a>	CPSC Adopts New Federal Standard for Portable Bed Rails	The improved warnings explicitly state that bed rails should never be used with children younger than two years old. They are intended for children age 2 to 5 who can get out of an adult bed without help. Gaps in and around bed rails have entrapped young children and killed infants.

**Table 3: Press Releases from CPSC on Adoption of Rules**

Date	CPSC Release	CPSC Headline	CPSC Incidents Statement
2011-04-14	<a href="#">No. 11-199</a>	CPSC Approves New Mandatory Standard for Toddler Beds	CPSC is aware of 122 incidents from 2005 through 2010, including four deaths and 43 injuries associated with toddler beds.
2010-12-17	<a href="#">No. 11-074</a>	CPSC Approves Strong New Crib Safety Standards To Ensure a Safe Sleep for Babies and Toddlers	CPSC has recalled more than 11 million dangerous cribs since 2007. Detaching drop-side rails were associated with at least 32 infant suffocation and strangulation deaths since 2000. Additional deaths have occurred due to faulty or defective hardware.
2010-05-20	<a href="#">No. 10-237</a>	CPSC Approves New Federal Safety Standard for Infant Bath Seats	From 1983 through November 2009, there were 174 reported deaths involving bath seats and 300 reported non fatal bath seat incidents. Many of the deaths and incidents involve babies left unattended while bathing.

**Table 4: Press Releases from CPSC on Enforcement Actions**

Date	CPSC Release	CPSC Headline	CPSC Incident Description
2015-09-10	<a href="#">No. 15-243</a>	phil&teds USA Agrees to Pay \$3.5 Million Civil Penalty, Implement Internal Compliance Program for Failure to Report Defective Clip-On High Chairs	<p>Between September 2009 and October 2010, phil&amp;teds USA received multiple reports of one or both sides of the high chair detaching, including two incidents where children’s fingertips were amputated. Despite these reports and two design changes to fix the problem, phil&amp;teds USA failed to immediately report the defect, consumer incidents or the design changes.</p> <p>When phil&amp;teds USA finally reported the MeToo high chair to CPSC in January 2011, the company failed to disclose that the high chair posed an amputation hazard, and withheld from CPSC staff that the sample high chair provided for analysis had been redesigned and was not the “representative sample” characterized by phil&amp;teds.</p> <p>The MeToo high chair was recalled in August 2011, after phil&amp;teds USA had imported and sold more than 13,000 units nationwide.</p>
2014-08-04	<a href="#">No. 14-248</a>	Star Networks USA Recalls Magnicubes Due to Ingestion Hazard	From 2009 to the present, CPSC staff has received numerous incident reports of ingestions involving small, high-powered magnets, including many that required surgery.
2013-06-14	<a href="#">No. 13-216</a>	Nap Nanny and Chill Infant Recliners Recalled by Baby Matters LLC After Five Infant Deaths	From 2009 to the present, the Commission staff has received at least 92 incident reports involving the Nap Nanny and Nap Nanny Chill products, including five infant deaths.

Table 4: Press Releases from CPSC on Enforcement Actions

Date	CPSC Release	CPSC Headline	CPSC Incident Description
2013-03-11	<a href="#">No. 13-136</a>	Kolcraft Agrees to \$400,000 Civil Penalty, Significant Internal Compliance Improvements for Failure to Report Defective Play Yards	<p>From about January 2000 through July 2009, Kolcraft received about 350 reports of the play yard collapsing, resulting in 21 injuries to young children, including bumps, scrapes, bruises, and one concussion.</p> <p>Kolcraft did not report the information regarding the play yards to CPSC until January 2009.</p> <p>In July 2009, Kolcraft and CPSC announced the recall of one million play yards.</p>
2013-01-30	<a href="#">No. 13-108</a>	Whalen Furniture to Pay \$725,000 Civil Penalty for Failing to Report Defective Children's Beds	<p>In November 2007, Whalen learned that a 22-month-old boy from Roseville, Calif. had died after the lid of a LaJolla bed's toy chest fell on the back of his head, entrapping his neck on the edge of the toy chest. The firm failed to report the death or hazard with its bed to CPSC until March 2008, after being contacted by agency staff and directed to do so.</p>
2012-12-05	<a href="#">No. 13-058</a>	Five Infant Deaths Prompt CPSC to Sue Manufacturer of Nap Nanny and Chill Infant Recliners	<p>CPSC is aware of four infants who died in Nap Nanny Generation Two recliners and a fifth death involved the Chill model.</p> <p>To date, CPSC has received a total of over 70 additional incident reports of children nearly falling out of the product.</p>
2011-11-22	<a href="#">No. 12-047</a>	Serious Head Injuries to Infants Continue Due to Falls from Bumbo Baby Seats Used on Elevated Surfaces	<p>CPSC and Bumbo International are aware of at least 45 incidents in which infants fell out of a Bumbo seat while it was being used on an elevated surface which occurred after an October 25, 2007 voluntary recall of the product. The recall required that new warnings be placed on the seat to deter elevated usage of the product. Since the recall, CPSC and Bumbo International have learned that 17 of those infants, ages 3-10 months, suffered skull fractures.</p> <p>CPSC and Bumbo International are also aware of an additional 50 reports of infants falling or maneuvering out of Bumbo seats used on the floor and at unknown elevations.</p>
2009-08-20	<a href="#">No. 09-319</a>	Two Additional Infant Deaths Prompt Re-announcement of Simplicity "Close-Sleeper/Bedside Sleeper" Bassinets	<p>CPSC learned that in September 2008, a two-month old female in Demorest, Georgia suffocated when she rolled into the adjustable fabric siding of the bassinet, pressing her face into a "pocket" which formed near the Velcro® fasteners. In another incident in January 2009, a six-month old female in Fort Worth, Texas appears to have been fatally entrapped in the bassinet's bar opening created when the Velcro® fasteners were not secured.</p>

## **6. Public Resource's Transformation of the Durable Infant Product Mandatory Standards**

In order to demonstrate how much more usable and accessible key provisions of the law can be made, Public Resource has posted a modern HTML transformation of 10 of the presently mandated durable infant standards as listed in [Table 2](#). In addition, Public Resource has posted a transformed version of [ASTM F963-2011](#), the mandatory standard required by the CPSC under the provisions of [15 U.S.C. § 2056b](#). Those documents are:

1. [ASTM F406-13](#), Standard Consumer Safety Specification for Non-Full-Size Baby Cribs/Play Yards
2. [ASTM F833-13b](#), Standard Consumer Safety Performance Specification for Carriages and Strollers
3. [ASTM F963-11](#), Standard Consumer Safety Specification for Toy Safety
4. [ASTM F977-12](#), Standard Consumer Safety Specification for Infant Walkers
5. [ASTM F1169-13](#), Standard Consumer Safety Specification for Full-Size Baby Cribs
6. [ASTM F1967-13](#), Standard Consumer Safety Specification for Infant Bath Seats
7. [ASTM F2050-13a](#), Standard Consumer Safety Specification for Hand-Held Infant Carriers
8. [ASTM F2088-13](#), Standard Consumer Safety Specification for Infant Swings
9. [ASTM F2194-13](#), Standard Consumer Safety Specification for Bassinets and Cradles
10. [ASTM F2236-14](#), Standard Consumer Safety Specification for Soft Infant and Toddler Carriers
11. [ASTM F2549-14a](#), Standard Consumer Safety Specification for Frame Child Carriers

All of these documents share a similar workflow:

1. The text of the document was set in HTML. All levels of headers in the specification were tagged as such, paragraphs were identified by type, numbered and unnumbered lists were marked, italicized and bold text was identified, and superscripts, subscripts, and special symbols were properly encoded.
2. Mathematical formulas were recoded using the MathML markup language. [12]
3. All of the graphics were recoded using the SVG markup language. [13]
4. All tables were set and styled.
5. A style sheet was applied to all elements of the markup.
6. Any external links to standards incorporated by reference that were available on our site were marked as hyperlinks and any other references to external resources, such as the CFR, were tagged.
7. Any internal references within the document to a section, figure, table, or equation were made into hyperlinks.
8. A table of contents was generated and “ARIA” tags were added in key locations to improve accessibility. [14]

During this process, we made extensive use of the W3C HTML5 validator and the tenon.io accessibility validator to make sure the code was valid. [15] [16]

The result in each case is a single file containing all formulas and graphics inline and coded using the modern HTML5 standard. The document is standalone, but there are three links to Internet resources in the head section. First, there are links to Google fonts, which improve readability, however the document would look fine even if those fonts are not loaded. [17] Second, there is a call to the [MathJax](#) open source javascript library, which makes the mathematics display properly on older browsers without proper MathML support. Third, there is a link to an external style sheet.

One of the goals of this exercise was to demonstrate how much more accessible this key standard required by law can be made for people who are visually impaired. It is a requirement of federal law under Section 508 that materials such as this, which are used on a daily basis by federal workers and the public, be made accessible. [18] The CFR itself and almost none of the currently available standards incorporated by

reference meet these requirements. For more information on this topic, please see Public Resource's comment [ATBCB-2015-0002](#) to the U.S. Access Board.

The transformed standards presented in this comment make it easier for a screen reader to process, and thus make them more accessible to people who are visually impaired:

1. The entire text is readable, and readable with structure. This means that there is a table of contents, and it a screen reader can allow the user to quickly navigate between the table of contents and go to a particular section, then flip through the subsections to find relevant text.
2. References to footnotes are tagged with the aria-describedby attribute. Instead of just hearing "18" for a footnote and then having to go hear the whole footnote to know what it contains, we have tagged a title or other short description of what is in the footnote. The user could thus choose whether or not to hear the entire footnote after being presented with a brief summary.
3. Because the math is in MathML, a screen reader can provide a much better rendition of mathematical formulas, reading the math with meaning instead of simply spelling out a bunch of symbols. A use would hear "the square root of two plus variable A" instead of "S Q R T 2 plus sign A."
4. Accessibility of images is a key challenge. For each graphic in the SVG format, we have added a title and a description. This is like the "alt" tag that can be put on an image, the difference is that titles and descriptions can be added to sub-components of a diagram in SVG, allowing a screen reader to potentially walk the user through descriptions of different parts.

We note that our work on accessibility is a work in progress. In particular, we are continuing to move from "presentation MathML," which has a strict focus on replication of that exact look of a mathematical equation from the printed version of the standard, to "content MathML," which has a focus on making sure the semantics of the equation are properly encoded so that a screen reader can properly speak an equation. Likewise, we are continuing to develop expertise in the use of accessible SVG markup, a particularly difficult area. In addition, like many of our colleagues who code in HTML, we are still struggling with the proper transformation of those files into "tagged" PDF files.

In addition to increased accessibility, the transformed documents have a number of other features that make them more usable:

1. We moved from the 2-column format that ASTM uses to a single column of text with inline graphics. This means the document is much more scalable. If you make your browser wide, you will the text expands to fill the screen. Likewise, graphics are not fixed size and will shrink or grow to fit the available space.
2. Because the graphics are coded in SVG, somebody working on a new document, such as a training manual or a public comment about infant safety, can make a copy of the images and put them into an illustration program. The diagrams can be colored or improved. Subcomponents can be broken out, such as the five types of infant walkers that are illustrated in [Figure 1 of ASTM F977-12](#), a diagram that was created by CPSC.
3. The mathematical formulas and tables can be pulled out of the specification and reused.
4. Because the document is built using CSS style specifications, a designer could easily change the look and feel of the document, changing the font size or even the entire layout of the document (for example, it would be trivial to move back to a two-column layout).
5. Not only can the HTML look-and-feel of the document be changed because of CSS, it is easy to use a tool such as Prince XML to generate a PDF document. Because we coded in the original page numbers, one could even generate a PDF document that maintains the original pagination. [19]

## **7. ASTM as Eager Participant and Beneficiary of This Process**

Every year, ASTM issues an annual report. The 2014 report is fairly short at 36 pages, yet six of those pages are devoted to features about the work that ASTM does with government. [20] In particular, ASTM's report highlights occasions when ASTM standards are developed at the behest of government or incorporated into law. A brief summary of some of those stories is contained in [Table 5](#). ASTM should rightly be proud of and acknowledge the efforts of the dedicated volunteers who worked closely with government agencies in areas including not only consumer safety, but also the

environment, energy, occupational safety, recycling of plastics, and protecting healthcare from Ebola. These are valuable efforts.

**Table 5: ASTM Prominently Features Its Relationship With Government in the 2014 Annual Report**

ASTM's Headline	ASTM's Descriptive Text
<b>EPA References ASTM Standards to Help Address Climate Change</b>	The U.S. Environmental Protection Agency released two proposed rules that would advance the Obama Administration's Climate Action Plan. The rules provide emission guidelines to U.S. states to reduce greenhouse gas.  To help EPA achieve these objectives, the proposed rules reference several ASTM Committee D02 standard specifications and test methods for fuel oils and biodiesel blends as well as Committee D05 standards on coal sampling and analysis.
<b>New Memorandum of Understanding with Critical Materials Institute</b>	A new memorandum of understanding with the Critical Materials Institute will pave the way for ongoing development of critical materials standards across many industry areas. The institute serves as an innovation hub for the U.S. Department of Energy, ensuring strong supply chains of materials for use in clean energy technologies, driving innovation in manufacturing and enhancing energy security.
<b>New Standard To Test Asbestos Exposure U.S. Occupational Safety and Health</b>	Administration regulations require that worker exposure to asbestos be determined with a "high level of certainty." A new standard, ASTM D7886, developed by Committee D22 on Air Quality, provides a method for exposure assessment tests under controlled conditions using the same work practices and asbestos-containing materials that tradesmen and technicians encounter on job sites.
<b>California Law Incorporates ASTM Labeling Standards</b>	California amended its code relating to solid waste in 2014. The code requires that plastic products meet several specifications from ASTM Committee D20 on Plastics. Products may be labeled compostable, marine degradable, biodegradable, degradable or decomposable in accordance with ASTM plastic labeling standards D6400, D6868 and D7081.
<b>Making Bedside Sleepers Safer</b>	The U.S. Consumer Product Safety Commission incorporated an important ASTM child safety standard in a new federal rule effective July 15. ASTM F2906, Standard Consumer Specification for Bedside Sleepers, was developed to minimize the risk of injury to infants, addressing structural integrity, product assembly and consumer education.
<b>Protecting Healthcare Workers from Ebola</b>	The California Department of Public Health updated their mandates for hospitals, with requirements for protective suits conforming to our standards. The U.S. federal government also provided recommendations for certain personal protective equipment to meet ASTM standards.

ASTM relishes the key role it plays in creating documents that are meant to be incorporated into law. Particularly striking is a listing that ASTM produced comparing its own efforts to other "regulatory SDOs." [21] ASTM keeps track of how many technical standards are incorporated into federal law, comparing its own efforts not only with other private nonprofit Standards Development Organizations, but also

government agencies such as the EPA, the National Highway Traffic Safety Administration, and the International Maritime Organization, as shown in [Table 6](#). ASTM proudly notes that it is the Number One Regulatory SDO on this list, beating other SDOs and the government.

**Table 6: ASTM's Top 10 List of Regulatory SDOs in the US**

No.	Standards Developing Organization	Acronym	No. of Incorporations
1	American Society for Testing and Materials	ASTM	2566
2	U.S. Environmental Protection Agency	EPA	1471
3	American Public Health Association	APHA	816
4	American Society of Mechanical Engineers	ASME	768
5	American National Standards Institute	ANSI	677
6	National Fire Protection Association	NFPA	589
7	International Maritime Organization	IMO	579
8	Society of Automotive Engineers	SAE	437
9	Reprographic Technologies	—na—	351
10	National Highway Traffic Safety Administration	DOT/NHTSA	344

The reason this is important to ASTM is that it is a big (non-profit) business, and its government activities are only a small part of the activities it undertakes. However, the stamp of approval of the United States government is a vital marketing tool for ASTM, allowing it to sell a number of services. In 2013, for example, ASTM had record revenues, including \$8,092,796 from proficiency tests, \$2,161,727 from member fees, \$3,159,647 in inspection fees, and \$1,628,282 in technical and professional training and symposia.

IRS filings show that from 2005 to 2013, ASTM has been a remarkably profitable non-profit, showing an increase in revenues of over 50%, a far more modest increase in expenses, and a dramatic increase in executive compensation (See [Table 7](#)). CEO salary, for example, went from \$540,122 in 2005 to \$1,136,652 in 2013. The organization does not include executive compensation in its annual report and does not file IRS forms until a year after the close of the reporting period, so 2014 salary information is not yet available. The percentage of senior management salaries to total expenses has risen from 6.95% in 2005 to 9.33% in 2013.

Table 7: Revenue, Expense, and Executive Compensation at ASTM International (\$\$)

Year	Revenue	Expense	Profit	CEO salary*	Executive Salary*	Exec. Salary/Expense
2013 [22] †	80,821,028	52,586,454	28,234,574	1,136,652	4,907,114	9.33%
2012 [23]	66,266,407	50,005,817	16,260,590	1,051,139	4,498,175	8.99%
2011 [24]	61,199,159	45,529,350	15,669,809	914,548	3,796,340	8.33%
2010 [25]	58,370,896	43,433,216	14,937,680	822,017	3,671,648	8.45%
2009 [26]	44,963,037	42,509,201	2,453,836	782,047	3,453,455	8.12%
2008 [27]	47,943,365	39,693,460	8,249,905	727,522	3,250,475	8.18%
2007 [28]	45,954,800	37,438,663	8,516,137	665,146	3,489,577	9.32%
2006 [29]	43,649,144	34,825,795	8,823,349	675,997	2,740,329	7.86%
2005 [30]	43,464,416	35,648,458	7,815,958	540,122	2,481,110	6.95%

\* Includes compensation listed on the Form 990 from related organizations.

† Includes 16,338,225 sale of assets as extraordinary revenue.

The 2014 annual report shows the organization ended the year with assets of \$347,003,250, with \$245,885,414 in investments and \$98,117,836 in the pension funds. The investments include money market funds, corporate bonds, government-backed bonds, mortgage backed securities, mutual funds, hedge funds, private equity, and a huge common stock portfolio. Liabilities were only \$28,664,031. The \$347,003,250 in assets in 2014 is a dramatic increase from 2004, when ASTM ended the year with \$143,429,140 in assets and \$9,130,665 in liabilities.

## 8. Government as Author, Director, and Star of This Process

U.S. policy allows government to take a lead role in creating standards when issues are a national priority. This policy is spelled out in “Principles for Federal Engagement in Standards Activities to Address National Priorities,” a White House memorandum entitled which states in part:

*Federal Government Objectives for Standards Engagement to Address National Priorities*

*Once a national priority has been identified, it is important for the Federal Government to engage private sector stakeholders early in the process of*

*identifying technology, regulatory, and/or procurement objectives. The Federal Government's engagement should be broad-based, and it should rely on open and transparent processes. Broad-based engagement provides public officials with the opportunity to obtain information that often is widely dispersed across the economy.*

*In undertaking such work, the Federal Government may play various roles in the standardization system—user, specifier, participant, facilitator, advocate, technical advisor/leader, convener, or source of funding to assure that key public policy goals are achieved in a timely and effective manner. [31]*

Durable infant products are a national priority established by the U.S. Congress. The Danny Keysar act passed the House by a vote of 407-0 and the Senate by a vote of 79-13. [32] This is a remarkable show of congressional unanimity and should not be taken lightly.

CPSC took the charge to develop mandatory durable infant standards very seriously, and enlisted the eager assistance of ASTM to assist them in this endeavor. Here is how the process was reported in ASTM Standardization News:

*CPSC staff has been providing technical support for a total of 61 consumer product safety standards, 42 of which are handled through ASTM committees ... The development of a new or revised ASTM International standard is often initiated when CPSC approaches ASTM regarding the need for a particular safety standard. CPSC staff will provide a list of people who might be interested in developing the standard. [33]*

When ASTM assists the CPSC in this effort, it receives praise from the government and issues press releases to let the world know In another issue of ASTM Standardization News, an interview with former Chairman Inez M. Tenenbaum stated:

*The new rules that were approved by the CPSC make adherence to ASTM [F1967, Consumer Safety Specification for Infant Bath Seats](#), and [F977, Consumer Safety Specification for Infant Walkers](#), mandatory requirements for these products when manufactured or sold in the United States. Among the reasons for the recent rulemakings, Tenenbaum remarked, "the bathtub and the stairs are clearly two of the most high risk places in the home for*

*babies and toddlers, and these two rules will help prevent drownings and serious falls. ASTM leadership and the subcommittee members played a positive role in working with CPSC staff on upgrading these standards from voluntary to mandatory. I want to thank ASTM for responding to my call to bring new thinking and speed to the standards development process.” [34]*

ASTM has been formally recognized for this work by the CPSC, receiving the coveted Chairman’s Circle of Commendation Award from Chairman Tenenbaum for their work on crib safety:

*I am so proud to be able to stand here today and say that the United States has the strongest crib safety standard in the world. The standard that CPSC approved one year ago was based to a large extent on the hard work—and the great work—done by this ASTM subcommittee.*

*Their mandate extends well beyond cribs and their efforts will continue to be instrumental, as CPSC works to turn all of the voluntary juvenile product standards into mandatory standards, as required by the Consumer Product Safety Improvement Act. [35] [36] [37]*

The CPSC is not alone in working closely with ASTM. In [Table 8](#), we see that a total of 1,039 U.S. government employees have signed up as ASTM members, including 44 CPSC employees. [38] Each of these U.S. government employees have purportedly agreed in theory to the ASTM membership agreement, a topic to which we will return shortly. In addition, [Table 9](#) lists 27 agencies or departments that have signed up as ASTM organizational members, again—at least from ASTM’s point of view—agreeing to the ASTM membership policy. [39]

**Table 8: Individual U.S. Government Employee Membership in ASTM**

U.S. Government Agency Name	No. of ASTM Members
Department of Agriculture	40
Department of Commerce (incl. NIST)	165
Consumer Product Safety Commission	44
Department of Defense	257
Department of Energy	178
Environmental Protection Agency	79

**Table 8: Individual U.S. Government Employee Membership in ASTM**

U.S. Government Agency Name	No. of ASTM Members
Federal Aviation Administration	55
Department of Health and Human Services	120
Housing and Urban Development	3
Department of Interior	3
Department of Justice	11
NASA	37
Nuclear Regulatory Commission	7
Occupational Safety & Health Administration	5
Department of Transportation	34
Department of Veterans Affairs	1
<b>TOTAL:</b>	<b>1,039</b>

**Table 9: U.S. Government Agencies That Are Organizational ASTM Members**

U.S. Government Agency Name
<a href="#"><u>Defense Contract Management Agency</u></a>
Defense Logistics Agency, Defense Supply Center Philadelphia
<a href="#"><u>Defense Logistics Agency, Aviation</u></a>
<a href="#"><u>Defense Logistics Agency, Product Testing Center</u></a>
<a href="#"><u>Naval Surface Warfare Center, Corona Division</u></a>
<a href="#"><u>U.S. Air Force</u></a>
<a href="#"><u>U.S. Air Force, Nondestructive Inspection Office</u></a>
<a href="#"><u>U.S. Army Logistics Support Activity</u></a>
<a href="#"><u>U.S. Army Engineering Research &amp; Development Center (ERDC)</u></a>
<a href="#"><u>U.S. Army Natick Soldier Research, Development &amp; Engineering Center</u></a>
<a href="#"><u>U.S. Coast Guard</u></a>
<a href="#"><u>National Institute of Standards and Technology</u></a>
<a href="#"><u>U.S. Dept. of Labor, Mine Safety and Health Administration</u></a>
<a href="#"><u>U.S. Dept. of Transportation, Maritime Administration</u></a>
<a href="#"><u>Federal Aviation Administration, Logistics Center</u></a>
<a href="#"><u>Federal Aviation Administration, Small Plane Directorate</u></a>
<a href="#"><u>Federal Aviation Administration, Fire Safety Branch</u></a>
<a href="#"><u>Federal Aviation Administration, Propulsion and Fuels R&amp;D</u></a>

Table 9: U.S. Government Agencies That Are Organizational ASTM Members

U.S. Government Agency Name
<a href="#">U.S. Food and Drug Administration</a>
<a href="#">U.S. National Gallery of Art</a>
<a href="#">U.S. National Park Service</a>
<a href="#">U.S. Dept. of Defense, Office of the Under Secretary</a>
<a href="#">U.S. Secret Service</a>
<a href="#">U.S. Special Operations Command</a>
<a href="#">U.S. Dept. of Justice</a>
<a href="#">U.S. Dept. of Interior</a>
<a href="#">U.S. Dept. of Housing and Urban Development</a>
<a href="#">U.S. Environmental Protection Agency</a>

There is a well-established policy in U.S. law that works of the federal government are exempt from coverage under the U.S. Copyright Act. Specially, § 105 reads:

*§ 105. Subject matter of copyright: United States Government works. Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.*

In many cases, as with the durable infant products, it is clear that the standards were not only developed at the behest of the government, it is clear that the government authored large parts of the text. A striking example of this can be seen by comparing the 2007 and 2012 versions of F977, the mandatory standard for infant walkers.

- The 2012 version of [16 CFR 1216.2](#) incorporates ASTM F977-07, but lists a large number of changes. That version of the CFR standard was published in 2010 in [75 FR 35273](#).
- Compare that to the much shorter version of [16 CFR 1216.2](#) which incorporates ASTM F977-12 as part of the June 24, 2013 final rule in [78 FR 37709](#).

- The reason it became so much smaller is because all of the CFR text was simply added to the 2012 version of the standard. To illustrate this, Public Resource has prepared [a “blueline” version of ASTM F977-2012](#) which marks the government-authored sections of this standard are marked in blue and have an aria-label of “gov.” Over 130 separate elements of F977-2012 have government authorship.

The reuse of materials from one standard to another and the incorporation of language from authors, including the U.S. Government, is common in the creation of standards. This is because there is only one way to state a particular requirement, and once consensus is reached, it is important to remain consistent. This is illustrated very clearly by looking at the U.S. and European standards for the safety of toys. In the U.S., the mandatory standard is [ASTM F963-11, Standard Consumer Safety Specification for Toy Safety](#). In Europe, a more extensive set of standards have been mandated in [EU Directive 2009/48/EC](#) on the safety of toys, and in five subsequent Directives and Regulations of the Commission.

The key standard is [EN 71-1:2011+A3, Safety of toys - Part 1: Mechanical and physical properties](#). Another important document in this series is [EN 71-3:2013+A1, Safety of toys - Part 3: Migration of certain elements](#). Migration of heavy metals and other substances is a key issue in toy safety. An example of migration is if lead is used in paint to cover a toy and the toy is subsequently put in a child’s mouth and flakes of the paint (and the lead) migrate from the toy to the child.

Public Resource has prepared a [simple “blueline” of F963-11](#), showing 17 diagrams that are identical between EN 71-1 and F963. Since most of the diagrams in question show only metric measurements, we presume that the original source of the diagrams were the Europeans, but no attribution is provided so it is not possible to precisely determine the source. Previous drafts of these documents are not available. In addition, a [2012 CPSC report by staff toxicologist Dominique W. Johnson](#) states that “CPSC staff believes that the migration limits in ASTM F 963-07 came directly from the European Standard EN 71-3.”

Safety of toys is a priority for both European and U.S. regulators and the area has received a great deal of attention. Public Resource has worked to bring the issue of public access and availability to the attention of regulators in other countries, most recently in a [petition to Her Majesty's Government](#) on the safety of toys.

## 9. Due Process is Essential for Mandatory Standards

In order for the U.S. government to work with a private organization such as ASTM to develop and incorporate standards—particularly standards intended to be mandatory—the White House has defined the essential attributes that must be present to be defined as a “voluntary consensus standards body” under OMB Circular OMB A-119, as revised in 1998:

*4(a)(1). “Voluntary consensus standards bodies” are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, “voluntary, private sector, consensus standards bodies,” as cited in Act, is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:*

- i. Openness.*
- ii. Balance of interest.*
- iii. Due process.*
- iv. An appeals process.*
- v. Consensus [40]*

Openness and due process are further defined in the proposed revision to A-119 currently under consideration by the Office of Information and Regulatory Affairs (OIRA):

*Openness: The procedures or processes used are open on a non-discriminatory basis to interested parties, and such parties are provided meaningful opportunities to participate at all stages of standards development. The procedures or processes for participating in standards development and for developing the standard are transparent;*

*Due process: Due process shall include adequate notice of meetings, sufficient time to review drafts and prepare views and objections, full access*

*to the views and objections of other participants, and a fair and impartial process for resolving conflicting views [41]*

The World Trade Organization has declared that making drafts, minutes, and other secondary materials available are an essential part of due process:

*It is recognized that the publication and communication of notices, notifications, draft standards, comments, adopted standards or work programmes electronically, via the internet, where feasible, can provide a useful means of ensuring the timely provision of information. At the same time, it is also recognized that the requisite technical means may not be available in some cases, particularly with regard to developing countries. Accordingly, it is important that procedures are in place to enable hard copies of such documents to be made available upon request. [42]*

## **9.1. The ASTM Paper Trail Is Difficult To Follow and the Terms of Entry Are Onerous**

The *Regulations Governing ASTM Technical Committees* require “each committee shall adopt, by ballot of the Committee, bylaws governing its operation.” [43] The bylaws include rules on qualification for membership, rules for the conducts of business and meetings, and governance including selection of officers. However, the bylaws for [Committee F15 on Consumer Products](#), which developed all the standards discussed in this comment, do not appear to be available.

The *ASTM Bylaws* likewise require certain principles of openness, in particular:

*7.1.2. Opportunity for all affected interests to participate in the deliberations, discussions and decisions concerned both with procedural and substantive matters affecting the proposed standard.*

*7.1.4. Timely publication and distribution of minutes of main and subcommittees.*

*7.1.9 Maintenance of records of drafts of a proposed standard, proposed amendments, action on amendments, and final promulgation of the standard. [44]*

ANSI requires openness as well in order to certify an organization as a voluntary, consensus body. The ANSI Essential Requirements Manual states:

*1.1 Openness. Participation shall be open to all persons who are directly and materially affected by the activity in question. There shall be no undue financial barriers to participation. Voting membership on the consensus body shall not be conditional upon membership in any organization, nor unreasonably restricted on the basis of technical qualifications or other such requirements. [45]*

ASTM fails in these requirements in multiple respects. First, in order to participate in the ASTM online process, one must purportedly agree to ASTM's terms of use, which include a number of onerous clauses. All participants, as a condition for membership (including membership by U.S. government bodies and by individual U.S. government employees) must purportedly agree to the transfer and waiver of all intellectual property rights, as stated in the *ASTM Intellectual Property Policy*:

*IV.B: This Policy applies to all ASTM International employees, members, officers, directors, Participants, resellers/distributors and others involved with the development, adoption, publication, use and/or distribution of ASTM IP. For purposes of this Policy, "committee" or "technical committee" includes subcommittees and task groups.*

*IV.C: Participants, members, and authorized resellers/distributors acknowledge and agree that the adoption, enactment, reference, or incorporation of any of the ASTM IP by any government or agency has not and will not effect, transfer, modify or alter the copyrights of the ASTM IP in any way. [46]*

This is further reinforced in the ASTM Application Membership Form purportedly required of all individual and organizational members:

*You agree, by your participation in ASTM and enjoyment of the benefits of your annual membership, to have transferred and assigned any and all interest you possess or may possess, including copyright, in the development*

or creation of ASTM standards or ASTM IP to ASTM. See ASTM IP policy, [www.astm.org/prpolicy.html](http://www.astm.org/prpolicy.html) [47]

These are remarkable statements. Clause IV.C, requiring participants to agree that even if the federal government incorporates a standard by reference that it does not affect any alleged copyright ASTM claims to have, is an astonishing example of overreach. It is also noteworthy that this clause was added October 28, 2003. Students of copyright history will remember that Chief Judge Edith H. Jones handed down the *en banc* decision of the U.S. Court of Appeals for the Fifth Circuit in the case of *Veeck v. Southern Building Code Congress* ([293 F. 3d 791](#)) on June 7, 2002. The *Veeck* decision ruled that a model building code incorporated by reference is the law and that people may therefore freely read and speak the provisions. ASTM's revision to its IP policy seems like a transparent and presumptuous attempt to trump our federal judiciary.

It is also quite remarkable that U.S. government employees are asked to transfer their purported copyright interests to ASTM, an agreement that no federal employee or organization is authorized to make under federal law.

## **9.2. A Paper Trail Is An Essential Component of Any Standards Effort, Particularly When Standards Are Created Expressly for the Purpose of Incorporation Into Law**

However, the membership policy has an even more insidious effect. When examining a standard for due process considerations, it is essential to be able to examine materials such as prior drafts, who attended the meeting, meeting minutes, negative votes and their resolution, and other supporting materials. This is standard operating procedure for any standards development organization.

Take, for example, the Internet Engineering Task Force (IETF) and RFC 2629, an Internet Draft authored by Dr. Marshall T. Rose (with assistance from a number of other contributors including Carl Malamud of Public Resource). The RFC describes an XML-based syntax for authoring IETF documents, a markup language that has been used actively by the organization since 1998. [48] A [full record of the evolution](#) of that document can be found on the IETF site including the current status, any successor documents, references to other standards documents, references from other standards documents, and prior versions. That RFC was an individual contribution which was submitted to the RFC editor and then approved by the Internet Engineering Task Force and has a standards-track status of informational.

For documents that are products of working groups and on the standards track, an even more extensive record is kept by the IETF. Take, for example, RFC 7230, Hypertext Transfer Protocol (HTTP/1.1): Message Syntax and Routing. [49] For that document, the IETF makes available all [26 prior versions](#), a detailed [IESG evaluation record](#) including votes, a full record of [all email notifications](#), and a [detailed history](#) (including the ability to compare any of the versions). In addition, there is a full record for the [working group](#) that developed the standard, including every email message sent, the charter of the working group, and minutes.

In the case of ASTM, none of these types of materials are available for the public to view on its web site. Even members of committees are able to access a subset. We were able to find some minutes of ASTM meetings on consumer safety only because some CPSC employees record a brief memorandum when they attend an ASTM meeting. The 250 documents [retrieved from the CPSC web site](#) date back to 1994 and provide an incomplete record of agency participation and an even more incomplete record of the development of the standards at issue.

It is clear from reading through these documents that CPSC was an active player, in many cases convening the initial meetings of working groups, providing draft texts for the subcommittees to start with, furnishing a large amount of technical support data including specifications for testing apparatus and procedures, and requiring a large number of changes in standards before CPSC approval is granted.

Because none of that process is visible to the public on the ASTM web site, there is no way for an “outsider” who has not agreed to the onerous ASTM terms to assess the validity of the process or the genesis of the resulting document that becomes a mandatory standard.

### **9.3. Claims of Exclusive Rights to the Law Are Inappropriate**

The policies of ASTM, including improper claims of exclusive rights to works of government and other works developed by dedicated volunteers, as well as closed opaque development process for the development of standards appears to reflect a sense at ASTM that its leadership should report to no master. We were struck by the statements of ASTM’s general counsel on this subject in an editorial he wrote for the ASTM newsletter:

*Why do we absolutely insist that every decision made by every body, public and private, must be subject to review by someone else?*

*The periodic (and happily infrequent) forays of government “watchdog” agencies into the standards world have shown the same mindset. These forays, usually on antitrust or public safety grounds, have always boiled down sooner or later to the basic proposition that the agency, for its own reasons, just didn’t agree with the decision made by a technical committee. In the view of the agency, the standard was “too tight” (it excluded a product from the marketplace and was therefore anti-competitive) or “too loose” (it allowed a defective product into the marketplace that was a threat to public safety). Apparently in each of these cases only the agency, like Goldilocks, could tell when the porridge was “just right.” Do we dare ask a critical question of this system of appeal under the guise of agency oversight? If you had to choose between the consensus decision of an ASTM technical committee, and the decision of, say, a group of Justice Department lawyers, on the substance of a standard, which decision would you think was likely to be sounder, more technically reliable, and more in the public interest?*

*Perhaps even worse than agency oversight is the omnipresent “oversight” of America’s legal system. There we have a literal army of folks waiting to second-guess any decision made by anybody on any subject—all on so-called “legal” grounds. [55]*

This attitude is perhaps appropriate as a personal opinion for a strictly private activity, but when it comes to the development of federal law, it shows an unseemly sense of entitlement for the general counsel of a wealthy non-profit to presume itself beyond the scrutiny of our government.

Even if such an opaque process as described here is chosen, the resulting document that is incorporated into federal law must be made available to the public to freely read and speak. No matter how the sausage is made—no matter what the flaws in due process—the people still have a right to see the thing that has become law.

#### **9.4. Government Must Avoid the Appearance of Conflicts of Interest That Enrich Private Organizations At the Expense of the Public Good**

There is one other due process issue that is important to mention. ASTM and other Standards Development Organizations have a strong incentive to maximize revenue. This is clear from an examination of the ASTM financial statements, but also clear from

the extremely aggressive stance that ASTM takes towards any efforts to make federal law more broadly available.

Public Resource has experienced this first hand as we are being sued by ASTM and five of their fellow SDOs in U.S. District Court for having made available standards that are incorporated by reference into the Code of Federal Regulations. [50] ASTM alleges copyright infringement, a charge we vehemently and vigorously deny. ASTM and their five fellow plaintiffs have expended great effort to prevent standards incorporated by reference from being available on the Internet. While the standards at issue in that litigation are different from the durable infant standards being discussed in this comment, the aggressive policy to preserve an exclusive right to display significant portions of the law puts the organization at odd with long-established federal policies and certainly casts an ominous chilling cloud over people trying to inform their fellow citizens about the provisions of the law.

ASTM may adopt any policy positions it chooses, but its pursuit of a policy of revenue maximization puts it in a position that frequently conflicts with the goals of our federal government. While federal policy encourages government participation in the standards-making process, it is important that the government always keep in mind that ASTM is a private organization with private goals.

We are thus concerned when we see Mr. Colin Church, the Voluntary Standards Coordinator for the CPSC—a key executive staff position at the Commission—put in a position where he may have to serve two masters. Let us state that we are strong admirers of the technical work that Mr. Church has undertaken in over 30 years of distinguished government service, a role that led to a well-deserved honor of being named the recipient of the ASTM International 2015 Cavanaugh Award:

*A member of ASTM Committee F15 on Consumer Products since 1988, Church serves on the F15 executive subcommittee as a member at large. As a member of both F15 and Committee F08 on Sports Equipment, Playing Surfaces and Equipment, he has played a pivotal role in identifying emerging threats to consumer safety and has transmitted incident data used by ASTM to mitigate hazards through standards. His work and dedication have contributed to ASTM consumer product safety standards being used to save lives and reduce serious injuries. An ASTM fellow who received the Award of Merit in 1998, Church was also honored with the F15 Margaret Dana Award in 1991.*

*Church joined the Office of Standards Coordination and Appraisal, Strategic Planning and Health Sciences at CPSC in 1975 as project manager for the Household Structures Program and assumed his current role in 1988. As voluntary standards coordinator, Church oversees activities to support the development of more than 80 voluntary standards to improve the safety of consumer goods and enhance cooperation between CPSC and industry. [51]*

Mr. Church also serves on the board of ANSI, an organization with a huge financial stake in maintaining an exclusive monopoly over portions of federal law for their members, an issue that is the number one policy priority for ANSI. Mr. Church, with a fiduciary responsibility to ANSI as well as his responsibilities to his primary employer, the U.S. Government, has been placed in a position of serving two masters.

The Office of Government Ethics has specifically dealt with the issue of government employees serving on the boards of external nonprofits and issued this guidance:

*It is a best practice for agencies to commit the scope of an employee's permissible activities to writing in a memorandum of understanding between the agency, the employee and the nonprofit organization. Agencies may also use this document to outline any pertinent limitations and explain the actions, including recusal or resignation from the nonprofit organization, that the employee must take if an actual or potential conflict-of-interest arises in connection with the employee's service in the nonprofit organization. This is important, as activities undertaken by the employee while assigned to the nonprofit organization that are outside the scope of the limitations imposed by the agency would not be covered by the exemption and, therefore, could constitute a violation of [18 U.S.C. § 208\(a\)](#). [52]*

Public Resource requested a copy of that agreement through the Freedom of Information Act on July 22, 2015 and received an answer on August 11, 2015. [53] [54] That response stated in part:

*There is no memorandum of understanding between the agency, the employee and the nonprofit organization. Commission Participation and Commission Employee Involvement in Voluntary Standards Activities ([16 CFR 1031](#)) sets for the Consumer Product Safety Commission's (CPSC's)*

*guidelines and requirements on participating in activities of voluntary standards bodies.*

The sections of the CFR that were cited by CPSC deal with government participation in the development of standards, not with government employees that are assuming a fiduciary responsibility for a private organization. However, the relevant section of the CFR does deal with the issue of closed meetings and the questions of independence and impartiality:

*16 CFR 1031.9(c)(3): Presents no real or apparent conflict of interest, and does not result in or create the appearance of the Commission giving preferential treatment to an organization or group or the Commission compromising its independence or impartiality*

*16 CFR 1031.13(c): Except in extraordinary circumstances and when approved in advance by the Executive Director in accordance with the provisions of the Commission's meetings policy, 16 CFR part 1012, Commission personnel shall not become involved in meetings concerning the development of voluntary standards that are not open to the public for attendance and observation.*

We wish to stress our admiration of the work of Mr. Church and we have no indication of anything but the most dedicated public service from him over several decades of work. However, we believe it is important, as does the Office of Government Ethics, to clearly delineate the roles government employees will take when assuming fiduciary responsibilities for private organizations.

## **10. The Law Belongs to the People in the United States**

The fundamental law of the United States requires that the government make standards that are incorporated by reference into federal regulations widely available to the public, without charge, and that such standards be deemed in the public domain rather than subject to copyright restrictions. Citizens have the right, without limitation, to read, speak, and disseminate the laws that we are required to obey, including laws that are critical to public safety and commerce. Open, effective, and efficient government and robust democracy require such free availability of standards incorporated by reference.

### **10.1. The Freedom of Information Act and Regulations Governing Incorporation by Reference Compel the CPSC To Make These Incorporated Standards Freely Available**

The Freedom of the Information Act allows the Director of the Office of the Federal Register to deem as effectively published in the Federal Register material that is incorporated by reference into a regulation, but only if such material is “reasonably available to the class of persons affected thereby.” [5 U.S.C. § 552\(a\)\(1\)](#). Title 51 of 1 CFR implements this provision. The Director of the Office of the Federal Register is charged with approving each instance of incorporation by reference requested by federal agencies. In carrying out this responsibility, the Director “will assume in carrying out the responsibilities for incorporation by reference that incorporation by reference ... is intended to benefit both the Federal Government and the members of the class affected ...” [1 CFR 51.1\(c\)\(1\)](#). In order to be eligible for incorporation for a reference, a publication must meet standards including that the publication “does not detract from the usefulness of the Federal Register publication system” and “is reasonably available to and usable by the class of persons affected.” [1 CFR 51.7\(a\)\(2\)\(ii\) and \(a\)\(3\)](#).

The advent of the Internet has fundamentally transformed what it means for material to be reasonably available. The Internet has brought the possibility that all standards incorporated into federal law can be instantly available online, linked directly to the relevant provisions of the CFR.

Before the Internet, it was impractical to offer within the pages of the Federal Register and Code of Federal Regulations the often voluminous standards incorporated by reference into agency rules; the regulations, at [1 CFR 51.7\(a\)\(3\)](#) specifically note that

material is eligible for incorporation by reference if it “[s]ubstantially reduces the volume of material published in the Federal Register.”

The widespread availability of the Internet, along with technologies like high-speed scanners and large-capacity hard drives, eliminates any argument that incorporation of standards through simple reference—as opposed to publishing the full text of the standard with the regulations—is needed to save space or trees.

Indeed, the Internet era provides a tremendous opportunity for government to inform its citizens in a broad and rapidly updated manner about the legal standards that must be met in carrying out daily activities. It also allows for companies, non-profits, and citizens to utilize and organize this information to enhance compliance, better understand the provisions of law, improve public safety, increase economic efficiency and opportunity, and highlight opportunities for effective reform.

Another strong advantage of widespread public availability of standards incorporated by reference would be to highlight the need for government to replace old, outdated standards with new ones. Public Resource has conducted an extensive examination of the Code of Federal Regulations with specific focus on incorporations by reference, coupled with an extensive examination of the Standards Incorporated by Reference (“SIBR”) database maintained by the National Institute of Standards and Technology. Many standards incorporated by reference into the CFR have been superseded by new standards from the SDOs. Greater public access to standards incorporated by reference into federal regulations might alert policy and industry communities to the fact that federal rules are too often connected to outdated private standards and are in need of updating to improve public safety. Among the findings of Public Resource’s review is that many of the standards incorporated by reference into federal law are simply unavailable for purchase. [56]

Today, the only thing impeding the broader availability to the public of standards incorporated by reference is the belief of some SDOs that they have the right to bar the public from reading and speaking these provisions of law, because they fear that broader public access will reduce their volume of sales of such standards.

Standards incorporated into current CPSC regulations would cost hundreds of dollars to purchase a copy, and any serious inquiry into federal public safety requirements inevitably requires consultation with other agencies as well. For example, an examination of CPSC standards invariably leads one to cross-reference standards promulgated by OSHA and the National Highway Traffic Safety Administration. High prices like that make the standards unavailable for the vast majority of Americans,

perverting the fundamental principles of notification and an informed citizenry, and violating FOIA's mandate that incorporated standards be reasonably available.

Given all these factors, CPSC should determine that the mandates of FOIA and the public interest require that the standards it incorporates by reference into its final rule be written directly into the rule or else available on a public website without charge, and without limitation of use.

That would include CPSC making clear that its obligations would not be satisfied by the relevant SDO posting its standard with the kind of restrictions that some SDOs, including ASTM, have imposed as they have, in recent years and months, posted some standards on their own websites—forcing persons wishing to read the standards to register, prohibiting copying, or printing, or bookmarking, curtailing search capacity, or otherwise limiting the capacity of all persons to read, speak, and use standards that have become binding law. [57]

Presented with a petition by legal scholars making the argument for free online access, the Office of the Federal Register recently addressed and modified its regulations governing incorporation by reference in a final rule (“the OFR rule”) issued on November 7, 2014, and effective January 6, 2015. [58] We believe that language in the preamble to this OFR rule inappropriately elevates copyright assertions of the SDOs over the mandates of FOIA. But the OFR rule, which became effective on January 6, 2015, does not in any respect bar CPSC (or any other agency) from making its own judgments as to its legal and public obligations regarding standards incorporated by reference and taking appropriate steps in this rulemaking to ensure that the law, including standards incorporated in the instant rule, is freely available to all.

OFR refused to grant the petition's central request—that it hold that material incorporated by reference in the Code of Federal Regulations be available online and free of charge. But OFR gave as its reason its view that OFR itself lacked the power to issue such a broad rule for all federal agencies: “petitioners’ proposed changes to our regulations go beyond our statutory authority.” OFR explained: “we are a procedural agency. We do not have the subject matter expertise (technical or legal) to tell another agency how they can best reach a rulemaking decision.”

Later in the preamble to its final rule, OFR indicated that agencies do have the discretion to make the text of standards incorporated by reference available free of charge:

*One commenter stated that since it is the text of standards that must be available (citing Veeck for the proposition that the law is not subject to copyright law), agencies should copy the text of IBR'd standards and place the text online. In a footnote, the commenter suggested that OFR require agencies to place the text of their "regulatory obligations" in their online dockets. This way the "text of the legal obligation and not the standard as such" is available online for free. [footnote omitted]*

*We leave it to the agencies to determine if they should follow this commenter's suggestion. [79 FR 66267](#)*

The OFR preamble, therefore, confirms what should be obvious: that specific agencies may make their own choices about reasonable availability, including placing incorporated standards online. CPSC should act here to do just that.

## **10.2. The Constitution and Judicial Decisions of the United States Compel CPSC To Make These Incorporated Standards Freely Available**

As discussed in greater detail in Public Resource's comment in OMB Request for Information 2012-7602, the U.S. Supreme Court in *Wheaton v. Peters*, [33 U.S. 591](#) (1834), and *Banks v. Manchester*, [128 U.S. 244](#) (1888), held that the law "is in the public domain and thus not amenable to copyright." *Veeck v. Southern Bldg. Code Congress International, Inc.*, [293 F.3d 791, 796](#) (5th Cir. 2002) (*en banc*), cert. denied, [539 U.S. 969](#) (2003). [59] *Wheaton*, *Banks*, and the *en banc* decision of the United States Court of Appeals for the Fifth Circuit in *Veeck* all concerned comparable fact patterns: One private party was trying to stop another private party from publishing material that was part of the law. In none of those three cases was anyone trying to prevent the first party from selling copies of such material, and we do not question the right of SDOs to sell standards incorporated by reference into law. Rather, we believe, as the courts concluded in those cases, that once material has become law, then other parties have the right to read it and to speak it, without limitation—and that that proposition clearly applies to standards incorporated by reference into federal law, notwithstanding assertions of copyright by SDOs.

The principle that the law must be public and available to citizens to read and speak has its roots in the concept of the rule of law itself, as well as central provisions of our Constitution. See generally Thomas Henry Bingham, *The Rule of Law*, 37-38 (Penguin Press 2011) ("The law must be accessible ... the successful conduct of trade,

investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.”); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 34 (Cambridge Univ. Press, 2004) (“Citizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance.”). That is why, going back to ancient times, societies that replaced the rule of tyrants with the rule of law prominently displayed the laws in public places for all to see. See, e.g., Robert C. Byrd, [The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism](#), 33, 128, 135 (U.S. Government Printing Office, 1995).

As this history suggests, open access to the law is essential to a free society. Citizens are expected to obey the law, but they cannot do so effectively if they do not know it. Further, the First Amendment right to freedom of speech is imperiled if citizens are barred from freely communicating the provisions of the law to each other. Cf. *Nieman v. VersusLaw, Inc.*, [No. 12-2810, at \\*2 \(7th Cir. Mar. 19, 2013\)](#) (“The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed.”).

By the same token, equal protection of the laws and due process are jeopardized if some citizens can afford to purchase access to the laws that all of us are bound to obey (with potential criminal penalties for non-compliance), but others cannot. Cf. *Harper v. Va. State Bd. of Elections*, [383 U.S. 663, 666](#) (1966) (a state violates the Equal Protection Clause “whenever it makes the affluence of the voter or payment of any fee an electoral standard”); see also Magna Carta [1297 c. 9 \(cl. 29\)](#) (1297) (“We will sell to no man, we will not deny or defer to any man either Justice or Right.”).

Consistent with these fundamental principles, it is unlawful and unreasonable for CPSC to make these standards part of binding United States law without providing a means for citizens to access them without cost or restriction.

### **10.3. Granting Citizens Access to Their Own Laws Will Not End the Creation of Public Safety Standards**

Opposition to allowing citizens to freely read and speak the public safety standards that are incorporated into law seems to rest on the premise that allowing such access will end the standards-creation process and thereby imperil safety. The argument advanced is that if the government required that all materials incorporated by reference be available for free, then SDOs would react not by making their standards truly available

to the public online but rather by ending or curtailing their work to create standards and/or by resisting government efforts to incorporate their standards into law.

Those assumptions of fact and law have been soundly refuted.

The *en banc* U.S. Court of Appeals for the Fifth Circuit in *Veeck* specifically addressed the policy and empirical issues regarding what might happen if courts, as that court did, expressly upheld the right of a citizen to communicate the law, in that case the right of a citizen to post the building code of his town, derived from a model code published by SBCCI, on the Internet. Rather than assume that the entire system of private standard-setting might collapse, the Fifth Circuit examined the arguments and determined that allowing citizens to speak their own laws would not end this beneficial system:

*Many of SBCCI's and the dissent's arguments center on the plea that without full copyright protection for model codes, despite their enactment as the law in hundreds or thousands of jurisdictions, SBCCI will lack the revenue to continue its public service of code drafting. Thus SBCCI needs copyright's economic incentives.*

*Several responses exist to this contention. First, SBCCI, like other code-writing organizations, has survived and grown over 60 years, yet no court has previously awarded copyright protection for the copying of an enacted building code under circumstances like these. Second, the success of voluntary code-writing groups is attributable to the technological complexity of modern life, which impels government entities to standardize their regulations. The entities would have to promulgate standards even if SBCCI did not exist, but the most fruitful approach for the public entities and the potentially regulated industries lies in mutual cooperation. The self-interest of the builders, engineers, designers and other relevant tradesmen should also not be overlooked in the calculus promoting uniform codes. As one commentator explained,*

*...it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.*

1 Goldstein § 2.5.2, at 2:51.

*Third, to enhance the market value of its model codes, SBCCI could easily publish them as do the compilers of statutes and judicial opinions, with “value-added” in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out. In short, we are unpersuaded that the removal of copyright protection from model codes only when and to the extent they are enacted into law disserves “the Progress of Science and useful Arts.” U.S. Const. art. I. § 8, cl. 8.*

*293 F.3d 791 at 806* (footnotes omitted).

These conclusions expressed by the court in *Veeck* are even more powerful today. Notwithstanding the issuance of the *Veeck* decision itself, and the U.S. Supreme Court’s denial of review after being informed by the Justice Department that “[t]he court of appeals reached the correct result,” SDOs have continued to create and issue standards for another decade. SDOs also have continued to press federal and state authorities to incorporate their standards into law.

Given these factors, we strongly believe that, if the CPSC and other agencies required that only standards made available without restriction be eligible for IBR, then (1) SDOs would continue to promulgate standards and urge their incorporation into law; (2) SDOs, government, and various private entities would make standards incorporated by reference available to the public without restriction, and the courts would uphold any challenges to such action, allowing the CPSC and other agencies to be confident that standards it was considering for IBR approval would indeed be publicly available.

## **11. Public Access to the Law is Crucial to CPSC’s Mission and is a Fundamental Precept of the Rule of Law and an Underpinning of our Democratic System of Government**

CPSC relies heavily on the public to carry out its mission. An article in the ASTM newsletter by George Sushinsky, a mechanical engineer at the CPSC, illustrates the importance of public participation:

*The CPSC also receives information about incidents and injuries associated with consumer products through the CPSC Hotline (800/638-2772 and 800/*

*638-8270 TTY for speech or hearing impaired). About 4,000 complaints about “unsafe” products are received through the hotline. Newspaper reports also serve as a source of approximately 7,000 consumer product-related incidents. Death information is obtained through the Medical Examiners and Coroners Alert Project, which accounts for about 3,500 death reports annually. CPSC also purchases death certificates from each state—a total of about 8,700 certificates each year. There are an additional 10,000 miscellaneous consumer product-related reports from lawyers, physicians, fire departments, and other sources. All of the reports are included in the CPSC databases and used to assess hazards associated with consumer products. [60]*

Public notifications are the key to tracking incidents. Public access to the law is also crucial for the U.S. to meet its international obligations to make the rules transparent and open, an issue that is particularly important since most toys and infant durable products come from China, and the U.S. very much wants all these toys to conform to our mandatory rules. This is enshrined in our World Trade Organization obligations under international law:

*2.11. Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them. [61]*

Rationing access to the law hurts trade, it hurts public safety, and it makes it much more difficult for the CPSC to carry out its congressionally-mandated mission. It makes absolutely no sense to prohibit parents, journalists, consumer groups, and government employees from widely disseminating the mandatory provisions of CPSC durable infant product standards. Doing so only makes the public less safe.

Not only does restricting access not make sense, it is not necessary. As we’ve seen, ASTM benefits greatly from its honored position as the official supplier of a key component of public safety law, a position it eagerly leverages into a huge marketing advantage with U.S. industry and abroad with foreign governments. Insisting that ASTM be the monopoly provider of this document and that all others must obtain a license before speaking the law—a license that can be arbitrarily denied or extended only under unreasonable terms—is unnecessary and, quite frankly, greedy.

Restricting access to the particular standard at issue, the 5-page infant bath standard, also makes no technical sense at all. The standard is five pages long, yet the CFR has four pages of changes, which when folded into the core text (with great difficulty), results in a 6-7 page document. As we've seen, the government is clearly an author of this work.

A fundamental requirement of the Office of the Federal Register is that the incorporation "Substantially reduces the volume of material published in the Federal Register" ([1 CFR 51.7\(3\)](#)) and "is reasonably available to and usable by the class of persons affected by the publication" ([1 CFR 51.7\(4\)](#)). Neither of these requirements are met. A much simpler solution would be to simply read the mandatory rule into the proposed text. Incorporation by reference is totally unnecessary in this case and runs counter to the professed aims of the rulemaking.

That citizens should know the law is crucial to the ability of CPSC to carry out its mission. The Commission was created by Congress in 1972 by the Consumer Product Safety Act ([Pub. Law 92-573](#)) because the "complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately." It runs directly counter to that mission to enact mandatory standards that are only available from one private provider, in an inaccessible and poorly executed format, with stringent restrictions on who may speak the law and under what conditions.

Public access to the law goes far beyond the mission of the CPSC; it is crucial to the mission of our system of government. We cannot have an effective democracy without an informed citizenry. John Adams eloquently made that point in his Dissertation on the Canon and Feudal Law:

*Liberty cannot be preserved without a general knowledge among the people, who have a right from the frame of their nature, to knowledge, as their great Creator who does nothing in vain, has given understandings, and a desire to know—but besides this they have a right, an indisputable, unalienable, indefeasible divine right to that most dreaded, and envied kind of knowledge, I mean of the characters and conduct of their rulers. Rulers are no more than attorneys, agents and trustees for the people.*

*Let the public disputations become researches into the grounds and nature and ends of government, and the means of preserving the good and demolishing the evil. Let the dialogues, and all the exercises, become the*

*instruments of impressing on the tender mind, and of spreading and distributing far and wide, the ideas of right and the sensations of freedom.*

*In a word, let every sluice of knowledge be opened and set a-flowing. [61]*

There can be no sluice of knowledge more important to be set a-flowing than that pertaining to the safety of our infants.

// signed //



Digitally signed by Carl Malamud  
DN: cn=Carl Malamud,  
o=Public.Resource.Org,  
ou,  
email=carl@media.org,  
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// sealed //



Wed Oct 28 17:45:06 UTC 2015  
Sebastopol, CA, USA

## 12. Notes

- [1] CPSC, [Statement of Chairman Elliot F. Kaye](#), Consumer Protection, Product Safety, Insurance, and Data Security Subcommittee of the U.S. Senate Commerce, Science, and Technology, Oversight of the Consumer Product Safety Commission, June 17, 2015.
- [2] CPSC, [Initial Regulatory Flexibility Analysis of Staff-Recommended Proposed Standards for Infant Bath Tubs](#), June 5, 2015, contained in Commission Briefing Packet, Proposed Rule: Safety Standard for Infant Bath Tubs, July 22, 2015, p. 60.
- [3] CPSC, [Infant Bath Tubs-Related Deaths, Injuries and Potential Injuries, and NEIS Injury Estimates Reported Between January 1, 2004 and May 20, 2015](#), contained in Commission Briefing Packet, Proposed Rule: Safety Standard for Infant Bath Tubs, July 22, 2015, p. 13.
- [4] CPSC, [Staff Letter to ASTM Subcommittee Regarding ASTM F2670 Infant Bath Tubs](#), March 31, 2015, contained in Commission Briefing Packet, Proposed Rule: Safety Standard for Infant Bath Tubs, July 22, 2015, p. 41.
- [5] U.S. House of Representatives, Committee on Energy and Commerce, Danny Keysar Child Product Safety Notification Act, [House Report 110-366](#), October 9, 2007.
- [6] CPSC, [Fiscal Year 2016 Performance Budget Request](#), February 2, 2015, page 33
- [7] CPSC, [Final and Proposed Rules](#), last visited October 20, 2015.
- [8] An Act to Provide the Consumer Product Safety Commission with Greater Authority and Discretion, [Pub. Law 112-28](#), 125 Stat. 273, August 12, 2011,
- [9] Commissioner Nancy A. Nord, [Statement on the notice of proposed rulemaking on hand-held infant carriers](#), December 11, 2012.
- [10] ASTM, Standardization News, [Toward Safer Consumer Products: An Interview with Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission](#), March/April 2012.
- [11] CPSC, [Injuries and Deaths Associated with Nursery Products Among Children Younger than Age Five](#), December 17, 2014.

- [12] World Wide Web Consortium (W3C), [Mathematical Markup Language \(MathML\) Version 3.0 2nd Edition](#), W3C Recommendation, April 10, 2014.
- [13] World Wide Web Consortium (W3C), [Scalable Vector Graphics \(SVG\) 1.1 \(Second Edition\)](#), W3C Recommendation, 16 August 2011.
- [14] World Wide Web Consortium (W3C), [Accessible Rich Internet Applications \(WAI-ARIA\) 1.0](#), W3C Recommendation, 20 March 2014.
- [15] World Wide Web Consortium (W3C), [Nu Html Checker](#), W3C Markup Validation Service, Version 15.7.14.
- [16] Tenon LLC, [WCAG 2.0 and Section 508 Validation Service](#).
- [17] Google, [Open Source Font Collection](#).
- [18] Section 508 of the Rehabilitation Act ([29 U.S.C. § 794d](#)), as amended by the Workforce Investment Act of 1998 ([Pub. Law 105-220](#)), August 7, 1998.
- [19] YesLogic Pty. Ltd., [Prince XML](#).
- [20] ASTM, [Annual Report 2014](#), May 27, 2015.
- [21] ASTM International, [Public Policy and Corporate Outreach](#), Virtual Officers' Training Week, September 2015, p. 11.
- [22] ASTM International, [Form 990 for 2013](#), filed November 5, 2014.
- [23] ASTM International, [Form 990 for 2012](#), filed November 1, 2013.
- [24] ASTM International, [Form 990 for 2011](#), filed October 23, 2012.
- [25] ASTM International, [Form 990 for 2010](#), filed November 15, 2011.
- [26] ASTM International, [Form 990 for 2009](#), filed October 22, 2010.
- [27] ASTM International, [Form 990 for 2008](#), filed November 16, 2009.
- [28] ASTM International, [Form 990 for 2007](#), filed November 10, 2008.
- [29] ASTM International, [Form 990 for 2006](#), filed November 13, 2007.
- [30] ASTM International, [Form 990 for 2005](#), filed November 10, 2006.
- [31] Executive Office of the President, [Memorandum M-12-08](#), Principles for Federal Engagement in Standards Activities to Address National Priorities, January 17, 2012.

- [32] GovTrack.US, [H.R. 4040 \(110th\): Consumer Product Safety Improvement Act of 2008](#), last visited October 24, 2015.
- [33] Alan R. Earls, [The CPSC-ASTM Collaboration: The Consensus Process Plays a Growing Role in Ensuring Child-Safe Products](#), ASTM Standardization News, January/February 2011.
- [34] ASTM, CPSC Chairman Tenenbaum Recognizes ASTM International for Efforts in Protecting Consumer Safety, [News Release #8811](#), March 9, 2011.
- [35] CPSC, Chairman Inez Tenenbaum, [Chairman's Circle of Commendation Awards Ceremony](#), December 1, 2011.
- [36] ASTM, ASTM Receives CPSC Chairman's Circle of Commendation Award for Crib Safety Standards Development, [News Release #9021](#), December 2, 2011.
- [37] ASTM, ASTM International Subcommittee Receives CPSC Award for Toy Safety Standard, [News Release #9472](#), September 26, 2013.
- [38] ASTM International, [Public Policy and Corporate Outreach](#), Virtual Officers' Training Week, September 2015, p. 15.
- [39] ASTM, [Organizational Membership Directory](#), last visited October 29, 2015.
- [40] Office of Management and Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, [Circular No. A-119 Revised](#), February 10, 1998.
- [41] Office of Management and Budget, [Proposed Revisions to the Circular](#), February 2, 2014. *See also* OMB, Federal Register Notice on Requests for Comments on a Proposed Revision to OMB Circular No. A-119 "Federal Participation in the Development and Use of Voluntary Consensus Standards and In Conformity Assessment Activities," [79 FR 8207](#), February 11, 2014.
- [42] World Trade Organization, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, [G/TBT/9](#), 13 November 2000 (00-4811), Annex 4, Decision of the Committee on Principles for the Development of International Standards, p. 24.
- [43] ASTM, [Regulations Governing ASTM Technical Committees](#), Updated April 2015.
- [44] ASTM, [ASTM Bylaws](#) (Last Revised May 2009), Section 7, Principles Governing Procedures for the Development and Adoption of Voluntary Consensus Standards.

- [45] ANSI, [Essential Requirements: Due Process requirements for American National Standards](#), January 2015.
- [46] ASTM, [Intellectual Property Policy of ASTM International](#) (“Policy”), Originally Approved 28 April 1999, last visited October 19, 2015.
- [47] ASTM, [ASTM Membership Application](#), last visited October 22, 2015.
- [48] Marshall T. Rose, Writing I-Ds and RFCs using XML, [RFC 2629](#), June 1999.
- [49] R. Fielding and J. Reschke, eds., Hypertext Transfer Protocol (HTTP/1.1): Message Syntax and Routing, [RFC 7230](#), June 2014.
- [50] Public Resource is currently being sued by six standards development organizations in two separate cases pending in the U.S. District Court for the District of Columbia over Public Resource’s actions to post online standards incorporated by reference into federal regulations. American Society for Testing and Materials et. al. v. Public.Resource.Org, D.D.C. [1:13-cv-01215](#); American Educational Research Association et. al. v. Public.Resource.Org, [1:14-cv-00857](#). In each of case, plaintiffs claim that Public Resource has infringed their copyrights, a charge that Public Resource firmly denies.
- [51] ASTM, CPSC’s Colin Church Honored with ASTM International 2015 Cavanaugh Award, [News Release #9887](#), August 6, 2014.
- [52] U.S. Office of Government Ethics, [LA-13-05](#), 18 U.S.C. § 208(b)(2) Exemption for Official Participation in Nonprofit Organizations, April 9, 2013.
- [53] Public.Resource.Org, [FOIA Request 15-F-00596 to Consumer Product Safety Commission](#), July 22, 2015.
- [54] CPSC, [Response to FOIA Request 15-F-00596 to Consumer Product Safety Commission](#), August 11, 2015.
- [55] Morris (Mo) Brooke, [In Praise of the Fat Lady](#), ASTM Standardization News, June 2000.
- [56] Letter from Public.Resource.Org to Amy Bunk, Office of the Federal Register, [Comments on Docket NARA 12-0002](#), April 6, 2012.
- [57] Similarly, the NPRM’s failure to provide access to the text of the incorporated standard violates the provisions of the Administrative Procedure Act that require agencies to give people an opportunity to comment on a proposed rule making. The APA requires that an NPRM include “either the terms or substance of the

proposed rule or a description of the subjects or issues involved.” [5 U.S.C. § 553\(b\)\(3\)](#). The bare-bones discussions of the ASTM standard to be incorporated by reference into the instant rule do not meet this agency obligation.

- [58] Office of the Federal Register, Incorporation by Reference, Final Rule, [79 FR 66267](#), November 7, 2014.
- [59] Public.Resource.Org, [Comment to the Office of Management and Budget](#), Request for Information OMB-2012-7602, April 11, 2012.
- [60] George Sushinsky, [Growing Together: ASTM Committee F08 and the U.S. Consumer Product Safety Commission](#), ASTM Standardization News, November 2004.
- [61] World Trade Organization, [Agreement on Technical Barriers to Trade](#), Uruguay Round Agreement, January 1, 1995.
- [62] John Adams, The Works of John Adams, Second President of the United States, Vol. III, Charles C. Little and James Brown (Boston: 1851), page 447, [A Dissertation on the Canon and Feudal Law](#), first published in the Boston Gazette as a series beginning August 12, 1765 and ending with No. IV on October 21, 1765.