



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE APPROVAL OF NOTICES OF REQUIREMENTS FOR THIRD PARTY CONFORMITY ASSESSMENT BODIES TO TEST CHILDREN'S TOYS FOR COMPLIANCE WITH ASTM F-963 AND CHILDREN'S TOYS AND CHILD CARE ARTICLES FOR COMPLIANCE WITH THE PHTHALATES STANDARD

August 1, 2011

The Commission voted unanimously to publish "Notices of Requirements" (NORs) for third-party labs to test to the toy and phthalates standards of the Consumer Product Safety Improvement Act (CPSIA). The statute requires such notices for all children's product safety rules, most have passed unanimously, and the content and language of the approximately 16 NORs the Commission has published is largely repetitive. My approval of both NORs is an acknowledgement of this statutory requirement and nothing more.

I Do Not Endorse Third-Party Testing

I understand that the CPSIA requires manufacturers to third party test to the phthalates and toy standards. I also recognize the expertise of Commission staff to establish the requirements for labs to follow in performing tests to the standards. I therefore voted to approve the NORs. But as with the statute's other testing requirements, I believe the Commission could have exercised its discretion to reduce the burden where an assessment of the risk warranted doing so, and regret that the Commission Majority resisted my efforts to do so. In this case, as discussed below, I believe we are requiring manufacturers to test a broader class of products for phthalates than the risk of contamination warrants.

My votes in favor of the NORs reflect my obligation as a Commissioner to enforce the law as written; they should not be construed as an endorsement of the underlying requirement to third-party test to the toy and phthalates standards. I do not believe that the statute's non-risk-based, third-party testing requirements will improve compliance with the underlying standards or improve safety. They will instead layer on costly, unnecessary burdens for manufacturers that will be passed to consumers as higher prices for a narrower selection of products. Relief from the law's testing requirements is the number one request of small businesses, many of whom may be able to comply with the law's phthalates or toy standards but still cannot afford the mandatory third-party testing. These NORs are noteworthy because they will trigger the final two, largest testing and certification requirements on a broad number of children's product manufacturers. Once the stays on testing for lead content, phthalates and to F-963 are lifted, on December 31, 2011, the full weight of the CPSIA's costly mandates will be felt.

As I have often stated, including in testimony before Congress, the current tools available to manufacturers, as well as the Commission's own improved enforcement methods, obviate the need for complex and costly, third-party testing and certification requirements to ensure compliance. By requiring all manufacturers of children's products to send their products to be tested at third-party labs, regardless of risk, the law

disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation. The CPSIA's micromanagement of a company's testing, certification and tracking of each and every component of a product is entirely unnecessary—and in fact, will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. Furthermore, a “bad actor” with a casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications.

There are entire industries that have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. For example, the American Apparel and Footwear Association wrote in its public comments on the Commission's Notice of Proposed Rulemaking on Component Parts:

As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information not lack of testing.¹

Today, the Commission also has enforcement tools vastly improved over those available even a few years ago. I believe these are a more effective use of taxpayer dollars to ensure compliance with safety standards than is policing all children's product manufacturers for certifications to mandatory third-party tests. Since the advent of our agency's Import Surveillance Division in 2008, we have continued to increase the number of full-time CPSC investigators posted at key U.S. ports. We have also expanded cooperation with Customs and Border Patrol to maximize the number of products screened at all U.S. ports. Today, the Commission intercepts non-compliant toys through more extensive border control efforts, application of x-ray technology (currently used to identify heavy metals) and computer databases that flag previous offenders for greater scrutiny. The CPSIA also increased the incentive for compliance by authorizing the CPSC to confiscate and destroy at the border products that violate federal safety standards, to impose higher penalties of up to fifteen million dollars, and to more easily seek criminal penalties.

The NORs Should Have Followed the President's Executive Order No. 13579

I am disheartened that the Majority was unwilling to issue either NOR consistent with the President's Executive Order No. 13579. The President's E.O. exhorts independent agencies to promulgate rules only after providing a “meaningful” notice and comment period and considering “their costs and benefits (both quantitative and qualitative).” The Commission's failure to honor the President's request by acquiring more data regarding the impact of the law's testing and certification requirements on the economy represents a lost opportunity. Because the Majority appropriately agreed to stay until December 31, 2011, the requirement to third-party test to the toy and phthalates standards, there was ample time to solicit and consider comments from our stakeholders and to perform a cost/benefit analysis before finalizing the rule. Had it done so, the Commission could have

¹ American Apparel and Footwear Association. Request for Comments. Docket No. CPSC-2010-0037 & CPSC-2010-0038. August 3, 2010.

better assessed the impact of those testing and certification requirements. It could also have responded by amending the NOR, issuing an enforcement policy or engaging in rulemaking, before issuing a final rule.

I believe, as the President has indicated through his Executive Order, that full comment periods are essential to ensure that an agency considers all options available to it in order to promulgate the clearest, most efficient, and least burdensome rules. And to be meaningful, such consideration must be given before the rule is finalized. The alternative of asking for comments in a final rule seems insincere. Since I have been a Commissioner, I have learned the most valuable insights from the comments received; because, industry and the general public living with regulations are the only “boots on the ground” that truly know how regulations will impact them.

Some emphasize the “voluntary” nature of the President’s request, in order to justify the failure to provide an opportunity for public comment. This argument is emblematic of the obstacles this agency faces to rational rulemaking: it presupposes a Commission so wedded to its preconceived positions that it is willfully blind to potentially contrary public input.

Manufacturers Need Guidance Beyond the Statutory Language, In Order to Comply with the Phthalates Standards

The Majority, in arguing against the value of a notice and comment period, claims that the law is clear with regard to the statutory phthalates standard, including the definitions of toy and child care article applicable to it. They therefore assert that the manufacturing community should not be confused concerning what is included in the NOR. This is an odd assertion given the evidence that the Commission itself has been unable or unwilling to provide greater clarification to industry than the ambiguous guidance offered in February and August 2009. Indeed, as discussed at Wednesday’s briefing, Commission staff last summer prepared an Interpretive Rule on the definition of toy and child care article that was pulled from consideration by the Commission at the last minute, and a public enforcement policy recently under discussion was also shelved. These facts suggest that even the Commission wrestled with these issues and could have benefitted from additional input from the regulated community.

In particular, notice and comment rulemaking would have assisted the Commission to determine whether the list of materials exempted from testing and certification to the phthalates standard (Phthalates NOR at pg. 9) should be expanded. That list is a subset of a longer list of materials that were described in the Commission’s August 2009 guidance document as “[e]xamples of materials that do not normally contain phthalates and, therefore, might not require testing or certification.” Materials included in the longer guidance list but excluded from the NOR exemption include textiles made from common synthetic fibers, polyethylene and polypropylene (polyolefins), and silicone rubber. I am concerned that manufacturers who acted in reliance on this previous (and still-standing) August 2009 guidance by introducing polyethylene and polypropylene into their products to save testing costs will now need to reengineer their products yet again.

The 30-Day Comment Period Provided By the NORs Is Insufficient

The inclusion in the Toy Standard and phthalates NORs of a 30-day period for outside groups to comment *after the vote approving the NORs*, is no substitute for the sort of notice and comment

rulemaking contemplated by the President's E.O. The latter approach would have allowed the public to comment before the rule was final and ***required the Commission to consider, and adequately respond to, any comments it received.*** Instead, we are following the same approach we have used for approximately nine other NOR rules. In most of those cases, the 30-day post-issuance comment period served no purpose. The Commission has neither responded to all of the comments received, nor published responses to any of them. With regard to phthalates, in particular, we have already received hundreds of pages of comments in response to guidance documents on at least three different occasions since 2009; yet, we have not responded to most of them. Indeed, the Commission received multiple comments explaining that the February and August 2009 guidance lacked clarity and was unhelpful as a means of determining which materials and products must be tested for phthalates. Yet in today's vote, we have simply incorporated by reference into the NORs this same unhelpful guidance.