



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER NANCY A. NORD

**Statement on the Commission's vote on
representative samples for periodic testing of children's products**

July 13, 2012

The Consumer Product Safety Commission failed this week, for lack of a majority, to promulgate language defining "representative sample" related to periodic third-party testing of children's products (section 14(i)(2)(B)(ii) of the Consumer Product Safety Act (CPSA) as amended by Public Law 112-28). Let me clarify a few issues related to this vote.

In Public Law 112-28 Congress did a course correction for the testing and certification requirements in the Consumer Product Safety Improvement Act (CPSIA), in part, by replacing "random sampling" with "representative sampling." The meaning therefore shifted from our agency's complex mathematical formula to a more general concept. (A dictionary definition of "representative" is "like or typical of others of the same group.")

All the Commissioners agreed on language that stated:

A manufacturer must select representative product samples to be submitted to the third party conformity assessment body for periodic testing. The procedure used to select representative product samples for periodic testing must provide a basis for inferring compliance about the population of untested products produced during the applicable periodic testing interval. The number of samples selected for the sampling procedure must be sufficient to ensure continuing compliance with all applicable children's product safety rules.

We could have adopted this language and defined the term that Congress had given us. This is all the statute required us to do. However, Chairman Tenenbaum and Commissioner Adler insisted on going further and imposing recordkeeping provisions that have high estimated costs and little estimated value. This recordkeeping would be in addition to the significant recordkeeping burden already imposed by the Testing and Certification Rule (16 C.F.R. § 1107).

I voted to remove this recordkeeping requirement for three reasons:

1. **Costs**—Our staff estimated the recordkeeping cost of this additional requirement upwards of \$32 million in the first year, and up to \$13 million

annually on an on-going basis. This cost is of questionable value, especially in light of the clear mandate for recordkeeping already in the Testing and Certification Rule to which this provision would be added. The rule, when discussing “Periodic Testing Plans,” already requires records that show the tests to be conducted, the intervals at which the tests will be conducted, and the number of samples tested. Most importantly, the plan must ensure with a high degree of assurance that the untested children’s products comply with all applicable children’s product safety rules. It is hard to imagine, then, how one can meet the required high degree of assurance without having used representative samples in the periodic third-party testing. Nevertheless, additional record systems would have to be designed and records kept to provide this additional documentation.

2. **De Minimis Enforcement Value**—Staff indicated at the public briefing for the Commission that violations of recordkeeping rules on representative sample selection methods would be a secondary violation if product were found to be in violation of our underlying safety rules. In other words, a folder containing a written sample selection explanation is not the key to safer products. More important is a close look at the manufacturer’s periodic testing plan or production testing plan. A company with violative products must be able to explain as much as possible about its periodic testing procedures or production testing, whether orally or in writing.

Further, companies will be incentivized to use truly representative samples for periodic testing, not because of a recordkeeping requirement for it, but because they do not want product that ends up as scrap, or in lost sales, costly recalls, or product liability suits that create bad publicity and financial uncertainty.

3. **Paperwork Reduction** - On June 22, 2012, the President’s Office of Information and Regulatory Affairs issued a memorandum asking heads of executive departments and agencies to make an effort to reduce reporting and paperwork burdens. Regulators were tasked with reducing unjustified regulatory burdens. Nonetheless, immediately after receiving this request from the President, my two colleagues voted yet again to increase the paperwork burden associated with this rule with no real justification, in the face of real estimates of millions of dollars in cost. I cannot support adding new recordkeeping on top of current broad recordkeeping requirements without some concrete value being added for safety’s sake. Merely saying “it could help” is not regulating responsibly.

As mentioned, because we all agreed on the definition of “representative sample,” we could have adopted that and done what Congress requested. But we did not. Maybe

stakeholders should rely on the words of my colleague Commissioner Adler who remarked at our public briefing: "Don't make golden samples, and if you've got a good procedure that means you're not doing golden samples, you're probably O.K." Unfortunately, that sentiment is not reflected in the vote that occurred on this matter.

Finally, it will be only a short time until a Democrat majority returns to the Commission, at which time, presumably, both the proposed definition of "representative sample" and the recordkeeping provisions will, then be adopted. It is a shame we did not adopt now at least the definition on which we all agreed.