



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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FURTHER SUPPLEMENTAL STATEMENT OF COMMISSIONER NANCY
NORD ON THE VOTES TO APPROVE THE FINAL RULE ON TESTING AND
CERTIFICATION, COMPONENT PART TESTING FINAL RULE, PROPOSED
RULE ON REPRESENTATIVE SAMPLING AND ISSUING QUESTIONS
ABOUT REDUCING THE COST OF TESTING

November 17, 2011

Proving my point,¹ my colleague, Commissioner Adler, wants to continue the merry go-round on our recent vote on product testing and certification (under the Consumer Product Safety Improvement Act, CPSIA). Commissioner Adler attributes this to a desire for “robust discussion and debate.” I respectfully submit the time for that is *before* a vote occurs, so that I might learn from his perspective and he from mine. I continue to believe the proper function of a written statement issued *after* a vote is for the statement’s author to explain his or her own decision, not to rebut another Commissioner’s written statement. Nonetheless, because Commissioner Adler asserts a right to “respond [] on the record to statements of our colleagues which [he believes] are erroneous or unfair,” I, too, will exercise that right and respond to some of his erroneous and unfair statements.

While I have a number of concerns with the *Testing Rule*, Commissioner Adler’s and my statement exchange revolves around two features of our rule. The first is its insistence that all children’s product testing, even periodic testing, be done by third-party laboratories, despite the absence of a legal mandate for such a regime. The second is the flawed, disjointed process we used to issue the rule, especially our decision to ignore the fact that Congress changed the legal background for the rule with H.R. 2715 in August of this year.

The Third-Party Testing Requirement is Unfounded.

Commissioner Adler substantially grounds his position on third-party periodic testing by pointing to the heading of the subsection that addresses continuing testing obligations. In

¹ See, e.g., Supplemental Statement of Commissioner Nancy Nord on the Votes to Approve the Final Rule on Testing and Certification, Component Part Testing Final Rule, Proposed Rule on Representative Sampling and Issuing Questions About Reducing the Cost of Testing, November 8, 2011, <http://www.cpsc.gov/pr/nord11082011.pdf>; Supplemental Statement of Commissioner Nancy Nord on the Vote of Technological Feasibility of Moving from 300 ppm to 100 ppm of Total Lead Content, August 3, 2011, <http://www.cpsc.gov/pr/nord08032011.pdf>.

his most recent supplemental statement, he mischaracterizes my position on the importance of the heading, suggesting that I have argued that headings in statutes have “no applicability.” This comes just after he quotes my actual argument, that such headings do not determine the meanings of those statutes. This is a rhetorical sleight-of-hand: There is a clear difference between suggesting something is limited in its capacity to resolve a question and suggesting it is irrelevant to the question. I did the former, but it was easier for Commissioner Adler to refute the latter, so enter the straw-man.

Further, Commissioner Adler accuses me of “ignoring the difference in language” between two provisions of the CPSIA. In Section 14(d)(2)(A), the law requires us to issue rules to let manufacturers label their products as complying with CPSC rules. In Section 14(d)(2)(B), the law requires us to establish standards and protocols for the testing of children’s products. Commissioner Adler points out that the testing portion refers to *children’s* products, while the labeling provision talks about *consumer* products, so it is “completely irrelevant” to link the two.²

That is the point: The sections have the same heading, but they do different things. Commissioner Adler has argued that Section 14(d)(2)(B)’s language must require third-party testing (even though it does not say so) because of the heading. If we accept that argument, then the labeling provision must incorporate third party testing, too, but that would be illogical, because they do not have to conduct tests at all. By highlighting the distinction between the two sections, Commissioner Adler has demonstrated my point—that using a heading to control language does not work.

The Commission Did Not Need to Rush the Testing Rule.

Finally, Commissioner Adler responds to my critique of the irresponsible process that led to our vote. He again mischaracterizes my arguments, reducing my criticisms to the idea that he and the majority pushed for this vote on this product only to avoid delay, while insisting he had other motivations. On the question of delay, his unwillingness to go through the proper process demonstrates little faith in our staff’s ability. I have more confidence in their skill and efficacy, particularly since most of the work was already done and we only needed to fix it, not reinvent it.³

Commissioner Adler also justifies his decision by citing these purported justifications:

² Of course, children’s products are a subset of the consumer products in Section 14(d)(2)(A), so, in order for a children’s product to have met all CPSC requirements and its manufacturer to use that label, it would need to meet the testing requirements of Section 14(d)(2)(B), so the two are not unrelated to each other.

³ Further, the delay argument fails when one notes that the rule has a particularly long-delayed effective date, a decision we had to make to give ourselves time to fix the many holes in this product. With the 15-month requirement already well past, and an option on the table to produce a *better* rule with the *same* effective date, the statutory deadline argument is a red herring. Perhaps the deadline that concerned Commissioner Adler was the pending departure of fellow majority-member Commissioner Moore and the looming reality of having to seek buy-in and collaboration. See Nancy Nord, “*Bridge Over Troubled Water*,” *Conversations with Consumers*, August 24, 2011, <http://nancynord.net/2011/08/24/bridge-over-troubled-water/>.

- Consumer safety. I believe a rule can only serve consumer safety when it takes effect, not when it appears in the Federal Register with a promise that something similar will be in effect in the future. To that end, I proposed we fix this rule first, then publish it and make it effective on the same timeline as this unworkable product.
- “Clear guidance” to industry. Putting out a rule we admit is incomplete and we know does not fulfill our Congressional mandate does not provide guidance, clear or otherwise. Commissioner Adler is right that industry needs clear guidance, which is why this quasi-final-but-we-might-change-it-but-we-might-not approach is so fatally flawed. It breeds nothing but uncertainty, and that helps no one.
- The urgings of “key members of Congress.”⁴ Our duty is to act according to law, and Commissioner Adler knows the opinions of three members are not law. Had a majority of Congress agreed, those opinions would exist in the law; they do not.

What does exist in law is a requirement that we consider the costs of this program and try to reduce them. It is absurd to suggest that Congress wanted us to consider those costs only *after* people have begun incurring them. Commissioner Adler is willing to use the opinions of three members to conclude the rest of Congress intended to do something absurd; I am not.

Commissioner Adler concludes by repeating his belief “that the Commission did the right thing in promulgating the rules.” I disagree with not only his conclusion but also his premise. What we published is not a rule as most people would understand it, which is a clear statement of what they are required to do and when they are required to start doing it. Instead, we promulgated an admittedly incomplete rule that we know we will have to revisit in light of work Congress has already told us to do, and that will create needless uncertainty and risk in the marketplace.

This is not something to be proud of. It is knowingly shoddy work, which is the very behavior we are seeking to stop on the part of manufacturers. Perhaps our rules should go out for third-party testing before they hit the market.

⁴ One wonders if Commissioner Adler would ever consider “key” a member of Congress who did not share his opinions.