



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**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**

October 20, 2011

The Consumer Product Safety Commission (Commission or CPSC) has now mandated an overreaching testing and certification regime that will drive up costs for consumers and deprive them of choices while adding only nominally to consumer safety. The majority did this without demonstrating safety gains that justify these extraordinary costs. The majority's actions will also harm the manufacturers and importers that serve American consumers—especially ones based here in the U.S. that will have to slow their growth or eliminate jobs to offset these new costs.

Though Congress recently required that we consider ways to reduce testing costs, the majority made a half-hearted promise to think about it, and not before finalizing its testing rule. This gets the process precisely backwards—an agency should think about keeping costs low first, and then issue a final rule. The Commission is issuing a faux final rule that will need to be amended several times before it becomes effective. This is regulatory malpractice. I voted against the final rules the Commission adopted because they represent bad policymaking.

The two final rules the Commission adopted are the *Final Rule on Testing and Labeling Pertaining to Certification* and the *Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meeting Testing and Certification Requirements* (the *Testing Rule* and the *Component Part Testing and Certification Rule*, respectively). My objections to these two rules are substantive and procedural.

The Testing Rule

While the *Testing Rule* is an improvement from the earlier proposed rule, it is still rife with provisions that drive up costs needlessly, and it lacks provisions that clarify the obligations of manufacturers under the rule. Since efforts to clarify obligations and lower costs were rejected by a majority of the commission, I could not, in good conscience, vote for this rule.

Costs and Benefits

The Commission's staff conducted a limited but eye-opening analysis of some of the costs of this rule in a Regulatory Flexibility analysis. They explained that the rule "will have a significant impact on all firms" making children's products and, unfortunately, American families should expect to bear the brunt of this rule's impact.

Our staff tells us that firms are likely to mitigate "the adverse impacts [of the rule by] . . . rais[ing] their prices to cover their costs." Not only will the *Testing Rule* impose substantial costs on consumers, it may slow or stop the pace of innovation in the design and manufacturing of children's products. As our staff explained, impacted companies may "forgo or delay implementing improvement to products' design or manufacturing processes in order to avoid the costs of third party testing." Forgone innovation could even include ways to make products safer. So, in order to test to today's safety standards, we may force companies to put off or abandon tomorrow's safety improvements. Our staff tells us that this "rule could be a barrier that inhibits new firms from entering the children's product market." Finally, the staff warns that these adverse impacts are "expected to be disproportionate on small and low-volume manufacturers." Small businesses can expect testing costs to consume a staggering 11.7% of their revenues. In other words, we are knowingly imposing significant and unfair costs on small business, the very drivers of economic growth.

Without explanation, the majority also deleted an exemption for low-volume manufacturers that we included in § 1107.21(c)(3) of the proposed rule and which our career staff recommended be included in the final rule. The exemption was reasonable: a small run of products does not pose the same risk as a run of 10 million products. There is less likelihood of something going awry in such a small run, and the burdens of testing could drive such small runs out of existence. Congress was aware of this exemption when it passed H.R. 2715, and did not move to eliminate it. The inclusion of the small-batch exemption does not vitiate the need for this exemption, because small-batch manufacturers and low-volume manufacturers are not always the same parties.

The heavy costs of the *Testing Rule* could be justified if there was a commensurate safety gain, but that gain simply is not demonstrated. This is not a matter of simply reallocating costs. To do that, the Commission would have had to evaluate the costs suffered in the current system, and the costs likely in the proposed regime. Then, we could have calibrated the system so that any new costs created were offset by benefits, and that costs were appropriately assigned to the party best positioned to avoid them. Without a proper cost-benefit analysis, we cannot assume that we have set the proper balance. That would have been a worthwhile exercise, but it was an exercise the majority rejected. Apparently, sometimes it is best not to let facts get in the way of regulating.

Third-Party Testing

As our staff has told us, the single biggest element on the cost side of the balance is the requirement that all testing of children's products be done by an outside third-party laboratory. This decision goes well beyond the statute's language. I agree that the statute requires that a product be tested by a third-party lab initially and after a material change

is made. However, the statute does not require that ongoing, periodic testing be performed by a third party. This is unnecessary from the standpoint of safety. Indeed, since the rule allows safety to be served by first party testing, one wonders how the majority can say that safety requires periodic testing to be done by third parties. Requiring periodic testing to be done by third parties also raises the costs so much that I fear that families will stop buying the children's products subject to this regime and shift their purchases to non-children's product that are not subject to these overreaching requirements. We have already heard of instances where this is occurring. This result creates a greater danger than the risks addressed by this testing regime ever did.

Enforcement Threats

Given the heavy costs imposed by third-party testing, the least the Commission should do is to clearly explain what a firm must do in a testing program to meet the CPSC's expectations. This the majority did not do. Instead, they feinted at permitting firms to adopt one-, two-, or three-year testing programs, while retaining the authority to question the frequency of testing based on nearly any factor a CPSC compliance officer thinks that a firm should consider. Because the agency will most often be looking at a testing program only after a non-compliant product turns up, we will be hard-pressed to identify what actually constitutes an appropriate testing frequency from a before-the-fact perspective. (It has even been suggested that the CPSC could initiate action for violation of this rule against the maker of a compliant product.) This violates a basic principle of Anglo-American law: the government should give clear notice of the lines that must not be crossed before punishing someone for crossing that line. This rule gives the CPSC authority to make *post hoc* judgments about what should have been done, rather than clearly defining expectations.

Regulatory Uncertainty

Beyond failing to set clear terms about the design of periodic testing programs, manufacturers and importers have reason to fear that something worse may be waiting for them. The Commission's majority created a climate of regulatory uncertainty because they refused to delete Subpart B from the rule, which defines and sets requirements for a "reasonable testing program" for non-children's products. (This refusal to delete came only after their telling staff to delete it, then changing their mind, later offering to delete it for votes, only to finally rescind the offer—"ping pong policy" at its best.)

This decision allows the Commission, if it wishes, to finalize the reasonable-testing-program provisions from the proposed rule without going through notice-and-comment rulemaking again. This is inappropriate for three reasons. First, the groundwork of the proposed definition of reasonable testing program was altered in the present rule and may be further altered if the Commission makes changes following responses to the questions posed by H.R. 2715. Second, the excessive burdens of the Commission's first attempted definition were part of what prompted the clamor that led to Congress's passing H.R. 2715—reintroducing the reasonable testing program without fundamentally rethinking it defies our congressional mandate. Finally, the Commission's decision to reserve this authority deprives manufacturers of the certainty they need to plan their quality assurance/quality control systems. This untenable position is unnecessary. If it

becomes appropriate to issue a rule defining the elements of a reasonable testing program, the Commission should do so through a full notice-and-comment process.

Process

It is not entirely surprising that the Commission developed such a wrong-headed rule here. The process that led up to this vote was questionable and driven by political concerns, and it may open the rule to legal challenge. In H.R. 2715, Congress expressed concern that the Commission had not adequately considered testing costs in the proposed rule. They imposed a new requirement on the Commission to seek guidance from the public to identify and reduce the testing costs that the proposed rule would have created. Congress further directed us to either make appropriate changes or to explain what powers the Commission would need to make those changes. Thus, Congress signaled that the Commission should go through a new notice-and-comment rulemaking process.

Had we followed that congressional signal, we would have sought the public's guidance on establishing a rational, effective testing regime. "The purpose of the notice and comment requirement is to provide for meaningful public participation in the rulemaking process. The opportunity to participate is not meaningful unless it occurs reasonably close to the time in which [an agency] makes a decision." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). There is nothing meaningful about allowing public comment only after the rule-making process concludes. Instead of releasing a faux final rule and then proceeding to ask the public for comments that might prompt the Commission to amend its rules, the Commission should have re-proposed the rule (with the notice of proposed rule on the meaning of "representative" and the questions Congress directed us to ask in H.R. 2715, both discussed further below).

I proposed an amendment that would have taken us through this process and resulted in a final effective date no later than the one the majority supported. Had the majority agreed to my amendment, they would have followed the advice found in the ABA's *Guide to Federal Agency Rulemaking*, which explains that "circumstances that might support a second cycle" of rulemaking include a change in the relevant statutory framework, as occurred here. Courts routinely explain to agencies in circumstances like these that re-proposal is the appropriate procedure.

Not only is it legally wise to re-propose, it is technically wise. This is what our technical staff told us. They believed it was appropriate to reconsider the *Testing Rule* in light of H.R. 2715, and therefore re-propose it for public comment. They explained their view immediately after the H.R. 2715's enactment, and they still favor that approach. The changes that Congress mandated are so fundamental that the only logical path from a technical standpoint was re-proposal.

The Component Part Testing and Certification Rule

The other final rule that the Commission approved was the *Component Part Testing and Certification Rule*. Intertwined with the *Testing Rule*, this rule's *raison d'être* was mitigating the burden of testing by spreading those costs across the supply chain. An

effective version of this rule would have driven safety efforts up the supply chain to the source. Unfortunately, in its final form, this rule lacks a structure embodying this principle. The present rule conflates “test results” and “certificates” such that no reasonable manufacturer will be able to rely on test results. This means that if a component part manufacturer decides to perform testing on a part and provide the test results to a manufacturer or importer, the recipient will effectively be no better off than if it had not received any test results.

Additionally, the preamble contains troubling language about “due care,” among other terms. Specifically, this language goes beyond the accepted legal definition of the term “due care” in explaining that, for example, site visits and confirmatory testing may be required for a manufacturer or importer to be considered as having exercised “due care.” Fortunately, this rule is voluntary so if it is too burdensome then manufacturers will simply ignore it. The more manufacturers are led to ignore this rule, the more it proves to be a regulatory charade. It is lamentable that the Commission needlessly squandered this opportunity to reduce the *Testing Rule*’s costs.

The “*Representative*” NPR

Fortunately, the Commission did make some positive moves due to congressional prodding. Among other changes in H.R. 2715, Congress told us that periodic tests on children’s products could be performed on “representative samples,” rather than “random samples,” as our statute previously read. The Commission today voted to issue a notice of proposed rulemaking on this: the *Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children’s Products*. I wholeheartedly agreed with the change that Congress made, so I joined my colleagues in supporting this proposed rule. We unanimously made an amendment to a portion of the text of the preamble that did not align with the proposed rule’s text.

I note that the proposed rule includes “random” sampling as an option for a manufacturer to use in selecting “representative” samples. This simply means that a manufacturer *may* choose to use that method in selecting its samples. Given the heavy criticism that the “random” standard engendered when the Commission first released its proposed *Testing Rule*, it seems unlikely that manufacturers will make such a choice.

H.R. 2715 Questions

Finally, as Congress directed, the Commission issued a set of questions soliciting information from the public about the costs of the *Testing Rule* and how the Commission can reduce those costs. I wholeheartedly supported asking these questions because I believe the rule’s costs are huge and can be reduced. I look forward to receiving the responses to these questions, and encourage the public to offer us creative solutions to the costs imposed by our *Testing Rule*.

Because Congress has directed us to consider even methods that are not currently within the Commission's power, commenters need not restrict themselves to the present framework. Of particular interest to me is determining whether the Commission can design a testing regime that allows manufacturers to focus their resources on riskier elements of their products, rather than testing obvious or benign elements with the same frequency and intensity as riskier or more dangerous elements. I look forward to reviewing the public's suggestions for improving the *Testing Rule*.

Conclusion

The Commission could have advanced safety for Americans without burdening our economy with rules that create greater costs and questionable safety gains. This it did not do. Our decision to move forward with the costly *Testing Rule* and the dubious *Component Part Testing and Certification Rule* without ensuring that they are truly tied to substantial safety gains was unwise. The majority created a regime in which paper violations proliferate without regard to substantial product compliance. This was rash and wrong, and it did not have to be done this way.