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#### **COMMISSIONER NANCY A. NORD**

# Statement on the Commission's failure to adopt a plan for retrospective regulatory review

September 19, 2012

It is unfortunate but not surprising that the CPSC Commissioners could not agree on a plan to review rules as directed by the President. This was a failure of imagination and leadership. We should have adopted a plan that would have helped the agency have the smallest footprint needed to achieve our safety mission. Commissioner Anne Northup and I drafted such a plan to identify rules in need of revision or revocation. But our colleagues disagreed and voted for a Potemkin plan that purports to direct serious regulatory review while focusing on minor fixes that will help neither consumers nor businesses. The hollow review plan that resulted from these colleagues' embrace of form over substance resulted in the Commission failing to adopt any plan. This is especially disappointing because we are ignoring the President's call for independent agencies to adopt such plans.<sup>2</sup>

## Regulatory review plans, past and future

Retrospective reviews of regulations have been called for and done before. This time, we had a chance to do something different. We had the opportunity to create a regulatory culture that encouraged imaginative efforts to achieve our mission while reducing the burden we place on consumers and the economy.

Since the late 1960s, *every* president—Republican or Democrat—has attempted to restrain the administrative state and to minimize regulations' impact on the economy. In the past the CPSC has periodically reviewed rules consistent with this policy objective, and this practice continued when I was Acting Chairman.

However, given untenable resource constraints and unrealistic timelines imposed by the Consumer Product Safety Improvement Act of 2008, we curtailed additional rule review to focus on the unprecedented regulatory requirements imposed by the law. Since assuming office more than three years ago, and even as our budget nearly

Our draft plan can be found at <a href="http://www.cpsc.gov/library/foia/ballot/ballot12/rulereview.pdf">http://www.cpsc.gov/library/foia/ballot/ballot12/rulereview.pdf</a>.

<sup>&</sup>lt;sup>2</sup> Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011).

doubled, the current leadership has made no move to restart the rule review process. But the President's Executive Order directed us to start anew.

The President asked us to prepare a rule review program that would reinvigorate the agency and cut unnecessary red tape that strangles the economy. As his adviser described it, "Our goal is to change the regulatory culture of Washington by constantly asking what's working and what isn't." After four months of discussion about competing visions we could not agree on a plan.

### Our plan: A vision for the future

The plan that Commissioner Northup and I proposed embraces the vision of a modern, efficient regulatory state. As the United States struggles through a tepid recovery, now is the time for regulatory agencies to identify the areas where they needlessly burden job-makers and trim the regulatory fat. Our plan was a chance to do something new, to reimagine our regulatory approach and ensure that our agency's culture is one of prudent regulation.

Under our plan, the Commission would have solicited public participation in the selection of rules that would come up for review. The rules would be chosen based on a number of factors, with emphasis on rules that pose the largest burdens on consumers.

As an example of something that could possibly come up for review, consider the mattress flammability rules, which impose costs on manufacturers (and thus consumers) by requiring two flammability tests—a smoldering test and an open-flame test—where one likely would do. The newer open-flame test arguably makes the older smoldering test redundant. (Of course, rather than eliminating the redundancy, we spent almost \$200,000 to develop a new "test" cigarette for manufacturers to use to perform this likely-unnecessary test.)

Another example of a rule that needs thorough revision is the bicycle rule, which is outmoded and does not reflect the way modern bicycles are made. Though they are safer because of new designs, many modern bicycles cannot comply with the rule that is on the books. Rather than fixing the problem, we ignore it.

Third, the fireworks rule cries out for overhaul. It relies on a highly subjective "test"—the ear of one particular employee and his rating of the firework's audible strength. Each of these rules affects a significant segment of our regulatory community

<sup>&</sup>lt;sup>3</sup> Cass Sunstein, 21st-Century Regulation: An Update on the President's Reforms, The Wall Street Journal, May 25, 2011, <a href="http://online.wsj.com/article/SB1000142405270230406650457634523">http://online.wsj.com/article/SB1000142405270230406650457634523</a> 0492613772.html.

and revisiting and revising any of these rules would help the Commission tailor its regulatory footprint to its mission and minimize the burden on the economy.

The rules discussed above are merely examples of possible candidates for rule review, not a checklist. There are, no doubt, many others. Our job was to create a mechanism to find flaws anywhere in our rules, not to handpick a few easy problems and call it a day. Commissioner Northup and I proposed a plan that met our responsibilities.

### The alternative plan: In the weeds

Our colleagues, on the other hand, voted to adopt a plan with a cramped vision: Instead of revamping and revitalizing the Commission's regulations, their plan was heavy on small housekeeping changes and light on the important rules that most affect consumers. To them, it is impressive that they claim willingness to review *all* of the Commission's rules and directives, not just the three rules technically deemed "major rules" that the Commission has issued in its 40-year history. But breadth alone does not make for a robust review plan—a cursory glance at our rules is just that, cursory. And if the tiniest rules imaginable count under their plan, then their plan is a fig leaf for performing basic duties and pretending that they count for something larger.

Look at the rules that rise to the top of their plan: restating our animal-testing policy and rescinding the toy cap gun regulations. These are not bad ideas—they are small ideas. We made the changes staff recommended in each case, but the changes did *nothing* to eliminate any burden that the Commission imposes on consumers and the economy. Irrelevant, outdated rules should, of course, be eliminated, but it is rich to contend that the getting rid of a rule that has no real effect will produce any real benefit to anyone.

What is more, it is a little strange that these rules were included as part of a proposed rule review plan at all. The Commission originally directed staff to revise the animaltesting policy in March 2011.<sup>5</sup> And the toy caps regulation was rendered a nullity in 2009 by the adoption of the mandatory toy standard, ASTM F963.<sup>6</sup> Both of these dates preceded the Executive Order that directed the review.

<sup>&</sup>lt;sup>4</sup> And since two out of these three rules were promulgated without cost-benefit analysis, they certainly should be candidates for review.

<sup>&</sup>lt;sup>5</sup> See Record of Commission Action on the Staff Response to the ICCVAM Recommendations on Four Test Method Evaluation Reports Regarding Ocular Toxicity Testing, Commission ballot vote, Mar. 2, 2011, <a href="http://www.cpsc.gov/library/foia/ballot/ballot11/oculartoxRCA.pdf">http://www.cpsc.gov/library/foia/ballot/ballot11/oculartoxRCA.pdf</a>.

<sup>&</sup>lt;sup>6</sup> See Nancy Nord, Statement on the Commission's decision to approve the Notice of Proposed Rulemaking on the revocation of certain requirements pertaining to caps intended for use with toy guns

It is also true that the Commission is reviewing the Testing Rule at Congress's direction in H.R. 2715 (also known as Public Law 112-28). Substantial resources are dedicated to this effort, which is why Commissioner Northup and I proposed waiting until those efforts were completed to begin reviewing other rules under the plan. But we cannot claim that our efforts under H.R. 2715 were prompted by the President's Executive Order. Congress directed these activities, and pretending otherwise would allow the Commission to double-count its efforts.

Nor is it correct to say that our colleagues' plan goes above and beyond the President's plan. The President's Executive Order was aimed at streamlining the regulatory state and making it more efficient and effective. It cannot be said that dealing with small updates like toy cap regulations and an animal testing policy furthers that goal. And although it is strictly accurate to say that only three Commission rules would fall within the definition articulated by the President, that is no excuse for planning rule revisions that have no effect on consumers, the regulated community or the larger economy. If we are to follow the spirit of the President's request—and if we are to pursue a path of prudent administrative policy—we should be focusing on rules that actually affect the economy.

## Our colleagues' joint statement: A rejoinder

As I have made clear, I agree with the longstanding practice of using Commissioners' Statements to set forth positive reasons for their positions on the Commission's actions. Traditionally, official statements have not been used to criticize or rebut the official statements of other Commissioners. Unfortunately, that tradition has fallen to the wayside under the current agency leadership. Since it has, I want to respond to a number of misstatements and strange assertions made by our colleagues in their joint statement.

Our colleagues label their plan as the career staff's plan, which they merely adopt. Let me be clear: Our staff does excellent work, and their efforts on this project have been welcome and helpful. But our staff relies on *us* to provide them with leadership and policy direction. The President's directive called for a visionary plan, which is what Commissioner Northup and I proposed. Our colleagues rejected adopting an

and toy guns not intended for use with caps (June 25, 2012), <a href="http://www.cpsc.gov/pr/nord06252012.pdf">http://www.cpsc.gov/pr/nord06252012.pdf</a>.

<sup>&</sup>lt;sup>7</sup> See Nancy Nord, Supplemental Statement on the vote to approve the Notice of Requirements for the toy standard, ASTM F-963 (July 29, 2011), <a href="http://www.cpsc.gov/pr/nord07292011.pdf">http://www.cpsc.gov/pr/nord07292011.pdf</a>.

<sup>8</sup> See Inez Tenenbaum & Robert Adler, Statement on the CPSC staff plan for retrospective review of existing CPSC regulations (Sep. 12, 2012), <a href="http://www.cpsc.gov/pr/tenenbaumadler09122012.pdf">http://www.cpsc.gov/pr/tenenbaumadler09122012.pdf</a>.

imaginative plan. Adopting a plan that essentially does nothing was their choice—they cannot lay the responsibility for that choice on staff's shoulders.<sup>9</sup>

Our colleagues further accuse us of seeking to re-litigate recent Commission actions. While I have dissented from many decisions over the past few years, I do not seek to change those decisions here. Rather, Commissioner Northup and I proposed a plan that enunciates general principles to streamline the Commission's regulations. Those principles are appropriate and do not demonstrate any prejudice toward revising recent rules, nor do they foreclose such revision. This stance makes sense in drawing up a plan to be used for years to come.

Additionally, our colleagues accuse us of seeking "paralysis by analysis," of demanding we use statutory review processes they believe are too thorough. In First, I do not concede their premise. The procedures Congress required of us in our statutes are only as time-consuming as we make them. And after all, when Congress passed CPSIA, which permitted certain rulemakings without those procedures, it neither prohibited nor eliminated them for other rulemakings. If Congress thought the procedures were unnecessary, it would have eliminated them. Instead, several bills currently under consideration would strengthen the requirements for agencies to perform analyses. Second, we did not insist on these procedures' use in rule review. We only asked the Commission to follow the spirit of the Executive Order and sincerely examine the costs we are imposing on the economy, the benefits the people in that economy see as a result, and whether the latter justifies the former.

My colleagues claim our plan dismisses the importance of cost-benefit analyses and rule review performed under the Regulatory Flexibility Act (RFA). This is wrong: RFA analysis is a useful tool, but there is no reason to think it is all we need to do. Allowing unnecessary or even destructive regulatory burdens to exist is inconsistent with our obligations no matter the size of the entities those burdens befall. We have a task under the RFA and a task under the Executive Order. We should keep those tasks separate.

My colleagues also take credit for purportedly using our congressionally-mandated review of the costs of our Testing Rule as an opportunity to review all its costs, not just

<sup>&</sup>lt;sup>9</sup> Of course, the agency's leadership has seen fit to revise staff's work extensively before it officially comes up for Commission consideration. They did so for the Testing Rule.

<sup>&</sup>lt;sup>10</sup> It is worth noting that the "cumbersome regulatory process" my colleagues describe is that "called for by many of our statutes," implying that they would prefer to regulate by fiat. I cannot join in that opinion.

<sup>&</sup>lt;sup>11</sup> See Exec. Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (cited by Exec. Order 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011), which is in turn cited by Exec. Order 13,579).

the ones Congress highlighted. This seems a reach, as the language in the statute ordered us to "include" Congress's list in our efforts, not limit ourselves to that series of questions. It is even more plainly inappropriate to claim that credit when the final item in the list was to ask for public comment on "[o]ther techniques for lowering the cost of third party testing consistent with assuring compliance," the very thing my colleagues use as the basis for their claim to have "greatly exceed[ed]" our obligations. Even if the vote on testing produces meaningful reductions in cost, we will have, at best, fulfilled that obligation, not exceeded it.

Each of these errors in my colleagues' arguments demonstrates the fundamental difference in our approaches to this task. It seems they sought merely to complete the checklist before them by cherry-picking a few minor but obvious problems in our rules and making examples of them. By contrast, Commissioner Northup and I offered a plan that would have created a free-standing process to identify unproductive burdens anywhere in our work, starting with our costliest rules. Our colleagues have spent many months extolling the virtues of ongoing testing of products, yet they passed up the opportunity for ongoing testing of our rules in favor of a few golden samples.

So, they claim to have complied with the spirit of the Executive Order (and good sense) based on one still-incomplete and perhaps perfunctory review the law required and two minor reviews that began before the Order came out. It is illogical to think this was what the President intended or the kind of behavior the public expects.

The job of a public servant is to serve the public, not just part of it. Where there are regulations that are more burdensome than necessary, we fail in our duty every day we allow those burdens to persist. Refusing even to faithfully engage in the debate on its merits, acting as an advocate for one group instead of a servant of all, is closer to an abdication of that duty.

#### Conclusion

By including animal testing, toy caps, and H.R. 2715 efforts in their plan, our colleagues demonstrate that they view rule review as a chore that they will do only in the most limited fashion. They appear to believe that using any more resources than strictly necessary to perform these chores takes away from—rather than enhances—the Commission's safety mission. But this is not true.

<sup>&</sup>lt;sup>12</sup> My colleagues also premise this claim on our having directed "staff to develop a briefing package summarizing and responding to the comments received," but, as with the open-ended inquiry, this is required by law. It is a well-settled principle of administrative law that agencies must respond to all substantive comments they receive in rulemaking.

The Commission cannot operate without regard to the larger world around us, and the regulated community has neither unlimited resources nor unlimited patience. Rules that impose unwarranted burdens harm consumers by slowing invention and innovation, raising barriers to business and job creation, eliminating safe products and their makers from the market, and raising administrative costs for the businesses that can survive the onslaught of federal mandates. And if the cost of regulations is too high, it is all too common for companies to find ways to work around the safety requirements, even if they flout the spirit or the letter of the law. For the Commission's mandates to be taken seriously and followed, they must be well-founded and practical. Our plan was the opportunity to make sure our rules fit those criteria.

Today the economy needs help, not unnecessary burdens. The serious plan that Commissioner Northup and I proposed would go a long way toward easing the burden that the CPSC imposes on consumers and businesses without jeopardizing consumer safety. Unfortunately, our colleagues did not agree and instead voted for a plan that was more show than substance. In doing so, they disregarded the directions from the President and pursued their own path. This was a disappointing failure of leadership, one that will be felt by consumers and businesses around the country.