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

Statement on the Commission's decision to issue a Notice of Proposed Rulemaking to amend the rule on Certificates of Compliance, 16 C.F.R. part 1110

May 15, 2013

The 2008 Consumer Product Safety Improvement Act (CPSIA)[1] mandated that the agency establish a testing and certification regime for products subject to our safety rules. Our rule on certificates—issued under the Act's unrealistic 90-day deadline[2]—lacked the opportunity for economic analysis or public comment.[3] Now, in proposing to amend that costly rule—16 C.F.R. part 1110—we should base it on the analysis and participation that we could not do or seek before. Despite serious specific reservations, I voted to publish this Notice of Proposed Rulemaking (NPR) to start this conversation with the public.

This rule is costly—part of $424.2 million in annual paperwork costs created by the testing and certification regime—but the basic requirement is Congress's, and we must give effect to it. However, because of the costly nature of these paperwork requirements, we need to assure ourselves that we are imposing the minimum requirements needed to effect the Congressional purpose. I am not convinced that we have met that obligation.

The notion of certificates is not a bad one: The agency can focus on checking certificates rather than products, enhancing our ability to monitor products in the field and products being brought in at the ports, let safe products enter the American marketplace, and focus on unreasonably risky products. But whether certificates actually have created any appreciable safety benefit is an open question. Since some of the burdens in this rule have been borne by product makers and importers since 2008, we now (finally) have the opportunity to get the formal and informed feedback that will help us to improve the rule. It is incumbent upon us to listen carefully to that feedback and act on it.

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[1] Pub. L. 110-314, 122 Stat. 3016 (Aug. 14, 2008).

[2] *Id.* at § 102(a)(1)(B).

[3] *See* Certificates of Compliance, 73 Fed. Reg. 68,328, 68,331 (Nov. 18, 2008) (codified at 16 C.F.R. pt. 1110).

I write now to highlight a few key matters—cost, in particular—that I believe it would be helpful for the public to address. But first, I must explain what led us to adopt the original Part 1110 in 2008.

Part 1110's past & future

When Congress passed the CPSIA in August 2008, it required affected manufacturers and private labelers to issue certificates starting only 90 days later. As we noted in 2008, there was "substantial confusion in the regulated community as to the application and implementation of [the certificate] requirement."[4] Thus, the Commission—which I then led as Acting Chairman—issued a direct final rule to give some initial clarity to the public. Unfortunately, given the "myriad of near[-]term statutory deadlines of various other CPSIA provisions,"[5] and the statutory deadline for *this* requirement, it was impossible to seek comments from the public on the contents of Part 1110 and still meet the statutory deadline. Nor was there time to perform a Paperwork Reduction Act (PRA)[6] analysis. As a result, we did not realize that Part 1110 was the second major rule issued by the agency—out of four total.[7] We now know more.

What we have learned is startling. As detailed below, the paperwork costs covered by Part 1110 and its companion rules are huge—approaching half a billion dollars. *For paperwork. Annually*. And although the agency cannot alter the central certificate requirement, we must implement it sensibly—and we have the authority to do so under CPSIA § 3.

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[4] 73 Fed. Reg. at 68,331.

[5] *Id.*

[6] 44 U.S.C. §§ 3501–21.

[7] Under Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), administrative agency rulemaking that would impose a cost of $100 million or more on the economy (among other factors), is considered "significant" and triggers an obligation to perform a thorough regulatory impact analysis that ensures that the rule is tailored to maximize benefits and minimize costs. Though this requirement technically does not apply to the CPSC, we have typically followed it in spirit, and courts would likely look askance at a CPSC rule that lacked any such analysis under the general "arbitrary and capricious standard" of the Administrative Procedure Act, *see* 5 U.S.C. § 706(2)(a), or the "necessary" provision of CPSIA § 3.

One other major rule relates to testing and certification—Part 1107. The other major rules are the mattress flammability standard for open-flame ignition sources, *see* 16 C.F.R. § 1633.8, and the safety standard for full-size and non-full-size baby cribs, *see* 75 Fed. Reg. 81,766, 81,782–786 (Dec. 28, 2010).

Because of the manner in which Part 1110 was promulgated, there is much that we do not know about its effects. But what we do know shows that this rule is having unintended burdens and the safety benefit is questionable so far. Therefore, I proposed several amendments at the Commission's meeting deciding to issue the revision of Part 1110, including three specific new questions for the public (the other amendments are discussed below). My colleagues rejected two out of the three questions (on one-off international sales directly to consumers, and duplicative certifications; they accepted a question on electronic access to certificates).[8] I am at a loss to understand why my colleagues shy away from or fear asking these questions. To effectively implement this rule, we need effective public participation. Asking questions and highlighting concerns is central to that effort. And my concerns run deep.

Certificate requirements

A key concern relates to the certificate requirements, as changed by two questionable modifications adopted by my colleagues to our staff's draft of the NPR.

Certificates for products that are not required to be tested

First, the proposed rule, as amended by my colleagues, requires companies whose products are not required to be tested to nonetheless document non-existent test results and prepare, file (as appropriate), disclose, and maintain certificates based on those non-existent test results. I objected to this because the certificate requirement makes scant sense when a product is not tested.

The statute envisions certificates "based on a test."[9] If a product need not be tested, then, the certificate has no basis. This includes products that fit under Commission determinations that testing is unnecessary.[10] Under staff's original draft NPR, certificates would not have been required for these products (so long as they were not required to test and certify under some other regulation). My colleagues amended staff's draft to require certificates for those products. In light of heavy costs and a lack of obvious necessity, I did not agree.

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[8] My proposed amendments are attached to this statement.

[9] Consumer Product Safety Act § 14(a)(1)(A); *see also id.* § 14(a)(2)(B).

[10] *See* 16 C.F.R. § 1500.91 (determinations that specified products will not contain lead); Third Party Testing for Certain Children's Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies to Assess Conformity With the Limits on Phthalates in Children's Toys and Child Car Articles, 76 Fed. Reg. 49,286, 49,288 n.2 & accompanying text (Aug. 10, 2011) (materials that will not contain banned phthalates).

Certificates for banned products

Another questionable amendment specifies which products, among those subject to a ban, must be accompanied by a certificate. Under the pre-CPSIA 1972 version of the Consumer Product Safety Act (CPSA), certificates were only required for products subject to a consumer product safety standard under the CPSA, and were not required for obligations imposed by other statutes we enforce.[11] Importantly, bans were not included. Under the CPSIA, bans are included in a larger list.[12] Read too broadly, requiring something to certify that it is not banned could lead to absurd results: *All* products under our jurisdiction could be required to certify that they are not banned under *any* relevant provision. (For example, a cotton baby blanket might have to bear a certificate that it is not a banned lawn dart, an unstable refuse bin, or butyl nitrite sold for the purpose of inducing euphoria.) Congress left it to us to implement this requirement reasonably, again under § 3 of the CPSIA.

There are at least three good readings of the how the certificate requirement should apply to bans. First, one reasonably could argue a banned product does not legally exist so there is nothing to certify to or that the product is outside the scope of any ban (and thus beyond the reach of the certificate requirement as relates to that ban). This leaves nothing of bans to be certified, but it could be argued that the law is not sufficiently clear to overcome that result. A second interpretation would apply the certificate requirement to products regulated under the Federal Hazardous Substances Act, which only permits the agency to regulate by banning a covered substance.

The third approach is the one our staff suggested. They reasoned thusly: Some bans forbid an entire product category, leaving nothing to be certified. Other bans forbid only part of a product category, leaving the remainder susceptible to certification. (In particular, when a product is subject to a specific test, it is easier to identify the products to be tested, and those that could pass the test would have to certify to the ban.) One colleague proposed articulating this principle in the preamble—along with a chart showing staff's assessment of how it would be applied. Including the chart and language was a move in the right direction, but not far enough. The principle should be adopted in the rule, not just in the preamble, where it would likely escape the public's

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[11] *See* CPSA, Pub. L. 92-573, § 14(a)(1), 86 Stat. 1207, 1220 (1972) ("Every manufacturer of a product which is subject to a consumer product safety standard under this chapter and which is distributed in commerce (and the private labeler of such product if it bears a private label) shall issue a certificate which shall certify that such product conforms to all applicable consumer product safety standards, and shall specify any standard which is applicable."), *amended by* CPSIA § 102(a)(1)(A) (2008).

[12] CPSA § 14(a)(1).

notice (preambles are not published in the Code of Federal Regulations, the compendium of most generally-applicable, permanent federal regulations).

Because the certificate requirement is backed by civil and criminal penalties, we have a constitutional, due process obligation to draw lines clearly. Following these principles, I proposed–and my colleagues rejected—language *in the rule* to clarify (not expand) our staff's analysis and proposed application of the certification requirement to bans. The particular language is less important to me than the principle that we should signal our intentions. The government must cut square corners when penalties loom.

Recordkeeping

One colleague's amendment to the staff's proposal addressed the rule's recordkeeping requirements. He sought to "harmonize" the recordkeeping requirements of General Conformity Certificates, or GCCs, with those of children's products (in Parts 1107 and 1109), the records of which must be kept for five years. In its draft, however, staff recommended applying the recordkeeping requirements of a GCC's applicable standard, and recommending three years of recordkeeping if the applicable standard lacked its own recordkeeping provision.

I could not object to our staff's provision. I did object to my colleague's and his rationale, however. Harmonization is a specious point here because the agency should require record retention as necessary to execute a regulation. Where the Commission has previously established detailed recordkeeping requirements based on the specific product being regulated and the risk being addressed, revising past Commission decisions in one subject-blind fell swoop—and the careful analysis they reflect—seems short-sighted and likely to produce inconsistency and confusion. As our staff's draft shows, there was no need to upset former Commission's decisions with respect to specific recordkeeping. As a mantra here, *harmonization* is unconvincing.

Costs

In the end, each unnecessary certificate that makes the consumer no safer is a wasted cost. Each of these topics that we let pass without seeking public input is a missed opportunity to find ways to reduce costs. And the enormous costs of this revised rule demand a fair evaluation by us and the public—the very function an NPR would have served if we had used it properly.

As required by the Paperwork Reduction Act (PRA), the proposal includes our staff's analysis of the estimated costs of Part 1110, as we propose to amend it: $192.9 million in

paperwork costs *annually*.[13] Add to this the estimated annual paperwork costs of Parts 1107 and 1109, and the total is a staggering $424.2 million *every year*. (Importantly, the full paperwork cost of Parts 1107 and 1109 could not be known until now because some elements were not calculated until now.) This cost estimate includes documenting test results, creating certificates, disclosing them to third parties (such as retailers and distributors), and (for importers) filing them with U.S. Customs and Border Patrol.

Requirements	GCCs	CPCs
Document test results	$118 million[14]	$216.4 million[15]
Create certificate		
Disclose certificate		$ 14.9 million[16]
File certificate with CBP	$56 million[17]	$18.7 million[18]
Subtotal	$174.2 million	$250 million
Total	$424.2 million	

This enormous yearly cost is likely only a fraction of the cost of the entire testing scheme, and readers should remember that it is purely for paperwork: No testing is included in this half-billion dollar annual payment.

I believe we owe the public a full accounting, which is why I proposed amending the preamble of this package to include this estimate. My colleagues do not agree. They argue that including it in the package is neither necessary nor typical agency practice,

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[13] As shown by the table here and in our staff's PRA analysis, the $192.9 million figure comes from adding all of the GCC costs (the documentation, creation, and disclosure requirements, plus the CBP filing requirement, which amounts to $174.2 million) to the CBP filing requirement as it applies to CPCs ($18.7 million).

[14] 78 Fed. Reg. at 28,092–106.

[15] Testing and Labeling Pertaining to Product Certification, 76 Fed. Reg. 69,482, 69,537–40 (Nov. 8, 2011) (codified at 16 C.F.R. pt. 1107); Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements, 76 Fed. Reg. 69,546, 69,578–80 (Nov. 8, 2011) (codified at 16 C.F.R. pt. 1109).

[16] 78 Fed. Reg. at 28,092–106.

[17] *Id.*

[18] *Id.*

and suggest I am merely making a political point. With respect, I believe they are incorrect.

In developing PRA analyses, agencies must evaluate the need to require the paperwork, specifically and objectively estimate the burden, and work with the public to reduce that burden.[19] For our stakeholders to properly understand what the full burden reported of this Part 1110 revision is, they should understand how it fits in with the burdens of its companion regulations, Parts 1107 and 1109.[20] Presenting this reality to the public is no more "political" than calculating the costs themselves—it is a matter of regulatory openness and clarity.

Moreover, separating these costs is a legal fiction—they are costs that will be incurred in complying with our certification recordkeeping. Those impacted by this rule cannot "separate" them or pay only portions but instead must incur them wholesale. We should tell them with that price tag is.

There is no good reason for refusing to put these totals up front other than seeking to minimize their appearance by forcing a reader to jump through multiple documents to tabulate the total. Further, the total itself is concerning to me, particularly because it represents so minuscule a portion of the overall cost associated with these rules. Even if the public is willing to bear that cost, we owe them a full explanation of it.

Other issues

Beyond the subjects of my amendments, there are a number of other very significant issues in this proposed rule that will change the way in which certificates are created and managed. For example, do we need and should we ask for the identity of the product manufacturer when this is often sensitive business information? Are the other pieces of information requested reasonable for carrying out our regulatory responsibilities?

This rule makes important changes with respect to requirements for electronic filing of certificates. Further it imposes certificate responsibilities on common carriers who act as "importers of record." It also states that for foreign manufacturers who sell directly to consumers (for their own use and not for resale), the foreign manufacturer is responsible for certifying compliance. The rationale is that we cannot require the consumer to certify and someone needs to. This seems to me to be a totally unenforceable requirement and

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[19] *See* 44 U.S.C. § 3506(c).

[20] *See* White House Office of Management & Budget, Circular A-4, 15–16 (Sep. 17, 2003) (explaining the need to measure costs against a baseline of the existing statutory and regulatory landscape).

fits into the notion that "regulators abhor a regulatory vacuum." There are no doubt many other issues that are raised by this proposed rule and should be addressed.

Conclusion

Part 1110 was issued in haste due to statutory requirements. The regulated community has dealt with it for several years and has substantial practical experience with it. Their advice is indispensable as we begin to fix it. And more than anything else, it was necessary to start that process. I have serious concerns about this rule, particularly as amended by my colleagues and without important questions that I believe we should have highlighted. Hopefully I have done so here. It is now up to the public to let us have the benefit of the wisdom that experience brings.

CONN Amendments to §1110 NPR

1. Insert the following chart into preamble PRA analysis section combining all recordkeeping costs.

Table D-1: Total PRA Burden Estimates for Certificates Limited to This Analysis—Both GCCs and CPCs—Under 16 CFR 1107 and 16 CFR 1110 as Proposed, Including the Requirement on Importers to File Certificates with CBP

Estimated Average Total Annual Cost of Preparing GCCs and CPCs and, as Applicable, Filing Certificates for Imports with CBP	$207,802,724

Table D-2: Total PRA Burden Estimates for Documenting Information for, Creating, Disclosing, and CBP Filing of Certificates Under 16 CFR 1107 and 1109, and 16 CFR 1110 as Proposed

Requirements	GCCs	CPCs
Document test results	$118 million[1]	$216.4 million[2]
Create certificate		
Disclose certificate		$ 14.9 million[3]
File certificate with CBP	$56 million[4]	$18.7 million[5]
Subtotal	$174.2 million	$250 million
Total	$424.2 million	

2.

a. In the draft rule at §1110.5, insert *(a)* in front of the current rule text and insert the following as a subsequent subparagraph:
(b). Certificates are required for products which are subject to a ban when the banned characteristics defined by the language of the ban do not define the whole product category within which the banned products fall and the products are not specifically excluded from the ban.

[1] § 1110 PRA (March 2013)

[2] §§ 1107 & 1109 PRAs (November 2011)

[3] § 1110 PRA (March 2013)

[4] § 1110 PRA (March 2013)

[5] § 1110 PRA (March 2013)

b. In the preamble, delete the following language on page 11:
For example, the Commission's ban on non-children's lawn darts at 16 CFR 1306.1 et seq. states that "any lawn dart is a banned hazardous product." This appears to ban the entire product category, yet the Commission is aware that certain manufacturers continue to sell products advertised as plastic-tipped lawn darts. These lawn darts appear not to present the hazard of death or injury that metal-tipped lawn darts do. In such a case, the Commission expects such manufacturers to issue GCCs that certify that the plastic-tipped lawn darts do not fit within the class of banned lawn darts.

c. Insert the following language as a request for comment at the appropriate location:
The Commission has proposed language at §1110.5 that identifies the products subject to a ban that would be required to provide certificates under this rule. A chart in Section II.C of this preamble provides the agency staff's initial assessment identifying which banning rules apply to products that would still require a certificate. The Commission seeks comments regarding whether the language the Commission proposes to adopt is sufficiently clear and whether a certificate is required as it applies to the particular products and bans concerned.

3.

a. Adopt staff's draft language at §1110.11(c) regarding certificate requirements and the absence of such a requirement for products that are not required to be tested or certified.

b. Insert the following language as a question for the record at the appropriate location in the preamble.
Section 14 requires that certificates be issued on the basis of testing. We have determined that certain products always meet the underlying requirements and so are not required to be subjected to third-party testing. For example, we determined that a number of products, including cotton, do not contain lead (see 16 CFR 1500.91(d)(7)(i)); thus, cotton children's products need not be tested to prove the absence of lead. We seek comments on whether certificates should be issued for products that are exempt from testing requirements. Noting that the products that are the subject of such exemptions and determinations still must comply with the underlying statutes and rules, we ask whether requiring certificates would aid or hinder compliance, expeditious import processing, or whether they would prove a benefit or hindrance in any other manner.

4. Replace the second and third sentences in §1110.17 with the following sentences:
For GCCs, the certificate and supporting test records shall be maintained based on recordkeeping provisions within the applicable substantive standard. If a standard does not contain a recordkeeping requirement, the issuer shall maintain certificates and test records for at least 5 years.

Requests for comment

5. Insert the following as a request for comment:
   Under proposed § 1110.7(a), a foreign manufacturer could become an importer and be required to make a certificate. Concerning direct-to-consumer sales, should the CPSC consider an exception for certificates for items purchased by consumers, from foreign manufacturers or sellers, for their individual use and not for resale or wider distribution?
6. Insert the following as a request for comment:
   Proposed § 1110.10(c) states that an electronic certificate can meet the requirements of the relevant provisions if it is identified prominently by a unique identifier and can be accessed via a World Wide Web uniform resource locator (URL) or other electronic means by the Commission (and others) without password protection. The Commission seeks comments on ways to make that information available only to the agency, CBP, distributors, and retailers.
7. Insert the following as a request for comment:
   Proposed § 1110.11(a)(4) requires a certifier to list each consumer product safety rule—or similar rule, ban, standard, or regulation under any law enforced by the Commission—to which the finished product is being certified. May the Commission deem certification to an applicable consumer product safety rule, ban, standard, or regulation that subsumes another applicable consumer rule, ban, standard, or regulation sufficient certification for both rules, bans, standards, or regulations?