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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THIRD-PARTY TESTING FOR FLAMMABILITY OF CARPETS & RUGS, SMALL CARPETS & RUGS, AND VINYL PLASTIC FILM: REQUIREMENTS FOR ACCREDITATION OF THIRD-PARTY CONFORMITY ASSESSMENT BODIES

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The Consumer Product Safety Commission (CPSC) has a proud history of assessing risk and protecting consumers from injury by setting risk-based standards, requiring companies to test their products to ensure compliance with those standards, and negotiating orderly recalls when a violative or defective product reaches the market. For decades, the CPSC used its flexibility to build a system on which the ever-changing consumer market could depend, ensuring both the vibrancy of new products and the reliability of the regulatory framework.

The Consumer Product Safety Improvement Act changed this tradition, setting arbitrary new standards on children's products without regard to risk. In addition, the law required expensive third-party testing for every component of a children's product[1] subject to a children's product safety rule, certification of the item based on those tests, and tracking labels to determine the source of each component and lab test. The costs associated with re-engineering and onerous third-party testing have already caused untold disruption to children's product markets: closing businesses, eliminating jobs, destroying livelihoods, removing perfectly safe products from store shelves, and restricting consumer choice.

In this case, the Commission (on a 3-2 vote along party lines) is setting a troubling precedent by broadly construing the term "children's product safety rule"[2] to encompass all "consumer product safety rules." The majority's decision to issue notices of accreditation for the flammability of carpets and rugs, small carpets and rugs, and vinyl plastic film employs bad legal interpretation to produce even worse policy results.[3] This decision expands the statute's costly third-party testing requirements and compounds the unintended destructive consequences of the law for no good reason. Although the law's earlier effects mainly resulted from statutory mandates outside the Commission's control, the same is not true here. The heavy costs this decision will impose for little or no consumer protection are entirely the agency's own fault.

Particularly where no significant safety benefits accrue, we should not expand the CPSIA's burdensome third-party testing regime. Based on the CPSC's longstanding authority to address risk, the agency can require third-party testing of children's products affected by consumer product safety rules if it is warranted. Until then, we should focus on issuing notices of accreditation only for ***children's*** product safety

[1] "The term 'children's product' means a consumer product designed or intended ***primarily*** for children 12 years of age or younger." CPSA § 3(a)(2); CPSIA § 235(a) (emphasis added).
[2] "The term 'children's product safety rule' means a consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance." CPSA §14(f)(1); CPSIA § 102(b).
[3] 16 CFR § 1630 Standard for the surface flammability of carpets and rugs; 16 CFR § 1631 Standard for the surface flammability of small carpets and rugs; 16 CFR § 1611 Standard for the flammability of vinyl plastic film.

rules—as Congress directed. Because I believe the three rules involved here are not children's product safety rules, I oppose issuing notices of accreditation that force unnecessary additional third-party testing.

Why These Rules Are Not "Other Children's Product Safety Rules"

Section 102(a)(3)(B)(vi) of the CPSIA instructs the Commission to "publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with other children's product safety rules… ." No one asked what constitutes a "children's product safety rule" when issuing previous notices of accreditation. Prior notices either dealt with rules that were specifically listed in the statute's timeline for notices of accreditation (*e.g.*, lead paint, small parts, children's metal jewelry) or else with rules that obviously related to children's product hazards (*e.g.*, children's bunk beds, rattles, electrically operated toys intended for use by children). All of these notices passed unanimously. The carpets and rugs rule, in contrast, presents the clearest example to date of a notice involving a general consumer product safety rule. Flammable carpets pose the same hazard to children as they pose to adults. Treating this rule as a "children's product safety rule" would mean that all product safety rules (including any new rules created) will be treated that way going forward and will require third-party testing of any children's products subject to them.

But construing ***children's*** product safety rules and ***consumer*** product safety rules to mean the same thing makes no sense for several reasons. First, treating the two terms as synonymous disregards the statute's creation of the separate new term "children's product safety rule" in § 102(a)(2). There was no reason for Congress to create a brand new term unless that term contains meaning different from "consumer product safety rule." Had Congress meant to require all children's products to be third-party tested and certified to all of the agency's applicable consumer product safety rules, it would have had no need to create a separate term. The statute would have just required any children's product to be third-party tested and certified to all applicable consumer product safety rules. By instead crafting a new term, Congress clearly distinguished between the testing requirements mandated for consumer product safety rules receiving general conformity certificates in § 102(a)(1) and the third-party testing and certification requirements mandated for children's product safety rules in § 102(a)(2).

Moreover, defining a children's product safety rule to mean exactly the same thing as a consumer product safety rule ignores the plain text contained in § 102(b)'s rule of construction paragraph. The rule of construction provision there begins, "Compliance of any children's product with third party testing and certification ***or general conformity certification*** requirements under this section…" (emphasis added).[4] That phrase indicates that some children's products will have general conformity certifications while other products will be certified based on third-party tests. Some products might even have both a certificate based on third-party testing for some rules (*e.g.*, for lead, phthalates, small parts, surface coatings, etc.) and a general conformity certificate for all other consumer product safety rules. But neither outcome is possible under a definition whereby all children's products under any applicable consumer product safety standard have to be third-party tested for everything. The rule of construction language only makes sense if Congress anticipated that some consumer product safety standards could cover children's products without themselves becoming children's product safety standards. Such children's products falling under general consumer product safety rules would only carry general conformity certifications. So-called youth carpets and rugs and vinyl plastic film are examples of these.

[4] CPSA § 14(h); CPSIA § 102(b).

Next, the timeline for accreditation strongly suggests that the statute did not intend for notices of accreditation to be issued for every existing regulation that might apply to some children's products. The catch-all provision requires the Commission to "publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with other children's product safety rules at the earliest practicable date, ***but in no case later than 10 months after the date of enactment***[.]"[5] (emphasis added). Thus, the timeline placed about a 300-day deadline on issuing notices of accreditation for children's product safety rules other than the ones listed. Given that the timeline allowed 210 days for issuing the first 9 notices, it only left 90 additional days for any more notices. Assuming about the same amount of time for each notice, the timeline only left room for about four more notices to be issued during the 10-month window. This provision could not have meant to require the agency to issue notices of accreditation for every single consumer product safety rule that contains some children's products, or else 10 months would have been an utterly impossible timeline for the agency to meet.

The timeline excludes treating the carpets and rugs and vinyl plastic film rules as children's product safety rules for another reason as well. Applying the statutory rule of construction known as "*ejusdem generis*"—which translates as "of the same kind, class or nature"—general words that follow specific words in a statutory enumeration are to be construed to only cover items similar to the specifically enumerated items. Thus the "other children's product safety rules" referred to in § 102(a)(3)(B)(vi) must be rules that are similar to the ones mentioned by name. For example, a notice of accreditation for rattles or infant bath seats would make sense, because those are both children's product safety rules that are akin to the listed rules for pacifiers and infant walkers. In contrast, the standards for surface flammability of carpets and rugs and for flammability of vinyl plastic film are not akin to any of the specific children's product safety rules listed.

Interpreting the Definition of "Children's Product Safety Rule"

Those Commissioners supporting this decision argue that the "plain language" definition of children's product safety rule in § 14(f)(1) of the Consumer Product Safety Act settles the question. That provision defines the term to mean "a consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, …" There are at least three major problems with reading that language to mean that every consumer product safety rule is a children's product safety rule. First, one can just as easily read that language to mean that a children's product safety rule *can be* any one of those types of regulations, but that does not make the reverse true. In other words, just because each children's product safety rule is a consumer product safety rule of some kind does not mean that every consumer product safety rule is thereby a children's product safety rule. The conclusion that Congress was just clarifying that a children's product safety rule can exist under any statute enforced by the Commission is strengthened by the fact that the statute provides the same clarification regarding the meaning of a consumer product safety rule. In both cases the clarification was needed because there have been past instances challenging the agency's authority to regulate particular products under particular statutes within its jurisdiction.

[5] CPSIA § 102(a)(3)(B)(vi). This provision also mentions "children's product safety rules established or revised 1 year or more after such date of enactment…" which refers to the mandatory durable nursery product standards called for under the CPSIA. The fact that those standards are allotted more time for notices of accreditation to be issued further underscores that the 10-month time limit could not have meant to encompass all CPSC rules. Those nursery standards—unlike carpets and rugs—also are children's product safety rules similar to the specifically listed ones (such as cribs).

Second, this Commission decision is inconsistent with our previous decisions, which undermines any claim that a "plain language reading" of the definition requires this regulation. A literal reading would treat every substantive agency regulation as a children's product safety rule, but we have already decided that certain rules of general application are not children's product safety rules even though children use products covered by those rules. The Commission did not previously construe the statute to require third-party testing for fireworks, swimming pool slides, or FHSA labeling requirements. Nor does it now offer a consistent rationale for excluding those rules from such testing—though there is one. Just as the safety considerations that pertain to those items are not uniquely (or predominantly) hazards for children, so too the safety considerations inherent in flammable carpets or rugs are no different for children. Thus, the carpets and rugs standards (and the vinyl plastic film standard) are consumer product safety rules of general application—not children's product safety rules.[6]

Last, even interpreting the definition of a children's product safety rule literally does not resolve whether these rules count, because the question remains whether or not they are ***similar*** rules, regulations, standards, or bans. And the answer to that question should be no. For example, perhaps the best reason not to consider the small carpets and rugs standard similar to a consumer product safety standard is that a carpet that fails the flammability standard—unlike products that fail other standards—can still be sold. The rule simply requires that a failing product carry a label noting that the carpet or rug is flammable. In this respect, the standard is essentially a labeling requirement. Since the CPSC has already determined that an FHSA labeling requirement is not a "similar rule, regulation, standard, or ban" for third-party testing purposes, it follows that this Flammable Fabrics Act labeling requirement is likewise not similar to a consumer product safety rule. Because the Commission's decision neither adheres to a plain language reading nor articulates any principle for having previously excluded certain rules, it offers little justification for issuing these notices beyond one's policy preferences.

Policy Consequences of this Precedent

Treating every consumer product safety rule as a children's product safety rule opens a Pandora's Box of regulatory mischief. For starters, it undoes much of the good work achieved with the agency's lead determinations rule. Before this decision, a small rug manufacturer could make a 100% cotton children's rug and avoid third-party testing entirely. Now, a rug exempt from lead or phthalate testing has to be third-party tested and certified to the surface flammability standard. And that is only the beginning. If the Commission is going to be consistent, a rug that has to be third-party tested to the carpet flammability standard would also require third-party testing for cyanide content, formaldehyde content, butyl nitrite, and a host of other general consumer product safety standards and bans. If the Commission stays down the path of saying that virtually every CPSC rule is a "children's product safety rule," then children's products would have to be third-party tested at tremendous cost to dozens of additional standards or bans never meant to require such testing, and small-scale production of children's products will cease.

Even for larger-scale manufacturers, this new approach throws a wrench in the works of commerce. The same labs that test for lead paint, lead content, and phthalates may not be the same ones that test for surface flammability of carpets. After all, only a few such carpets exist and it will not be economical for very many test labs to seek accreditation for this standard. By the time a manufacturer has supplied sufficient samples to enough different labs operating on different schedules to third-party test a children's

[6]Formally recognizing that not all consumer product safety rules are children's product safety rules provides a general principle that helps to rationalize this agency's prior decisions in implementing the CPSIA.

product line to an entire battery of standards and bans, staying in the children's product business or offering parents a wide variety of rugs or carpets for their children's rooms may not seem worth the price. The children will not have safer rugs (no one even bothers to claim third-party testing to the flammability standard will actually makes rugs safer), just less interesting ones.

This decision does not represent good policy for carpets or vinyl film, and the problems it creates for these rules foretell the wider policy consequences to come. These three rules have been in place for decades and have done an effective job without third-party testing. For example, there have been no recalls of youth carpets and rugs in the last 36 years of the agency's existence. There is absolutely no reason to now mess with a system that has worked. Carpets already have to meet the flammability standard, they already get tested in house, and they can obtain general conformity certificates on that basis. Third-party testing will not improve children's safety. Nor does it make sense to treat so-called youth carpets differently. No child stays entirely in his own room and crawls or plays exclusively on his own rug. Children's rugs do not need different flammability protection than adult rugs. Indeed, every other rug in the house is more likely to have a cigarette dropped or candle tipped onto it than the carpet in a child's room. If this testing made sense, why would we not also require third-party testing for all carpets being laid in elementary schools or in babies' rooms? If a wall-to-wall carpet installer arrives at a job to find a crib set up in the room and a mother far along in pregnancy, why should third-party testing turn on whether the carpet has a juvenile design or not? Such criteria would make absolutely no sense if children did need greater flammability protection than other consumers.

Conclusion

This decision results from bad policymaking, not legal necessity. The CPSIA requires third-party testing and certification of "any children's product that is subject to a children's product safety rule,"[7] but it does ***not*** require third-party testing of children's products for compliance with the Commission's numerous general consumer product safety rules that are not primarily concerned with hazards posed to children. The Flammable Fabrics Act regulations at issue here are not similar to the product safety rules specified for third-party testing in the CPSIA. Forcing third-party testing to general consumer product standards that are not similar to children's product safety standards will not increase safety, and the Commission never should have issued these notices.

While the legal argument can be made for these two notices, it unravels upon close examination. Such an interpretation of the law would not explain why Congress created a separate new term in the first place, and it does not reconcile the definition of a "children's product safety rule" with the distinct testing rules in § 14(a)(1) and (a)(2), the reference to some children's products having general conformity certificates in § 14(h), nor the timeline for accreditation provided in the 10-month rule of § 14(a)(3)(B)(vi). Furthermore, § 3 of the CPSIA provides the agency with more than enough policy discretion to implement this part of the statute without wreaking havoc on existing regulatory frameworks that work.[8]

The majority's unwillingness to use our policy discretion points up a basic difference that exists among the Commissioners. Whereas the majority is willing to go out of its way to increase regulation, I believe we should only opt for more regulation where there is a concrete safety benefit to be had. No one can make that argument for carpets and rugs or vinyl plastic film. Of course we all support issuing the

[7] CPSIA § 102(a)(2).
[8] "The Commission may issue regulations, as necessary, to implement this Act and the amendments made by this Act." § 3 CPSIA.

regulations that the law requires, but we should not create more regulation than necessary when no increase in children's safety will result. Nor should we operate in a fashion that is oblivious to the economic condition around us. Especially given the difficult circumstances that many children's product manufacturers find themselves in today, it serves no good purpose to foist extra regulatory burdens on them.

By recognizing that Congress meant something more specific by "children's product safety rules" than all the agency's rules, the agency could have maintained flexibility to mandate more sensible testing in the future on a case-by-case basis. Instead, this vote will steer us on a course of excessive regulation. Public comments on this decision are due in 30 days. It is my hope that affected parties will comment on whether these notices should even have issued, as well as on why FFA rules are not similar to consumer product safety rules like those in the timeline for accreditation. Such input might help us to reverse this unfortunate decision.