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CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER ANNE M. NORTHUP

SUPPLEMENTAL STATEMENT OF COMMISSIONER ANNE NORTHUP ON THE VOTE TO APPROVE A PLAN FOR THE RETROSPECTIVE REVIEW OF EXISTING RULES.

September 19, 2012

It is not my usual practice to respond to my colleagues' statements after I have already explained my position on a Commission ballot. But the tortured and parsed Statement of Chairman Inez M. Tenenbaum and Commissioner Robert Adler on the CPSC Staff Plan for Retrospective Review of Existing CPSC Regulations so distorts my views and those of the President that I am compelled to correct the record. In addition, equal scrutiny must be brought to bear on what is conspicuously absent from my colleagues' statement.

Let me begin by asking a plain question: why do the Democrat Commissioners not simply make the case against cost benefit analysis either under the current circumstances or as a general basis for public policy? One could not have followed the Consumer Product Safety Commission over the past three years and not know that the Democrat Commissioners do not support cost benefit analysis. Indeed, Commissioner Adler stated on the record in a public meeting that the CPSC would perform a cost benefit analysis "over [his] dead body." Yet in their statement, Commissioner Adler and Chairman Tennenbaum feign outrage that I accuse them of having "refused to consider the costs of our rules or to permit staff to engage in cost-benefit analysis."[1]

The Democrats claim only not to support my "notion" of cost benefit analysis, as though there are many definitions of this term and I have adopted a radical interpretation. There is a common understanding of what "cost benefit analysis" means. It is defined in our laws, is routinely debated in political campaigns, and the President himself has cited it as the basis for making regulations. While it can be further refined in a particular application, it is broadly understood that cost benefit analysis is a quantitative and qualitative study of the costs a regulation will impose and the benefits expected to flow from it, with the requirement that the benefit be determined to be proportionate to the cost before a rule is adopted.

The "notion" of what a cost benefit analysis is does not even begin to describe the differences between our offices on the issue, as the Democrats' repeated invocation of the Regulatory Flexibility Act to prove their support for cost benefit analysis illustrates. The RFA requires

[1] *Statement of Chairman Inez M. Tenebaum and Commissioner Robert Adler on the CPSC Staff Plan for Retrospective Review of Existing CPSC Regulations* at: http://www.cpsc.gov/pr/tenenbaumadler09122012.pdf

agencies to examine the economic impact of their regulations only on small businesses, not on the entire market. In addition, it does not require agencies to forgo or modify any rulemaking as a consequence of that analysis. Here at the CPSC, RFA analyses invariably become a speculative and cursory look at a rule's effects, usually concluding that some significant number of businesses will close due to the rule. But never has that conclusion caused any of my Democrat colleagues to vote against or request a change in a rule. Thus, while the Small Business Administration may well attribute $200 billion in savings to the RFA since 1998 (an interesting choice for a statistic intended to show the current administration's commitment to cost saving through the RFA), I can attest without doubt that the RFA has saved zero dollars at this agency since I became a Commissioner. It is no wonder my colleagues champion the RFA; it requires the measurement of cost, without any need to ensure that the benefits justify the costs. That's not actionable cost benefit analysis, its meaningless cost analysis.

My colleagues' refusal to own up to their views makes finding a middle ground difficult. An open and honest debate about the role of cost benefit analysis in the context of rule review is also precluded by distorting my position and refusing to admit the implications of their own view. Just as the President urged agencies to undertake cost benefit analyses to ensure that the benefits of existing regulations justify their costs, I pointed out that this is particularly important at the CPSC, where, at the direction of Congress, we have promulgated a large number of very costly rules under the CPSIA without any effort to evaluate their costs or benefits. I therefore urged that we undertake cost benefit analyses of our CPSIA regulations when they become subjects of rule review.

Instead of explaining why we should carve out a huge swath of very costly rules from ever being proven justified, my colleagues once again choose to attack an argument I never made. Thus, they trot out Commissioner Adler's favorite phrase "paralysis by analysis" to explain why Congress excepted the CPSIA regulations from cost benefit analysis "because they considered our lengthy process to be counterproductive and not sufficiently protective of children." That may well be, but it is no longer relevant. In the context of rule review, the rules are *already in place.* There is no issue of delay. The only issue remaining is whether rules should remain forever on the books without ever establishing that their costs justify their benefits. My colleagues completely ignore that issue, confirming through their silence what I previously explained: "My Democrat colleagues not only believe that no cost is too great to bear in order to reduce even the smallest theoretical risk, but also object even to quantifying the costs and benefits of government regulation."

My Democrat colleagues accuse me of "partisanship" for viewing the rule review process "through a political prism", and contend that my doing so "is counterproductive to the Commission's safety mission." They go on to explain condescendingly that "[product safety is not the exclusive domain of any political party . . . both the major political parties strongly support product safety." This is the sort of rhetoric that makes reaching bipartisan compromises so difficult here at the CPSC. Anyone who disagrees with the Democrat Commissioners' regulatory approach doesn't care about product safety. Apparently, if not for my "overtly political perspective" we would all have voted for the "nonpolitical staff proposal."

They apparently object to my referring to them as "Democrats" and to the plan they supported as the "Democrat Plan." But I refer to the "Democrat Commissioners" and the "Democrat plan" only

as a non-derogatory shorthand way of distinguishing Chairman Tenenbaum, Commissioner Adler and their plan from Commissioner Nord, myself and our plan. One can no longer refer to those on one side of an issue as the Majority or Minority Commissioners, because we now have a 2-2 split. And while not all split votes divide along partisan lines, most often the split is ideological and, as one might expect, divides along party lines. This should not surprise anyone. There is a reason Congress specified that the agency be comprised of Commissioners from each party. Congress must have wanted both sides of an issue raised for consideration.

My colleagues' attempt to hide their views behind the "staff" plan, as if the Democrats and the entire professional staff were in support of one plan, is misleading at best. Of course the staff focused on housekeeping types of reviews. They could also read the Operating Plan for FY2012, had heard years of dismissal of the value of cost benefit analysis, and report to the Chair and the politically appointed Executive Director of the agency. Our highly qualified staff of experts guide us in identifying and addressing product safety hazards. It is important to rely upon, and often to defer to, staff on questions of product safety. But policy questions are the province of the Commissioners. How the Commission chooses to respond to the President's call to reduce the economic burdens of existing regulations – particularly given the Democrat Commissioners repeated reminders that "we are not required to follow these Executive Orders" – is principally a matter of public policy, not agency expertise. They should drop the pretense that they are simply deferring to staff's plan "to proceed on the basis of data and science, not on the basis of an ideological agenda." There is no data or science involved in setting these priorities. The extent to which the sliver of resources set aside for rule review should focus on reducing rather than enhancing regulatory burdens *is* an ideological policy question. I am willing to defend and be held accountable for my views. The Democrats should have the courage of their convictions to do the same.

My colleagues' effort to paint me as insufficiently committed to product safety is a tactic they use to obfuscate their own rejection of the President's regulatory philosophy. It also relies upon a bald and knowing misstatement of my position. I argued, with over two pages of direct quotes from the President and his regulatory "czar", Cass Sunstein, that the President envisioned a rule review program that prioritized the greatest reduction in economic burdens. It was the President that defined the Executive Orders and argued in public writings and speeches that the Executive Orders were designed to reduce the cost and burden of regulations contributing to the worst economic recovery since the Great Depression. Let me state it again: Cost reduction was the main purpose!

In their statement attacking my position, my colleagues ignore virtually all of these numerous public pronouncements of the administration. They instead focus on one line from one of the relevant Executive Orders, to suggest that equal effort should be made toward strengthening rules; and, in an effort to substantiate their false claim that only three rules at the CPSC would qualify for review, they cut out most of a sentence explaining how the President would have us prioritize rules for review by focusing on those imposing the greatest burdens. Their plan instead envisioned including every imaginable dot and tittle, and not permitting prioritization based on cost, creating a process that would eliminate any chance of meaningful regulatory reform at the CPSC for decades.

My position on the importance of strengthening rules where necessary as part of the Commission's core mission *and* in connection with its rule review program was clear:

> While I support the extension of existing rules where necessary to ensure product safety, rule review in response to the President's Executive Order is not the place to do that. Our core mission is to protect product safety, and we should always be on the lookout for opportunities to address product hazards. Rule review, in contrast, is a separate initiative intended to reduce unnecessary economic burdens.
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> While I agree that a rule subject to review may require strengthening or complimenting, I believe it is inconsistent with the President's intent to select rules in order to strengthen them, rather than to reduce unnecessary burdens.[2]

My colleagues correctly attribute to me the view that rules should not be *selected* with the purpose of strengthening them, rather than reducing burdens, but then mischaracterize my position with: "In other words, should our rule review determine that a safety standard has failed to protect consumers from unreasonable risk, we should do nothing and remain focused exclusively on burden reduction activities."

This is, of course, the exact opposite of my acknowledgement that "a rule subject to review may require strengthening or complimenting." It is also a scurrilous accusation that borders on defamatory – as if I would advocate doing nothing in the face of evidence that a safety standard failed to protect against unreasonable risk. Not only does this knowingly misrepresent my public statements and demonize my character, it flies in the face of the fact that I have taken a hard stand against dangerous products.

Finally, a few words are also needed to correct my colleagues' misstatements and omissions regarding the rules specifically selected for review in FY2012 and FY2013 under their plan. To begin with, the practical difference between our positions is small for FY2012. I obviously support the third-party testing cost reduction work that Congress required the CPSC to do in H.R. 2715, and I also do not object to the Commission's cleaning up its books, so to speak, by eliminating the toy caps rule and making minor modifications to its animal testing rule. My objection was to our taking credit for the statutorily mandated work and then selecting additional picayune rules for review in both FY2012 and FY2013 as though they met the expectations of the Executive Order. In the spirit of compromise, I was willing to acknowledge the resources necessary to do the statutorily mandated work, and would have accepted only housekeeping types of other rule review in FY2012, followed by the selection of meaningful rules in future years through public participation.

In my colleagues' hands, that reasonable position has been distorted into some kind of reversal because I "approved" the review of the toy caps and animal testing rules "without objection" in the

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[2] *Statement of Commissioner Anne Northup on the Vote to Approve A Plan for the Retrospective Review of Existing Rules* at: http://www.cpsc.gov/pr/northup08152012.pdf.

2012 Operating Plan. This may seem like a minor point, but the private deliberations of the Commission are required by our internal operating rules to be kept secret. It is outrageous that my colleagues would not only breach that trust in order to score a cheap point in a statement, but would misrepresent the actual deliberations in order to do so. At the time the 2012 Operating Plan was negotiated, I made clear that I objected to counting the toy cap and animal testing rule changes as part of the rule review requested by the President. I did so for all of the reasons I articulated in this and my prior statement. I also agreed to permit the minimal expenditure of agency resources necessary to change those rules.

This distinction is clear from changes made to the 2012 Operating Plan between its initial public release and final approved version. As originally drafted, the 2012 Operating Plan included under the rubric of Rule Review a discussion of the President's rule review executive orders and a single goal describing the development of a plan for selecting rules for review, and a commitment to initiate the review of two rules. When I learned that the rules contemplated were minor revisions to the toy cap and animal testing rules, I asked that they be separated out as an additional goal independent of and unrelated to the development of a rule review plan. This was because I disagreed with their selection in response to the President's request, and it made no sense to select the rules under a rule selection plan that had yet to be developed. As the attached document reflects, my views in this regard were communicated to the other Commissioners' offices through my staff.[3]

Far from being attributable to my partisanship or lack of commitment to public safety, the Commissioners' inability to reach a consensus rule review plan stemmed from my Democrat colleagues' opposition to rule review as a vehicle for meaningful burden reduction, and their inability to engage in an open and honest debate about the issues. As their statement shows, when challenged, they instead knowingly distort my positions in order to avoid defending their own. But they will soon have another opportunity to demonstrate that their commitment to cost reduction is not mere lip service.

The Commission's Democrats and Republicans all agree that the main focus of FY2012 and FY2013 rule review should be responding to the Congressional mandate to search for ways to reduce the cost of third party testing consistent with assuring compliance with applicable children's product safety rules. After over a year of work, the staff recently completed their recommendation of sixteen possible actions the Commission could take to reduce third part testing costs without impacting safety. The amount of resources the Democrats are willing to dedicate to pursuing those options will be a telling measure of their commitment to reducing the unnecessary economic burdens imposed by our regulations. For my part, I will leave this agency proud to have worked to enhance consumer safety, while also striving to ensure that our regulations do not do more harm than good.

[3] The document is redacted to reflect only my proposed changes to the goals relating to Rule Review. I consider the internal deliberations regarding other aspects of the Operating Plan to remain confidential.

Avitabile, Gregg

From: Avitabile, Gregg
Sent: Monday, March 05, 2012 1:29 PM
To: Avitabile, Gregg; Levine, Jason; Martyak, Joseph; Cardon, Nathan; Pearson, Kelly; Howsare, Matt; Kaye, Elliot
Subject: Updated OP edits 3-5
Attachments: AMN Proposed Changes to 2012 OP as of 3-5.doc

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Anne Northup's Proposed Changes to 2012 Operating Plan

Objective 2.2

Rule Review (p. 27)

Goal: In 2012, CPSC staff will be seeking public comments and information to help develop a plan for review of existing rules that will be appropriate to the agency~~. be consistent with (and not duplicate) previous and ongoing reviews.~~ and fulfill the spirit of E.O. 13579. Based on the comments received, CPSC staff will *submit a draft plan for Commission consideration on revising CPSC's voluntary review process for existing rules.* ~~*resume revise the CPSC's voluntary review process for existing rules, as appropriate, and submit a proposed schedule to insure that significant rules or those that impose the highest burden of compliance are given priority. draft plan for Commission consideration on revising CPSC's voluntary review process for existing rules.*~~

Goal: ~~In addition, CPSC s~~Staff will initiate and complete two rule reviews, as directed by the Commission ~~and will prepare recommendations for future rulemaking activity, as necessary, for Commission consideration~~.

Comment [Gxa1]: Commissioner Northup is withdrawing this ask in deference to the ongoing process of setting selection criteria initiated with the FR notice seeking public comment

Comment [Gxa2]: Per my discussion with DeWane, these rules are being reviewed based on a longstanding need and not as part of the E O process, which will not even be established before the rule reviews are underway. A new goal is added to avoid confusion concerning the relationship between these two rule reviews and the rule reviews conducted pursuant to the E O

Comment [Gxa3]: It doesn't make sense for staff to prepare recommendations of rules to be reviewed based on the revised rule review process, until the process of rule selection is approved by the Commission.