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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE FINAL INTERPRETATIVE RULE: INTERPRETATION OF CHILDREN'S PRODUCT

September 29, 2010

I had hoped that the Children's Product Final Interpretative Rule would accomplish two things: first, reduce the number of products that must unnecessarily bear the burdens imposed by the Consumer Product Safety Improvement Act of 2008 ("CPSIA"); and second, provide clarity to manufacturers. There really was no other reason to issue this interpretive rule. The law certainly did not require it. Unfortunately, the Rule approved today by a 3-2 Commission vote does a poor job by both measures.

Building a Fence

The CPSIA is a regulatory morass of third-party testing, certification, tracking labels, limits on lead content in the substrate and—most recently—extra testing for children's products to all of the agency's pre-existing consumer product safety rules. To better understand the action taken by the Commission today, think of the definition of a children's product as constructing a fence around all those products that are trapped in this morass and must comply with these new regulatory requirements. The statute lays out for the agency certain things to consider in determining what belongs inside the fence, but Congress fortunately provided the agency flexibility when it defined a children's product as "a consumer product designed or intended ***primarily*** for children 12 years of age or younger."[1] By issuing this interpretive rule, the Commission has made a policy choice to construe the word "primarily" and various statutory factors quite narrowly. As a result, I believe the Commission has built far too large a fence that corrals too many products that pose too little risk.

Products caught inside the fence built around children's products face tremendous re-engineering and mandatory regulatory compliance costs. For that reason, the definition we adopt should be narrower than the definition we would adopt if regulating hazards. In the latter case, we would seek to entrap as many products as possible to prevent harm. But here, where a broad definition threatens to capture many products in an arbitrary statutory regime that pose no risk, the fence should not encompass more than what is absolutely required. After all, where substantial risk remains, the agency may still reach beyond the fence to regulate it.

In fact, Members of Congress on both sides of the aisle who supported this legislation have repeatedly called on the Commission to temper the harsh unintended consequences of this law through judicious use of our regulatory flexibility in interpreting the statute. Frankly, the statute does not always contain as much play in the joints as the Commission needs in order to regulate with common sense; in this case, however, the term 'primarily' provides plenty of flexibility to permit reasonable decisions to exclude far more products that do not pose a risk.

[1] CPSIA § 235(a); 15 U.S.C. § 2052(a)(2) (emphasis added).

In deciding what belongs within the "fence," unless the statute absolutely requires that a product be included, I believe we should consider whether the product poses a risk such that putting it inside the fence better protects children. If the statute requires a product to be treated as a children's product, then that settles the matter. So cribs, toddler toys, and baby clothes are in. But where the statute is ambiguous, I believe risk should decide what belongs inside the fence.[2] If a product poses a genuine risk to children and can be reasonably construed as a children's product under the statute, then we should include it. On the other hand, if a product poses little or no risk to children and can be reasonably construed *not* to be a children's product under the statute, then we should exclude it. Although the CPSIA itself ignored consideration of risk—in setting arbitrary lead content limits, for example—nothing in the statute forbids the agency from taking risk into consideration in using our discretion to make policy choices.

What Goes Inside the Fence

By not explicitly considering risk, the Commission's Final Interpretative Rule captures more products than it should and fails to provide clarity to manufacturers. First, our children's product definition captures many products that the statute does not necessarily cover and which a majority of Congress surely did not have in mind. The fault for this lies entirely with the Commission, and such overreaching is misguided. Congress gave us the flexibility on this point, and we declined to take full advantage of it. We also did not do all we could to bring the problem to Congress's attention.

Incredibly, the definition actually has gotten worse in many respects in its final form than it was in the Proposed Interpretative Rule ("PIR").[3] The Commission voted 5-0 to support the PIR, and I initially thought that document did a reasonable job of flexibly defining the term. However, as I reviewed the comments, which were overwhelmingly in favor of "fencing in" fewer products rather than more, I realized that the draft rule had a number of problems that needed to be fixed.

Strangely, the draft that came up to the Commission from the professional staff moved the definition in the opposite direction from the weight of the comments. Such a result undermines the entire point of notice and comment procedures in administrative law. I have spent the past several weeks trying to persuade the majority of the Commission to restore the definition at least back to how it was in the draft proposal.

Although the substitute version offered today more closely resembles the PIR in key respects than did the staff's final draft, it still falls well short of excluding products that the statute does not require us to cover (*e.g.*, school lockers/desks/chairs, science kits, home furnishings, and CDs/DVDs). The Commission did not even find enough flexibility to push off the effective date of this rule. Despite the detrimental reliance that our unanimous PIR vote no doubt created for some products, the Commission did not even stay enforcement for those "children's products" on which the Commission has done an about face since April.

Not only does the children's product definition capture too many products, but it also fails to provide clarity. The main reason to adopt such a voluntary interpretive rule is to provide clarity to the regulated community regarding their compliance obligations. Clarity permits conscientious, law-abiding manufacturers to arrange their conduct in advance in order to avoid violating the law. Unfortunately, this final interpretive rule provides precious little clarity to manufacturers that make products for age groups

[2] Congress already adopted 12 instead of 7 as the age cutoff for this law, allowing for an extra margin of safety. We do not then need to add an additional margin by strictly policing the line between 12 and 13 year olds.
[3] Federal Register, Vol. 75, No. 75, pp. 20533-20541 (April 20, 2010).

around the edges of the definition—and in some respects it even misleads them. Instead, this rule is chock-full of open questions, endless equivocation, and vague guidance implying that each case is different and that there are few obvious answers in advance of the Commission staff's consideration of a particular case. It leaves the impression that "you should have asked" will be the Commission's rejoinder to any manufacturer who thinks theirs is not a children's product when the Commission believes it is.

To achieve clarity, we should provide more useful subfactors to manufacturers when construing the statutory factors. To the greatest extent possible, we should draw bright lines that allow producers to know early in the product development cycle whether a particular product will be considered a children's product so they can ensure it will comply with all of the extra legal requirements for such products. The regulation should speak with more specificity than the statute and avoid creating a system whereby the only way to obtain certainty is to get pre-clearance from the agency for a product. We do not have the resources to do that, nor do manufacturers. A free country operating under the rule of law does not require its citizens to obtain advance government approval before producing goods anyway—especially ones that pose no risk.

Some of my colleagues would ask the regulated community to "trust us," but this rule does not inspire confidence in the agency's discretion. We let brass instruments (handled daily, loaded with lead) escape while forcing lamps (seldom touched, much less played with) to run the testing gauntlet without justification. Yet a child would handle a brass musical instrument far more often and interact with it more directly than he would a child-themed brass lamp for the bedside. The reality is neither of these items poses much risk and they should both be outside the fence if possible. But only musical instruments made the cut. Children's lamps will have to be tested. In addition, we have gone out of our way to avoid considering most art materials to be children's products, yet we have ensnared most science kits and child-sized sporting goods. Such conflicting decisions also make no sense from a risk perspective, and they breed confusion.

Even if our compliance office ultimately applies the children's product definition reasonably to exclude, say, a child-themed humidifier whose principal use has nothing to do with entertaining a child and everything to do with humidifying whatever room it happens to be in (often a child's room at night when its appearance does not matter), this definition does not provide manufacturers enough guidance to ensure that they will avoid needless testing costs for such products. Nor is this a hypothetical concern. We hear stories from companies every week explaining that retailers and understandably cautious corporate compliance counsel insist on over-testing due to our lack of clarity.

A Bid for Greater Clarity

To further illustrate my points, consider some of the following bright lines we could have drawn, flexibility we could have exercised, and clarifying factors we could have adopted. Although the interpretive rule passed today did not incorporate these ideas for a variety of reasons, perhaps detailing them here will provide clarity to the regulatory community that is missing from the rule itself:

- *Tell the regulated community that we will respect the manufacturer's statement about the age group for which the product was primarily intended and will weight that factor most heavily.* In practice, the manufacturer's statement will be determinative as long as it is reasonable. But we should say as much. Of course if a product is primarily used by children despite a manufacturer's intentions, we could still regulate it. In such cases we would regulate it on a going forward basis and not penalize the failure to treat it as a children's product originally. We should say that too.

- *Exclude all CDs/DVDs by considering them general use storage media regardless of their content.* While discs may have encoded content that is child-oriented, the discs themselves are fragile, easily scratched, and not primarily intended for use by children when out of the player. They differ considerably from the kind of sturdier cartridges that come with children's devices. The child-themed content cannot be accessed without putting the disc into a player, at which point the disc itself is not accessible. We already exempt DVDs from the small parts rule, which means we have considered them not for use by children under three. We also consider almost all disc players to be general use products. Younger children will not be permitted to handle discs at all. Many parents may permit an older child to insert a disc into the player (regardless of its content). However, such limited physical interaction does not convert those general use discs into children's products any more than parents' allowing their older children to set the table with sharp knives and breakable glasses converts those items into children's products. The Commission's reversal on this point from the PIR is particularly frustrating. Although a number of convincing comments came in criticizing the PIR's exclusion of CDs/DVDs for infants and toddlers (because only adults handle them), the overwhelming thrust of those comments was to exempt CDs/DVDs altogether—not to ensnare all of them. Our decision not to exclude discs will force stores and libraries to remove these harmless "children's products" from their shelves without notice.

- *Exclude home furnishings and décor.* Like holiday decorations, much of what goes into a child's room (*e.g.*, carpet, wallpaper, draperies) is not selected according to the child's taste, nor even necessarily intended primarily for the child's use. Anyone who goes into the room uses the carpeting and it may be identical to the carpet in the hallway. Wallpaper with teddy bears on it poses no more risk than plain striped wallpaper, so forcing one to be tested just raises costs, reduces choice, and causes substitution to cheaper adult designs with no risk reduction.

- *Clarify that the presence of a matching crib in a collection does not necessarily condemn <u>every</u> other piece in the collection to treatment as a children's product.* Also, we could have clarified that some furniture (*e.g.*, a desk, mirror, or vanity) tends to be used primarily by children 13 and older and thus would not be considered a children's product. The furniture industry makes a compelling case that their broad collections of furniture may simultaneously target several markets, including nursery, teen/dorm, guest room, starter house, and vacation home. Although such collections may make a matching crib available, many other pieces in such a collection would not necessarily be designed or intended primarily for children 12 years of age or younger. Because the crib may be made on one assembly line and all the other furniture on multiple other assembly lines, it becomes inordinately expensive and logistically impracticable to track every nut, screw, bolt, glue, and up to fourteen layers of coatings. Domestic manufacturers claim that even though every single component they have tested complies with the law (under lead limits, no phthalates, *etc*.), having to track that each piece has been third-party tested and certified correctly creates a compliance nightmare. The Commission could have provided more certain relief.

- *Exclude items that require adult supervision.* In reality, some products are for children, some are for adults, and some are to be used together and pose little risk under adult supervision. We need not think of the last category as products primarily intended for children—especially if many teenagers or adult hobbyists would use them unsupervised (*e.g.*, certain model kits). This rule creates an incentive to market such products only to teenagers and sell them without adult supervision warnings to avoid being considered children's products. Perversely, that could

actually increase the risk they pose to younger consumers. And, of course, we once again exclude fireworks that are used primarily by children, such as sparklers, from being considered children's products—even though they pose a known hazard.

- *General use items remain general use items even when packaged with children's products.* This idea would resolve the now infamous paper clip problem in the science kit. We have said that a stuffed animal packaged with a candle in a product intended for an adult on Valentine's Day remains a children's product. But if a children's product remains so when co-packaged, then a general use product should also remain a general use product when co-packaged with a children's product. So too, assembling a bunch of general use products together in a kit marketed as a science kit for children should not automatically transmute every one of those general use items into children's products that have to be separately third-party tested, certified and labeled so that the cohort of respective tests can be traced. The argument that adopting such a rule would also convert the button on a doll's dress into an exempt general use product is wholly specious. There is a tangible difference between a paper clip in a kit (or a general use baseball packaged with a child's mitt), and a button on a doll (or a general purpose screw in a children's crib), and we could have policed that line readily.

- *Exclude science kits.* If the "adult supervision" and "general use remains general use" concepts would not suffice, we also could have excluded many science kits outright. Congress spoke directly to this question in the FHSA, where it excluded properly labeled chemistry sets from the FHSA's definition of a "banned hazardous substance."[4] The CPSIA's general provisions do not impliedly supersede such a direct statement in the FHSA. Indeed, the CPSIA does not even conflict with the FHSA, as it specifically directs the CPSC to treat products containing lead over the limit as a banned hazardous substance, which by definition entails excluding chemistry sets. The FHSA exclusion alone might not free science kits from all third-party testing, but it should free them from testing for lead in the substrate of a paper clip. The FHSA exclusion should also make us far more willing to exclude such kits from the definition of a children's product—if for no other reason than the agency might well lose in court if it tried to enforce CPSIA § 101(a)(1) against some science kits. To instead say that the CPSIA does not ban science kits, or that this definition should not be conflated with testing costs, misses the point. When the cost of testing such a kit—with which the definition of a children's product is inextricably bound—exceeds the profit margin in producing it, the Commission effectively eliminates that product from the market by classifying it as a children's product even if the statute does not explicitly ban it.

- *Explain the interaction of the children's product definition with the ASTM F963 toy safety standard.* The agency received a specific comment seeking clarity on the interaction of the children's product definition with F963, because the commenter worried about the seeming

[4] "*Provided*, That the Commission, by regulation, (i) shall exempt from clause (A) of this paragraph articles, such as chemical sets, which by reason of their functional purpose require the inclusion of the hazardous substance involved, or necessarily present an electrical, mechanical, or thermal hazard, and which bear labeling giving adequate directions and warning for safe use and are intended for use by children who have attained sufficient maturity, and may reasonably be expected, to read and heed such directions and warnings …" 15 U.S.C. § 1261(q)(1). Our regulations extend this language, *inter alia*, to "other science education sets intended primarily for juveniles" as well as "[e]ducational materials such as art materials, preserved biological specimens, laboratory chemicals, and other articles intended and used for educational purposes." 16 CFR § 1500.85(a)(1) and (a)(4). Reliance on the FHSA as a rationale for excluding science kits would also help justify the Commission's position on fireworks, because the statutory definition of a banned hazardous substance also excludes certain fireworks.

inconsistency in how our statutes treat certain products. The confusion stems from the fact that the children's product definition affects products designed or intended primarily for children 12 years of age or younger whereas F963 requirements apply to products used by consumers under 14 years of age. The interpretive rule responds to the comment without addressing it. The short answer is that a toy designed for the 13+ market (or even for the 9+ market if primarily used by consumers over 12) would have to comply with ASTM F963, but such a toy would not have to comply with third-party testing and other requirements that apply exclusively to children's products because it would not be designed or intended primarily for children 12 years of age or younger. Section 102(a)(2) of CPSIA requires third-party testing of "any ***children's product*** that is subject to a children's product safety rule," so only toys designed or intended primarily for children 12 years of age or younger have to comply with the CPSIA's third-party testing and certification requirements (*e.g.*, to the ASTM F963 standard), its lead and phthalate content limits, and its tracking label mandate.

Conclusion

By failing to limit the Children's Product Definition Final Interpretative Rule to only those items that are clearly required to be captured by the law or those items that actually pose risk, the Commission has created a hodge-podge of ifs, ands, buts and maybes that are completely inconsistent and unpredictable. Of course the implicit admission that we make by excluding musical instruments—that they do not pose a risk—is revealing. Our decision making here is more than a little bit arbitrary and capricious. If we are willing to exclude musical instruments with high lead levels even when they are marketed deliberately and predictably to children, then we ought to be equally willing to exclude many other categories of products that also pose little or no risk.

Some supporters of the CPSIA and today's interpretive rule want to believe that business will find a way to persevere despite all of the regulatory fetters we attach. But we know that this law is already driving companies out of business, reducing choice in the marketplace, eroding the American manufacturing base, and killing jobs. And what are American families getting? Fewer choices of products they want, higher prices at the cash register, and the tax bill to pay for all the new employees we are hiring to enforce these needless new regulations.

As the federal government talks about helping small businesses and stimulating job creation in today's dismal economy, we Commissioners cannot be oblivious to the burden that new regulations from our agency put on industry. Because the CPSIA is so broad-sweeping and impacts so many products which pose no risk to children at all, the lack of clarity in this final interpretive rule—and the agency's failure to take every opportunity to limit its scope—will add new, unnecessary burdens on thousands of manufacturers and force them to spend scarce resources deciphering our compliance rules and re-engineering products instead of hiring new workers.

This Commission's voluntary policy choice to enlarge the children's product definition fence will set traps for unwary companies and cause the CPSIA to have an even harsher impact on the economy and jobs going forward. Rather than reverse course from the PIR, we should hew more closely to what the statute absolutely requires, stick as much as possible to those products that pose risk, and develop subfactors that promote clarity. Then we need to return to our core mission of product safety and let American business get back to work.