



U.S. CONSUMER PRODUCT SAFETY COMMISSION

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JOINT STATEMENT OF COMMISSIONER ANN MARIE BUERKLE AND COMMISSIONER JOSEPH P. MOHOROVIC REGARDING THE FALL 2015 REGULATORY AGENDA

September 17, 2015

Today, the Commission voted to set its Fall 2015 Regulatory Agenda. This document's function is to identify for the public "the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year,"¹ and its purpose is to "make the [regulatory] process more accessible and open to the public."² The hope is that the process of regularly setting and publicizing agendas will help agencies regulate "with due regard to the discretion that has been entrusted to [them]."³ Today, the Commission failed to meet that goal.

The agenda we submitted reflects an assumption that the Commission will, by the end of Fiscal Year 2016, issue final rules on "Voluntary Recall Notices" and "Information Disclosure Under Section 6(b) of the CPSA." This inclusion is fundamentally inconsistent with what we have led our interested stakeholders to believe about the importance we place – or do not – on these two highly controversial, unnecessary rules.

For over a year, the CPSC community has heard that these rules were not safety priorities and would take a back seat to projects that address real safety problems, that the Commission would "be more inclined to want to spent more time on something where somebody can articulate"⁴ the risk to consumers the rule is intended to reduce. Today, my colleague, Commissioner Buerkle, and I offered two amendments to the draft Regulatory Agenda that would have ensured our

¹ Executive Order 12866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993).

² *Id.* at 51,735.

³ *Id.*

⁴ Rebecca Kern, *CPSC Must Focus on Collaboration, Safety Impact of Regs, New Chairman Says*, 42 PROD. SAFETY & LIAB. REPORTER 904 (Aug. 13, 2014) (statement of CPSC Chairman Elliot Kaye).

published plans match up with our words. These amendments would have removed the rules from OIRA's online agenda while doing nothing to withdraw or otherwise disturb the proposed rules themselves. Our amendments were defeated on a party-line vote.

At a minimum, the Commission is creating confusion and uncertainty where there need not be any. If these rules are not priorities, then why are they listed in a document designed to detail our priorities?

Moreover, continuing to drag these non-priority rules along comes at significant opportunity cost to the agency. Our agenda will list 32 rules (including 14 new additions) versus 22 rules in the Spring 2015 Regulatory Agenda. Many of these address real safety concerns – such as carbon monoxide from portable generators or furniture flammability – or are required by statute.

The furniture rule has been pending for over **21 years**.⁵ Finishing that vital work – and taking care of our statutory responsibilities – should come before controversial rules that have been almost universally derided and do nothing to make a single product safer. Why distract ourselves with, for example, a Recall Rule that even one of the most activist chairmen in CPSC's history has warned would threaten the viability of our highly successful Fast Track Recall program?⁶

The cynical CPSC-watcher might worry that the repeated assurances that these rules were not priorities were mere palliatives, a classic “nothing to see here” spiel designed to soothe the community's discontent long enough for the uproar to die down before the regulations spring to life in the midnight hour.⁷ To those who rightly worry about the disastrous effect these rules would have on CPSC's already-strained relationship with its regulated community, the refusal to formally acknowledge what we have publicly stated – that they are not priority rules – is like a once-defeated villain's eyes springing open at the end of a film: It looks like a sequel is coming, and it won't be pretty.

⁵ Upholstered Furniture; Advance Notice of Proposed Rulemaking; Request for Comments and Information, 59 Fed. Reg. 30,735 (June 15, 1994).

⁶ Ann Brown, Letter to The Honorable Fred S. Upton and The Honorable Henry A. Waxman (May 30, 2014), available at <http://www.consumerproductmatters.com/files/2014/06/Ann-Brown-Letter-on-Voluntary-Recalls.pdf>.

⁷ For further exploration of the concept of “Midnight Regulation,” see Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163 (2009).