U.S. CONSUMER PRODUCT SAFETY COMMISSION
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JOINT STATEMENT OF CHAIRMAN INEZ TENENBAUM AND COMMISSIONER ROBERT ADLER ON THE NOTICE OF PROPOSED RULEMAKING REGARDING CERTIFICATES OF COMPLIANCE, 16 C.F.R. PART 1110

June 5, 2013

On May 1, 2013, the Consumer Product Safety Commission voted to publish a Notice of Proposed Rulemaking (NPR) regarding certificates of compliance, which are required under section 14 of the Consumer Product Safety Act (CPSA).[1] Certificates of compliance are simply documents issued by manufacturers that accompany their products as they move in commerce to attest that the products have been tested and found compliant with CPSC safety rules.[2]

The issue before the Commission was a relatively minor amendment to our existing certification rule, which was issued in 2008 and is referred to as the "1110" rule.[3] The 1110 rule, as originally written, set forth the agency's general policy regarding product certification. Based on this rule, firms have been required to issue certificates of compliance for the past four-plus years.

With respect to the current vote to amend 1110, the Commission wanted, among other things, to implement section 14(g) of the CPSA, which authorizes the Commission to

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[1] 15 U.S.C. §§2051-2089. Section 14 was amended in 2008 by the Consumer Product Safety Improvement Act (CPSIA) to extend the requirement for certification to include "every manufacturer of a product which is subject to a consumer product safety rule under the [CPSA] or similar rule, ban, standard, or regulation under any other Act enforced by the Commission."

[2] Different tests for product certification apply to different products. Certificates for children's products must be based on testing by third party laboratories, and are known as Children's Product Certificates (CPC). Certificates for non-children's products need not be tested by third party labs, but must be issued based on tests of each product or according to a "reasonable testing program." Non-children's product certificates are known as General Conformity Certificates (GCC).

[3] 16 CFR Part 1110 (2008).

require the electronic filing of certificates of imported products before their arrival at a U.S. port. In addition, because the Commission had not undertaken a Paperwork Reduction Act (PRA) analysis for the original 1110 rule in 2008, the agency included this analysis along with the PRA for the amended rule.[4]

Although we considered the agency staff's draft 1110 NPR to be generally excellent, we proposed several changes to clarify the NPR and to incorporate several policy concerns that we had. Specifically, we proposed the following amendments:

- Clarify Which Bans Require Certificates: One could argue that section 14(a) requires GCCs for all banned products, but staff pointed out that some bans remove all products from the category addressed by our rules, so there would be nothing to certify. Other bans, however, operate more like standards and permit some products in a regulated category to be sold.[5] To address possible confusion regarding which bans require certificates and which do not, we proposed to add a table developed by agency staff that listed CPSC bans and identified which required certificates.

- Certificates for Products Excluded From Testing: Staff's original draft NPR required products subject to multiple rules to certify compliance with all applicable rules, including those rules for which the products had been excluded from CPSC testing requirements. This left products subject to testing to one rule only—but exempt for whatever reason—not required to certify their exempt status. We found this perplexing since the same concerns about compliance apply irrespective of whether a product is subject to one rule or many. That is, inspectors who saw products subject to CPSC rules without markings would be unable to tell whether the products fell within a testing exclusion or were simply violative. Accordingly, we proposed to extend certification requirements to all products subject to CPSC rules, whether excluded from testing or not.

- Harmonized Recordkeeping for CPCs and GCCs: To harmonize the requirements for keeping test records between Children's Product Certificates (CPCs) and

[4] Our colleague, Commissioner Nord, who was Acting Chairman in 2008, writes that the press of events prevented the Commission from doing the PRA at the time or from seeking public comment.

[5] For example, only certain slant-sided refuse bins are banned from the market while others may continue to be sold. See 16 CFR 1301.

General Conformity Certificates (GCCs), we proposed to require record retention for GCCs to match that of CPCs.

- Tables for PRA Analyses: To provide clarity regarding the PRA analyses conducted by staff, we proposed to provide tables that detailed the "old" costs associated with the original 1110 rule promulgated in 2008 and two separate PRA tables that identified the "new" costs in 2013 associated with electronic filing of certificates with Customs and Border Protection (CBP) for CPCs and GCCs. (We also included a table that identified the "old" costs required in Part 1107 associated with third party disclosure of CPCs to retailers, distributors, or the CPSC.)

- Replacement Parts Can be "Finished" Products: To clarify that "replacement" parts could be considered "finished" products, we proposed clarifying language for the term "finished" product.

Our colleague, Commissioner Nord also proposed several amendments, some of which we concurred in and others of which we opposed. She later issued a statement explaining her amendments and voicing objections to some of our amendments. Having read her statement carefully, we feel a need to explain in greater detail the rationale for our amendments and why we did not agree with her objections.

Table of Certificate Requirements for Banned Products

Although Commissioner Nord apparently approves the idea of including a table that identifies which bans require certificates and which do not, she criticized our rejection of her proposed language to clarify the Commission's approach. Unfortunately, she misstates the nature of our disagreement, so, reluctantly, we must explain the point.

What happened to our colleague's proposal was the failure of a somewhat lengthy negotiation, which included several parts.[6] Our colleague suggested specific language setting forth a statement of principle that distinguished between those banned products that would require certificates and those that would not. She also proposed to include her language in the rule in addition to its placement in the preamble. Although we had misgivings regarding her proposal, we responded, in the spirit of compromise, that we

[6] Most of the negotiation occurred between Commissioner Adler and Commissioner Nord, but Chairman Tenenbaum stayed apprised throughout the process and concurred with Commissioner Adler's position.

would agree to it so long as staff had the opportunity to apply her statement of principle to the staff's proposed table—and that all would abide by staff's assessment of the impact of her language on the table. Without such agreement, we could see no basis for accepting her language since the point of the table was to clarify the Commission's approach and provide direction to industry. If the Commissioners and staff failed to agree on how to interpret her statement of principle, we would have reached a deal in the abstract only—not at all useful in providing clarity and guidance.

Unfortunately, when staff applied Commissioner Nord's statement of principle to the table, she rejected their interpretation and insisted on sticking to the table's original version. This clearly violated our agreement and meant that we failed to reach a deal on her proposal.

Whether the Commission should include some statement of principle about bans and certification in the rule as well as in the preamble, we maintain an open mind. What we did not agree to is adding Commissioner Nord's statement of principle in the rule text without her willingness to make changes to the table in the preamble that reflects the application of her statement of principle.

We believe that both sides negotiated in good faith and at length. Unfortunately, despite our best efforts, the two sides could not get to yes.

Certificates for Products Excluded From Testing

Our colleague criticizes our amendment to 1110 that requires certifiers to list all product testing exclusions on their certificates whether or not the products are subject to one rule or multiple rules. As she states, certificates are based on a test. If there is no test, she asks why there is a need to certify that no testing of a product has occurred. Fortunately, the answer is contained in her own statement where she describes the benefits of certification:

> 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.

As our colleague correctly notes, the advantage of certificates is that the agency can check a certificate rather than test the product. Thus, the point of requiring a certificate is to alert CPSC staff in the field and CBP inspectors at the ports that a product that clearly falls within the scope of a Commission rule is not violative. Absent a certificate, the

enforcement staff would have no idea whether a product's manufacturer has taken proper steps to ensure that its product fits within a CPSC exclusion or whether the manufacturer is simply a scofflaw. Without such information, staff might have to place a hold on the product's distribution until they have satisfied themselves that the product presented no hazard. Unfortunately, stopping a product's distribution imposes costs on manufacturers, consumers, and enforcement staff, which can be avoided if a certificate provides proof of a product's compliance with CPSC rules.

The principle here is the same as the one that leads Transportation Security Administration (TSA) staff to insist that all air travelers go through TSA's screening procedures. If one applied Commissioner Nord's logic, one would ask why perfectly innocent passengers should have to endure security checks. Only terrorists or heavily armed travelers should have to be screened. Of course, the answer is that agents do not know the difference until they have done the screening and established that no security threat exists. Similarly, CPSC enforcement staff will not be able to make a judgment about products covered by safety rules until they see some clear evidence, *i.e.*, a certificate, that the products comply with or are excluded from testing under CPSC rules.

Cost Calculations

Perhaps the greatest disagreement that we have with our colleague's statement is her insistence that the Commission include a table showing that the total cost of GCCs and CPCs is "a staggering $424.2 million every year." To say that her math is misleading and unfair is an understatement. In fact, the correct number is roughly 20 percent of hers—about $75 million—spread among tens of thousands of firms. Her "staggering" number is clearly designed to score political points and to frighten the regulated community into thinking that the Commission has just unloaded enormous new costs on them. That, of course, is completely untrue.

Frankly, Commissioner Nord adds apples and oranges and then calls everything an apple when she cites this number. Unfortunately, the problem traces back to 2008 when Commissioner Nord was Acting Chair of the agency. Had she directed staff back then to undertake a Paperwork Reduction Act (PRA) analysis of the original 1110 rule, we would not have needed to do such an analysis this year—four and a half years after it should have been done. These costs would have been accounted for, and they would not have been included in the current proposed revision to the rule.

In fact, as our colleague well knows, the Paperwork Reduction Act was never intended to require or provide a running tally of regulatory costs. It requires agencies that impose new paperwork costs to estimate what those costs will be.

That said, we have sought to rectify the situation. But, we need to distinguish the costs associated with the original version of the rule—which have been incurred by industry for the past four and a half years—from the new costs associated with the relatively minor changes made in this revised rule. So, to properly account for the old versus new costs, we proposed four tables, as follows:

Old Costs

> **Table B-1**: Summary of PRA Burden Estimates by Rule for Non-Children's Products that Require a General Conformity Certificate (GCC) Attributable to Existing 16 CFR 1110 (November 2008) Requirements = $56,000,000
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> **Table C-1**: Summary of PRA Burden Estimates for Third Party Disclosure of Children's Product Certificates (CPCs) Attributable to Existing 16 CFR 1107 (November 2011) Requirements = $14,936,000

New Costs

> **Table B-2**: Summary of PRA Burden Estimates for Non-Children's Products that Require a General Conformity Certificate (GCC) to be Filed with CBP for Import Attributable to the Proposed Amendment to Existing 16 CFR 1110 (March 2013) Requirements = $56,000,000
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> **Table C-2**: PRA Burden Estimates for Children's Products that Require a CPC to be Filed with CBP for Import Attributable to the Proposed Amendment to Existing 16 CFR 1110 (March 2013) Requirements = $18,700,000.

Commissioner Nord advocates lumping these costs together because "[f]or our stakeholders to properly understand what the full burden … of this Part 1110 revision is, they should understand how it fits in with the burdens of its companion regulations, Parts 1107 and 1109." To say the least, this explanation is disingenuous. If ever there were a group that "properly understood" the costs to which she refers, it would be regulated industry since they have actually incurred the costs of Parts 1107, 1109 and 1110 for the

past several years. Commissioner Nord's certification math provides no new information whatsoever to them.[7]

Aside from her unconvincing attempts to pump up the PRA certification costs of our 1110 amendments, Commissioner Nord's approach strikes us as particularly troubling on two additional grounds. First, to those not sophisticated in CPSC matters, her number might confuse them into thinking that the Commission was about to impose hundreds of millions in new regulatory costs, which we are not. Second, she ignores the fact that the costs associated with these rules will be spread among tens of thousands of manufacturers, private labelers, and importers, meaning that the added costs will be minimal for any individual company.

Recordkeeping Harmonization for CPCs and GCCs

Commissioner Nord criticizes our harmonizing the recordkeeping requirements of General Conformity Certificates (GCCs) with those of Children's Products (CPCs) by paying homage to recordkeeping requirements established by the Commission in years past. She states, without any supporting evidence or data, that the "careful analysis" in the past deserves great deference.[8] Absent any reason other than her general reverence for the past for creating two separate regulatory schemes, we find it hard to impose such inconsistent approaches to recordkeeping.

What prompted our current amendment to conform the time frames for recordkeeping was our desire to avoid confusion and provide consistency for those who have to keep both CPCs and GCCs. In the Commission's 1107 rule, the agency established a recordkeeping requirement of five years for CPCs to be consistent with the five year

[7] Given her "let's throw in the kitchen sink" logic, we're surprised that she did not insist on adding in to the PRA the ongoing certification costs for CPSC's 37-year old swimming pool slide standard or the certification costs for our 34-year old lawn mower standard, or those for the many other long-existing Commission standards. Moreover, if she were so concerned about ensuring that our stakeholders knew about the burdens of our regulation, one puzzles at her silence for the past four years regarding the need for a PRA —or, for that matter, the need for public comments on 1110.

[8] As one who worked at the Commission back then, Commissioner Adler can say that the amount of thought attributable to the time frame for maintaining certification records was minimal. In fact, once the Commission first established a time period for certification records to be kept, subsequent Commissions simply copied the time frames into later standards.

statute of limitations that we must abide by for assessing civil penalties.[9] It would make no sense to have a different rule for GCCs.

Moreover, the added costs of this rule change should be extremely small. Because section 14(a) requires firms to subject their products to a "reasonable testing program" in order to issue GCCs, the only costs associated with this requirement are retaining the records of companies' tests—rather than disposing of them. And given that virtually all records will be digitized, the costs of retaining them for five years are likely to be counted in pennies, or fractions thereof.

Other Concerns

Commissioner Nord raises a number of other concerns about the 1110 rule that boil down to what we consider her main objection to the certification rule. As with almost everything associated with the additional authority and resources granted to the Commission in 2008 by the Consumer Product Safety Improvement Act (CPSIA), she manages to find fault. She has voted against and voiced disapproval of most, if not all, of the Act's provisions related to testing and certification, insisting that the costs associated with these measures cannot be justified. Her current dissent thus hardly comes as a surprise.

Although we believe that the final returns are not in that would justify every word of the CPSIA, we understand that this act was approved overwhelmingly by Congress in 2008 and basically affirmed with minor adjustments by even larger majorities in 2011. We regret our colleague's ongoing battle with this strong and clear legislative mandate even now, five years after its enactment.

All of this said, we look forward to receiving public comments on the proposed amendments to the 1110 rule in the months ahead.

[9] 16 CFR Part 1107.26(b).