U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD

Further statement on the Commission's vote to approve a final rule establishing requirements pertaining to third-party conformity assessment bodies

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As I have noted before, it had been longstanding practice at the CPSC for Commissioners' statements to discuss their votes, rather than use their statements to rebut those of their colleagues. Unfortunately, one of my colleagues does not subscribe to that view, and his statement on our recent vote to adopt requirements for third-party conformity assessment bodies (that is, laboratories) appears to be prompted entirely by mine. Since my statement has been challenged, I feel I must respond.

The staff presented us with a thoughtful definition of the kind of control that could lead to concerns about a laboratory's independence and warrant "firewalled" status: a manufacturer's ability (1) to appoint a majority of the governing body, (2) to appoint the presiding officer of the laboratory's governing body, or (3) to make staffing and compensation decisions about laboratory personnel. To assure that this definition was as complete as possible, I offered an amendment that would have required firewalling wherever a manufacturer had the ability to exercise a controlling influence over the management or policies of the governing body. This language mirrors the definition of "control" in other areas of law, but this compromise amendment was rejected.

Instead, the majority adopted an amendment states that an ability to appoint even a single member of the governing body would result in firewalled status. My colleague justifies this amendment as addressing a situation where a laboratory is being "forced . . . —against its will—to appoint a board member or senior executive." However, we have no evidence that kind of coercion is happening or would happen, as shown by our staff's language. Further, if it did occur, it would be contrary to the requirements of ISO 17025, a standard that applies to all our accredited laboratories.

There was no review of the impact of this change, nor was there any attempt to define its scope—for instance, limiting it to situations in which the company holding the appointment power is actually transacting business with the relevant lab. In other words, we are squashing an ant with a sledge hammer. We have created a hypothetical problem and crafted an overly broad solution to address it. And that is why, as indicated in my earlier statement, my larger concern is that this amendment reflects an instinct on the part of this Commission to hyper-regulate, to issue edicts that go beyond demonstrated need.

The CPSIA set a reasonable boundary between third-party labs and firewalled labs, requiring the latter to go to extra lengths to prove their independence. The boundary is "owned, managed, or controlled by a manufacturer."[1] We should have followed our staff's recommendations and left the line where Congress drew it.

[1] 122 Stat. 3016 § 102(b) (codified at 15 U.S.C. § 2063(f)(2)(D)).