



UNITED STATES  
CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

This document has been electronically  
approved and signed.

**DATE:** September 4, 2013

## BALLOT VOTE SHEET

**TO:** The Commission  
Todd A. Stevenson, Secretary

**THROUGH:** Stephanie Tsacoumis, General Counsel  
Kenneth R. Hinson, Executive Director

**FROM:** Patricia M. Pollitzer, Assistant General Counsel  
Mary A. House, Attorney, OGC

**SUBJECT:** Notice of Proposed Rulemaking: Amendment to 16 CFR Part 1031, Commission Participation and Commission Employee Involvement in Voluntary Standards Activities

BALLOT VOTE DUE September 10, 2013

The Office of the General Counsel is providing for Commission consideration the attached draft notice of proposed rulemaking (NPR) for publication in the *Federal Register*. In response to the recommendations of a May 2012 report published by the U. S. Government Accountability Office, the attached draft NPR proposes to remove prohibitions on CPSC staff (1) participating as voting members of voluntary standard development groups, and (2) accepting leadership positions in voluntary standard development groups. The proposed rule would allow these activities on an optional basis, provided that such activities have the prior approval of the Office of the Executive Director.

Please indicate your vote on the following options:

I. Approve publication of the attached document in the *Federal Register*, as drafted.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

CPSC Hotline: 1-800-638-CPSC(2772) ★ CPSC's Web Site: <http://www.cpsc.gov>

II. Approve publication of the attached document in the *Federal Register*, with changes.  
(Please specify.)

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\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

III. Do not approve publication of the attached document in the *Federal Register*.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

IV. Take other action. (Please specify.)

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\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

Attachment: Draft *Federal Register* Notice of Proposed Rulemaking to Amend 16 C.F.R. Part 1031  
Regarding Commission Participation and Commission Employee Involvement in Voluntary  
Standards Activities

Billing Code 6355-01-P

**CONSUMER PRODUCT SAFETY COMMISSION**

**16 CFR Part 1031**

**CPSC Docket No. CPSC-2013-XXXX**

**Commission Participation and Commission Employee Involvement in Voluntary Standards Activities**

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The United States Consumer Product Safety Commission (Commission or CPSC) is issuing a proposed rule that would amend the existing regulation on Commission participation and employee involvement in voluntary standards activities. Currently, Commission rules allow employees to participate in voluntary standard development groups on a non-voting basis, and do not allow Commission employees to accept leadership positions in voluntary standard development groups. The proposed rule would remove these restrictions and would allow Commission employees to participate as voting members and to accept leadership positions in voluntary standard development groups, subject to prior approval by the Office of the Executive Director (OEX).

**DATES:** Written comments must be received by [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by Docket No. CPSC-2013-XXXX, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

The Commission is no longer accepting comments submitted by electronic mail (e-mail), except through [www.regulations.gov](http://www.regulations.gov).

#### Written Submissions

Submit written submissions in the following way:

Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to: <http://www.regulations.gov>. Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to: <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Jacob Miller, Deputy Voluntary Standards Coordinator, Office of Hazard Identification and Reduction, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: 301-504-7415; [jmiller@cpsc.gov](mailto:jmiller@cpsc.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Introduction**

Many consumer products under the Commission's jurisdiction are covered by voluntary standards. Voluntary standards provide safety provisions addressing potential hazards associated with consumer products found in in such locations as homes, schools, and recreational areas. Voluntary standards activity is an ongoing process that may involve multiple revisions to a standard within one year, or over multiple years. Voluntary standards development activities for consumer products within the Commission's jurisdiction are handled primarily by three standards development/ coordinating organizations: ASTM International (previously called the American Society for Testing and Materials), the American National Standards Institute (ANSI), and Underwriters Laboratories Inc. (UL). Along with industry, consumer groups, and product safety experts, CPSC staff works with these organizations to coordinate the development of voluntary standards.

Currently, CPSC staff provides technical support to organizations that coordinate the development of voluntary standards. According to the CPSC's Voluntary Standards Activities FY 2013 Midyear Report, CPSC staff will provide technical support or monitor voluntary standards activities for 71 products in FY 2013. Staff participates in the voluntary standards development process by providing expert advice, technical assistance, and information, based on analyses of the numbers and causes of deaths, injuries, or incidents associated with a product. Staff may also conduct CPSC research, perform laboratory tests, and provide draft language for a voluntary standard.

The Commission's involvement and staff's participation in voluntary standards activities have been and currently are governed by the Commission's rule at 16 CFR part 1031, Commission Participation and Commission Employee Involvement in Voluntary Standards Activities (part 1031). Part 1031 prohibits CPSC staff from voting and precludes staff from

holding leadership positions in voluntary standards development groups. The proposed rule would amend part 1031 to eliminate these prohibitions and allow these activities on an optional basis, provided that such activities have the prior approval of the CPSC Office of the Executive Director.

*A. Statutory and Regulatory Background*

Congress enacted the Consumer Product Safety Act (CPSA) in 1972, codified at 15 U.S.C. 2051, *et seq.*, to protect consumers against unreasonable risks of injury associated with consumer products. In furtherance of that goal, Congress established the Consumer Product Safety Commission as an independent regulatory agency, and Congress granted the CPSC broad authority to promulgate mandatory safety standards for consumer products as a necessary alternative to industry self-regulation. 15 U.S.C. 2056(a)(1)(A). Although neither the CPSA nor the other statutes administered by the Commission referred to voluntary standards, the Commission issued regulations in 1978, describing the extent and form of Commission involvement in the development of voluntary standards (43 FR 19216 (May 4, 1978)). Acknowledging the contribution that voluntary standards had made to reducing hazards associated with consumer products, the Commission stated its support for an effective voluntary standards program, finding that a proper combination of voluntary and mandatory standards can increase product safety better than either mandatory or voluntary activities alone.

In 1981, Congress amended the CPSA, the Federal Hazardous Substances Act (FHSA), and the Flammable Fabrics Act (FFA), to, among other things, mandate that the Commission give preference to voluntary standards as opposed to promulgating mandatory standards, if the Commission determines that a voluntary standard will eliminate or adequately reduce an unreasonable risk of injury and there will be a likelihood of substantial compliance with the

standard. 15 U.S.C. 2056(b), 15 U.S.C. 1262(g)(2), 15 U.S.C. 1193(h)(2). In 1989, the Commission adopted regulations to reflect the policies set forth by the 1981 amendments, making several changes in the agency's policies on employee participation in voluntary standards development activities. The 1989 amendments also combined parts 1031 (on employee membership and participation) and 1032 (on Commission involvement) into a revised part 1031, titled, Commission Participation and Commission Employee Involvement in Voluntary Standards Activities. 54 FR 6646 (Feb. 14, 1989).

In 2006, the Commission amended several provisions of part 1031. 71 FR 38754 (July 10, 2006). Among other things, the 2006 amendments provided that Commission employees only participate in voluntary standards efforts consistent with the Commission's priorities identified in the operating plan, performance budget, mid-year review, or other official Commission document. In addition, the Commission added a requirement that employees with ongoing participation in voluntary standards activities report regularly to the Voluntary Standards Coordinator, to help ensure ongoing oversight and coordination. Lastly, the 2006 amendments added a requirement that the CPSC provide notice and the opportunity for the public to comment on staff's positions on voluntary standards activities.

*B. Recent Statutory Changes Involving Voluntary Standards*

In the past, CPSC staff typically served on voluntary standards committees based on the Commission's priorities. Staff participated without any expectation that such voluntary standards would necessarily form the basis of a mandatory standard. The Consumer Product Safety Improvement Act of 2008 (CPSIA), however, gave rise to the expectation that, for certain children's products, voluntary standards would form the basis for mandatory standards development. For example, section 104(b) of the CPSIA requires the Commission to promulgate

consumer product safety standards for durable infant and toddler products. These standards are to be “substantially the same as” applicable voluntary standards or more stringent than the voluntary standard, if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product.

Congress also has addressed participation by federal agencies in voluntary standards development. Public Law No. 104-113 directed federal agencies to “use technical standards that are developed or adopted by voluntary consensus standards bodies” and to “participate with such bodies in the development of technical standards.” Pub.L. No. 104-113, 12(d)(1) & (2), 110 Stat.775, 783 (1996), 15 U.S.C. 272 note. Congress anticipated that federal agencies would “work closely” with voluntary standards organizations, that these organizations would “include active government participation,” and that agencies would “work with these voluntary consensus bodies, whenever and wherever appropriate.” H.R. Rep. 104-390 at 15, 25 (1995). *See also* 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella).

### *C. GAO Report*

On May 16, 2012, the U.S. Government Accountability Office (GAO) issued a report titled, “Consumer Product Safety Commission: A More Active Role in Voluntary Standards Development Should Be Considered” (GAO Report) (available at: <http://www.gao.gov/assets/600/590990.pdf>). The GAO Report recommended that the Commission review its policy for staff participation in voluntary standards development activities and determine the feasibility of the agency staff assuming a more active, engaged role in developing voluntary standards. Specifically, the GAO Report recommended that CPSC staff be allowed to vote to approve or disapprove balloted provisions of voluntary standards and to hold leadership positions at various levels of standards development organizations, including task groups, subcommittees, or committees. GAO concluded that changing the CPSC’s

regulations to allow staff to participate more actively in voluntary standards activities, especially when working with technical committees for which CPSC staff can provide expertise, and permitting CPSC staff to vote on voluntary standards, could result in stronger voluntary standards, without compromising the CPSC's independence.

*D. CPSC's Response to the GAO Report*

In response to the GAO Report recommendations, the Commission proposes removing the prohibitions on CPSC staff participating as voting members and accepting leadership positions in voluntary standard development groups. However, the Commission would require that staff participation in such activities receive prior approval by OEX. When approving staff's participation in such activities, OEX should consider the policy concerns set forth in 16 CFR 1031.9 (appearance of preferential treatment, loss of impartiality, compromise of the agency's independence, and a real or apparent conflict of interest). The policy concerns in § 1031.9 must be balanced against Commission priorities, available resources, the need for greater staff involvement, and the efficiency of the voluntary standards process. Thus, OEX will evaluate, on a case-by-case basis, each request for staff to participate as a voting member of a voluntary standard development group or to accept a leadership position. OEX would authorize staff generally to vote on matters involving a specified voluntary standard, but would not be approving each individual vote.

Permitting CPSC staff the option to vote on a voluntary standard and/or accept a leadership position in a voluntary standards development group may result in a more effective voluntary standards process and accelerate standards development and implementation, without compromising the CPSC's independence. Such participation could gain CPSC staff further access to and familiarity with latest technologies, and would provide an opportunity for staff to

help establish standards that would advance CPSC's safety goals. In addition, "full" federal government participation in standards development increases the likelihood that the standards can meet both public and private sector needs. 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella). A single standard that satisfies both industry and the CPSC would benefit both industry and the CPSC by simplifying applicable requirements – only a single set of standards would apply.

In addition, optional staff participation in voluntary standards development groups by voting and taking leadership roles would be consistent with the guidance reflected in OMB Circular A-119 Revised, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" (February 10, 1998). Among other things, OMB Circular A-119 encourages agency representatives serving as members of voluntary consensus standards bodies to "participate actively and on an equal basis with other members," and to "vote . . . at each stage of the standards development process unless prohibited from doing so by law of their agencies."

In participating as a voting member of, or in a leadership position on, a voluntary standards development group, CPSC staff shall indicate clearly that any views expressed in connection with such participation represent CPSC staff's position and may not necessarily represent the Commission's position. Making such a disclaimer is consistent with current staff practice regarding representations in oral and written presentations and staff documents intended for public release. As in these contexts, CPSC staff's views cannot serve as a proxy for the Commission's or the agency's views on any particular issue. Similarly, CPSC staff serving in leadership positions on a voluntary standards development group would serve in their capacity as CPSC staff members, and their views would not necessarily represent the views of the

Commission. In particular, CPSC staff participation in a voluntary standards development group, even in a leadership position, does not provide any assurance that Commission will adopt the resulting voluntary standard.

Removing prohibitions on employees voting and serving in leadership positions should not result in the Commission compromising the policy concerns set forth in § 1031.9. Generally, before any substantive issue is balloted on a voluntary standards committee, the committee is given the opportunity to discuss the proposals in detail. Currently, Commission staff engages in these discussions, such that the technical opinions of staff are known before a proposed change in a voluntary standard is balloted. Accordingly, CPSC staff's ability to vote on such ballots should not fundamentally alter current procedures in a manner that impinges on the Commission's independence. Rather, staff's ability to vote on a voluntary standard may improve the credibility and efficiency of the standard. Additionally, not only can OEX consider policy concerns when deciding whether to authorize staff participation in voluntary standards activities as voting members or in leadership roles, but OEX's approval also can impose constraints or limitations tailored to specific circumstances, such as measures to avoid undue influence or any appearance of impropriety.

To serve in a leadership position on a voluntary standards development group, CPSC staff must agree to follow the procedures set forth by the voluntary standards development group for leadership positions. Staff's leadership role may involve helping the development group to run more smoothly and assisting the committee in achieving timely deliberations.

## **II. Description of the Proposed Rule**

Following is a section-by-section description of the proposed changes to part 1031.

Section 1031.10(b) – Existing § 1031.10(b), regarding definitions, lists the types of activities that may comprise “employee involvement” in voluntary standards development activities. Proposed § 1031.10(b) expands the list of activities to include: “participating as a voting member of, or in a leadership position on, a voluntary standard development group, when authorized,” to recognize that such activities are part of the term “employee involvement.”

Section 1031.11(c) – Existing § 1031.11(c), regarding procedural safeguards, states that involvement in voluntary standards activities by Commission officials and employees is predicated on an understanding by the voluntary standards group that such involvement is on a non-voting basis. The proposed rule deletes this provision as inconsistent with the goal of allowing employees the option, with prior approval, to participate as voting members of a voluntary standards committee.

Section 1031.11(d) – Existing § 1031.11(d), regarding procedural safeguards, states: “[i]n no case shall Commission employees or officials vote or otherwise formally indicate approval or disapproval of a voluntary standard during the course of a voluntary standard development process.” The proposed rule renumbers this section to § 1031.11(c), and revises the content to remove the existing language, which is inconsistent with allowing Commission employees the option, with prior approval, to vote. The proposed rule provides that employees authorized to participate as voting members of a voluntary standard development group represent the position of CPSC staff. Such votes do not necessarily represent the opinions or views of the Commission, and would not be binding on the Commission.

Section 1031.11(e) – Existing § 1031.11(e), on procedural safeguards, states that Commission officials and employees cannot accept voluntary standards committee leadership positions, except that the Voluntary Standards Coordinator may accept leadership positions with

the governing bodies of standards-making entities with the approval of the Executive Director. The proposed rule renumbers this provision to § 1031.11(d), and revises the language to state that Commission officials and employees may accept leadership positions in voluntary standard development groups, if approved as set forth in § 1031.12(b). Also, the proposed rule removes the reference to “Executive Director” and replaces that reference with “Office of the Executive Director” to reflect that approval for a Voluntary Standards Coordinator to accept a leadership position must be made by the Office of the Executive Director.

Section 1031.11(f) – The proposed rule renumbers existing § 1031.11(f) to § 1031.11(e).

Section 1031.12(b) – Existing § 1031.12(b), on membership criteria, states that all officials and employees not discussed in § 1031.12(a) [which lists Commissioners and employees who may not become members of voluntary standards groups because they either make or advise on final agency decisions] may be advisory, non-voting members of voluntary standards development and advisory groups with the prior approval of the Executive Director, including the Voluntary Standards Coordinator. Proposed § 1031.12(b) would revise the language to provide that all other officials and employees not covered under § 1031.12(a) may participate as voting members or accept leadership positions in voluntary standard development groups, when authorized with the prior approval of the Office of the Executive Director.

Proposed § 1031.12(b) would remove the reference to the Voluntary Standards Coordinator because such person is not prohibited from becoming a member of a voluntary standards group in § 1031.12(a). Thus, the Voluntary Standards Coordinator would fall within the class of persons discussed in proposed § 1031.12(b) who may serve as a voting member and hold leadership positions, as authorized.

Section 1031.12(c) – Existing § 1031.12(c) references the Executive Director as the management official with the authority to approve staff serving as members of a voluntary standards organization or group. Proposed § 1031.12(c) removes the reference to the “Executive Director” and replaces it with “Office of the Executive Director” to reflect that prior approval for membership in voluntary standards activities must be approved by the Office of the Executive Director.

### **III. Request for Comments**

The Commission encourages stakeholders to comment on all sections of the proposed amendments to 16 CFR part 1031, and specifically requests comment on the following additional issues. Comments should be submitted in accordance with the instructions in the ADDRESSES section at the beginning of this notice.

1. The value of CPSC staff participation in voluntary standard development groups in a voting capacity or in a leadership role, including potential related benefits;
2. Concerns relating to, or issues raised by, CPSC staff participation in voluntary standard development groups in a voting capacity or in a leadership role, and potential solutions or measures to mitigate such concerns or issues;
3. The requirement for OEX approval of staff participation in voluntary standard development groups, considering the criteria for Commission involvement in voluntary standards activity as noted in 16 CFR 1031.5 and the extent and form of Commission involvement in the development of voluntary standards as noted in 16 CFR 1031.6, either in a voting capacity or in a leadership role.

### **IV. Environmental Impact**

Generally, the Commission's regulations are considered to have little or no potential for affecting the human environment, and environmental assessments and impact statements are not usually required. *See* 16 CFR 1021.5(a). The proposed rule solely involves Commission procedure, and therefore, the proposed rule is not expected to have an adverse impact on the environment. The rule generally falls within the categorical exclusion in 16 CFR 1021.5(c), eliminating the need for an environmental assessment or environmental impact statement.

#### **V. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA) requires that proposed rules be reviewed for the potential economic impact on small entities, including small businesses. Section 603 of the RFA requires agencies to prepare and make available for public comment an Initial Regulatory Flexibility Analysis (IRFA), describing the impact of the proposed rule on small entities and identifying impact-reducing alternatives. Section 605 of the RFA provides that no IRFA is required if the proposal would not have significant impacts on a substantial number of small entities and the agency head certifies and publishes that determination in the notice of proposed rulemaking in the *Federal Register*. This section summarizes CPSC staff's assessment of the potential impact that the proposed rule amending 16 CFR part 1031 would have on small entities.

The proposed amendment would neither impose any new requirements on businesses, including small businesses, nor require any greater governmental participation in voluntary standards. The proposal would simply provide the option of increased involvement by Commission employees in the voluntary standards process. Participating CPSC staff would continue to abide by existing voluntary standards bodies' procedures for voting membership and leadership positions.

Although there are millions of small businesses that conform to voluntary standards related to consumer product safety, none of the proposed changes would impose any new obligations on small businesses that conform to voluntary standards. Product manufacturing, importing, testing, reporting, recordkeeping, and other commercial activities would be unaffected. Accordingly, the proposed amendment to 16 CFR part 1031 on participation and involvement of CPSC employees in voluntary standards would not directly impact any small businesses or other small entities. The proposed amendment, if promulgated on a final basis, would not have a significant impact on a substantial number of small entities.

#### **VI. Paperwork Reduction Act**

The proposed rule does not require any stakeholder to create, maintain, or disclose information. Thus, the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not implicated in this proposed rulemaking.

#### **VII. Effective Date**

The Administrative Procedure Act (APA) generally requires that the effective date of a rule be at least 30 days after publication of a final rule. 5 U.S.C. 553(d). The Commission proposes that any final rule based on this proposal would become effective 30 days after the final rule is published in the *Federal Register* because the proposed rule solely affects Commission procedure and does not require stakeholders to take any action.

#### **List of Subjects in 16 CFR Part 1031**

Business and industry, Consumer protection, Voluntary standards.

For the reasons stated in the preamble, the Commission proposes to amend 16 CFR part 1031 as follows:

**Part 1031—COMMISSION PARTICIPATION AND COMMISSION EMPLOYEE INVOLVEMENT IN VOLUNTARY STANDARDS ACTIVITIES**

1. The authority citation for part 1031 is revised to read as follows:

**AUTHORITY:** 15 U.S.C. 2051–2083; 15 U.S.C. 1261–1276; 15 U.S.C. 1191–1204; Sec. 3, 104, 106, 223 Pub. L. 110-314, 122 Stat. 3016, 3017 (2008), Sec. 3, 4 Pub. L. 112-28 (2011).

2. In § 1031.10(b), revise the third sentence to read: “Employee involvement may include regularly attending meetings of a standards development committee or group, taking an active part in discussions and technical debates, expressing opinions, expending other resources in support of a voluntary standard development activity, and participating as a voting member of, or in a leadership position on, a voluntary standard development group, when authorized.”

3. Revise § 1031.11 to read as follows:

**§ 1031.11 Procedural safeguards.**

\* \* \* \* \*

(c) Commission officials or employees who are authorized to participate as a voting member of a voluntary standard development group represent the position of CPSC staff. Such votes or opinions do not bind the Commission in any way or necessarily represent the opinions or views of the Commission, but rather, solely represent the views of the CPSC staff.

(d) Commission employees and officials who are involved in the development of voluntary standards may accept leadership positions in voluntary standard development groups if approved as set forth in § 1031.12(b), *e.g.*, committee chairman or secretary. Subject to prior

approval by the Office of the Executive Director, the Voluntary Standards Coordinator may accept leadership positions with the governing bodies of standards-making entities.

(e) Attendance of Commission personnel at voluntary standards meetings shall be noted in the public calendar, and meeting summaries shall be submitted to the Office of the Secretary, as required by the Commission’s meetings policy, 16 CFR part 1012.

4. In § 1031.12, revise paragraph (b) to read as follows:

**§ 1031.12 Membership criteria.**

\* \* \* \* \*

(b) All other officials and employees not covered under § 1031.12(a) may participate as voting members or accept leadership positions in voluntary standard development groups, when authorized with the prior approval of the Office of the Executive Director.

5. In § 1031.12(c), remove the phrase: “Executive Director,” and add in its place “Office of the Executive Director.”

Dated: \_\_\_\_\_

\_\_\_\_\_  
Todd A. Stevenson,  
Secretary, Consumer Product Safety Commission.



UNITED STATES  
CONSUMER PRODUCT SAFETY COMMISSION  
BETHESDA, MD 20814

This document has been electronically  
approved and signed.

## Memorandum

Date: September 4, 2013

TO: The Commission  
Todd A. Stevenson, Secretary

THROUGH: Kenneth R. Hinson, Executive Director  
Stephanie Tsacoumis, General Counsel

FROM: Robert J. Howell, Acting Assistant Executive Director  
Office of Hazard Identification and Reduction

Jacob J. Miller, Deputy Voluntary Standards Coordinator  
Office of Hazard Identification and Reduction

SUBJECT : Notice of Proposed Rulemaking to Amend 16 C.F.R. Part 1031 Regarding  
Commission Participation and Commission Employee Involvement in Voluntary  
Standards Activities

### I. INTRODUCTION

Many consumer products under the U.S. Consumer Product Safety Commission's (CPSC or Commission) jurisdiction are covered by voluntary standards. Voluntary standards provide safety provisions addressing potential hazards associated with consumer products found in such locations as homes, schools, and recreational areas. Voluntary standards activity is an ongoing process that may involve multiple revisions to a standard within one year, or over multiple years. Voluntary standards development activities for consumer products within the Commission's jurisdiction are handled primarily by three standards development/coordinating organizations: ASTM International (previously called the American Society for Testing and Materials), the American National Standards Institute (ANSI), and Underwriters Laboratories Inc. (UL). Along with industry, consumer groups, and product safety experts, CPSC staff works with these organizations to coordinate the development of voluntary standards.

Currently, CPSC staff provides technical support to organizations that coordinate the development of voluntary standards. According to the CPSC's Voluntary Standards Activities FY 2013 Midyear Report,<sup>1</sup> CPSC staff will provide technical support or monitor voluntary standards activities for 71 products in FY 2013. Staff participates in the voluntary standards development process by providing expert advice, technical assistance, and information, based on analyses of the numbers and causes of deaths, injuries, or incidents associated with a product. Staff may also conduct CPSC research, perform laboratory tests, and provide draft language for a voluntary

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<sup>1</sup> Available at: <http://www.cpsc.gov/Global/Regulations-Laws-and-Standards/Voluntary-Standards/Voluntary-Standards-Reports/2013Midyear.pdf>.

standard. The Commission's involvement and staff's participation in voluntary standards activities have been and currently are governed by the Commission's rule at 16 C.F.R. part 1031, Commission Participation and Commission Employee Involvement in Voluntary Standards Activities (part 1031). Part 1031 prohibits CPSC staff from voting and precludes staff from holding leadership positions in voluntary standards development groups.

On May 16, 2012, the U.S. Government Accountability Office (GAO) issued a report titled, "Consumer Product Safety Commission: A More Active Role in Voluntary Standards Development Should Be Considered" (GAO Report) (available at: <http://www.gao.gov/assets/600/590990.pdf>). The GAO Report recommended that the Commission review the policy for participating in voluntary standards development activities and determine the feasibility of agency staff assuming a more active, engaged role in developing voluntary standards. Specifically, the GAO Report recommended that CPSC staff be allowed to: (1) vote to approve or disapprove ballot items, and (2) hold leadership positions at various levels of standards development bodies, including task groups, subcommittees, or committees.

This briefing package provides for Commission consideration of a notice of proposed rulemaking (NPR) to amend the current Commission policy on staff participation in voluntary standards development bodies, as described in part 1031. The draft proposed rule would eliminate prohibitions on staff: (1) participating as voting members of voluntary standard development groups, and (2) accepting leadership positions in voluntary standard development groups. The proposed rule would allow these activities as an option, provided that staff receives prior approval from the Office of the Executive Director (OEX) before participating in either or both of the activities. Staff participation in voluntary standards activities in these capacities would not be mandatory.

## **II. BACKGROUND**

### *A. Statutory and Policy Overview of the Commission's Participation in Voluntary Standards Bodies*

Congress enacted the Consumer Product Safety Act (CPSA) in 1972, codified at 15 U.S.C. § 2051, *et seq.*, to protect consumers against unreasonable risks of injury associated with consumer products. To advance that goal, Congress established the CPSC as an independent regulatory agency and granted the CPSC broad authority to promulgate mandatory safety standards for consumer products as a necessary alternative to industry self-regulation. Although neither the CPSA nor the other statutes administered by the Commission referred to voluntary standards, the Commission issued regulations in 1978, describing the extent and form of Commission involvement in the development of voluntary standards.<sup>2</sup> Acknowledging the contribution that voluntary standards had made to reducing hazards associated with consumer products, the Commission stated its support for an effective voluntary standards program, finding that a proper combination of voluntary and mandatory standards can increase product safety better than either mandatory or voluntary activities alone.

In 1981, Congress amended the CPSA, the Federal Hazardous Substances Act (FHSA), and the Flammable Fabrics Act (FFA), to, among other things, mandate that the Commission give

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<sup>2</sup> 43 *Federal Register* 19216 (May 4, 1978).

preference to voluntary standards as opposed to promulgating mandatory standards, if the Commission determines that a voluntary standard will eliminate or adequately reduce an unreasonable risk of injury, and that there will be a likelihood of substantial compliance with the voluntary standard.<sup>3</sup> In 1989, the Commission adopted regulations to reflect the policies set forth by the 1981 amendments, making several changes in the agency's policies on employee participation in voluntary standards development groups. The 1989 amendments also combined parts 1031 (on employee membership and participation) and 1032 (on Commission involvement) into a revised part 1031, titled Commission Participation and Commission Employee Involvement in Voluntary Standards Activities.<sup>4</sup>

In 2006, the Commission amended several provisions of part 1031.<sup>5</sup> Among other things, the 2006 amendments provided that Commission employees only participate in voluntary standards efforts consistent with the Commission's priorities as identified in the operating plan, performance budget, mid-year review, or other official Commission document. The 2006 amendments also added a requirement that employees with ongoing participation in voluntary standards activities regularly report to the CPSC Voluntary Standards Coordinator, to ensure ongoing oversight and coordination. In addition, the amendments added a requirement that the CPSC provide the public with notice and the opportunity to comment on staff's technical positions on voluntary standards activities.

*B. Statutory Changes and Policy Considerations Related to Participation in Voluntary Standards Bodies*

In the past, CPSC staff typically served on voluntary standards development groups based on the Commission's priorities. However, staff participated on these groups without any expectation that the voluntary standards would necessarily serve as the basis of a mandatory standard. However, the Consumer Product Safety Improvement Act of 2008 (CPSIA), gave rise to an expectation that voluntary standards would form the basis for mandatory standards development for certain children's products. For example, section 104(b) of the CPSIA requires the Commission to promulgate consumer product safety standards for durable infant and toddler products. These standards are to be "substantially the same as" applicable voluntary standards or more stringent than the voluntary standard, if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product.

Congress also has addressed participation by federal agencies in voluntary standards development. Public Law No. 104-113 directed federal agencies to "use technical standards that are developed or adopted by voluntary consensus standards bodies" and to "participate with such bodies in the development of technical standards."<sup>6</sup> Congress anticipated that federal agencies would "work closely" with voluntary standards organizations, that these organizations would "include active government participation," and that agencies would "work with these voluntary consensus bodies, whenever and wherever appropriate."<sup>7</sup>

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<sup>3</sup> 15 U.S.C. § 2056(b), 15 U.S.C. § 1262(g)(2), and 15 U.S.C. § 1193(h)(2).

<sup>4</sup> 54 Fed. Reg. 6646 (Feb. 14, 1989).

<sup>5</sup> 71 Fed. Reg. 38754 (July 10, 2006).

<sup>6</sup> Pub.L. No. 104-113, § 12(d)(1) & (2), 110 Stat.775, 783 (1996), 15 U.S.C. §272 note.

<sup>7</sup> H.R. Rep. 104-390 at 15, 25 (1995). *See also* 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella).

### C. *GAO Report*

The GAO Report considered the CPSC's voluntary standards activities, including the agency's increased role pursuant to section 104 of the CPSIA. The GAO Report concluded that because of the prevalence of voluntary standards for consumer products, CPSC's early and active participation in standards development activity is critical to establishing adequate voluntary standards. The GAO Report noted that the CPSC has chosen to limit participation in voluntary standards activities to maintain impartiality and to avoid the appearance of endorsing a specific voluntary standard. The GAO Report concluded that changing the CPSC's policy to allow staff to participate more actively in voluntary standards activities, especially when working with technical committees for which CPSC can provide expertise, and permitting CPSC staff to vote on voluntary standards, could result in stronger voluntary standards, without compromising the CPSC's independence.

In response to the recommendations in the GAO Report, the draft proposed rule would remove employee prohibitions on voting and serving in leadership positions. However, the Commission would require that staff participation in such activities receive prior approval by OEX. When approving staff's participation in such activities, OEX should consider the policy concerns set forth in 16 C.F.R. § 1031.9 (appearance of preferential treatment, loss of impartiality, compromise of the agency's independence, and a real or apparent conflict of interest). The policy concerns in § 1031.9 must be balanced against Commission priorities, available resources, the need for greater staff involvement, and the efficiency of the voluntary standards process. Thus, OEX will evaluate, on a case-by-case basis, each request for staff to participate as a voting member of a voluntary standard development group or to accept a leadership position. OEX would authorize staff generally to vote on matters involving a specified voluntary standard, but would not be approving each individual vote.

Permitting CPSC staff the option to vote on a voluntary standard and/or accept a leadership position in a voluntary standards development group may result in a more effective voluntary standards process and accelerate standards development and implementation, without compromising the CPSC's independence. Such participation could gain CPSC staff further access to and familiarity with latest technologies, and would provide an opportunity for staff to help establish standards that would advance CPSC's safety goals. In addition, "full" federal government participation in standards development increases the likelihood that the standards can meet both public and private sector needs.<sup>8</sup> A single standard that satisfies both industry and the CPSC would benefit both industry and the CPSC by simplifying applicable requirements – only a single set of standards would apply.

In addition, optional staff participation in voluntary standards development groups by voting and taking leadership roles would be consistent with the guidance reflected in OMB Circular A-119 Revised, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" (February 10, 1998). Among other things, OMB Circular A-119 encourages agency representatives serving as members of voluntary consensus standards bodies to "participate actively and on an equal basis with other members," and to "vote . . . at each stage of the standards development process unless prohibited from doing so by law of their agencies."

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<sup>8</sup> 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella).

In participating as a voting member of, or in a leadership position on, a voluntary standards development group, CPSC staff shall indicate clearly that any views expressed in connection with such participation represent CPSC staff's position and may not necessarily represent the Commission's position. Making such a disclaimer is consistent with current staff practice regarding representations in oral and written presentations and staff documents intended for public release. As in these contexts, CPSC staff's views cannot serve as a proxy for the Commission's or the agency's views on any particular issue. Similarly, CPSC staff serving in leadership positions on a voluntary standards development group would serve in their capacity as CPSC staff members, and their views would not necessarily represent the views of the Commission. In particular, CPSC staff participation in a voluntary standards development group, even in a leadership position, does not provide any assurance that CPSC will adopt the resulting voluntary standard.

Removing prohibitions on employees voting and serving in leadership positions should not result in the Commission compromising the policy concerns set forth in 16 C.F.R. § 1031.9. Generally, before any substantive issue is balloted on a voluntary standards committee, the committee is given the opportunity to discuss the proposals in detail. Currently, Commission staff engages in these discussions, such that the technical opinions of staff are known before a proposed change in a voluntary standard is balloted. Accordingly, CPSC staff's ability to vote on such ballots should not fundamentally alter current procedures in a manner that impinges on the Commission's independence. Rather, staff's ability to vote on a voluntary standard may improve the credibility and efficiency of the standard. Additionally, not only can OEX consider policy concerns when deciding whether to authorize staff participation in voluntary standards activities as voting members or in leadership roles, but OEX's approval also can impose constraints or limitations tailored to specific circumstances, such as measures to avoid undue influence or any appearance of impropriety.

To serve in a leadership position on a voluntary standards development group, CPSC staff must agree to follow the procedures set forth by the voluntary standards development group for leadership positions. Staff's leadership role may involve helping the development group to run more smoothly and assisting the committee in achieving timely deliberations.

### **III. SUMMARY OF THE DRAFT PROPOSED RULE**

Following is a summary of the draft proposed amendments to the existing part 1031 to meet the objectives described in section II.C, above:

- Section 1031.10(b) – Expand employee involvement to include: “participating as a voting member of, or in a leadership position on, a voluntary standard development group, when authorized.”
- Section 1031.11(c) – Delete this provision, which currently prohibits Commission officials and employees from participating as voting members of a voluntary standard development group.
- Section 1031.11(d) – Renumber to (c), and revise the content to state that an employee's vote does not necessarily represent the views of the Commission, but those of CPSC staff and that such votes would not be binding on the Commission.

- Section 1031.11(e) – Renumber to (d), and revise the content to state that Commission employees can serve in leadership positions, if approved as set forth in § 1031.12(b). Also, revise reference from “Executive Director” to “Office of the Executive Director,” to be consistent with other portions of the regulations.
- Section 1031.11(f) – Renumber to (e), to maintain consistency with recommended changes.
- Section 1031.12(b) – Revise content to state that all other officials and employees not covered under § 1031.12(a) [which lists Commissioners and employees who may not become members of voluntary standards groups because they either make or advise on final agency decisions] may participate as voting members and may serve in leadership positions of voluntary standards development groups with the prior approval of the Office of the Executive Director. Remove the reference to the Voluntary Standards Coordinator because this person falls within the class of employees authorized to serve as a voting member of a voluntary standards development group and serve in a leadership position, if authorized.
- Section 1031.12(c) – Revise reference from “Executive Director” to “Office of the Executive Director.”

### C. *Request for Comments*

CPSC staff recommends inviting the public to comment on the NPR and is specifically asking for comments on these issues in the draft proposed rule:

1. The value of CPSC staff participation in voluntary standard development groups in a voting capacity or in a leadership role, including potential related benefits;
2. Concerns relating to, or issues raised by, CPSC staff participation in voluntary standard development groups in a voting capacity or in a leadership role, and potential solutions or measures to mitigate such concerns or issues;
3. The requirement for OEX approval of staff participation in voluntary standard development groups, considering the criteria for Commission involvement in voluntary standards activity as noted in 16 C.F.R. § 1031.5 and the extent and form of Commission involvement in the development of voluntary standards as noted in 16 C.F.R. § 1031.6, either in a voting capacity or in a leadership role.

## IV. **POTENTIAL SMALL BUSINESS IMPACT**

As required by the Regulatory Flexibility Act (RFA), staff assessed the impact that the draft proposed rule would have on small entities, including small businesses. The staff memorandum from the Directorate for Economic Analysis can be found in Tab A. Section 605 of the RFA provides that, if the proposal would not have a significant impact on a substantial number of small entities, the agency head may certify and publish that determination in the NPR in the *Federal Register*. The proposed amendment would neither impose any new requirements on businesses,

including small businesses, nor require any greater governmental participation in voluntary standards. The proposal would simply allow increased involvement by Commission employees in the voluntary standards process. Because the proposed changes would not impose new obligations on small businesses that conform to voluntary standards, the draft proposed amendments to 16 C.F.R. part 1031, if promulgated on a final basis, would not have a significant impact on a substantial number of small entities.

## **V. EFFECTIVE DATE**

Staff recommends an effective date of 30 days after publication of a final rule in the *Federal Register* because this rule does not govern the conduct of stakeholders, only the conduct of Commission employees.

## **VI. COMMISSION OPTIONS**

The following options are available for Commission consideration:

- (1) Publish the notice of proposed rulemaking (NPR), as drafted by the Office of the General Counsel;
- (2) Publish the NPR, with changes, as directed by the Commission; or
- (3) Consider other options, as directed by the Commission.

# TAB A



UNITED STATES  
CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

## MEMORANDUM

**Date:** June 13, 2013

**TO** : Jake J. Miller, Office of Hazard Identification & Reduction

**THROUGH** : Gregory B. Rodgers, AED, Directorate for Economic Analysis  
Deborah V. Aiken, Senior Staff Coordinator, Directorate for Economic Analysis

**FROM** : Dale R. Ray, Directorate for Economic Analysis

**SUBJECT** : Proposed Amendments to 16 C.F.R. Part 1031, Commission Participation and Commission Employee Involvement in Voluntary Standards Activities: Regulatory Flexibility Act Certification

The draft proposed rule proposes to amend the U.S. Consumer Product Safety Commission's (CPSC, Commission) regulations governing the Commission's participation in voluntary standards development activities, codified at 16 C.F.R. part 1031. The CPSC staff maintains substantial involvement in voluntary standards development activities, consistent with the 1981 amendments to the Consumer Product Safety Act and other enabling legislation, the enactment of the Consumer Product Safety Improvement Act of 1990, and the implementation of the Consumer Product Safety Improvement Act of 2008. A May 2012 U. S. Government Accountability Office (GAO) report<sup>1</sup> recommended that the Commission consider assuming a more active, engaged role in developing voluntary standards.

The proposed amendments apply to sections 1031.11 (Procedural Safeguards) and 1031.12 (Membership Criteria) of Subpart B of the regulations, regarding employee involvement as voting members and assuming leadership positions. The result of the current proposed amendments may be some increase in the level of agency staff involvement.

The proposed amendments would be promulgated under the Administrative Procedures Act (U.S.C. § 553). Under most circumstances, whenever an agency proposes a rule, the agency must conduct and publish an initial regulatory flexibility analysis of potential impacts upon small businesses and other small entities, in accordance with the requirements of Section 603 of the Regulatory Flexibility Act (RFA, P.L. 96-354, 5 U.S.C. 601, *et seq.*). Section 605 of the RFA provides that, if the proposal would not have significant impacts on a substantial number of small

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<sup>1</sup> U.S. Government Accountability Office, "Consumer Product Safety Commission: A More Active Role in Voluntary Safety Standards Should Be Considered," GAO 12-582, May 2012, <http://www.gao.gov/assets/600/590990.pdf>.

entities, the agency head may certify and publish that determination in the notice of proposed rulemaking in the *Federal Register*.

Two essential elements of the proposed amendments would affect CPSC staff involvement:

- Commission employees authorized to serve on a voluntary standards body would be allowed to vote. Previously, involvement was on a non-voting basis.
- Subject to CPSC management approval, participating staff may serve in leadership positions, *e.g.*, committee chair or secretary. Previously, employees could not accept leadership positions.

The proposed amendments would neither impose any new requirements on businesses, including small businesses, nor require any greater governmental participation in voluntary standards. The proposal would simply allow increased involvement by Commission employees.

While there are millions of small businesses that conform to voluntary standards related to consumer product safety, none of the proposed changes would impose any new obligations on small businesses that conform to voluntary standards. Product manufacturing, importing, testing, reporting, recordkeeping, and other commercial activities would be unaffected.

In conclusion, the proposed amendments to 16 C.F.R. part 1031 on participation and involvement of CPSC employees in voluntary standards would not directly impact any small businesses or other small entities. The proposed amendments, if promulgated on a final basis, would not have a significant impact on a substantial number of small entities.