



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

STATEMENT OF COMMISSIONER JOSEPH P. MOHOROVIC REGARDING THE COMMISSION'S DECISION TO EXERCISE ENFORCEMENT DISCRETION REGARDING CERTIFICATES OF COMPLIANCE FOR LOW-RISK ADULT APPAREL

WEDNESDAY, FEBRUARY 24, 2016

Merriam-Webster defines “red tape” as “a series of actions or complicated tasks that seem unnecessary but that a government organization requires you to do in order to get or do something.”¹ American Heritage defines the phrase as “the collection or sequence of forms and procedures required to gain bureaucratic approval for something, especially when oppressively complex and time-consuming.”²

If I did not know better, I would have assumed those definitions were based on the idea that companies that make and sell adult apparel the Consumer Product Safety Commission (CPSC) has, for years, considered categorically safe were nonetheless required to certify that those products were, in fact, safe. Thankfully, with the unanimous support of my colleagues, the agency has cut that red tape to the tune of \$250 million a year.

In making this sensible, risk-based change,³ we have discharged our duty as regulators to impose the lightest burden we can to achieve our safety objectives.⁴ We have also answered the calls of Executive Orders issued by presidents of both parties across decades.⁵ Those orders reflect the same spirit embodied in the appropriately named Paperwork Reduction Act, which seeks to “minimize the Federal paperwork burden for individuals, small businesses, State and local

¹ *Definition of Red Tape*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/red%20tape> (last accessed Feb. 18, 2016).

² American Heritage Dictionary of the English Language, Fifth Edition (2011), *available at* <http://www.thefreedictionary.com/red+tape>.

³ In fact, this decision was based on a *lack* of risk.

⁴ 15 U.S.C. § 2058(f)(3)(F).

⁵ *See, e.g.*, Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (issued by President Reagan); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (issued by President Clinton); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (issued by President Obama); Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012) (issued by President Obama).

governments, and other persons.”⁶ Taking this simple but remarkable step is a great credit to the CPSC and everyone who is a part of it.

What We Are Doing

The Consumer Product Safety Improvement Act of 2008 (CPSIA)⁷ requires that a manufacturer or importer of a product subject to a CPSC rule certify that the product complies with that rule. Ordinary adult apparel is subject to a single rule, the flammability standards⁸ established under the Flammable Fabrics Act (FFA).⁹ CPSIA, then, would seem to require certification solely to demonstrate that any adult apparel product complies with those standards.

However, our rule under the FFA also establishes a list of fabrics that we have determined will necessarily and consistently meet the flammability standard.¹⁰ In light of that determination, relying on our authority and discretion as a law enforcement agency,¹¹ the Commission will not pursue enforcement action regarding a lack of certification for apparel made entirely from one or more of the listed fabrics.¹²

Why We Are Doing It

The list of fabrics covered by this enforcement discretion is no mere accident. It was adopted¹³ over 30 years ago as the result of a decade of CPSC experience that made clear that those fabrics are inherently compliant with the flammability standards.¹⁴ Nothing has altered this conclusion.¹⁵ Because of this woven-in compliance, we already know they are inherently safe. There is no

⁶ Two other purposes of the PRA are “to minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information” and “to maximize the usefulness of information collected by the Federal Government,” purposes our action today serves, as well.

⁷ Pub. L. No. 110-314, 122 Stat. 3016 (2008) (codified as amended in various sections of Title 15, U.S.C.).

⁸ 16 C.F.R. part 1610.

⁹ Pub. L. No. 83-88, 38 Stat. 717 (1953) (codified as amended at 15 U.S.C. § 1191 *et seq.*).

¹⁰ These are “plain surface fabrics, regardless of fiber content, weighing 2.6 ounces per square yard or more” and “all fabrics, both plain surface and raised-fiber surface textiles, regardless of weight, made entirely from any of the following fibers or entirely from combination of the following fibers: acrylic, modacrylic, nylon, olefin, polyester, wool.” 16 C.F.R. § 1610.1(d). Garments made with any other fabric – or with adulterations of the listed fabrics – will still require certification of compliance with the FFA flammability standards.

¹¹ *See generally, e.g.,* Heckler v. Chaney, 470 U.S. 821 (1985).

¹² It is important to note three things we did not do with this action. First, we did not set a precedent for the exercise of enforcement discretion for other products. Adult apparel products made from the listed fabrics are unique in that we have already determined – by rule – that they are so likely (virtually certain) to comply with the only relevant requirement that they present, at most, negligible risk; for other high risk or children’s products, certification has real value. Second, we did not lift the underlying requirements the products face. As unlikely as any violations are, if they occur, they are still subject to enforcement action. Third, we did not set anything in stone, but we did at least freeze the frame. Any enforcement discretion is subject to revocation, but we committed to giving industry at least 90 days’ notice before we do so, in the unlikely event that these historically safe products begin to present any appreciable risk.

¹³ Standard for the Flammability of Clothing Textiles, 49 Fed. Reg. 48,683 (Dec. 14, 1984).

¹⁴ *Id.* at 48,687.

¹⁵ In fact, when we refreshed the clothing flammability standard less than eight years ago, we expressly noted that, “No change has been made” to the list and referred interested readers to the reasoning of the 1984 amendments. 73 Fed. Reg. 15,636, 15,638 (Mar. 25, 2008).

added safety value in companies attesting to compliance the Commission has pre-determined because, certified or not, they are quintessential low-risk products.

Contrast this with other products that are subject to more requirements or present higher risks. In those cases, certificates are either based on demonstrable evidence of compliance (such as test data) or are a more meaningful affirmation that the company followed the law. In the case of adult apparel, using a fabric on the CPSC list *necessarily* follows the law.

No clothing is made any safer because of a certificate that tells us what we already know; it is only made more expensive. How much more expensive?

Based on the data we have collected, and excluding the tiny fraction of adult apparel that is not made of fabrics on the list, the industry has to produce over 26 million certificates at a cost of roughly \$250 million *each year*.¹⁶ That is a quarter-billion dollar annual price tag for confidence we already have that these products meet the standard and present little risk.

Worse still, the burden is heaviest on the small businesses that are the backbone of the American economy. Not only do they lack the infrastructure to minimize per-certificate costs, but their smaller product runs and purchase orders mean they have fewer units under each certificate. As a result, more than 60% of this burden – again, for products we know are safe and compliant – falls on small businesses.

This certificate requirement was the definition of red tape. It was an unnecessary action or task required in order to make or import low-risk adult apparel. It was a needless form and procedure required to gain bureaucratic approval. And it was costing an enormous sum, particularly for the people least able to absorb the cost. So, we cut it.

Why It Matters

The American economy is laboring under a substantial regulatory burden. Some have estimated that burden at nearly \$1.88 trillion,¹⁷ suggesting that, “If it were a country, U.S. regulation would be the world’s tenth-largest economy, ranking behind Russia and ahead of India.”¹⁸ While it is fair to question how that or any total is calculated, any reasonable math would yield a hefty sum.

Whether or not that regulatory cost is excessive is also a fair subject for debate, though polls consistently indicate that roughly half of the country would agree with me that businesses do spend too much on regulatory compliance.¹⁹ As reflected in the Executive Orders²⁰ and the

¹⁶ The roughly 16.8 billion units of clothing imported each year are covered by an estimated 26.6 million certificates at a cost of \$9.34 each, or \$248.4 million.

¹⁷ Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise institute, 2 (2015).

¹⁸ *Id.* at 3.

¹⁹ In a September survey, “a sturdy 49% of Americans say the government regulates business too much, [and] a near-low percentage instead say it regulates too little (21%).” Andrew Dugan, *In U.S., Half Still Say Gov’t Regulates*

Paperwork Reduction Act, however, there is broad consensus that pure red tape should be cut. Leaders from a variety of political camps have agreed that rules that have costs but no benefits should go.

I am grateful for the support of my colleagues and our expert career staff in recognizing that requiring companies to attest to the safety of products we already know are safe was a pure red tape regulation. As we both evaluate potential new rules and pursue the Commission's unanimous direction to enhance our efforts at retrospective review,²¹ I hope we can continue to find common ground regarding the dead weight in our regulations.

I also hope we will continue to pursue the burden reduction Congress has directed us to find in our third-party testing and certification rules for children's products. Today's action unfortunately cannot tally on that scorecard. Since we have already deemed almost all adult apparel compliant, it is not subject to any testing requirement, much less a third-party mandate, and there is no third-party testing burden to relieve. But, whatever label is appropriate, a \$250 million reduction in annual paperwork compliance costs is sizeable, and it ranks among the largest burden reductions federal agencies have enacted.²²

Too often, we in government prove the wisdom of President Reagan's theory that "the nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.'"²³ Today, we have helped, 250 million times over.

Business Too Much, Gallup, <http://www.gallup.com/poll/185609/half-say-gov-regulates-business.aspx> (last accessed Feb. 19, 2016).

²⁰ "[A]gencies shall give priority . . . to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens." 77 Fed. Reg. at 28,470.

²¹ Manager's Amendment to the FY 2015 Midyear Review and Proposed Operating Plan Adjustments, 2 (2015), available at <http://go.usa.gov/cBAVV>.

²² For example, when the Environmental Protection Agency concluded that a milk spill is not equivalent to an oil spill and did not require the same level of remediation, it saved dairies an estimated \$133 million a year. Amendments for Milk and Milk Product Containers, 76 Fed. Reg. 21,652, 21,653 (Apr. 18, 2011), available at <http://go.usa.gov/cp4GV>.

²³ Presidential News Conference (Aug. 12, 1986), available at <http://www.reaganfoundation.org/reagan-quotes-detail.aspx?tx=2079>. A popular website posits a similar theory: "Government – If you think the problems we create are bad, just wait until you see our solutions." GOVERNMENT – DESPAIR, INC., <http://despair.com/products/government> (last visited Feb. 17, 2016).