



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**STATEMENT OF COMMISSIONER ANNE M. NORTHUP REGARDING
THE NOTICE OF PROPOSED RULEMAKING ON THE PUBLICLY AVAILABLE
CONSUMER PRODUCT SAFETY INFORMATION DATABASE**

April 22, 2010

Imagine that early one morning a man wearing slippers and a bathrobe props a frost-covered Looneyville ladder against the gutter of his house and starts climbing up to retrieve the family cat. Holding his morning cup of coffee and nursing a severely sprained ankle from the previous night out dancing, he slips off the ladder when he reaches for the cat and tumbles to the ground unharmed. Scenes like this involving all varieties of consumer products play out across the country every day, but they do not represent an epidemic of defective products. Yet, combining such scenarios with the proposed database rule the Commission has now passed, these ordinary incidents will become the basis for confusion and possibly mischief via unreliable and unverifiable reports of harm.

Under the proposed rule, the nosy neighbor next door could submit a report of harm to the national database indicating that an Acme ladder caused a man to fall and break his ankle. Such a well-intended but inaccurate report—wrong manufacturer, wrong injury information, lots of missing context—would not help consumers differentiate properly between safe products and unsafe ones. It would not help regulators decide whether current product safety standards need updating. Nor would it help manufacturers to produce better and safer products. About the only person such a report might help is someone suing Acme. However, promoting lawsuits against improperly named defendants or based on false information is hardly a justifiable rationale for the CPSC's new database.

In an effort to improve the database's reliability, Commissioner Nancy Nord and I offered over twenty amendments that would have corrected most of the biggest defects in the proposed rule during a highly unusual five-hour long debate. Unfortunately, nearly every one of those amendments was rejected and the consumer product safety database notice of proposed rulemaking ("NPR") was approved on a partisan 3-2 vote. Thus, the proposed rule that passed still suffers from admitting too many unreliable reports with far too few details into the public database. It will accept reports not only from bystanders, but also from attorneys, engineers, consumer advocates, nongovernmental organizations, and trade associations. This scattershot approach to data collection will generate a database of dubious reliability. As a result, the database will become useless at best—and potentially far more destructive than that.

Although some philosophical differences over the database undoubtedly exist, we all agree that a properly constructed safety database could advance the Commission's mission of protecting consumers and promoting product safety. My staunch opposition to the Commission's action stems from the crippling practical problems that the proposed rule builds into the database. In my view not only has the agency blatantly misinterpreted the statute, but it has done so in ways that will: (1) mislead and confuse consumers with inaccurate database information; (2) invade the privacy of injured consumers; (3) waste scarce taxpayer

funds and the time of agency personnel; and (4) inflict reputational damage on manufacturers unrelated to legitimate product safety concerns.

The Agency's Misreading of the Statute

In order to enhance the utility and workability of the database, Congress wrote a statute that *does* limit the set of people who may submit reports of harm but *does not* limit the mandatory pieces of information the agency may require in those reports. Congress recognized that only specified parties (consumers, treating physicians, emergency responders, child care providers, etc.) with a relationship to an incident should submit reports of harm, and it judiciously limited the statutory list accordingly. In contrast, when it came to specifying what data fields should be mandatory in reports of harm, Congress largely left it to the agency to sort out, naming a bare minimum number of fields and inviting the agency to fill in the rest. Unfortunately, the agency has produced a rule that does the exact opposite of what the law demands. The proposed database rule completely ignores the statutory limit on who may submit reports of harm while simultaneously it fails to add enough mandatory fields to make the database useful and workable.

The statutory language specifying who may submit reports of harm is quite clear. The database must include reports received by the Commission from “(i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities.” There is no language at all inviting the Commission to add additional persons to the list of who may submit reports of harm. Yet, in the proposed rule, the Commission defines “consumers” so broadly that even bystanders and/or people that may hear about the accident can submit a report. In addition, the Commission adds a sixth category of “*Others* including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations.” This addition of special interest groups has zero basis in the statute.

By comparison, the statute also clearly indicates where the agency may supplement lists in the database. For example, in listing the requirements that any report of harm must include, the statute requires five specific items “at a minimum.” In listing the ways in which database information must be sortable, the statute mentions four categories and then “such other elements as the Commission considers in the public interest.” So twice—in the very same section as the reports of harm language—the statute makes it perfectly clear when lists are not exclusive. But in the case of who may submit reports of harm, the statute includes no such language inviting the Commission to supplement the list. Thus, that list must be finite.

Inaccurate Information

The proposed rule will reduce the accuracy of information published to the database and mislead consumers who use it to obtain safety data—thereby undermining the very reason for creating the database in the first place. This result will occur because the proposed rule allows too many reports from people without direct knowledge of incidents to submit reports that are subject to too little verification. In addition, because the proposed rule mandates too few required fields in reports of harm, the database will include undated reports without enough details to permit verification, de-duplication, or prioritization.

First of all, the proposed rule allows bystanders without direct knowledge of an incident to make a report. This mistake comes from the staff's interpreting “consumers” way beyond its common meaning, even to include “observers of the consumer products being used.” But these additional reporters, like the

nosy neighbor, will not have the full information necessary to evaluate whether a product was unsafe, whether harm occurred, and whether the harm sustained was truly caused by the product. Most bystanders will lack sufficient knowledge to know whether a report should even be filed, and the vast majority of them will not be able to provide enough context to make their reports of harm reliably useful. It could always be worse. One Commissioner has opined that since “we’re all consumers” anyone can submit a report to the database. But that is an unserious way to interpret statutory language. If the term “consumers” were meant to encompass everyone, then Congress would not have bothered to list further specific categories of those who may submit a report.

Next, as discussed above, the rule permits reports filed by “*Others*.” Even if the agency were right that the statute may be read to permit expanding the list of who may submit reports of harm, nothing in the statute supports extending it so widely. The categories of people listed under “*Others*” are different in kind from the statute’s specified list of entities who may submit reports of harm. Consumers, government agencies, health care professionals, child service providers, and public safety entities are all in a position to have direct contact with the victim at or near the time of the incident and/or they are in positions of responsibility with respect to public health for which they may be held to account. In stark contrast, attorneys, engineers, investigators, NGOs, consumer groups, and trade associations are not likely to have direct contact with the victim at or near the time of the incident and are not necessarily in positions of responsibility to care for the victim. The reliability of reports submitted by these special interest groups will not match the reliability of reports from objective sources, and these entities may “data dump” information into the database that will swamp everyday consumers trying to share valid information.

These concerns would be reduced if reports had to be adequately verified before being published, but the rule does not require that either. Unlike the kind of elaborate verification the staff has called for in other CPSIA regulations interpreting statutory demands for verification (like the 15-month rule), here the proposed rule merely asks the submitter of a report of harm to check a box stating that the report they are submitting is accurate to the best of their knowledge. That limited degree of verification is essentially worthless considering that few people would be making a report if they did not *believe* it to be true.

If the rule at least required reporters of harm to include the victim’s identity and contact information with a report, others could verify some reports. Instead, the proposed rule neither requires that information, nor permits an injured person to determine whether a report of harm that seems to be about them actually is, nor even allows a victim to vet a report of harm that they are sure concerns them. Because reporters of harm also do not have to make public their identities (other than to the agency), it will be difficult if not impossible for victims to police the accuracy of reports filed about them. Without any of this information required, reporters of harm will be able to submit hearsay, second-hand information, and urban legends. Even well-intentioned reporters of harm—such as hospitals—may not provide accurate reports, because victims may not be completely candid about the details of the incident in the course of obtaining medical treatment.

The proposed rule further reduces the accuracy of database information by not requiring the date and geographic location of reported harms. This basic information is crucial to helping remove duplicative reports from the database, as well as to comparing multiple reports on the same incident to compile a single incident report that is as complete and as accurate as possible. The presence of duplicates makes any database less useful, particularly a safety database where the number of incidents caused by a particular product is perhaps the single most important piece of data. Contrary to the Chairman’s assertion that we

have software to eliminate duplications, that software is not magic. It depends on useful input data. As with the rest of the database, “garbage in” will mean “garbage out.”

In addition to helping eliminate duplicate reports, making the date of an incident (as opposed to the date when a report is filed) mandatory would help prioritize the level of concern to attach to a report. Safety standards change over time. A report about an older version of a product is less meaningful than a report on the newest version of that same product. If a manufacturer, for instance, does not know the date of an incident, it will be impossible to know if a particular report pertains to a currently available product. Furthermore, the more distant the incident is in the past, the more likely a person’s memory may be mistaken. By way of contrast, the National Highway Traffic Safety Administration’s web-based form for submitting consumer safety complaints (including complaints about child car seats) requires complainants to give both the approximate incident date and the date the product was manufactured.

Since the database is not explicitly prospective in terms of when incidents must have occurred to be entered, this will be a particular problem at the outset. New database entries about old incidents will confuse consumers seeking safety information about new products for sale as well as manufacturers trying to improve their latest models.

Commissioner Nord and I offered amendments to address all of these deficiencies that would have: narrowed the definition of “consumers” to exclude observers; defined consumer as the owner/user/victim of a product or that person’s parent/guardian; required those submitting reports of harm to have first-hand knowledge of the incident or the harm caused; struck “Others” as a category of who may submit reports of harm (or limited the scope of that category); permitted the victim to confirm or refute the details in any report of harm; allowed a harmed party to verify a report of harm about them; required the identity of the harmed party and valid contact information for them; permitted reporters of harm to retract reports from the database without having to prove they supplied materially inaccurate information; mandated the date and location of every reported incident; made the database apply prospectively, and; required a federal criminal penalty warning about supplying false information at the verification stage. The majority refused to adopt any of these amendments.

Invasion of Privacy

In addition to providing unreliable information to mislead consumers, the proposed rule will allow the database to invade the privacy of those persons injured by consumer products. Although submitters of reports of harm can choose whether or not to submit a report, whether or not to make their name and contact information available to the manufacturer, and whether or not to reveal any private information in the course of making a report, victims do not enjoy the same rights. Although a victim’s name will not be published and photographs containing personally identifying information will be redacted, every other detail of an accident involving a consumer product could be published on the national database for all to see. While more details are good for purposes like de-duping, they also invade privacy when the details involve someone who has no say in whether they are disclosed. In small towns and notorious cases, the invasion of personal privacy could be extreme.

Even minors are not exempt from this invasion of privacy. The rule stipulates that minors may not enter data about their own incidents without parental permission; however, any other person named in the rule is perfectly free to publish a report to the national database about a minor without parental permission.

This approach turns respect for the privacy rights of minors and their parents on its head. Most parents will likely be alarmed to learn that they will not be able to take down a report published on the national database involving their child. Even if a report is materially inaccurate, a parent would have to prove the inaccuracy in order to persuade agency staff to remove the report. Such proof could itself involve revealing information that a victim would rather not reveal. Nor can parents even confirm that a report on the database is about their child.

The proposed rule even goes so far as to permit the posting of medical records on the national database for public inspection. These records will not be posted unless some unspecified level of “consent” is given, but it does not take much imagination to see how an inadvertent “consent” could cause real regret later. Any parent who has experienced an emergency room visit with their child can remember signing multiple releases to quickly have their child seen. The agency has assured the public that knowingly false and confidential information will not be published on the database, but there are no embedded safeguards. One cannot—at least not credibly—simultaneously say that the agency is not going to publish confidential information and then also insist that victims not have any say over whether reports of harm involving them (and their personal information) get published. “We want the busybodies reporting to us,” as was argued in the public meeting, is not a philosophy consistent with respecting individual privacy interests.

Commissioner Nord and I offered amendments that would have prevented adding privacy-invading insult on top of consumer product-related injury. The changes we proposed would have: required a harmed party’s consent to have their information published in the public database; required a parent’s express consent for a report of harm involving a minor child; required the identity of the harmed party and valid contact information as mandated fields, and; allowed victims who believe they are described in a report of harm to get confirmation from the agency and the ability to have that report removed from public view. Again, the majority refused to adopt any of these amendments, so the proposed rule respects the privacy of submitters but not the privacy of victims.

A Waste of Resources

Still another problem with the proposed database rule is that it will squander taxpayer funds and waste agency resources. A current television ad for a job search website features two players getting ready to begin a game of tennis. Just as the first player begins to serve, spectators descend onto the court armed with their own racquets intent on participating in the match themselves. Naturally, the ensuing chaos makes it impossible for the original two players to play their game. By admitting too many unverified reports from too many unreliable sources, the proposed database rule will similarly pollute what good data goes into the system to the point that consumers trying to use the database will not find it helpful.

The estimated cost to get this database up and running is in the millions of dollars. The additional cost in annual agency staff resources that will be expended keeping up the database will no doubt total additional millions. The staff has said that every report in the database will be personally reviewed by a CPSC employee, who will send the information to the manufacturer, assess whether a CPSC investigation is warranted, and try to resolve questions of accuracy raised by manufacturers. For such a large and ongoing expenditure of taxpayer funds, we should do better than to produce a tool of dubious worth. Indeed, the agency has long had access internally to a world-class storehouse of carefully cultivated product safety information to guide our consideration of regulatory and enforcement activities. Modernizing the existing, proven database and making it publicly available—with a couple of additional tweaks to satisfy the statute—

would have been a far superior approach to devising a new database from scratch with all the defects inherent in this one. Unlike the current design, that approach would also not have required massive agency resources, including dedicated new staff, to supervise it.

But rather than emulate the reliable internal database or even stick to the statutory scheme, a majority of the Commission has now endorsed a proposed rule that turns the database in a direction contrary to both law and common sense. In our haste to tout the potential benefits of a consumer product safety database, we must not gloss over the very real risks that such an endeavor entails. Worse than wasting dollars, the new database threatens to reduce safety in at least two respects.

First, because the new database will lack exposure data, it could well mislead consumers about the comparative safety of products. Ostensibly, the database is meant to allow consumers to judge the comparative safety of different consumer products. However, *comparative* safety is not possible to measure unless the database gives the number of products in circulation. There is a huge “compared to what?” problem without such information being part of the database. Without that data, consumers may be misled. The most popular products will have more numbers in circulation. Holding all else equal, those products produced in the greatest quantities will generate more reports, but that does not mean they are less safe. We do not want to push people away from products with 1:10,000,000 deaths to products with 1:10,000 deaths because a small numbers problem causes the former products to show up more frequently in the database or the latter products to show up at a later point in time in the database. But depending on what information goes into this database, a consumer could actually be led away from a safer product and toward a riskier one.

Second, safety could also suffer counterproductively when the new database identifies priorities different from ones generated by more reliable internal metrics. To the extent that headlines drive agency priorities (or at least divert agency attention), the problems surfaced by the less reliable information in the public database could take time and resources away from greater risks in order to deal with externally created public relations crises. Responding to such events instead of focusing on what our careful internal analysis reveals are the top safety concerns will reduce overall safety.

Commissioner Nord and I again offered amendments to ensure the staff’s hard work in creating the database framework would not go for naught. These amendments would have: limited reports of harm to particular incidents, not generalized concerns; mandated date and location information in every report; limited reports of harm to those incidents occurring after the database launches (or at least after the statute passed), and; indicated the unreliability of database records by refusing to treat them as agency records or certify them as official business records. The majority once again refused to adopt any of these amendments.

Indiscriminate Harm to Manufacturers

One major function of the consumer safety database should be to inform consumers’ purchasing decisions, enabling them to acquire safer products. The main byproduct of a successful database would thus be to reward manufacturers who make safe products and penalize those who make less safe or unsafe products. But because the proposed rule will create a database chock-full of inaccurate and unverifiable information, it will not incentivize companies appropriately. Instead, the proposed rule will create a database that fails to reinforce responsible corporate behavior and harms good companies indiscriminately.

A good database would provide companies with the ability to take full advantage of reports of harm. For example, it would give enough detail to enable them to compare reports against internal company data. That way they could identify hazard trends more quickly, get in front of safety problems, and perfect their products going forward. It would also enable manufacturers to garner additional details, allowing them to discern what kind of product improvements could have made a difference as well as when incidents involve factors that a better design could not have helped.

Unfortunately, the paltry information in this database will not enable such learning. All too often companies will not be able to differentiate between multiple entries on the same incident and reports representing multiple incidents. Manufacturers will not be able to discern whether a report pertains to a product currently on the market or a much older model. In many cases they will not be able to follow up with the submitter (or the injured party) to verify the accuracy of a report, obtain additional specifics, or debunk erroneous reports. They may not be able to tell, for instance, whether a reporter of harm mistook the company's product for a similar model manufactured by another firm. With no real way to separate genuine reports from bogus ones, the database will put manufacturers in the impossible position of being asked to comment on incidents they know very little about. Most manufacturers in that situation will be likely to provide very little response for publication in the database. Consumers will be the poorer for that, but companies cannot afford to comment on incidents where they do not have all the relevant facts.

These same failings will cause the database to inflict reputational damage and other harm on companies without regard to their safety track records. Just as the public database will distract the agency's attention, so too will it preoccupy manufacturers who must be even more responsive to negative publicity to protect their brands. Some of this crisis response may come in reaction to legitimate safety issues, but most will not—meaning that frequently companies' attention will be diverted from real safety concerns in order to handle public relations flare-ups generated by the database. Furthermore, when reputational risk appears disconnected from safety issues, it incentivizes manufacturers to improve their public relations capacity instead of their products.

In addition to reputational black eyes, the database is apt to generate more lawsuits against consumer product manufacturers. In part this is because the saferproducts.gov website will put a government imprimatur on voluntarily supplied external data that the agency has not validated. Moreover, the sheer volume of incident and injury data the database contains will attract plaintiffs' trial lawyers to use it as a search engine. Such objections would not have merit if these effects stemmed from accurate data. But they will not. Regrettably, the extra litigation costs for borderline cases will lead to higher prices for consumers, some safe products getting pulled from the market, and even some good companies going out of business.

Commissioner Nord and I introduced amendments to address these concerns, but yet again the majority did not adopt them. Our revisions would have: required the date and location of incidents; flagged reports of harm where submitters refused to share their contact information; flagged reports of harm challenged as materially inaccurate while any investigation was pending; provided a timeline for such investigations and for immediate removal of materially inaccurate information; decreased the likelihood of mistaking a manufacturer's identity; indicated the unreliability of database records by refusing to treat them as agency records or certify them as official business records, and; allowed submitters to indicate their level of certainty regarding particular facts. We also discussed with staff the possibility of enabling the manufacturer to communicate with submitters of reports of harm who do not want their contact information released through some kind of anonymous electronic bulletin board.

Conclusion

The Notice of Proposed Rulemaking for the consumer product safety database that the Commission approved this past week could have been written as a balanced rule that adheres faithfully to the statute and maximizes the database's chances for success. Instead, the rule deviates from the statute's mandate and shapes a database that will be unreliable to the point, essentially, of uselessness. Worse yet, the database will mislead consumers, invade their privacy, waste their tax dollars, and inflict random reputational harm on makers of consumer products. Any modest benefits that flow from the public database will not be commensurate to the extensive harm it will cause. Because I believe that the proposed rule adopted this past week is likely to compromise safety, lead to less well informed agency decision making, and do more overall harm than good, I cannot support it.

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Because I do not think it a coincidence that the resulting rule is so unsatisfactory, I would like to add a few words about the unfortunate process that accompanied this past week's disappointing vote. Although the Chairman could not be there, the initial public hearing and discussion on the database was vigorous and respectful among those Commissioners in attendance. Several of the concerns outlined in this statement were first aired at that time, and I believe that many of them could (and would) have been addressed had normal procedure been followed.

Until the package for a proposed rule comes up to the Commissioners for our consideration, there is nothing concrete for the various offices to discuss. Although preliminary briefings may occur, the public hearing is generally the first opportunity for us to read the exact language being proposed and hear each other's reactions to the policy under consideration. Following the public hearing, the various offices usually send around marked up versions of the proposed rule or other shorter documents listing their proposed changes. Because the Sunshine Act forbids more than two Commissioners from meeting privately to discuss these changes ourselves, staff assistants from each of the five offices typically meet together in so-called junior fishbowl sessions to hash out changes instead.

Despite a request for such a meeting, in this instance, the Commissioners of the majority party first ignored the request and then produced a document agreed to by all three Democrat offices as a fait accompli. At the last minute a fishbowl was conducted cursorily with only four offices in attendance. Even then, rather than begin a search for common ground, that meeting was treated merely as an opportunity to craft talking points for the public decisional meeting in opposition to any ideas for changes that were raised. This breach of decorum forced Commissioner Nord and me to draft numerous amendments to propose at the public decisional meeting, which lasted several hours longer than usual in order to consider them. I sincerely hope that whatever circumstance led to the departure from our customary mode of operations on this proposed rule does not recur. I value the constructive input to our rulemaking that comes from every Commissioner's office, and I believe the quality of our work product suffers when the collaborative process is bypassed.