



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

**SUPPLEMENTAL STATEMENT OF COMMISSIONER NANCY NORD ON  
THE VOTES TO APPROVE THE FINAL RULE ON TESTING AND  
CERTIFICATION, COMPONENT PART TESTING FINAL RULE, PROPOSED  
RULE ON REPRESENTATIVE SAMPLING AND ISSUING QUESTIONS  
ABOUT REDUCING THE COST OF TESTING**

November 8, 2011

In the past, Commissioners' written statements were issued to explain the reasoning behind their votes, and not to rebut the written statements of other Commissioners. As I have stated, "[w]ithout this understanding, the Commissioner writing last has the last word, and the public will be forced to navigate a potentially endless merry-go-round of statements as one responds to the other." (See my [July 29, 2011 supplemental statement](#).) Unfortunately, this past practice has apparently been cast to the side with the current Commission. Again, Commissioner Adler has posted a supplemental statement that specifically attempts to rebut arguments I made in my written statement, this time dealing with the recently issued *Final Rule on Testing and Labeling Pertaining to Certification* (the *Testing Rule*). His statement deserves response.<sup>1</sup>

As I indicated in my [statement](#) explaining why I voted against publishing the *Testing Rule*, I believe that the decision of the Consumer Product Safety Commission's majority to adopt the rule will drive up costs for manufacturers—and, ultimately, consumers—without corresponding safety benefits. I also believe that the Commission chose poor process over reasoned decision-making in deciding not to re-propose the *Testing Rule* after Congress changed the law that directed the Commission to issue the rule in the first place.

**Periodic Testing Need Not Be Performed by a Third-Party Lab**

Commissioner Adler questions my understanding that periodic testing need not be performed by a third-party conformity assessment body (a third-party lab). I am happy to explain why I believe that a close reading of the statute undermines the notion that all testing of children's products must be performed by a third party.

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<sup>1</sup> This statement does not attempt to respond to all Commissioner Adler's arguments against those raised in my statement. Even though I am not responding to all his arguments, I do not concede the merits of those arguments.

In the Consumer Product Safety Improvement Act (§ 14(a)(2)), Congress created the third-party testing requirement by directing manufacturers and private labelers of children’s products subject to a children’s product safety rule to submit their products for testing *before* the products are introduced into commerce.<sup>2</sup> In other words, a children’s product manufacturer must have *initial* tests performed by third-party labs. These tests must be on “sufficient samples of the children’s product”—which must be “identical in all material respects to the product” that the manufacturer wishes to sell. Thus, if a manufacturer makes a material change to a product, then the children’s product sold would *not* be identical in all material respects to the samples tested, so the manufacturer could not rely on the initial testing of the children’s product. *This* section (§ 14(a)(2)) is the source of the third-party testing requirement, which ensures that every new product—including those so materially different from predecessors that they should be considered new—is tested by a party independent from the manufacturer. This section has nothing to say about any continued testing requirements.

In a later section, Congress required the Commission to create protocols and standards for continued testing of children’s products. More specifically, the Commission was obligated to “establish protocols and standards . . . for ensuring that a children’s product tested for compliance with an applicable children’s product safety rule is subject to testing periodically and when there has been a material change in the product’s design or manufacturing process, including the sourcing of component parts.”<sup>3</sup> This subparagraph does *not* impose any requirement that the periodic testing be performed by a third-party lab; it is only by reference back to the earlier section that one can possibly infer a third-party testing requirement for continuing testing.

A more proper reading of these two sections would require:

- (1) initial tests, which must be performed by third-party labs;
- (2) tests after material changes, which must be performed by third-party labs; and
- (3) continued, periodic testing, which must be performed but need not necessarily be done by third-party labs.

This articulated testing regime would ensure that the most expensive testing—that is, testing done by a third-party lab—is performed before a new product is introduced to the market. Testing that is done on a continuing basis would be performed according to standards and protocols that we would establish but does not necessarily need to be done by a third-party lab.

Commissioner Adler places a great deal of stock in the heading of the continued-testing section which describes the section as “Additional Regulations for Third Party Testing.”

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<sup>2</sup> The issue of whether third-party testing is required of children’s products subject to a general safety rule or only those products subject to a “children’s product safety rule” is outside the scope of this discussion. Nevertheless, I believe that the Commission has over-read the statute in this regard and extended the third-party testing requirement to more products than required by the statute. See my [September 29, 2010 statement](#).

<sup>3</sup> CPSA § 14(d)(2)(B).

Headings and titles, while helpful, do not determine the meaning of the text that follows. As Commissioner Adler knows, this is a basic principle of legal interpretation, and it makes good sense. Titles can be—and are often—misleading. In this case the subsection deals with things other than third-party testing (i.e., labeling). And, as demonstrated, the statutory text does not require continued testing to be performed by a third party.

Testing can often enhance safety by helping manufacturers identify failures in manufacturing processes. Having tests performed by an independent third party might prevent a bad actor from gaming the system. But these tests can be extraordinarily expensive when performed by a third-party lab—especially for small- and mid-sized businesses, who must amortize the cost of testing across fewer units. The costs that the Commission imposes should be tied to the increase in safety created by the Commission’s actions. Given the heavy costs and questionable safety benefits of continued third-party testing, I would not read a third-party periodic testing requirement into the statute if Congress did not put it there in the first place.

### **Re-proposal Was the Correct Course**

Commissioner Adler believes that Congress intended the Commission to promulgate the *Testing Rule* without any delay. I argued that Congress had signaled the Commission should reconsider its proposed rule so thoroughly that re-proposal would have best effectuated Congress’s intent. The agency’s career staff also recommended re-proposal. This would have allowed a single process to move forward, allowing the rule and all of its components to be considered holistically. Piecemeal, *post hoc* analysis and revision of the rule’s elements is poor regulatory process. Instead, the Commission is moving forward with a “faux final rule” that may need to be amended multiple times before it goes into effect. Failing to re-propose after Congress made fundamental structural changes to the statute underlying the *Testing Rule* could jeopardize the rule if it is challenged in court.

Commissioner Adler relies on a colloquy among three senators for the proposition that Congress intended that the Commission not re-propose the *Testing Rule*. While the Senators, in statements after the law was passed, indicated their desire that the Commission proceed apace, those statements do not argue against proper procedure or for reckless regulation. What *is* clear is that the post-enactment colloquy is immaterial.

Commissioner Adler is suggesting the odd notion that the opinions, expressed after passage, of 0.6% of Congress are somehow law. With all respect due to the participants in that colloquy, the intentions of a few members of Congress are legally irrelevant. The only “intent” that matters is the text that was passed by both houses of Congress and signed by the president. As Judge Alex Kozinski described it, “The two Houses and the President agree on the text of statutes, not on committee reports or floor statements. To give substantive effect to this flotsam and jetsam of the legislative process is to short-circuit the constitutional scheme for making law.”<sup>4</sup> Wisdom counsels re-proposal.

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<sup>4</sup> Alex Kozinski, “Should Reading Legislative History Be an Impeachable Offense?,” 31 *Suffolk U. L. Rev.* 807, 813 (1998).

In any event, Commissioner Adler fails to offer any policy justification beyond “delay” to buttress his view that the Commission was right to issue a final rule without re-proposal. But re-proposal would not have delayed the implementation of the *Testing Rule*: As I demonstrated with the alternative timeline that I presented to the other Commissioners at our decisional meeting on October 19th, a re-proposed *Testing Rule* could have gone through a full notice-and-comment rulemaking process and still become effective in January 2013, the same effective date as the one that the Commission just approved. Commissioner Adler’s failure to point to any other basis for plowing ahead can only be viewed as a concession that there was no rational policy basis for rejecting staff’s expert recommendation that the rule be re-proposed. His silence speaks volumes about the transparent political motivation underlying the majority’s decision to barrel ahead with a rule while their majority remained intact.