U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

STATEMENT OF COMMISSIONER JOSEPH P. MOHOROVIC REGARDING THE COMMISSION'S REGULATORY FLEXIBILITY ACT REVIEW OF THE STANDARD FOR THE FLAMMABILITY (OPEN FLAME) OF MATTRESS SETS (16 C.F.R. PART 1633)

Monday, December 12, 2016

A year and a half ago, the CPSC gave notice in the Federal Register that the agency would, as required by law, review its Standard for the Flammability (Open Flame) of Mattress Sets. Last week, the Commission voted to publish the results of that review: Nothing to see here.

Questions Unanswered

We concluded[1] that the Open Flame Standard needs no changes, no improvements. This, despite our recognition that the rule has fallen well short of our expectations in its ability to save lives and prevent injuries. In publishing the final rule, "staff estimated a reduction of about 73.5 percent in addressable deaths and a reduction of about 78.5 percent in addressable injuries when all mattresses were compliant."[2] Now, it looks like "the rule [may be] only about 60 percent as effective in reducing deaths . . . and about 78 percent as effective in reducing injuries . . . as assumed in the final regulatory analysis."[3]

We declined to hazard a guess as to the reason for this discrepancy,[4] instead leaving the question for some undetermined future day. Maybe our engineering work missed the mark, or maybe our economic estimates were off, but we will only find out if we conduct further review. I believe this incomplete analysis is inconsistent with the culture of retrospective review that is a hallmark of a mature regulatory state and has been recognized as a best practice by presidents of both parties for decades.

---

[1] Lisa Scott, et al., Staff Briefing Package: Rule Review of 16 C.F.R. Part 1633 – Standard for the Flammability (Open Flame) of Mattress Sets ("Briefing Package") (Nov. 9, 2016), *available at* http://go.usa.gov/x8pbR.

[2] George Borlase, et al., Response to Commissioner Mohorovic's Question for the Record Regarding the Notice of Availability – Regulatory Flexibility Act Section 610 Review of the Standard for Flammability (Open Flame) of Mattress Sets ("Response"), 2 (Dec. 7, 2016), *available at http://go.usa.gov/x8pbQ*. We initially assumed it would take 10 years for the mattress market to turn over and compliant products to fully diffuse. We now consider that assumption to have been low and believe 14 years is more accurate, effectively giving the Standard more time to demonstrate its utility. Briefing Package at 20-21.

[3] Response at 2.

[4] Briefing Package at 23.

Needless Self-Limitations

This review was required by the Regulatory Flexibility Act (RFA).[5] In relevant part, the RFA requires that agencies review within ten years any rule that "[has] or will have a significant economic impact upon a substantial number of small entities."[6] The goal of the review is "to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes."[7]

The 10-year review – like the rest of the RFA – is focused on identifying and, where possible, reducing a rule's burdens on small business. Its emphasis is economic, and within a particular slice of the market. But the fact that the RFA has a small-business centered objective does not mean we should limit *our* interest to those parameters. If we're changing the air filter, we might as well check some belts and top-off the washer fluid while we have the hood up.

There is no shortage of learned, bi- or non-partisan guidance available about what makes an effective retrospective review. Presidents have been urging such review for decades,[8] and President Obama issued an executive order clearly detailing the kinds of rules agencies should review and the best opportunities for modifying, streamlining, expanding, or repealing rules that were not providing the best regulatory bang for the economic buck.[9]

If We Fail to Plan, . . .

One of the "how-to" recommendations that has won broad support is the idea that agencies should established the parameters for retrospective review of a rule while they are developing the rule itself. Regulatory scholars and experts of all political stripes – from Susan Dudley at George Washington University[10] to Joseph Aldy at Harvard[11] to the Administrative Conference of the United States[12] – have urged this prospective or *ex ante* retrospective review. In conjunction with NYU's Institute for Policy Integrity, a roundtable of former leaders of the Office of Information and Regulatory Affairs (OIRA) recommended to President-elect Trump that, "for each new economically significant rule, agencies should be required to set a timeline for future retrospective

[5] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[6] 5 U.S.C. § 610(a).
[7] *Id*.
[8] See, e.g., Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).
[9] Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (2012).
[10] "Agencies should plan for retrospective review at the outset, establishing a framework for empirical testing of assumptions and hypothesized outcomes." Susan Dudley, *A Retrospective Review of Retrospective Review*, 2 (2013), *available at* https://regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf.
[11] "Planning for ex post analysis of a rule could ensure both the availability of such data and an implementation scheme that may permit causal inference on the impact of the rule." Joseph Aldy, Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy, 61 (2014), available at http://www.hks.harvard.edu/fs/jaldy/img/aldy_retrospective.pdf.
[12] "Regulatory review should not only be a backward-looking exercise; rather . . . [p]lanning for reevaluation and regulatory improvement (including defining how success will be measured and how the data necessary for this measurement will be collected) should be considered an integral part of the development process." Administrative Conference of the United States, Administrative Conference Recommendation 2014-5: Retrospective Review of Agency Rules, 4-5 (2014), available at http://go.usa.gov/cBAVx.

reviews and define the goals, metrics, and milestones against which the rule's success will be evaluated."[13]

This review of the Open Flame Standard demonstrates precisely why such *ex ante* review modeling has such value. Instead of having to simply guess at whether it takes 10 or 14 or some other number of years for new mattresses to filter through the market, we could have been collecting data on mattress sales and use. With that information in hand, we could have better determined the cause for the gap between our 2006 expectations and the 2016 reality. Is the standard not good enough or are compliant mattresses just taking too long to work their way into consumers' homes? We could have known, but we don't.

I have pushed for the inclusion of retrospective review measures and the identification of necessary data in our rules, and I will continue to do so. Perhaps the disappointing performance of the Open Flame Standard and our inability to explain it will help drive home the point.

Questions Unasked

I am also concerned with an issue I believe we examined in only the most cursory fashion: The extent to which the Open Flame Standard overlaps with – or even renders superfluous – our Standard for the Flammability of Mattresses and Mattress Pads (Cigarette Ignition Standard).

Many people believe the Cigarette Ignition Standard – which governs how well a mattress or pad must resist the heat of a smoldering cigarette – is entirely subsumed by the Open Flame Standard. The reasoning is that a mattress that performs to our expectations against an open flame will necessarily meet expectations for smoldering. There is an intuitive logic to this opinion, but others have suggested the two standards have independent virtue because of differences in the heat dynamics of prolonged smoldering and intense, immediate flame.

I do not know which position is right as a matter of physics. I do know there have been enough questions asked that we owe it to the regulated community and to the economy as a whole to provide clear, data-driven answers. I also know that this review presented an ideal opportunity to find those answers, and we chose to let that opportunity pass us by.

Several commenters to this review urged us either to repeal the Cigarette Ignition Standard or, at least, to blend its most meaningful requirements into the Open Flame Standard to create one harmonized rule, eliminating any potential duplication. These comments should not have come as a surprise, not only because of the longstanding concerns about these rules, but also because we directly *asked* for such comments. Moreover, the RFA – the law that compelled this review – "requires agencies to consider five factors . . . including: (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules."[14]

So, the interaction between the Cigarette Ignition and Open Flame Standards was made a part of this review by commenters, by the Commission, and implicitly by the RFA. We were given at least three reminders that this issue needed to be explored. What was our response?

[13] Jason A. Schwartz and Caroline Cecot, *Strengthening Regulatory Review: Recommendations for the Trump Administration from Former OIRA Leaders*, 9 (2016), *available at* http://policyintegrity.org/publications/detail/strengthening-regulatory-review.
[14] 5 U.S.C. § 610

> [We consider] these comments as general support that the Mattress Standard addresses the risks associated with open flame ignition of mattresses and mattress sets. The comments requesting changes all focus on changes to or elimination of the Cigarette Ignition Standard. Staff will consider comments pertaining to the Cigarette Ignition Standard when staff develops the next step for the ANPR.[15]

In short, we dismissed the issue. The RFA required us to look at the Open Flame Standard, so we only looked at the Open Flame Standard (ignoring the fact that the RFA also required us to look for potential overlap or duplication).[16] We checked the bureaucratic box and called it a day.

Retrospectively, the Buck Still Stops Here

For both of these problems – our inability to answer questions about this rule's effectiveness and our unwillingness to ask questions about its relationship to our other rules – I do not fault the excellent team of talented, dedicated public servants who conducted this review. As always, they faithfully followed the direction the Commission has given. For too long, however, that direction has been to approach retrospective review with something less than the zeal we display for handing down new mandates to address the real or perceived Danger of the Day.

This approach to review – lackadaisical at best, hostile at worst – suggests a hubristic belief that we have no need for review because our rules are flawless. I cannot adopt such a belief. Everyone at the agency makes every effort to get every rule right, but it is a daunting task. Even understanding the present market for and use of a product is difficult, and predicting the future market even more so. Our duty is to provide the best analysis we can despite the challenges, but we also have to realize the odds of perfect foresight are low, creating a need for later reexamination.

I have to assume, however, that my colleagues understand limits of our wisdom and our foresight. So maybe the problem is not arrogance. Maybe it is fear. We avoid looking in the mirror because we worry we will not like what we see. I understand that – no one likes making mistakes or being proven wrong in a prediction – but the responsible path is to engage with the reality of our imperfection, not hide from it. We owe that duty of honest introspection to consumers, to businesses, to taxpayers, and particularly to the very staff whose hard work these rules reflect.

Conclusion

"A more or less stringent regulation might actually better maximize net benefits; a rule based on antiquated technology may now seem either too lax or obsolete; other government actions and external events may render a rule either redundant or overly narrow in scope."[17] The only way we

[15] Briefing Package at 6, *citing* "Advance Notice of Proposed Rulemaking: Possible Revocation or Amendment of Standard for the Flammability of Mattresses and Mattress Pads (Cigarette Ignition), 70 Fed. Reg. 36,357 (June 23, 2005). That ANPR was issued in 2005 (a year before the Open Flame Standard was promulgated), and there is no work on it scheduled in the current Operating Plan, nor has there been any work in several years.

[16] Apart from the responses to comments, we do discuss the overlap and duplication prong of RFA review, but we note only that (1) the Cigarette Ignition and Open Flame Standards have different scopes and hazard scenarios and that (2) in our magnanimity, we have exercised enforcement discretion to allow manufacturers to burn fewer of their products for the sake of the Cigarette Ignition Standard. We refused to consider whether or not they really needed to burn any at all. Briefing Package at 10.

[17] Schwartz at 8.

will ever know is to answer – and ask – the right questions about how our rules function in the real, retrospective world, not the hypothetical, prospective one.

Once a rule is on the books, it can change in only three ways: Congress can override it, a court can throw it out, or we can revisit it. We should not let either consumers or markets endure the consequences of our mistakes, and we should not rely on other branches of government to fix them. We should embrace retrospective review as a valuable tool for optimizing regulation, not a chore to be dispensed with as quickly as possible.