



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER NANCY A. NORD

Supplemental statement on the Commission's decision to issue a Notice of Proposed Rulemaking to amend the rule on Certificates of Compliance, 16 C.F.R. part 1110

June 11, 2013

The Consumer Product Safety Commission recently issued a long-awaited Notice of Proposed Rulemaking to revise 16 C.F.R. part 1110—the rule describing the agency's requirements for congressionally-mandated certificates of compliance.¹ This rule is part of what I will call the CPSC's testing and certification triad.² I wrote a statement explaining why I voted to issue the NPR to revise Part 1110,³ and my colleagues have now issued a joint statement, which (in part) responds to my statement.⁴ In general, our statements stand for themselves and I will not respond to every element of their statement that I do not agree with. A few points, however, need clarification. First, getting public input is always important, and is something I consistently seek, including

¹ Consumer Product Safety Act § 14(a), 15 U.S.C. § 2063(a), *as amended by* Consumer Product Safety Improvement Act § 102(a), Pub. L. 110–314, 122 Stat. 3016, 3022 (Aug. 14, 2008).

² The triad represents the agency's approach to ensuring safety through the testing and certification of children's (and other) products. The other elements of the triad are 16 C.F.R. part 1107, which addresses testing and certification requirements for children's products, and 16 C.F.R. part 1109, which establishes complementary requirements for components of those products.

³ Nancy Nord, *Statement on the Commission's decision to issue a Notice of Proposed Rulemaking to amend the rule on Certificates of Compliance, 16 C.F.R. part 1110* (May 15, 2013), <http://www.cpsc.gov//Global/About-CPSC/Nord/Nord1110Amendment.pdf>.

⁴ Inez Tenenbaum & Robert Adler, *Joint Statement on the Notice of Proposed Rulemaking Regarding Certificates of Compliance, 16 C.F.R. Part 1110* (June 6, 2013), <http://www.cpsc.gov//Global/About-CPSC/Joint-Statements/TenenbaumAdler1110Rule.pdf>. I adhere to my oft-expressed belief that past Commission practice—and collegiality and decorum—held that Commissioners should use their statements to state their own positive rationales for their votes, rather than respond directly to their colleagues' stated rationales in written statements. *See, e.g.*, Nancy Nord, *Supplemental statement on the Commission's decision to provisionally accept a civil penalty with Williams-Sonoma, Inc.* (May 13, 2013), <http://www.cpsc.gov//Global/About-CPSC/Commissioners/Nord/NordWilliamsSonomaSupplemental.pdf>; Nancy Nord, *Supplemental statement on the vote to approve the Notice of Requirements for the toy standard, ASTM F-963* (July 29, 2011), <http://www.cpsc.gov/PageFiles/120775/nord07292011.pdf>.

with respect to this rule and its proposed amendment. Second, the importance of this input is illustrated dramatically by the cost estimates for this rule, particularly when viewed in light of the rules that this NPR is related to. Finally, I must respond to my colleagues' assertions about my motivations with respect to how I approached this and other rules promulgated under the Consumer Product Safety Improvement Act of 2008.

To the extent that my colleagues suggest that I have sat silently concerning the need for public comment on Part 1110, they are simply incorrect. I have repeatedly pushed the agency's leadership and our staff to move forward on Part 1110 in order to get public input, as my colleagues surely know. They are also surely aware that it is my practice to seek public comment on important matters, and to insist on debating matters openly, not behind closed doors.⁵ With respect to the original promulgation of Part 1110, my description of the heavy press of work that preceded and followed the Notice of Rulemaking stands.⁶ What we could not do then, we can and are doing now, which is as it should be.

Additionally, when it comes to stating the overall, annual paperwork cost calculation of \$424.2 million, I believe it is important to point out where we agree, where we should agree, and where we disagree.

1. We all agree that our staff estimated the total annual paperwork cost added by the changes in Part 1110 proposed in this NPR to be \$74.8 million a year.⁷
2. None of us disputes our staff's estimates of the annual paperwork burden created by Parts 1107 and 1109, and included in the PRA analyses for their respective *Federal Register* notices, which total about \$216.4 million per year.⁸

⁵ For example, in the Commission's decision to revoke its definition of the term "unblockable drain" in the Virginia Graeme Baker Pool and Spa Safety Act, I called for public participation, particularly because we were aware that a number of state health officials were concerned about the agency's approach. This was rejected. See Nancy Nord, *Statement on the revocation of the interpretation of the term "unblockable drain" under the Virginia Graeme Baker Pool and Spa Safety Act* (Sep. 28, 2011), <http://www.cpsc.gov/PageFiles/123764/nord09282011.pdf>.

⁶ See Nord, *supra* note 3, at 2.

⁷ Compare Amendment to Certificates of Compliance, 78 Fed. Reg. 28,080, 28,106 (proposed May 13, 2013) (add totals from Tables B-2 and C-2) with Nord, *supra* note 3, at 6 (add totals on table from row entitled "File certificates with CBP") and Tenenbaum & Adler, *supra* note 4, at 5 (citing "about \$75 million" as the cost that should be cited in lieu of approximately \$424.2 million annually).

⁸ See Nord, *supra* note 3, at 6 nn.14-19, citing Testing and Labeling Pertaining to Product Certification, 76 Fed. Reg. 69,482, 69,537-40 (Nov. 8, 2011) (codified at 16 C.F.R. pt. 1107) (PRA analysis); Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and

3. None of us disputes our staff's estimate of the annual paperwork burden created by Parts 1107 and 1109, not included in the original PRA analyses for those rules, and thus included in *this* NPR's PRA analysis because the agency is required to provide such an estimate and this analysis was an appropriate place to put it, because this rule is part of the testing and certification triad. This is about \$14.9 million per year.⁹
4. None of us disputes our staff's estimate of the paperwork burden created by the original 2008 version of Part 1110, which was not then estimated but now has been estimated. Annually, this is about \$118 million.

These are our staff's estimates, which none of us have disputed. Now, the great leap of logic that my colleagues accuse me of is recognizing that the three rules—Parts 1107, 1109, and 1110—are related. Part 1107 and 1109 address the testing requirements that form the basis of the certificate, whose requirements are covered in Part 1110. Together, they form a triad. In combination, their paperwork costs total \$424.2 million annually. Whether or not the total is important to my colleagues, it is important to me, and I believe it will be important to Congress and to the public.

As I made clear in my amendment and in my statement, the annual \$424.4 million cost is combined cost. To the extent that my colleagues believe that I stated the total combined paperwork costs to mislead the public about the costs imposed by this revision of Part 1110, nothing could be further from the truth. The chart I proposed does not mislead the public, nor does my statement. I fear my colleagues may also believe I want to foist the full responsibility for that combined annual total onto them, as the current majority on the Commission. This is also untrue. A substantial portion of the costs imposed—those of Part 1110 as originally promulgated—were imposed while I was Acting Chairman, at Congress's direction. Indeed, it is surely fair to say that a substantial portion of the annual \$424.2 million total is outside the agency's discretion entirely. Whatever the outlines of a certificate rule, Congress required it, and it is only our job to estimate it in the PRA analysis, along with the burdens that we add to Congress's minimum. (I suspect we would disagree on precisely what that minimum is, but its existence is not in doubt.)

My colleagues assert that I proposed including the annual paperwork costs of the triad of testing and certification rules for political reasons. Is it political to include this total in the *Federal Register* notice? If it is political to state the numbers clearly, then call the chart political. If it is political to highlight the cost of an administrative regime, then

Certification Requirements, 76 Fed. Reg. 69,546, 69,578–80 (Nov. 8, 2011) (codified at 16 C.F.R. pt. 1109) (same).

⁹ See *id.* at 6 n.16, citing 78 Fed. Reg. at 28,092–106 (PRA analysis).

call the chart political. If it is political to believe that more clear speech from the federal bureaucracy is good—when that bureaucracy is hardly a bastion of clarity¹⁰—then call the chart political. My motives, however, are not and were not political.

I respect my colleagues’ perspectives on the mission, objective, and standards of regulatory agencies generally, and I agree with them on many (but not all) key matters. I have long been an advocate for consumer safety, and I believe that the best way to achieve that is to seek collaboration among the many interests involved, which sometimes compete and sometimes work in concert with each other. Our goal in governing through regulation should be to maximize safety at the lowest cost.

Anyone familiar with my time at the agency is aware that I believe—along with many economists, judges, policymakers, and members of the public—that regulations are not costless or perfect. Congress, reacting to alarming (and alarmist) reports, passed the CPSIA in 2008 to improve consumer safety. I worked with Congress as Acting Chairman of the agency before the adoption of CPSIA, and I worked with Congress afterward, both as Acting Chairman and as a Commissioner. I agreed with Congress that parts of the agency and its organic statute needed changes; I suggested some, and Congress accepted some of my proposals, and added many other provisions.

Yet my colleagues write that my “concerns about the 1110 rule boil down to what we consider her main objection to the certification rule”: my “insist[ence] that the costs associated with these measures cannot be justified.” They write that I have voted against rules promulgated under “most, if not all, of the [CPSIA]’s provisions.” It is puzzling that they bring up this point now. And it is troubling that they stray from focusing on the merits and defects of our respective policy positions and into the motivations behind my votes and amendments on CPSIA-related actions.

Of course, no one who has paid attention would say that I agree with every jot and tittle of the CPSIA. And many of the rules the agency has promulgated under the statute have been, in my judgment, unduly burdensome. But I believe that as a duly appointed and sworn member of the Commission, I must administer the law as Congress writes it. I strive to do so the best way I see open to the agency, and so I offer amendments where I view proposals as diverging from the best reading of the law. (And where my views and our statutes’ commands diverge, I defer to our statutes.) No one should expect anything different from me, and I do not expect anything different from my colleagues.

¹⁰ See Plain Writing Act of 2010, § 2, Pub. L. 111–274, 124 Stat. 2861 (codified at 5 U.S.C. § 301 note) (“The purpose of this Act is to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.”).

To the extent their concern about my opposition to their implementation of the CPSIA is relevant, I repeat—I follow the law and seek to have it applied in the manner I believe is most effective. But I am not at all sure that their point *is* relevant—the proposals and objections I made with respect to this NPR have been based on good-faith legal and policy conclusions, and this is true of all of my proposals over the years. That my colleagues feel the need to conjure this bogeyman suggests their objections’ paucity.