U.S. CONSUMER PRODUCT SAFETY COMMISSION
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SUPPLEMENTAL STATEMENT OF COMMISSIONER ROBERT ADLER REGARDING THE PUBLICLY AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION DATABASE RULE

January 14, 2011

Several centuries ago, Francis Bacon wrote that "knowledge is power,"[1] and I believe that basic truth endures today. Accordingly, I took particular delight on November 24, 2010, in casting my vote to empower the public by creating a consumer product safety database at the CPSC. This Commission action puts critical knowledge about the safety of products in consumers' hands in a timely fashion, and should save lives and reduce injuries.

Our vote carries out the congressional mandate in section 212 of the Consumer Product Safety Improvement Act (CPSIA),[2] which requires the Commission to establish and maintain a publicly available, searchable database on the safety of consumer products. Now that the final rule has passed, I believe the full scope of the database's benefits can be appreciated. In its most basic sense, the database will provide an early warning system to alert the public as hazards unfold – not years later when a full accounting of danger is finally written. The virtue of the database is that it can provide current data in an easily accessible manner likely to alert the public before tragedy replaces concern.

I voice my approval notwithstanding a number of objections to the database by some in the regulated community as well as by two of my CPSC colleagues, Nancy Nord and Anne Northup. In fact, my colleagues proposed an alternative draft of the database rule,[3] to which I devoted considerable time and attention before the Commission's deliberations in its meeting on November 24, 2010. I believe that reasonable minds can disagree, and so I carefully reviewed their proposal. After such consideration, I found that I strongly disagreed with most of their substantive suggestions. Because I think it important to explain my disagreement, I have addressed the most significant of these objections in section II of this statement. In addition, I have set forth, in section III, my response to a further statement by my colleague, Anne Northup.[4] Before this, however, I think it

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[1] Francis Bacon, *Mediationes Sacrae*, "Of Heresies" (1597). He wrote "Nam et ipsa scientia potestas est," or "For also knowledge itself is power."
[2] Incorporated in the Consumer Product Safety Act as section 6A and found at 15 U.S.C. §2055a.
[3] Nancy Nord & Anne Northup, "Alternative Database Rule Proposal from Commissioners Nancy Nord and Anne Northup," *available at* http://www.cpsc.gov/PR/nordnorthup11092010.pdf.
[4] Anne Northup, "Further Statement of Commissioner Anne M. Northup on the Final Rule Implementing a Publicly Available Consumer Product Safety Information Database" *available at* http://www.cpsc.gov/PR/northup01072011.pdf.

important to review the benefits of the database and to offer my views about why I think it will be so useful.

I. The Database Can Save Lives

To most parents, the thought of losing a child is almost unimaginable. What would add to this horror is the pain that a parent would feel upon discovering that the child's life could have been saved by a body of information that warned of the deadly hazard. Imagine further if the parent found out that the federal government already had this information in its files, but faced legal restrictions[5] that delayed its release in a timely or user-friendly fashion. Regrettably, this is the case today and it will remain so until the database becomes operational in March 2011.

What has always been lacking is a simple, central place to find whether products consumers are about to purchase (or which already reside in their homes) present dangers that other members of the public have discovered. The disconnect between those who have safety information and those who need it led Congress in 2008 to establish the database to forge a life-saving link between the two groups.

One need only reflect on the tragedy of Danny Keysar, in whose honor section 104 of the CPSIA[6] is named, to see how the CPSC database might have spelled the difference between life and death. Danny, at age 16 months, strangled to death in a crib that had been the subject of two prior CPSC recalls, but the news of the recalls never reached Danny's parents nor did it reach the day care center where Danny died. The existence of a public, easily-accessible, user-friendly database might have made the difference in whether Danny lived or died.

This point was further driven home for me when I read a comment about the need for a CPSC database filed by a parent, Michelle Witte, who also lost her child in a crib tragedy:[7]

> Consumers have the right to know if a product has caused injury or death. If I knew that the drop side crib I purchased from a reputable manufacturer/retailer killed some of the babies placed in it, I would never have purchased the product. If I read on a database about the children who died in the crib I purchased I could have reasoned that the design was unsafe. No one protected me, the consumer, from purchasing a crib that was known to cause injury and death. Horrific. My son would be alive today if I would have known that drop side cribs kill…. I had to learn about these babies on my own through Google.

[5] The legal restrictions are found in section 6(b) of the Consumer Product Safety Act. I discuss the restrictions *infra*, at notes 10-13 and accompanying text.
[6] The "Danny Keysar Child Product Safety Notification Act." Section 104 of the CPSIA.
[7] Comment No. CPSC-2010-0041-0003 on Publicly Available Consumer Product Safety Information Database, Michelle Witte (July 14, 2010).

What is so compelling about Ms. Witte's comment is the fact that other parents actually had the critical information that might have saved her child's life. Unfortunately, the information resided in a disorganized and scattered fashion on the internet – accessible only through an exhaustive search that no parent would ever likely undertake before making a purchase. Had a publicly accessible, easily searchable database existed, this death might have been avoided.

In other words, every time that a product is implicated in a consumer's injury or death, those who face a similar risk have an immediate need to be alerted to the product's dangers – as do manufacturers who may use this information to fix a product before any consumer is seriously injured or killed. In short, we need a mechanism that provides safety information as hazards emerge, not after they become tragedy. I believe the database will do that.[8]

II. Nord/Northup Alternative Proposal

As stated above, two of my colleagues, Commissioners Nancy Nord and Anne Northup, have raised a number of objections to the Commission's approach to implementing the database. In support of their position, they circulated both within the Commission and outside it, an alternative draft of a database rule.

I appreciate the care and attention my colleagues devoted to their proposal. I reviewed their proposal carefully prior to the Commission's vote on November 24 and wish to share my response to the most significant of their proposed changes. While I agreed with a number of their suggested changes, which were incorporated into the final rule,[9] I disagreed with many of them, as I explain below.

A. Nord/Northup Proposal: Reinstating § 6(b) through the "backdoor"

Unlike any other agency in the federal government, the CPSC is restricted in the safety information it can share with the public. The restrictions are imposed by section 6(b) of the CPSA.[10] Section 6(b) requires the Commission, not less than 15 days prior to

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[8] At this point, I feel a need to distinguish between "dangerous" products and "defective" ones because I think a number of commenters have missed this critical point. The database will be a repository of information about potentially *dangerous* products, some of which – but not all – may be *defective*. I make this point because some commenters seem to believe that the only reports of harm that should be permitted in the database are those where a product has been determined to be defective. That is incorrect. I believe that the database is, and should be, a place where consumers find news about products that present safety risks to them and their families irrespective of whether the Commission would necessarily write a safety standard or conduct a recall of the products. For example, consumer complaints that children have suffered diaper rash from a particular brand should be posted in the database even where the Commission lacks the data to determine whether the diaper brand presents hazards greater than those presented by other brands. For purposes of the database, it is enough that children suffer diaper rash for a consumer to file a report of harm. That fact alone is important both for parents of infants and for manufacturers of diapers. Parents will be alerted about the dangers of diaper rash, which can occasionally be severe. And manufacturers will have an incentive to develop diapers that produce fewer rashes.

[9] *See infra* note 61 and accompanying text.

[10] 15 U.S.C. §2055(b).

publicly disclosing information that would permit the public to ascertain readily the identity of a manufacturer or private labeler of a consumer product, to notify and provide a summary of the information to the manufacturer and to provide the manufacturer with a reasonable opportunity to submit comments to the Commission regarding such information. The section further requires the Commission to take reasonable steps to assure, prior to public disclosure of the information, that the information is accurate, and that its disclosure is fair in the circumstances and reasonably related to effectuating the purposes of the Act.

Implementing this mandate costs the agency substantial time and money[11] – and places the public at risk because complying with 6(b) procedures delays the release of critical safety information, sometimes for years. One of the most significant features of the database provisions in the CPSIA is the elimination of 6(b) procedures for the filing of reports of harm by members of the public. Although not as effective as simply repealing 6(b) – which I prefer – the elimination of 6(b) procedures for most of the database's operations represents a significant reform and means that the database will operate in a much more efficient and effective manner.

Unfortunately, as I read the Nord/Northup proposal, they would effectively reinstate many of the onerous 6(b) procedures – or worse. To understand this point, one needs to compare 6(b) requirements with those in my colleagues' proposal. As currently written, section 6(b) requires the Commission, prior to publicly disclosing manufacturer-specific information, to take "reasonable steps" to assure the information's accuracy. The reasonable steps the Commission takes to ensure accuracy are set forth in a CPSC interpretive rule.[12] The rule identifies the steps the Commission takes, but it does not require a formal agency investigation and determination that the information is accurate.

In sharp contrast, as I read the Nord/Northup proposal they would require the Commission actually to conduct an investigation, as opposed to taking reasonable steps, to determine whether the information submitted in a report of harm is free of material inaccuracy. So, what would suffice under current 6(b) procedures might well fall short under the Nord/Northup approach.[13] In short, their approach for determining accuracy for the database is at least as onerous, if not more so, as current law. And, it is, at best, a "backdoor" reinstatement of section 6(b) or, at worst, a requirement that the Commission do more than is required under current 6(b) procedures.

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[11] To pick one random example of section 6(b)'s unnecessary costs, if a Freedom of Information Act request seeks a document with the names of 50 manufacturers in it, the CPSC staff must send out 50 separate notices under 6(b) with the names of 49 manufacturers blanked out in each one. They must then analyze the response of each manufacturer prior to disclosing the information.

[12] 16 C.F.R. §1101.32.

[13] To pick an example, under the Commission's 6(b) rule, one reasonable step to ensure accuracy is sending the information identifying a manufacturer to the parents of a child involved in (or to an eyewitness of) a safety-related incident of the manufacturer's product to confirm the details of the incident. *See* 16 C.F.R. §1101.32.(a)(3). Under my colleagues' proposal, such confirmation would not be sufficient to include a report of harm in the database.

Needless to say, the Nord/Northup proposal conflicts with Congress's desire to simplify and streamline the database by eliminating 6(b) procedures from its processing of reports of harm. I repeat: CPSC is the only agency in the federal government burdened with 6(b) procedures, and to the extent Congress lifted this burden, the agency should embrace, not undermine, this welcome change in the law.

B. Nord/Northup Proposal: Excluding Legitimate Reports of Harm

1. Definition of "consumers"

Turning to the specifics of the Nord/Northup proposal, I note preliminarily that, under the CPSIA and section 1102.10 of the Commission's database rule, "consumers" may submit reports of harm about consumer products. Under the Commission's rule, the term "consumers" includes, but is not limited to:

> users of consumer products, family members, relatives, parents, guardians, friends, attorneys, investigators, professional engineers, agents of a user of a consumer product, and observers of the consumer products being used.

This provision has been revised since the Commission first proposed the database rule. It incorporates several categories previously placed in a separate subsection titled "other,"[14] such as "attorneys, investigators, professional engineers, [and] agents of a user of a consumer product." The Commission deleted the "other" subsection because many commenters misinterpreted the subsection as impermissibly adding groups to the list of possible submitters authorized in the CPSIA. These commenters argued that Congress explicitly spelled out those groups that it wished to have participate in the database – and no others.[15] I disagree with such a parsimonious and illogical interpretation, especially since Congress gave no indication that it wished to exclude reports from such key groups as professional safety engineers, safety investigators, and attorneys with law practices dedicated to safety issues.

Although I would have been comfortable retaining these groups in a separate "other" section, I have no objection to including them in the definition of "consumers" as the Commission has done in the final rule. I say this because the term "consumer" generally carries a broad meaning[16] and because it clearly seems to be the definition intended by

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[14] *See* Consumer Product Safety Commission, *Publicly Available Consumer Product Safety Information Database; Proposed Rule*, 75 Fed. Reg. 29156 (May 24, 2010) at §1102.10(a)(1).

[15] I am well aware that in one draft of the CPSIA, Congress included the term "other" only to exclude it in subsequent drafts. However, based on a plain meaning interpretation of the term "consumer," I am convinced that Congress excluded the term "other" because the term "consumer" encompassed any and all who wished to submit reports, and not because Congress wished to narrow the list of those who could submit reports. Moreover, if one assumed that groups explicitly mentioned in early drafts that got removed in subsequent drafts meant that those groups could not be eligible to submit reports of harm, one would have to exclude physicians, hospitals, coroners, police, and fire fighters as entities eligible to be submitters. Congress clearly intended no result so absurd.

[16] The Commission appropriately defines the term as "anyone who consumes or uses an economic good." *See* http://www.merriam-webster.com/dictionary/consumer (Merriam-Webster definition of the term

Congress.[17] In fact, if one looks at the broad range of CPSC regulations, one quickly sees that we identify groups as divergent as "children," "the elderly," and "the handicapped" as consumers.[18] Furthermore, as members of the business community and others constantly remind us, "we are all consumers." Among those who have made this point: the president of Apple Computers,[19] Senator Richard Shelby of Alabama,[20] and a Senior Vice President of the U.S. Chamber of Commerce.[21] To me, a fair summary of the term is that no one is just a consumer, but we are, in fact, all consumers.

My dissenting colleagues have proposed an extremely narrow definition of consumers that I believe has no basis in law or sound public policy. Their suggested interpretation is as follows:

> Consumers of the product about which a report of harm is submitted and family members or legal guardians *submitting firsthand knowledge on the consumer's behalf about a particular incident*.[22] (emphasis added).

Far too many groups would be excluded if we limited consumer submitters only to those who are consumers of the product or who have "firsthand knowledge."[23] To illustrate, I

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consumer is "one that consumes, one that utilizes economic goods"). These definitions are consistent with previous agency interpretations of the term. *See infra* note 18 and accompanying text.

[17] Senator Mark Pryor (D. Ark), Chairman, Subcommittee on Consumer Protection, Product Safety and Insurance, Committee on Commerce, Science and Transportation, to the Commission makes this point in a letter to the Commission:

> As one of the key authors of [the database] provision, I am very pleased that the Commission has crafted rules implementing Section 212 in a manner that will make critical product safety information available widely to members of the general public. In particular, I applaud the Commission's efforts to empower all consumers who have information regarding a product safety hazard to report the incident. While some Members of the Commission have sought to limit the ability of certain parties to provide information, a plain reading of the CPSIA supports the interpretation in the final rule as to who is eligible to submit reports to the Database. The clear Congressional intent behind this provision was to maximize reporting of product safety incidents and to make this information accessible to the general public as quickly as possible.

Letter from Honorable Mark Pryor to the Honorable Inez Tenenbaum, Chairman, U.S. Consumer Product Safety Commission (December 2, 2010).

[18] *See*, e.g., Consumer Product Safety Commission, *Policy on Establishing Priorities for Commission Action*, 16 C.F.R. 1009.8(c)(6).

[19] *See* Peter Lewis, *CNN Money.com*, "Tiny Apple Has Oversize Influence," January 19, 2006, *available at* http://money.cnn.com/2006/01/11/technology/apple_macworld. (According to Steve Jobs, Apple's President, "we're all consumers [at Apple] and we know what consumers like.")

[20] PBS Newshour, Interview with Senator Richard Shelby, March 16, 2010 ("But we're all consumers. We don't want anybody exploited in this country.") *available at* http://www.pbs.org/newshour/bb/business/jan-june10/shelby_03-16.html.

[21] Myron Brilliant, Senior Vice President, International Affairs, US Chamber of Commerce, at the conference "Twenty Years After the Fall of the Berlin Wall: Lessons learned and the Future of Reform, November 16, 2009, *available at* http://cipe-eurasia.org/articles/Brilliant.pdf. ("We're all consumers, whether we work for the government, whether we work in the private sector, whether we work in the media. We're all consumers not only of government actions, we're also consumers of private sector development, and that's something we always need to keep in the back of our mind.")

[22] Nord/Northup proposal, Section 1102.10(a)(1).

turn again to the tragedy of Danny Keysar, the young child who strangled in a twice-recalled crib at a day care center.[24] As I read my colleagues' proposal, Danny's parents would be barred from submitting a report to the database because they were not the consumers of the product.[25] And, needless to say, the consumer of the product, Danny, could not file a report because he was an infant and because he died while using the crib. Moreover, because neither parent was present, each lacked the "firsthand knowledge" required by my colleagues for them to file a report.

Setting aside the indignity and pain imposed by barring Danny's parents from filing a report of harm, my colleagues' approach simply cannot be justified by any language, direct or implied, in the CPSIA. Congress knew that the agency historically has accepted reports of injury, illness or death from anyone who had information to offer. Nothing in the statute or its legislative history suggests a contrary and narrower interpretation.

Moreover, I have two additional concerns regarding my colleagues' proposal. First, to demand that the Commission reject reports of harm not based on firsthand knowledge places an unjustified burden on the agency staff to review each report to determine which points are based on "firsthand knowledge" and which are not. Second, their reliance on such knowledge ignores years of accumulated research that demonstrates how unreliable firsthand eyewitness information can be.[26] I do not suggest that eyewitness information

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[23] As the Commission has carefully explained in the rule's preamble, firsthand knowledge as a requirement makes little sense:

> The plain statutory language does not require a submitter of a report of harm to have "firsthand knowledge." We have chosen an interpretation of "consumer" that comports with our experience in maintaining a database of consumer product incident reports. Historically, we have received reports of harm from any and all consumers in order to protect individuals who use consumer goods. Currently, parents, guardians, and family members are a major and important source of information collected for the most vulnerable segments of the population. In the most basic example, if the user of a consumer product is killed or seriously injured in the incident, or is an infant, he or she will be unable to enter the incident report. Parents, for example, may enter information related to consumer products used by their children, regardless of whether they personally witnessed the incident or purchased the product.

[24] *See supra*, note 6 and accompanying text.

[25] My colleague, Anne Northup, during our November 24th meeting, while not disputing this point, argued that the day care center would be a "consumer" under their definition and thus eligible to file a report of harm. Try as I might, I find no supporting language in my colleagues' proposal for such an interpretation. I grant that the owner of the day care center was the *owner* of the crib, but that does not make him or her the consumer of the crib under their approach. In fact, the only reasonable interpretation of my colleagues' definition is that the *consumer* would be the child who used the crib, not the daycare center that bought it. Moreover, even if I accepted her interpretation, it would still bar Danny's parents from filing a report of harm.

[26] *See*, e.g., Frederick D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stanford L. Rev. 969 (1977), Jennifer Scheer, *The Reliability of Eyewitness Reports: The Effect of Accurate and Inaccurate Information on Memory and Bias*, 34 Colgate J. of the Sciences (2001-2002) *available at* http://groups.colgate.edu/cjs/2002/psychology.htm, and Saul M Kassin, et. al, *The Accuracy-Confidence Correlation in Eyewitness Testimony: Limits and Extensions of the Retrospective Seal-Awareness Effect*, 61 J. of Personality and Social Psychology 698 (1991).

is always flawed, just that it is not always accurate – and second hand knowledge can often be as accurate, or more so, depending on how it is gathered and used.[27]

Demanding firsthand knowledge as my colleagues do would result in the Commission treating the database as though it were a court of law with a court's elaborate rules of evidence. But the database is not a court nor is there any suggestion in the statute that it should operate like one. Rather, it is an open storehouse of critical, rapidly emerging information that members of the public and the CPSC can sift through to find potentially dangerous products.

2. Definitions of Other Submitters

The CPSIA lists other possible submitters of reports of harm to the database:

- "local, state or federal agencies,"
- "health care professionals,"
- "child service providers," and
- "public safety entities."[28]

My colleagues would also substantially narrow the definitions of these categories of potential submitters. Here, for example, is the Commission's definition of "local, state, or federal government agencies" eligible to submit reports of harm --

> *Local, state, or federal agencies* including, but not limited to, local government agencies, school systems, social services, child protective services, state attorneys general, state agencies and all executive and independent federal agencies as defined in Title 5 of the United States Code;

Contrast this expansive definition with my colleagues' much narrower definition:

> *Local, state, or federal agencies* including municipal government agencies, school systems, social services, child protective services, state attorneys general, and all executive and independent federal agencies *who in their official capacity directly obtain verifiable information about a particular incident*; (emphasis added)

I find particularly unhelpful their suggested requirement that officials "*directly obtain verifiable information about a particular incident*." Nowhere do they define the term "verifiable information." I surmise that my colleagues would not insist that information actually be verified to be eligible for inclusion in the database, but am still left with several questions. How is the CPSC supposed to determine whether information is verifiable? In any given case, such a determination might require the expenditure of hundreds of staff hours and thousands of scarce agency dollars. Do my colleagues really

[27] In fact, almost all information that the Commission relies on in its decision making is second hand or third hand data.
[28] *See* §§ 6A(b)(1)(A)(i) – (v) of the CPSIA.

believe that Congress intended to place such a burden on a tiny agency like ours? More importantly, why should the agency have to make such a determination? Nothing in the CPSIA imposes such a requirement, and I can see no sound public policy reason for limiting submissions on this basis. To the contrary, such an onerous restriction may serve only to discourage sister agencies and others from submitting critical safety information. Congress intended the database to be user-friendly and navigable, not an obstacle course.

The problems with my colleagues' approach are compounded when one turns to their definition of the terms "health care professionals," "child service providers," and "public safety entities."[29] To illustrate, here is the Commission's definition of one of these terms, "health care professionals" –

> *Health care professionals* including, but not limited to, medical examiners, coroners, physicians, nurses, physician's assistants, hospitals, chiropractors and acupuncturists;

Again, contrast this definition with my colleagues' much more constricted approach:

> *Health care professionals* including medical examiners, coroners, physicians, physician's assistants, hospitals, and chiropractors *who in their professional capacity interact with an injured consumer and thereby obtain firsthand or personally verifiable information about a particular incident*; (emphasis added)

My colleagues propose the quoted language above not just for "health care professionals," but also for "child service providers" and "public safety entities." This is both confusing and troubling. They continue the requirement for firsthand knowledge, with all of the attendant problems attached to this approach. In the alternative, they permit reports of harm if the submitters "*in their professional capacity interact with an injured consumer and thereby obtain … personally verifiable information about a particular incident.*" (emphasis added).

All of a sudden, they have moved from the requirement that government agencies, as submitters of reports of harm, "directly obtain verifiable information" to a new requirement for other submitters such as health care professionals, child service providers and public safety entities that these groups, in their professional capacity, "interact with an injured consumer and thereby obtain personally verifiable information" about an incident. I fail to see why a submitter of a report of harm needs to "*directly obtain verifiable information*" in the case of government agencies, but needs to obtain "*personally verifiable information*" in the case of health care professionals, child service providers, and public safety entities – or for that matter, what the difference is between these two types of information. Such complexity hardly serves a useful public purpose, especially when none of the language or concepts my colleagues propose finds any basis in the CPSIA or in sound public policy.

[29] These groups are also explicitly identified as eligible to file reports of harm in the CPSIA. *See* §6A(b)(1)(1).

Moreover, by limiting reports to "injured consumers" my colleagues eliminate half of the database. In fact, the database is supposed to collect information about actual harms and risks of harm, i.e., potentially dangerous products where no injury has occurred. To limit reports only to injured consumers is at odds with the plain language of the statute.[30]

One final aspect of my colleagues' approach in this subsection with which I disagree is their dismissive view of engineers, attorneys, NGOs, consumer groups, and trade associations. More specifically, they question the value of reports of harm from groups such as attorneys or labor unions because, as one of my colleagues has asserted, these groups "may have their own reasons to 'salt' the database [in a manner different from] those of actual consumers with firsthand experience with a product."[31] To say the least, such an accusation is totally speculative. It certainly does not rest on evidence that any of these groups, including engineers or product safety investigators, have a reputation for reporting unreliable information.[32]

C. Nord/Northup Proposal: Onerous Requirements for Publishing Reports of Harm

According to the Commission's rule, in order for a report of harm to be posted in the database, submitters must provide a certain minimum amount of information.[33] That information is as follows:

1. A description of the consumer product,
2. The identity of the manufacturer or private labeler,
3. A description of the harm (including any risk of injury, illness or death)
4. The incident date (or approximate date),
5. The category of submitter (e.g., consumer or day care center),
6. Contact information of the submitter (which will not be published in the database),
7. Verification from the submitter that he or she has reviewed the report and that it is true and accurate to the best of the submitter's information, knowledge and belief, and
8. Consent to have the report of harm published.

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[30] In fairness to my colleagues, I note that in section 1102.6 of their proposal, they define the term "harm" to include the *risk* of injury, illness, or death, so it is clear that they understand the scope of the statutory definition. Why they then limit reports from various submitters only to those who have been injured is unclear to me.

[31] Nancy Nord, *Statement on the Commission Vote to Approve the Final Rule for the Publicly Available Consumer Product Safety Information Database*, November 24, 2010.

[32] To the contrary, current CPSC regulations (16 C.F.R. § 1101.32) specifically identify engineers as qualified persons outside the Commission who may conduct an investigation in order to meet the "reasonable steps to assure information is accurate" before releasing the information to the public under section 6(b) procedures. One wonders why engineers are good enough to assist in the release of data under section 6(b), but not section 6A.

[33] Section 1102.10(d) of the final rule.

To me, this list strikes a thoughtful balance between obtaining adequate information about a potentially dangerous product and demanding extraneous information that would discourage submitters from filing a report of harm. My colleagues' proposal, by contrast, imposes numerous additional and complex requirements for a report to be included in the database. Without addressing every change they propose, I will address two of the more troubling.

Description of the consumer product: Although the Commission's rule calls for a description of the consumer product, my colleagues go well beyond the simple requirements for identifying the consumer product contained in the Commission's rule. Among other requirements, they add the following:

> In addition then, a description of a consumer product shall include at least two of the following pieces of information: the name, including the brand name of the product (where that is different from the manufacturer or private labeler name), model serial number, date of manufacture (if known) or date code, UPC code, price paid, retailer, or any other descriptive information about the product.[34]

Both from a submitter's perspective and from the Commission's, such added complexity provides few benefits for the cost involved. How many consumers will know when a product is manufactured, or the date code, or the UPC code? Also, how many consumers are likely to know the price of a product months or perhaps years after purchase?

Simply reading through this list requires considerable effort and time. And then making sure that at least two of the newly mandated fields are filled out will prove unnecessarily daunting to many submitters, especially consumers. The only sure outcome from such a long list is that fewer consumers will complete reports of harm. As study after study has shown, the more fields in a form that are required, the higher the abandonment rate climbs.[35]

Identity of the victim: My colleagues would require that "the first and last name of every person whose injury is the subject of the report of harm" be included in every report of harm. This proposed requirement presents serious problems. Once again, it ignores the fact that, under the CPSIA, reports of harm include the "*risk* of injury, illness or death…" as well as *actual* injury, illness or death. Both the CPSIA and the Commission's rule permit reports of harm even though no one was injured. By contrast, my colleagues' approach would bar reports where no one was injured even though a serious risk was clearly identified – e.g., an exposed wire or a smoldering component.

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[34] Nord/Northup proposal, section 1102.10(d)(1) .

[35] The term "abandonment rate" refers to the rate at which consumers begin filling out a form but never complete it. *See*, e.g., Bogen, K, *The Effect of Questionnaire Length on Response Rates: A Review of the Literature* U.S. Census Bureau (1996); La Mar Adams & Darwin Gale, *Solving the Quandary Between Questionnaire Length and Response Rate in Educational Research*, Res. In Higher Education, Vol. 17, No. 3 (1982); Mirta Galesic & Michael Bosnjak, *Effects of Questionnaire Length on Participation and Indicators of Response Quality in a Web Survey*, Pub. Opinion Quarterly, Vol 73, No. 2 (Summer 2009); and Jeffrey Henning, *Maximizing Survey Completion Rates*, Voice of Vovici Blog, March 31, 2010.

Such an approach flies in the face of the clear language of the CPSIA and would dramatically reduce the number of reports the Commission could and should receive. Similarly, their approach ignores the fact that illnesses and the risk of illness are also legitimate items to report. [36]

Finally, my colleagues do not acknowledge that there may be instances where the submitter simply does not know the name of the injured consumer or does not wish to invade the privacy of the victim. While I agree that such information is useful, and I have no problem with *requesting* it, I object to *demanding* it in order for a report to be posted in the database.[37]

D. Nord/Northup Proposal: Applying Section 6(b) Inappropriately

Under the Commission's rule, submitters such as:

- professional engineers,
- product safety investigators,
- consumer advocates,
- trade associations,
- attorneys, and
- observers of a consumer product being used –

have the right to submit reports of harm under the procedures set out in the CPSIA. These procedures specifically exempt such reports from the onerous provisions of section 6(b) of the CPSA.[38] Under my colleagues' approach, however, these potential submitters are barred from filing reports of harm. To the contrary, my colleagues require any information received from these groups to slog through section 6(b) procedures in order to be published in the database – and then not as reports of harm, but only as "additional information" [39] presumably separate from the reports of harm.[40]

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[36] Again, notwithstanding my colleagues' recognition that the term "harm" extends to risks of harm, their proposal appears to ignore the point. *See supra* note 30.

[37] In fact, my colleagues would also require that the complete mailing address and either a telephone number or an email address of the victim be included in a report of harm in order for it to be published unless the submitter affirmatively states that the submitter was not able to obtain such information. In other words, the submitter seems obligated to search for such information as a condition to filing a report of harm. How many submitters are likely to engage in such extensive efforts simply to file a report of harm?

[38] *See supra* notes 10-13 and accompanying text for a discussion of the problems associated with section 6(b).

[39] As proposed by my colleagues, section 1102.18 of the rule would read as follows:

> § 1102.18. Additional Information
>
> In addition to reports of harm manufacturer comments and recall notices, the CPSC shall include in the Database any additional information it determines to be in the public interest, consistent with the requirements of section 6(a) and (b) of the CPSA. Under this heading, for example, the Commission could determine it to be in the public interest to publish specific product safety information received from professional engineers, product safety investigators, consumer advocates, trade associations, attorneys, or observers of a consumer product being used.

Again, I note that nothing in the CPSIA calls for such differential treatment with respect to these groups. One struggles to see a sound policy basis for such an arbitrary distinction between groups that seek to submit useful safety information. Are daycare workers, school officials, chiropractors or coroners inherently more reliable sources of safety information than professional engineers, product safety investigators, or attorneys?[41] I think not, and my colleagues have offered no evidence that this is so.

E. Nord/Northup Proposal: Undermining the Definition of "Materially Inaccurate Information"

Another of my disagreements with my colleagues resides in their treatment of the term "materially inaccurate information." I contrast the Commission's definition with theirs. The Commission defines the term as follows:

> *Materially inaccurate information in a report of harm* means information that is false or misleading, *and which is so substantial and important* as to affect a reasonable consumer's decision making about the product …. (emphasis added).

Inexplicably, my colleagues propose to delete the key words "*and which is so substantial and important...*" from the Commission's definition. I am troubled by the deletion of these words. In my view, they are necessary to make clear that trivial mistakes of limited or no relevance to a consumer's safety decisions cannot provide the basis for a determination that a report of harm is materially inaccurate.[42] Deleting these words substantially undermines the requirement of "materiality" from the definition. The net effect, of course, is to expand the number of successful manufacturers' claims challenging reports of harm as being "materially inaccurate." Under my colleagues' approach, even relatively insignificant errors in reports of harm may well lead to their suppression for the flimsiest of reasons.

In other words, professional engineers, product safety investigators, consumer advocates, trade associations, attorneys, or eyewitnesses to accidents would be considered unworthy of filing reports of harm directly to the database. Rather, they would have to have their submissions processed through the onerous 6(b) procedures of the CPSA.

[40] Section 6A(b)(3) calls for "additional information" to be processed through section 6(b) of the CPSA. As noted in the preamble to the Database rule, the Commission takes the position that information received from the above groups should be treated as reports of harm, not as "additional information." The Commission considers the category of "additional information" to include things such as internal CPSC reports, in-depth investigations, and product safety assessments, not reports of harm.

[41] For example, I believe that attorneys involved in product liability cases often have intimate knowledge of dangerous products that can be of immense assistance to the CPSC. To pick one instance, in 1978, an attorney named John Purtle, horrified at the disfigurement caused by the kickback from a chain saw to one of his clients, petitioned the CPSC to write a safety standard for this product. His petition led to strong action by the agency and to a dramatic improvement in chain saw safety.

[42] My colleagues would also delete these words in defining the term "materially inaccurate" with respect to comments filed by manufacturers or private labelers. This would present the same problems that I see with respect to reports of harm.

F. Whether the Commission May Delay the Publication of Reports of Harm or Manufacturer Comments to Investigate for Materially Inaccurate Information

When the Commission published its Notice of Proposed Rulemaking (NPR), we discussed procedures for dealing with "materially inaccurate information" in a way that created some confusion in the minds of a number of commenters. In the preamble to the proposed rule in the Federal Register, the Commission stated:

> We propose that if a claim of materially inaccurate information is timely submitted, the Commission may withhold the report of harm from publication until a determination is made regarding such claim. Absent such a determination, the Commission will generally publish reports of harm on the tenth business day after transmitting a report of harm.[43]

Upon reflection, I have concluded that the preamble language could have been clearer. Only after I read a number of comments on the proposed rule did I see how it could be misconstrued. The Commission's main point was to emphasize the need for comments to be filed in a timely fashion – before the expiration of the ten day period between the date of transmission of the report of harm to the manufacturer and the date of publication. The Commission did not mean to imply that it would routinely withhold publishing the report of harm beyond ten business days after transmitting the report to the manufacturer in order to make a determination with respect to a claim of material inaccuracy.[44]

In fact, even if the Commission wished to withhold publishing reports of harm to investigate them for material inaccuracy, the statute simply does not allow it. Here is the statutory mandate:

> *Reports*. – Except as provided in paragraph (4)(A), if the Commission receives a report [of harm,] the Commission shall make the report available in the database not later than the 10th business day after the Commission transmits the report [to the manufacturer or private labeler].[45]

Turning to the language in (4)(A), one sees that it provides the Commission the ability to withhold reports of harm only in one limited circumstance, viz., where the Commission has made a determination of material inaccuracy prior to the expiration of the ten business day time period:

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[43] 75 Fed. Reg. 29156, at 29170. In fact, the text of the proposed rule had no such exception language. *See* 75 Fed. Reg. at 29181.

[44] As the Commissioner who offered the word "generally" to the Commission's Notice of Proposed Rulemaking, I plead guilty to inartful wording. My thought when I proposed adding the word was to address situations like the massive snowstorms that crippled the D.C. area in February 2010 where the Commission could not meet a statutory deadline because of overwhelming events that were beyond the agency's control. Upon checking, I now understand that such days would not be "business days" under the statute, so my concern was misplaced as well as potentially misleading.

[45] §6A(c)(3)(A) of the CPSIA.

(4)(A) Inaccurate information in reports and comments received –

If, prior, to making a report [of harm] or a comment described in paragraph (2) of this subsection available in the database, the Commission determines that the information in such report or comment is materially inaccurate, the Commission shall –

(i) decline to add the materially inaccurate information to the database;
(ii) correct the materially inaccurate information in the report or comment and add the report or comment to the database; or
(iii) add information to correct inaccurate information in the database.[46]

As set forth in this subsection, the Commission's only discretion to withhold publication is ***if, prior to publishing a report of harm or comment, the Commission actually makes a determination of material inaccuracy.*** My colleagues incorrectly interpret these words to permit the Commission to delay publishing a report of harm for an indefinite period while it conducts an accuracy investigation. To say the least, this departs dramatically from the statute's plain meaning and, in effect, rewrites the law – an approach I find unconvincing. In short, it seems to me that my colleagues argue what they would <u>like</u> the statute to say, but they fail to address what it <u>actually</u> says.

Commissioner Northup makes one additional argument that deserves to be addressed regarding the Commission's discretion to withhold reports from publication.[47] She points out that section (c)(2)(C),the subsection that addresses confidentiality issues, carries conditional language with respect to publishing reports of harm in a manner somewhat similar to subsection (c)(4)(A) and reaches the conclusion that Congress intended the two sections to be treated similarly. In both cases, this would mean having the Commission withhold reports of harm from publication while issues of confidentiality and material inaccuracy are resolved. I disagree.

First, I note that the issue of confidentiality versus material inaccuracy that my colleague raises is hypothetical at best. Congress surely understood that the number of confidentiality claims likely to be filed with the Commission will be few and far between. It is self evident that consumers and other submitters of reports of harm are extremely unlikely to have access to confidential business information. In fact, in the almost forty years that the Commission has been in existence, the number of confidentiality claims filed with the agency about the reports of injury and death that it collects can be counted on one hand.[48] By contrast, challenges filed annually with the Commission under section 6(b) procedures number in the thousands. Accordingly, Congress understood that the

[46] §6A(c)(4)(A) of the CPSIA.
[47] Statement of Commissioner Anne M. Northup on the Final Rule Implementing a Publicly Available Consumer Product Safety Information Database, *available at* http://www.cpsc.gov/PR/northup11242010.pdf.
[48] If there were confidentiality issues in such reports, we would have heard them because all reports that identify a manufacturer are routinely sent to the manufacturer in accordance with section 6(b) of the CPSA.

resources required to address confidentiality claims versus those needed for material inaccuracy challenges are substantially different, calling for different approaches in dealing with the two types of challenges.

Second, the practical implications of addressing confidentiality claims versus material inaccuracy claims also call for different approaches. If the Commission were to publish information claimed to be confidential before it made a determination of its validity, it would destroy the claim – effectively rendering the process meaningless.[49]

G. Implications of Withholding Information While it is Investigated for Material Inaccuracy

Congress could have insisted that all reports of harm instantly be posted to the CPSC database without any assessment of their accuracy – as is the case with the National Highway Traffic Safety Administration's (NHTSA) database,[50] the government database upon which the CPSC's database is closely modeled. Conversely, the legislature could have required multiyear elaborate FBI-type investigations to ensure that no inaccurate information would ever be posted. Given NHTSA's success in operating an open, unfiltered forum that requires neither accuracy investigations nor disclaimers, one might conclude that such a streamlined structure would work well at the CPSC. Congress, however, clearly preferred a more nuanced approach for the Commission – one that incorporated several measures of due process for manufacturers and private labelers. Because I recognize the potential for some inaccurate reports to find their way into the database, I accept the inclusion of these due process measures. That said, these due process measures such as permitting manufacturers to have their comments published along with reports of harm and the strong disclaimer placed within every report of harm should dramatically reduce the potential for any inaccuracies to mislead or cause harm.

Turning to my colleagues' proposal, I note that they repeatedly express great concern about the potential harm from the publication of inaccurate information. Because of this, they insist that no report of harm be published without a Commission investigation and determination that the report is free of material inaccuracy.[51] However, I find no acknowledgement that their insistence on embargoing information while it is investigated carries any costs or presents any threat to public health and safety. To the contrary, the only cost they seem to find unacceptable is the cost to manufacturers of uninvestigated

[49] In fact, under section (c)(2)(C), a manufacturer contesting the Commission's determination that a manufacturer's claim of confidentiality is invalid must file an action in federal district court seeking removal of the contested information. No such provision applies to contested claims of material inaccuracy. Moreover, if one were to buy the argument that the conditional language in the two provisions of law has to be read the same way – and I reject such an argument – the most reasonable interpretation of the plain meaning of these sections would be that the Commission lacks the discretion to withhold publishing reports of harm when challenged on a confidentiality basis beyond the ten day statutory period.

[50] *See* www.safercar.gov to view NHTSA's database.

[51] Given this, I wonder whether they would support an amendment to the CPSIA that eliminates the statutory disclaimer that the Commission does not guarantee the accuracy of the information in the report of harm. Perhaps it could be replaced with a highly visible statement on each page certifying that the report of harm has been investigated and found to contain no known materially inaccurate information.

reports of harm. One of my colleagues decries the possibility that the Commission will develop a "post it and forget it" approach with respect to reports of harm that have been published in the database.[52] Yet, she turns a blind eye to the much more likely possibility that a "submit it and forget it" approach would occur with respect to reports never published because of her insistence on prior accuracy investigations.

If, as most observers predict, the Commission receives roughly the same number of reports of harm to the database as the number of consumer complaints we currently receive, the agency will process roughly 10,000-15,000 reports annually.[53] Further, if the agency receives claims of material inaccuracy for only half of the reports, the resource implications of investigating each of these claims of materially inaccurate information will be overwhelming, ensuring that few reports of harm will ever see the light of day.

Even if I thought it legally permissible under the CPSIA to embargo information while we investigated accuracy challenges, I would still disagree with my colleagues' position that the agency should do so. Maybe if CPSC had twenty times the staff we currently have, and if we could ask everyone using the product at issue to stop using it while we investigated, I might find their proposal more persuasive. In the real world, however, people's lives, limbs, and well-being are on the line every day, every week, every month and every year that information sits unpublished while it is investigated. That is a risk I am unwilling to take – and it is most certainly not a risk that Congress intended for us to visit upon the heads of American consumers.

In other words, my colleagues call for the impractical, if not the impossible. They insist that the agency withhold reports of harm while the reports are investigated, ignoring the fact that this cannot be done in any reasonable time frame or within the Commission's tiny budget. Accordingly, they should know that a vast stockpile of uninvestigated reports is likely to languish for months or even years as ever more challenged reports are placed in the "to do" dustbin each year.

H. Whether Manufacturers Are Likely to File False Comments

In addition to the specific points of disagreement with my colleagues' proposal, I have one overarching objection. Nowhere do I see any recognition from them that any manufacturers might falsely challenge reports of harm simply to delay or suppress the publication of such reports. Evidently in my colleagues' eyes, the only groups capable of filing false statements are those who file reports of harm, not manufacturers filing false comments to mislead the public into believing that a dangerous product is harmless. Yet, as anyone who has studied the history of corporate misconduct in the United States knows, the marketplace is littered with the bodies of citizens injured, sickened, or killed by so-called "benign" products like tobacco, lead and asbestos that manufacturers lied

[52] Andrew Martin, quoting Commissioner Nord in *Partisan Rift Mires Product Safety Database Plan*, N.Y. Times, Nov. 23, 2010.
[53] NHTSA's database currently receives roughly 35,000 incident reports annually.

about for years.[54] And by uncritically accepting that the only groups capable of falsehoods are those who submit reports of harm, my colleagues too quickly conclude that the best way to manage the database is to withhold information contained in such reports whenever they are challenged. In contrast, if one believes that some manufacturers are equally likely to try to suppress the publication of reports of harm by filing false comments, one realizes that withholding reports of harm serves only to delay getting vital safety information to the public. One then sees the wisdom of Congress's view that the best way to truth is through the marketplace of ideas. In the case of the database, this means letting members of the public read both sides of a report of harm and drawing their own conclusions. As Justice Louis Brandeis sagely noted, "sunlight is … the best of disinfectants."[55]

III. **Commissioner Northup's Procedural Objections**

In a further statement on the final database rule, my colleague, Anne Northup, on January 10, 2011, issued a strongly worded attack on the Commission's approach to promulgating the database rule that all but openly invites a legal challenge to the rule. I find her accusations to be both incorrect[56] and unfounded.

A. Whether the Commission Gave Adequate Consideration to the Nord/Northup Alternative Proposal

My colleague complains that the Commission failed to give adequate consideration to her alternative proposal in violation of the Administrative Procedure Act as called for in decisions like *Chamber of Commerce v. Securities and Exchange Commission*, 412 F.3d 133 (D.C. Cir. 2005) and *American Gas Ass'n v Federal Energy Regulatory Commission*, 593 F. 3d 14 (D.C. Cir. 2010). In both of those cases, the D.C. Circuit invalidated decisions of regulatory agencies where the majority failed to consider alternative proposals offered by dissenting Commissioners.[57]

As a starting point, I find my colleague's claim to be baffling given that the five Commissioners spent much, if not most, of our November 24th public decisional meeting debating the merits of the Nord/Northup proposal. How anyone, therefore, could contend that the Commission failed to acknowledge and consider the alternative proposal is beyond me.

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[54] For a number of examples of such misconduct, *see* David Michaels, "Doubt is their Product," *Scientific American*, June 2005, Vol. 292 (6). *See also*, David Michaels, *Doubt is Their Product* (2008) [expanded discussion of Scientific American article documenting numerous instances of corporate lies about the safety of various products].

[55] Louis Brandeis, *What Publicity Can Do*, Harper's Weekly (1913).

[56] For example Commissioner Northup's claim that the database has cost or will cost $29 million is flat wrong. The actual cost of the database is much less. The figure she cites is the total cost of upgrading the Commission's entire IT structure over the course of three years, only a small fraction of which will be spent on the database. In fact, according to CPSC staff, the cost of the database is only a small part of the $9 million spent on the first phase of the IT modernization.

[57] As noted by the court in the *American Gas Ass'n* case, although the majority "is not required to agree with arguments raised by a dissenting Commissioner… it must, at a minimum, acknowledge and consider them." The record clearly demonstrates that the CPSC majority has done both in this matter.

To counter this obvious direct evidence contradicting her claim, my colleague resorts to a novel argument which, to say the least, I find singularly unpersuasive. She insists that because the majority Commissioners failed to order our staffs to join with senior CPSC staff to meet with the minority Commissioners' staff to discuss the particulars of the Nord/Northup proposal, we did not adequately consider their proposal.[58] As I read her statement, she claims a right to have detailed "line by line" discussions of her alternative proposal in a setting that she concedes has often been "tedious"[59] when done in previous agency rulemaking. With all due respect, I fail to see even a hint in any court ruling on point that has gone so far as to mandate that Commissioners require their staffs and senior agency staff to attend endless meetings to discuss alternative proposed rules in order to comply with the APA requirement for adequate consideration of such proposals.[60]

What the courts require is a thorough consideration of my colleagues' alternative proposal. As Chairman Tenenbaum and I discussed at some length during the Commission's November 24 meeting – and which I have fully explained in this statement – the majority carefully considered every major point raised in my colleagues' proposal. Moreover, although Commissioner Northup never acknowledges it, the majority incorporated in the final rule a number of points from the Nord/Northup proposal – which could not have occurred had we ignored their views.[61] As the courts have made clear, she has the right to have us consider her proposal, but she has no right to have us agree with it.

Let me be clear: I have always been willing and delighted to have my staff meet to discuss proposals from any of my colleagues. In this case, however, both of my colleagues made perfectly clear from the moment they published their proposal and disseminated it across the country that they demanded wholesale changes in the Commission's approach that they knew the majority would never agree to. Under such a circumstance, I hope that, as an independent, conscientious commissioner, I am

[58] The meetings Commissioner Northup calls for are staff meetings, not meetings among the Commissioners – the actual decision makers. As she knows, the Commissioners did meet and consider the alternative proposal on November 24. I see nothing in the case law that calls for staff meetings. Of course, nothing prevented Commissioner Northup from asking to meet one-on-one with me to discuss the alternative proposal – a request that I would have honored, but never received.

[59] In her statement, she describes the review of pending items in previous staff meetings as "line by line in a tedious yet deliberative fashion." Given the immense distance between the majority's approach and my colleagues, a line-by-line review would certainly have been tedious, but it would not have been productive.

[60] Although Commissioner Northup does not mention it, various one-on-one meetings between majority and minority staff in the weeks prior to the November 24 meeting about the alternative proposal did occur. Based on the reports from those meetings, I reasonably concluded that elaborate, lengthy meetings involving large numbers of agency staff would not have resolved our differences and would have wasted scarce agency resources.

[61] By my count, the majority adopted at least seven recommended changes from the Nord/Northup alternative proposal in the Commission's final rule, including the deletion of a one-year cut-off for comments from manufacturers. No surprise, however, we did not adopt most of their major recommendations. The reason is simple: we strongly disagreed with them. That, however, does not mean we did not consider them.

permitted, after carefully considering their proposal at length and in good faith, to exercise my own judgment about how I approach policy making, including when I think pre-decisional staff meetings are worthwhile and when they are not.

B. Whether the Database Rule Should be Re-Proposed

Commissioner Northup argues that the Commission needed to re-propose the database rule because of her conclusion that the agency reversed its position on the ten-day deadline in section 6A(c)(3)(A) of the CPSIA. As I have discussed above,[62] I believe that the language in the Commission's Notice of Proposed Rulemaking (NPR) may have created some confusion in the minds of some commenters, but that is a far and distant cry from my colleague's claim that the agency reversed its position, thereby creating a need for re-proposal.

As I understand the Administrative Procedure Act, an agency conducting notice-and-comment rulemaking must publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Long Island Care at Home, Ltd. v. Coke*¸ 551 U.S. 158, 174 (2007). As Justice Breyer noted in this case, "[t]he Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be a 'logical outgrowth' of the rule proposed. [citations omitted] The object, in short, is one of fair notice." *Id.* Fair notice does not require an agency to adopt the precise rule that it proposed so long as any changes are "reasonably foreseeable." *Id.*, citing *Arizona Public Serv. Co. v. EPA*, 211 F. 3d 1280, 1299-1300 (D.C. Cir. 2000).

A need to re-propose arises when an agency makes a complete about face and changes course from the NPR to the final rule without notice to the public. As one court put it, agencies may not "use the rulemaking process to pull a surprise switcheroo on regulated entities." *Environmental Integrity Project v EPA*, 925 F. 3d 992, 996 (D.C. Cir. 2005).

No surprise switcheroo occurred in this case. To the contrary, as I discussed during the Commission's meeting on November 24, 2010, the Commission long ago explicitly invited comments about its authority to withhold a report of harm from the database if a manufacturer claimed the report contained materially inaccurate or confidential information – the very issue on which my colleague claims we reversed course.[63] In fact, the database rule, as actually proposed in the Federal Register, contained only one specific scenario where the ten-day deadline for publishing reports of harm would not apply – if "the Commission determines a report of harm misidentifies or fails to identify

[62] *See supra* notes 43-46 and accompanying text.

[63] On January 11-12, 2010, the Commission hosted an open workshop to discuss implementation of the database with all interested members of the public. We specifically invited comments from participants and other interested parties on the issue of our authority to withhold information in reports of harm in response to comments from manufacturers. 74 Fed. Reg 68055 (December 22, 2009).

all manufacturers or private labelers."[64] Clearly, the Commission made no switch with respect to that.[65]

In short, the Commission has been clear throughout the entire process of considering the database that, absent a prior determination of material inaccuracy, we generally intended to publish reports of harm within the ten-day deadline as a matter of policy. Nothing about that position changed between the NPR and the final rule. The only shift in position, if one even occurred, is that the Commission, upon consideration, concluded that the CPSIA mandated as a matter of law the position that we had already indicated we planned to adopt as a matter of policy. In other words, we previously said "We're going to stick to the ten day rule." Now, we are saying "We're going to stick to the ten day rule because we have to." Despite my colleague's attempt to frame it as such, that is not a 180 degree shift. It is just a clarification of what had been under consideration all along. The Administrative Procedure Act clearly permits this. If agencies could not modify rules after proposing them, one puzzles about why they are proposed in the first place. As one court has said,

> The law does not require that every alteration in a proposed rule be reissued for notice and comment. If that were the case, an agency could "learn from the comments on its proposal only at the peril of" subjecting itself to rulemaking without end.[66]

The Commission's decision will come as no surprise to the commenters to the proposed rule. In fact, most of the commenters voiced dissatisfaction with the Commission's intention to stick to the ten day time period as announced in the NPR, so our holding firm on this point, although it may not please everyone, will surprise no one. Moreover, speaking only for myself, my revised thinking on the Commission's legal authority under the CPSIA came about as a result of reading the comments on the ten day period. It would be strange indeed to argue that members of the public will claim surprise that the Commission plans to implement the ten day rule. The only change, if any, is our more specific explanation for why we plan to stay with the rule.

C. Regulatory Flexibility Analysis: Avoidance of Duplicative or Unnecessary Analyses

The impact of any law or regulation on a specific segment of our economy is a difficult thing to measure retrospectively let alone prospectively. When agencies, as required by the Regulatory Flexibility Act ("RFA"),[67] undertake the difficult, but required, task of reviewing proposed rules for their potential impact on small entities, we rely on the

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[64] 75 Fed. Reg. 29181 (May 24, 2010) at §1102.28(b).

[65] Any report of harm that misidentified or failed to identify all manufacturers or private labelers would not meet the minimum statutory requirements for a report of harm, and thus would not be eligible for publishing.

[66] *International Harvester Co. v Ruckelshaus*, 478 F.2d. 615, 632 (D.C. Cir. 1973). *See also, Trans-Pacific Freight Conference v. Federal Maritime Comm'n*, 650 F. 2d 1235, 1249 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 984, 101 S. Ct. 2315 (1981) and *South Terminal Corp. v. EPA*, 504 F. 2d 646, 659 (1st Cir. 1974).

[67] 5 U.S.C. §§ 601 - 612.

considered opinions of professional economists and whatever hard data is available. Accordingly, I am surprised by my colleague's entirely conclusory assertion that the agency failed to meet our requirements under the RFA when the hard data indicates otherwise.

Section 605(b) of the RFA is subtitled "Avoidance of duplicative or unnecessary analyses."[68] This section states that the RFA's requirement[69] to perform an initial regulatory flexibility analysis describing the impact of a proposed rule on small entities is *not* required if the head of an agency reasonably certifies that the rule in question will not, if promulgated, have a significant economic impact on a substantial number of small entities. When the Commission released its briefing package to the public on March 31, 2010, it included the view of the agency's Directorate for Economic Analysis.[70] This analysis concluded that based on the number of incident reports currently received by the Commission (approximately 15,000), the probability of most small entities receiving even one incident report as a result of the database was "quite low."[71] When the Commission approved the proposed database rule and published it in the Federal Register on May 24, 2010, we noted that we did not believe that the rule would have a significant economic impact on a substantial number of entities, but requested comments and additional information on the topic from the public.[72] The Commission received a single comment on the point from the International Association of Amusement Parks and Attractions.[73] The comment noted, without supplying economy-wide data or data specific to its membership, that it disagreed with the Commission's conclusion regarding the need for an initial regulatory flexibility analysis. It's hard to see how this lone comment provides any basis for changing the Commission's assessment that an RFA was not required.

While Commissioner Northup writes that "[t]he best information the agency has indicates that small businesses will face significant costs registering for the business portal, preparing to receive reports of harm from the agency, and planning how to reply to such reports of harm," she neither cites information to support her assertion nor provides it. When the Commission issued the proposed Final Rule, it released the agency's Directorate for Economic Analysis' second review of the issue.[74] This second memo restated the conclusion that the impact was unlikely to be significant to a substantial number of entities and provided a more in-depth explanation of this conclusion, including an analysis of the available statistical data and an examination of the differences between

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[68] 5 U.S.C. § 605(b).
[69] 5 U.S.C. § 603.
[70] Attachment A of the Proposed Rule on the Publicly Available Consumer Product Information Database, *available at:* http://www.cpsc.gov/library/foia/foia10/brief/databasenpr.pdf. (March 26, 2010).
[71] *Id.* at page 58.
[72] 75 Fed. Reg. at 29175-76 (May 24, 2010).
[73] Comment No. "CPSC-2010-0041" *available at*: http://www.cpsc.gov/library/foia/foia11/pubcom/commCPRMS.pdf. According to its website, the "IAAPA is the largest international trade association for permanently situated amusement facilities worldwide and is dedicated to the preservation and prosperity of the amusement industry." *See* http://www.iaapa.org/aboutus/facts/.
[74] Tab B of the Draft Final Rule on the Publicly Available Consumer Product Information Database *available at:* http://www.cpsc.gov/library/foia/foia11/brief/publicdb.pdf. (Oct. 1, 2010).

the types of entity (manufacturer, retailer, or wholesaler) that might choose to respond.[75] In the Final Rule, the Commission explained why we chose to certify that the § 605(b) exception applied and also responded to the single comment received.[76] The record belies the suggestion that these issues were not fully addressed.

In her statement, my colleague apparently is concerned with the most difficult of all impacts to analyze – reputational harm to a company whose product is mentioned in a report of harm. Although she implies that her alternative rule would have addressed this issue she fails to provide specifics as to how it would accomplish such a task without simply reverting to a pre-CPSIA status quo where § 6(b) significantly delayed or functionally prevented the release of critical product safety to the public.[77] On this issue, too, the Commission's record speaks for itself, as we examined the issue of reputational harm in a thoughtful and serious manner.[78] The analysis reviewed a number of studies that have been performed on the subject of reputational harm due to recalls with respect to public companies through the prism of the database rule and reached a conclusion that it would be unlikely that the reputational impact would be significant on a substantial number of entities. Though my colleague may disagree with the thoughtful and detailed analysis provided to the Commission by the professional CPSC staff that does not make the analysis "cursory" or "conclusory." It simply means the staff's analysis does not comport with her opinion.

Finally, a footnote in the October 1, 2010 economic analysis memo explains rather succinctly the importance of the database and a point that I am saddened to note does not appear in my colleague's statement on the matter:

> In a well functioning market, these reputational effects can be beneficial to consumers and can promote safety. To the extent that the Database provides useful and accurate information about injuries involving consumer products, it may allow some consumers to make more informed product choices. Consumer welfare may increase if consumers who want to buy safer products are able to use the Database to do so. Moreover, the concomitant reduction in demand for the apparently less safe products, by having a negative impact on the businesses producing the less safe products, may encourage manufacturers to improve the safety of their products.[79]

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[75] For example, the memo states: "Even if an average small manufacturer received and responded to 10 reports of harm during the year, the cost still would be considerably less than one-tenth of one percent of the value of shipments." *Id.* at page 6. Further, the memorandum notes that as a technical matter when the possible impacts of a rule are due to an indirect effect (such as here where no entity is *required* to respond) the agency is not required to conduct a regulatory flexibility analysis. *See* Office of Advocacy of the Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, May 2003, p. 20. Nevertheless, the Commission chose to solicit comments on the topic of whether an initial regulatory flexibility analysis was necessary.

[76] 75 Fed. Reg. at 76866-67 (Dec. 9, 2010).

[77] 15 U.S.C. § 2055(b). *See supra* notes 10-13and accompanying text.

[78] Tab B of the Draft Final Rule on the Publicly Available Consumer Product Information Database *available at:* http://www.cpsc.gov/library/foia/foia11/brief/publicdb.pdf. (Oct. 1, 2010) at page 7.

[79] *Id.* at page 7, fn 7.

This is not to say that there is no *possibility* of reputational harm because of a materially inaccurate report of harm in the database that is not addressed prior to the report being posted in the database. Yet, I quote the above because when addressing the real world effects of the database only from the economic perspective of a manufacturer, the essence of the database's purpose – to protect consumers from dangerous products – seems forgotten.

Conclusion

To me, one of the most regrettable aspects of the debate on the database is the refusal of those objecting to the Commission's rule to permit consumers to make their own decisions free from government interference. Instead, we see an insistence that consumers cannot be trusted with vital safety information until the government has embargoed it, processed it, pre-approved it, and then doled it out for public consumption. In other words, my colleagues and others would have the CPSC be the National Data Nanny. I, for one, have greater faith in the American public and applaud the Commission's vote to move forward with a comprehensive and vigorous database.