U.S. CONSUMER PRODUCT SAFETY COMMISSION
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Statement of Commissioner Robert S. Adler on a Final Rule to Substitute the Term "Representative" for "Random" in the Commission's Continued Testing Rule for Children's Products

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On July 12, 2012, the Consumer Product Safety Commission deadlocked 2-2 on a rule that would have substituted a definition of the term "representative" sample for the term "random" sample previously enacted in 2008 in the Consumer Product Safety Improvement Act (CPSIA). This vote occurred as a result of the recent passage of Public Law 112-28 which directed the Commission to make this substitution to ease the third-party testing requirements mandated in CPSIA.

I am disappointed that the Commission's vote has resulted in depriving manufacturers of the guidance they deserve in order to comply with a law designed to protect children. Sadly, because of this vote, manufacturers may have to devote more resources to ensure their compliance with the law than they otherwise would have expended. I cannot see this as a victory for industry – or consumers.

Background

Passed on August 12, 2011, Public Law 112-28 (P.L. 112-28) amended CPSIA and required a number of actions by the Commission. Most relevant to this discussion was changing the word "random" to the word "representative" in the continued testing section of the law.[1]

There is little doubt that the reason for the change from "random" to "representative" in P.L. 112-28 was the regulated community's objections to the Commission's proposed

[1] 15 U.S.C. § 2063(i)(2)(B).

definition of "random" in its Notice of Proposed Rulemaking for Testing and Certification.[2] The original definition of "random" stated, among other things:

> Each manufacturer must select samples for periodic testing by using a process that assigns each sample in the production population an equal probability of being selected.

Many manufacturers believed this definition was too mathematically rigid and would create production issues. Foreshadowing Congress' later action in P.L. 112-28, some commenters even suggested the Commission use the concept of a "representative" sample in the definition.[3]

The Costs of Deadlock

What is most disappointing about the Commission being prevented from completing its Testing and Certification rule[4] with respect to the term "representative" is that my colleagues' objection purportedly focuses on the burden placed on children's product manufacturers. [5] Yet, the change of "random" to "representative" is a burden *reducing* change. Therefore, finalizing the rule would have provided the opportunity for firms to decide for themselves the best method of selecting samples to assist them in ensuring continued compliance. In other words, we would provide more, not less, discretion to manufacturers. What's more they would have had seven months to make important decisions about how to test. Now, they have been left in limbo.

Ironically, almost all the comments received that discussed the original definition of "random" complained about how difficult and costly it would be to comply with such a definition. This rule answered those complaints. Further, almost all of the comments received on the new definition were in favor of the change. I believe my colleagues have achieved a pyrrhic victory and have succeeded only in slowing down progress that would benefit both consumers and children's product manufacturers.

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[2] *See* 75 Fed. Reg. 28336 (May 20, 2010). Discussion of the proposed § 1107.22 is at 75 Fed. Reg. 28340, 28349-50. The language of the proposed rule itself can be found at 75 Fed. Reg. 28365.

[3] *See e.g.*: Toys"R"Us, Inc. Comment number CPSC-2010-0038-0036 at: www.Regulations.gov.

[4] 16 CFR 1107 *Final Rule on Testing and Labeling Pertaining to Product Certification* ("Testing and Certification rule").

[5] As far as I can tell, my colleagues who voted against the final rule did not take issue with the actual proposed definition of "representative." *See* Draft Record of Commission Action (July 12, 2012) available at: http://www.cpsc.gov/library/foia/ballot/ballot12/repsample.pdf, and *Statement of Commissioner Nancy Nord on the Commission's Vote on Representative Samples for Periodic Testing of Children's Products*, available at: http://www.cpsc.gov/pr/nord07132012.pdf.

Recordkeeping

My colleagues' main complaint is the inclusion of the following words recommended by CPSC staff to document manufacturer's compliance with the statute's recordkeeping requirements:

> the procedure used to select the product samples for periodic testing and the basis for inferring the compliance of the product manufactured during the periodic testing interval from the results of the tested samples.[6]

In other words, children's product manufacturers are asked to write down: "how did you choose this sample and why?" As a starting point, whether or not the CPSC included this requirement, it would be an essential business practice for manufacturers to keep such a record. More relevant, it is hard to fathom how a responsible law enforcement agency such as the CPSC would not require this information be written down somewhere.

CPSC staff's explanation for the benefit to the public bears quoting:

> Because failure in the certification system of children's products could occur in many ways, recordkeeping can provide data to help identify the source of the failure. A safety benefit of the recordkeeping requirement is that, if noncompliant products are found in the marketplace, information is readily available that might help the manufacturer and the CPSC determine how such noncompliance occurred and its extent. Requiring manufacturers to provide a rationale for why their samples were chosen for periodic testing may help determine whether that rationale could have been a contributing factor in the incidence of noncompliant children's products being introduced into commerce.[7]

What needs to be emphasized here is the significant resource benefit to the manufacturer should it have to undertake a recall: the firm will be much better positioned to isolate the problem group of its product as opposed to having to potentially remove its entire line from the market because it could not determine where or how the problem arose. In fact, this seems to be a useful business practice for all concerned, so I remain puzzled as to how this will wreak such havoc on the children's product manufacturing community that we must deprive them of the guidance provided by the final rule.

Moreover, I find myself perplexed by the objection that this requirement will add unnecessary costs to manufacturers. In fact, as my colleague Commissioner Nord

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[6] Proposed 1107.21(f) at 75 Fed. Reg. 28365 (May 20, 2010).

[7] *Final Rule: Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products*, response 19 at page 28, *available at:* http://www.cpsc.gov/library/foia/foia12/brief/labelfinal.pdf.

acknowledges, the clear mandate for recordkeeping in the Testing and Certification Rule to which this provision would be added already requires records that show the tests to be conducted, the intervals at which the tests will be conducted and the number of samples tested. In addition, all periodic testing plans must demonstrate with a high degree of assurance that untested children's products comply with CPSC children's safety rules. Therefore, my colleague concludes, there is no need for additional recordkeeping since demonstrating the required high degree of assurance should satisfy any need the agency might have for documenting the procedure used to select representative samples for testing.

Of course, if my colleague is correct, the extra costs for documenting a manufacturer's plan surely must be extremely small since the company would already have it essentially in place and be following it. On the other hand, she nowhere acknowledges that the cost to a law enforcement agent to understand how a manufacturer produced noncomplying goods would be considerable without the ability to see the manufacturer's procedure in writing. To repeat: without such a written procedure, a manufacturer itself might face substantial costs in tracking down how it fell short in meeting its own quality control requirements. In short, the Commission's requirement is both low cost and helpful to manufacturers.[8]

De Minimis Enforcement Value: Really?

Commissioner Nord further argues that the enforcement value of the staff's recommended recordkeeping requirements would be minimal given staff's indication that that a violation of recordkeeping rules on representative sample selection methods would be "secondary" if the product were found to be in violation of the agency's underlying safety rules. With all due respect, I strongly disagree. As I noted during the Commission's meeting on this rule, I can contemplate situations where the Commission might bring an enforcement action against a company solely for its failure to conduct required recordkeeping.

Just as society finds it useful to stop speeding or inebriated drivers even where there has been no traffic accident, so also, on occasion, must the CPSC take action against

[8] The myth of the excessive burden created by the recordkeeping requirement is additionally highlighted by the absence of an outcry from the regulated community. Since the passage of CPSIA it has been clear when the children's product manufacturing industry have been displeased either with the words of a statute or a proposed regulation, they have spoken clearly and loudly. Submitting formal comments related to proposed rules has been only one of the means chosen to express displeasure as to an announced Commission action. There have been congressional hearings, blogs, and letter writing campaigns all devoted to make sure we are aware of such concerns.

Yet, in this instance the expression "the silence was deafening" comes to mind. We received 10 comments in response to the proposed rule regarding the term, "representative." Only one of these comments called the recordkeeping requirements of this portion of the rule burdensome. It is surprising that this lone voice is being used to justify grinding to a halt a rulemaking for the entire children's product manufacturing community.

manufacturers based only on recordkeeping violations. For example, the Commission should not hesitate to enforce against those who have engaged in sham recordkeeping or who have undertaken no recordkeeping – gambling that their products would pass the substantive requirements of CPSC safety rules. In these and other cases, the agency must always reserve the right to enforce its recordkeeping rules by themselves lest the public be exposed to dangerous products.

Let me be clear: treating all recordkeeping violations as "secondary" is not something that the Commission has ever approved as policy and is not something that I would ever approve. Any manufacturer who would take a brief colloquy between Commissioner Nord and a single compliance staff member at a Commission meeting as official agency policy is unfortunately due for a rude awakening.

Conclusion

I retain my optimism that this impasse is not permanent and that we will be able to provide our stakeholders with the guidance that they need in the months ahead. Yet, I remain deeply saddened that something so useful to all concerned parties seems to have been sacrificed. As far as I can discern, this deadlock has little to do with product safety.

I repeat my support for the staff's succinct and reasonable draft final rule requiring that children's product manufacturers write down how and why they chose a given sample to demonstrate continued compliance with the applicable standard.