U.S. CONSUMER PRODUCT SAFETY COMMISSION
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FURTHER SUPPLEMENTAL STATEMENT OF COMMISSIONER ROBERT ADLER REGARDING THE APPROVAL OF THIRD PARTY TESTING RULES FOR CHILDREN'S PRODUCTS

November 14, 2011

My colleague, Commissioner Nord, has issued a supplemental statement in which she, among other things, refers to a past practice of the Commission in which Commissioners' statements were limited to explain the reasoning behind their votes, but not to rebut the written statements of other Commissioners. Her argument is that such an approach is necessary in order to avoid Commissioners responding to each other's argument in "a potentially endless merry-go-round of statements as one responds to the other." [1]

While I am mindful of my colleague's concern and respect the sincerity of her view, I find myself unpersuaded that any such tradition exists, or should exist. It is not one that the Commission followed in the years I spent at the agency previously – and it is not one to which I have ever assented nor one with which I agree. Accepting her approach means that Commissioners would be forever barred from responding on the record to statements of our colleagues which we believe to be erroneous or unfair. That does not make a lot of sense to me. I believe in robust discussion and debate on the critical policy issues that come before the Commission. In fact, I believe that is one of the reasons Congress set the Commission up as a collegial body.

Periodic Testing by Third-Party Labs

Turning to my colleague's supplemental statement, I appreciate seeing an explanation of why she believes that the Consumer Product Safety Improvement Act (CPSIA) does not require periodic testing to be conducted by independent third-party labs. She points to section 14(a)(2) of the CPSIA as the foundation of third-party testing for children's products. Based on the language of this section, she concludes that *initial* tests must be conducted by third-party labs. She further notes the section requires that samples tested must be identical in all material respects to the product and states "if a manufacturer

[1] *Supplemental Statement of Commissioner Nancy Nord on the Votes to Approve the Final Rule on Testing and Certification, Component Part Testing Final Rule, Proposed Rule on Representative Sampling and Issuing Questions About Reducing the Cost of Testing* (hereafter, "Nord Statement") available at: http://www.cpsc.gov/pr/nord11082011.pdf.

makes a material change to a product, then the children's product sold would *not* be identical in all material respects to the samples tested, so the manufacturer could not rely on the initial testing of the children's product." Accordingly, she agrees that *material changes* in products also require third party testing.

So far, so good. I agree with her analysis to this point. She then takes a step too far. She asserts that a later section, entitled "*Additional Regulations for Third Party Testing*,"[2] does not really impose additional regulations for third party testing. Instead, she declares that this section merely creates protocols and standards for continued testing of children's products, but "does *not* impose any requirement that the periodic testing be performed by a third-party lab…."

In asserting this interpretation of the law, my colleague dismisses the significance of the title of section 14(d) being *Additional Regulations for Third Party Testing*. According to her, "headings and titles, while helpful, do not determine the meaning of the text that follows." Unfortunately, my colleague never explains what the title is doing there if it has no applicability to the section.

In fact, the courts have long held that titles serve a useful purpose in shedding light on a section's basic thrust[3] or in resolving ambiguities in the text of a statute.[4] Titles are placed in statutes to provide guidance about what sections mean. What titles cannot do, and what I have never claimed the title in section 14(d) does, is to enlarge the scope of a section or confer powers not otherwise granted in the actual text of the law.

My colleague further notes that titles can be "misleading." True indeed, but they can also be accurate – as in the case of section 14(d). In fact, the title of this section is quite consistent with the language in the section. Her only argument is to note that the section "deals with things other than third party testing (i.e., labeling)." This point is not persuasive. The reference to labeling arises in section 14(d)(2)(A) with respect to the requirement for labeling under section 14(a), which, of necessity, encompasses both children's and *non-children's* products. That is completely irrelevant to third party testing in section 14(d)(2)(B), which is the provision that my colleague asserts not to apply to periodic testing.

Commissioner Nord ignores the difference in language between subsections 14(d)(2)(A) and (B). Section (A) uses the term "consumer product" which necessarily encompasses both children's and non-children's products. Section (B), on the other hand, refers only to *children's products*, which are the very things to which third party testing applies.

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[2] Section 14(d) of the CPSA, found at 15 U.S.C. § 2063(d).

[3] See, e.g., *Almendarez-Torres v. U.S.*, 523 U.S. 224, 234 (1998) and *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991).

[4] See *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189-90 (1991); *Mead Corp. v Tilley*, 490 U.S. 714, 723 (1989); *FTC v Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959); and *Reese v. U.S.*, 24 F. 3d 228 (1994).

And to repeat a point from my statement of October 31,[5] it is in this subsection that the text requires third party testing both for material changes and periodic testing in children's products.[6]

Moreover, given Congress' insistence that children's products be third party tested for compliance with CPSC safety rules, I find it spectacularly odd that the legislature would have so casually exempted periodic testing from third party requirements, as my colleague claims, without one explicit statement – or even a hint, wink, or nod – to that effect either in the CPSIA or in H.R. 2715. In particular, one puzzles why Congress, which knew for over a year that CPSC planned to require periodic testing be done by third party labs, did not clarify the point in H.R. 2715 when it enacted this law if it felt the CPSC to be on the wrong path. Surely, given Congress' desire that the Commission seek ways of reducing third party testing burdens, the legislature would have said something somewhere on the point if they disagreed with the Commission's stated intent.

My colleague's concern about third party periodic testing seems to rest primarily on her objection to the costs of such testing. Unfortunately, that concern, which I generally share, says nothing about what the statute *requires.*

Commissioner Nord's Alternative Approach to Testing and Certification

My colleague claims that I did not offer any policy justification beyond "delay" to support my view that the Commission was right to issue a final rule without re-proposal. Not so. The specific concerns that I stated were threefold:[7] (1) consumer safety required the Commission to proceed to make the rule final, (2) industry needed clear guidance regarding its third party testing obligations, and (3) key members of Congress, knowing our progress on developing the testing and certification rule, emphatically urged that this rule proceed on an expedited and tight time frame. I continue to believe this.

With respect to concerns about delay, my colleague in effect acknowledges them to be important by noting that she proposed an alternative approach to developing the rule that could have gone through a full notice-and-comment rulemaking process and still become effective in January 2013, the same effective date as the one the Commission approved. I acknowledge her sincerity in making such a proposal. Unfortunately, if past is prologue – and in the case of the testing and certification rules, I believe it highly likely – the idea that the Commission could re-propose and promulgate such a massive and complex rule according to my colleague's timeline is unconvincing. I repeat: notwithstanding that

[5] *Supplemental Statement of Commissioner Robert Adler Regarding the Approval of Third Party Testing Rules for Children's Products* (hereafter "my statement") available at: http://www.cpsc.gov/pr/adler10312011.pdf.

[6] See section 14(d)(2)(B)(i) which requires the Commission to develop third party protocols and standards for "ensuring that a children's product tested for compliance with an applicable children's product safety rule is subject to ***testing periodically*** and when there has been a ***material change*** in the product's design or manufacturing process …." (emphasis added).

[7] I refer my colleague to pages 3-6 of my statement.

Congress mandated a fifteen month deadline for this rule, the Commission actually took 38 months to promulgate it. Despite my colleague's assertion that her proposal would work as expeditiously as she claims, she has provided no evidence other than her word that it would. On this point, I am guided by the old Latin maxim, *et suppositio nil ponit in esse*, loosely translated as "saying it don't make it so."[8]

In summary, I continue to believe that the Commission did the right thing in promulgating the rules on testing and certification and component parts. And I look forward to implementing the provisions of H.R. 2715 in a thoughtful and reasonable manner.

[8] To be more precise, "and a supposition puts nothing in being."