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

MINUTES OF COMMISSION MEETING
April 15, 2010

Chairman Inez M. Tenenbaum convened the April 15, 2010, meeting of the U. S. Consumer Product Safety Commission at 9:00 a.m. in open session. Commissioners Thomas H. Moore, Nancy A. Nord, Robert S. Adler and Anne M. Northup were also in attendance. Chairman Tenenbaum made welcoming remarks and thanked the staff for their work on the public database proposed rule.

Publicly Available Consumer Product Safety Information Database – Notice of Proposed Rule

Chairman Tenenbaum introduced the decisional matter about the proposed rule for a publicly available consumer product safety information database to be published in the *Federal Register* ("*FR*"). Chairman Tenenbaum recognized Commissioner Adler. Commissioner Adler made a motion to substitute an amended draft *FR* notice for the original document provided by the staff that was titled "Draft Notice of Proposed Rule – Publicly Available Consumer Product Safety Information Database," circulated in a briefing package dated March 31, 2010. He stated it is essentially the same draft, but incorporates the changes discussed in the briefing meeting and other meetings.

Commissioner Adler began to review the major substantive changes from the staff document beginning with proposed Section 1102.24(b) which now would require that a requester of confidential information "bears the burden of proof" for the designation of confidential information. General Counsel Cheryl A. Falvey interrupted and discussed the clarification of the procedures with the presentation and voting on the substitute proposed notice motion. Chairman Tenenbaum requested a second for the motion on the substitute proposed notice and Commissioner Moore seconded the motion. Commissioner Adler continued reviewing the changes with proposed Section 1102.24(e), *Assistance with defense*, which will require the requester of confidential information to certify in writing an intent to assist the Commission in the defense of any judicial proceeding about the information. He explained the change to proposed Section 1102.26(a)(1), *Materially inaccurate information in a report of harm*, which involves the clarification of the definition of inaccurate information and clarification of the definition in proposed Section 1102.26(a)(2) the materially inaccurate information in a manufacturer comment. He explained the changes to proposed Section 1102.26(b), *request for designation of materially inaccurate information,* regarding the change that the requester "bears the burden of proof" for such claimed information. Proposed Section 1102.26(c)(1) was added to have the Commission "strongly" recommend that the length of a request seeking an expedited review of materially inaccurate information be limited to no more than five pages. Proposed Section 1102.26(d) involving *timing of submission*, indicates that if a request for a determination of materially inaccurate information is submitted prior to publication in the database, the

Commission "may" withhold a report of harm from publication and absent such a determination the Commission will generally publish reports of harm on the tenth business day after they are transmitted to the manufacturer. Proposed Section 1102.26(e), *Assistance with defense*, which would require the requester of a determination of materially inaccurate information to in good faith, certify in writing to assist the Commission in the defense of any judicial proceeding about the information. Proposed Section 1102.26(3)(i)(b), *Expedited determinations*, adds that the Commission shall attempt, where practicable, to make an expedited determination and publish the report of harm on the tenth business day after transmitting a report of harm where either the manufacturer's comments have exceeded the recommended length or the Commission has been unable to make a determination regarding the claim of materially inaccurate information prior to the statutorily mandated publication date.

Chairman Tenenbaum called for discussion of the motion. General Counsel Falvey clarified that the motion for the substitution is before the Commission and other amendments *can* be made after a decision on the present motion. The Commissioners discussed the process of the debate on the content of the database changes and other amendments.

Commissioner Northup discussed making amendments to the substitution and made a motion, seconded by Commissioner Nord, to strike the portions of proposed Section 1102.26(b), *Request for designation of materially inaccurate information*, of the manufacturer having the "burden of proof" that information is materially inaccurate. The Commission discussed the motion and definition of "burden of proof." Commissioner Nord made a motion to amend the motion by Commissioner Northup, that was seconded by Commissioner Northup, to strike the provision of proposed Section 1102.26(b) regarding "burden of proof," and include a question in the preamble to seek the public comment about the meaning of the term and seeking the standard of proof that would be imposed. The motion passed by a vote of (3-2) by the Commission. Commissioner Moore, Nord and Northup voted in favor of the motion. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion.

Commissioner Nord sought clarification of the terms in the substitution proposed rule, "so certified in writing" and "the assistance with defense." The Commission discussed the terms and the expected level of assistance.

Commissioner Northup made a motion, seconded by Commissioner Nord, to strike the language in proposed Section 1102.10(h) *Official records of the Commission* that the reports of harm become the Official records of the Commission. After discussion by the Commission and General Counsel Falvey regarding a definition of Official records, Commissioner Northup withdrew her motion with a comment about the level of veracity of documents that are received by the Commission.

Commissioner Nord made a motion, seconded by Commissioner Northup, to offer an amendment regarding proposed Section 1102.26(a)(1) *Materially inaccurate information in a report of harm*, to strike the proposed sectional and pose a question in the preamble as to whether this is understandable or can be clarified in any way. After discussion, the motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and

Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

The Commission discussed proposed Section 1102.26(c)(1), *Length of request and expedited review*, and the meaning of the recommended length of the request for materially inaccurate information to be no more than five pages.

Chairman reintroduced the original motion made by Commissioner Adler and seconded by Commissioner Moore on Commissioner Adler's substitute amended draft of the *FR* notice for the original staff draft for the Draft Notice of Proposed Rule – Publicly Available Consumer Product Safety Information Database dated March 31, 2010. The Commission voted (3-2) to pass the motion and approve the substitute amended draft *FR* notice. Chairman Tenenbaum and Commissioners Moore and Adler voted in favor of the motion. Commissioners Nord and Northup voted in opposition to the motion. The Commission approved the substitute amended draft of the *FR* notice with the amendment previously approved.

Chairman Tenenbaum and Commissioners Moore, Nord, Adler and Northup submitted the attached statements regarding the matter.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend the approved substitution draft at proposed Section 1102.20, *Consumers*, as follows: Consumers are users of consumer products including, as appropriate, family members, relatives and in the case of children 18 and under, parents and guardians who have *first-hand knowledge of the incident of harm involving use of a consumer product.* After an explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

Commissioner Northup made a motion, seconded by Commissioner Nord, to strike the category "Others" from proposed Section 1102.10(a)(6) by deleting paragraph (6). After an explanation of the amendment by Commissioner Northup and discussion, the motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

Commissioner Nord made a motion, seconded by Commissioner Northup, that proposed Section 1102.10(a)(6) be amended to read: Define Others: Others includes those not listed above, but who have firsthand knowledge of the incident of harm. After an explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

Commissioner Northup made a motion, seconded by Commissioner Nord, to amend the proposed rule to add the following: A harmed party or the parent or guardian must consent to their information being included in the database and have the opportunity to verify the reported harm. After an explanation of the amendment by Commissioner Northup and discussion, the

motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

Commissioner Northup made a motion, seconded by Commissioner Nord, to amend the proposed rule to add the following: A submitter of a report of harm must include (as a mandatory field) the identity of the harmed party and valid contact information for the harmed party. (The purpose of the amendment is for verification of the incident). After an explanation of the amendment by Commissioner Northup and discussion, the motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend proposed Section 1102.6(b)(8), to read: Report of harm means any report about a *specific incident* submitted to the Commission regarding an injury, illness or death, or any risk of injury, illness or death as determined by the Commission, relating to the use of a consumer product. After an explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend the proposed Section 1102.10(c)(3) to read: *Description of the harm.* A description of harm shall include the date on which the harm occurred or manifested itself and the location (city and state). After an explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

Commissioner Northup made a motion, seconded by Commissioner Nord, to amend the proposed rule to allow the submitters of reports of harm to retract their reports from the database at any time. After an explanation of the amendment by Commissioner Northup and discussion, Commissioner Northup revised the amendment to read: the submitters of reports of harm can retract their reports from the database if they realize what they submitted was materially inaccurate. The Commission voted unanimously (5-0) to table the motion and direct the General Counsel Falvey to revise the language of the motion. General Counsel Falvey proposed that the amendment to proposed Section 1102.10(f)(6) to strike the "and/or" at the end of (6) and add a new section (7) that reads: "submitters of reports of harm may retract reports at any time, if they indicate in writing to the Commission that they supplied materially inaccurate information; and/or" and the (7) will become (8). Commissioner Northup made a motion to include the version of the amendment as read by General Counsel Falvey. Commissioner Adler seconded the motion. The Commission voted unanimously (5-0) to pass the motion.

Commissioner Northup made a motion, seconded by Commissioner Nord, to amend the proposed rule to allow victims who believe they are described in a report of harm to ask the agency if the report in fact does refer to them and a right to ask the agency to take down the report of harm. After an explanation of the amendment by Commissioner Northup and discussion, Commissioner Northup withdrew her amendment and asked that it be posed as a question. The Commission voted (4-1) to pose it as a question in the proposed rule. Chairman Tenenbaum and Commissioners Moore, Nord and Northup voted to include the question in the preamble. Commissioner Adler voted in opposition to placing the question in the preamble. After discussion General Counsel Falvey suggested that she draft a revised amendment and find the proper place for it in the proposed rule and then a Commissioner can offer it as a new motion. After further discussion General Counsel Falvey proposed that the revised language for motion for an amendment involving the victim's veto be placed page 27 in the preamble of the substitution document where 1102.28 as discussed at the last sentence at line 11 to read: "The Commission also seeks comment on the question of whether victims who believe that they are described in a report of harm have the right to have the report of harm taken down, when that report of harm does in fact refer to them." After a discussion of the wording of the amendment, Commissioner Northup made a motion to include the version of the amendment as explained and read by General Counsel Falvey. Commissioner Nord seconded the motion. The motion failed to pass by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion.

Commissioner Moore left the meeting at this time.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend the proposed Section 1102.6(b)(10) to read: *Permit reports of incidents that occurred after a particular date.* Effective date means that reports submitted to the public database for incidents which occurred prior to the launch of the database (March 2011) will not be subject to the Consumer Product Safety Improvement Act ("CPSIA") requirements, and not be made public. After an explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass for a lack of a majority by a vote of (2-2) by the Commission. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Northup made a motion, seconded by Commissioner Nord, for an amendment that reads: Reports of harm must involve incidents occurring on or after the date on which the statute went into effect, August 14, 2008. After an explanation of the amendment by Commissioner Northup and discussion, the motion failed to pass for a lack of a majority by a vote of (2-2) by the Commission. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend proposed Section 1102.10(c)(7) that in order for the report of harm to be included in the database the submitter of a report of harm must explain their connection to the incident or the victim and indicate whether it is first hand or from a second or third-party account of the incident. After an

explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass for a lack of a majority by a vote of (2-2) by the Commission. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Northup made a motion, seconded by Commissioner Nord, to amend the proposed rule so that, as a part of verifying a report, submitters of reports of harm must indicate what category they are in (consumer, government agency, health care professional, etc.) in a drop down menu on the form. The Chairman called for discussion. There being none, the Commission voted (4-0) to pass the motion. Chairman Tenenbaum and Commissioners Nord, Northup and Adler voted in favor of the motion. Commissioner Moore was not present.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend the proposed rule to require a status field for reports to display status messaging to the public so that consumers are aware when there is an assertion of material inaccuracy and a report is under review. After an explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass for a lack of a majority by a vote of (2-2) by the Commission. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Northup made a motion, seconded by Commissioner Nord, to amend the proposed rule to require that reports of harm for which the submitter refused to share contact information with the manufacturer be designated as such. After an explanation of the amendment by Commissioner Northup, the motion failed to pass for a lack of a majority by a vote of (2-2) by the Commission. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend the proposed Section 1102.26(b) *Designation of Materially Inaccurate Information*, to include the following: For reports that have a claim of materially inaccurate information, staff has 30 days to review such claims or submit a justification to the Commission why additional time is needed to complete the review. After an explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass for a lack of a majority by a vote of (2-2) by the Commission. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Northup made a motion, seconded by Commissioner Nord, to amend the proposed rule to clarify that database records will not be certified as agency records by the Office of the Secretary or otherwise. After an explanation of the amendment by Commissioner Northup and discussion, the motion failed to pass for a lack of a majority by a vote of (2-2) by the Commission. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend the proposed Section 1102.42 *Disclaimers and Warnings*, as follows: The database will contain a warning that federal criminal penalties attach to deliberate filing of false information to the government. This warning will be prominently and conspicuously displayed on the database and on any documents that are printed from the database. After an explanation of the amendment by Commissioner Nord and discussion, the motion failed to pass for a lack of a majority by a vote of (2-2) by the Commission. Chairman Tenenbaum and Commissioner Adler voted in opposition to the motion. Commissioners Nord and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Nord made a motion, seconded by Commissioner Northup, to amend the preamble of the proposed rule regarding the discussion on the Regulatory Flexibility Act as follows (in *italics*): 1. (line 1) *Preliminary analysis shows* the proposed rule will have little or no effect on small businesses. 2. (line 2) However, because of their small sales volumes, *we believe* small manufacturers are less likely to experience any impacts. 3. (Line 10) ... incident report, *we believe* the amount of time to do so would not likely choose to respond .... 4. (lines 11, 12 , 13) *Before* the Commission *can certify* that the rule will not have a significant economic impact on a substantial number of small entities *additional information on these points will be helpful. Therefore,* the Commission invites comment on this analysis and preliminary certification statement. After an explanation of the amendment by Commissioner Nord and discussion, the Commission voted (4-0) to pass the motion. Chairman Tenenbaum and Commissioners Nord, Adler and Northup voted in favor of the motion. Commissioner Moore was not present.

Commissioner Adler made a motion, seconded by Chairman Tenenbaum, to approve publication of the Adler draft substitute notice in the FR with the previously approved amendments. The motion passed by a vote of (3-2) by the Commission. Chairman Tenenbaum and Commissioners Moore and Adler voted in favor of the motion. (Commissioner Moore voted by written ballot.) Commissioners Nord and Northup voted in opposition to the motion.

Proposed Rule: Testing and Labeling Pertaining to Product Certification and Proposed Rule: Conditions and Requirements for Testing Component Parts of Consumer Products

Robert J. Howell, Director of the Office of Hazard Identification and Reduction ("EXHR"), and Harleigh Ewell, General Attorney, Office of General Counsel, briefed the Commission on the proposed rule that would establish requirements for a reasonable testing program and for compliance and continuing testing for children's products. The proposal would also address labeling of consumer products to show that the product complies with certification requirements under a reasonable testing program for non-children's products or under compliance and continuing testing for children's products. The proposed rule would implement section 14(a) and (d) of the Consumer Product Safety Act ("CPSA"), as amended by section 102(b) of the CPSIA of 2008. Dave DiMatteo, General Attorney, Office of General Counsel, Randy Butturini, Electrical Engineer, Directorate for Engineering Sciences, and Robert Franklin, Economist, Directorate for Economics, briefed the Commission on the proposed rule that would establish requirements for persons issuing certificates that their products comply with applicable CPSC requirements of section 14(a) of the CPSA, as amended by section 102(b) of the CPSIA of

2008, may rely on tests obtained by suppliers of component parts, or others, as the basis for their certificates. The Commissioners discussed the proposed rules and asked questions of the staff. Commissioner Nord left the meeting during this part of the briefing. No decisions were made during this part of the meeting.

There being no further business on the agenda, Chairman Tenenbaum adjourned the meeting at 5:30 p.m.

For the Commission:

Todd A. Stevenson
Secretary to the Commission

Attachments: Statement of Chairman Tenenbaum
Statement of Commissioner Moore
Statement of Commissioner Nord
Statement of Commissioner Northup
Statement of Commissioner Adler

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April 15, 2010

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE COMMISSION DECISION REGARDING THE NOTICE OF PROPOSED RULEMAKING ON THE ESTABLISHMENT OF A PUBLIC AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION DATABASE

The vote of the Commission today on the public database is a major step forward in our Open Government Project and a significant part of the progress we are making to bring the agency fully into the 21st Century. Section 212 of the Consumer Product Safety Improvement Act requires the Commission to establish and maintain a publicly available, searchable, and Internet accessible website on the safety of consumer products and substances under our jurisdiction. In less than one year, consumers, government officials, health care professionals and others will be able to report harmful products to the agency in a way that is accessible to the public. The database will contribute to a new generation of educated consumers and will help CPSC and manufactures react faster as incident data reports come in through SaferProducts.gov.

SaferProducts.gov, the website under development, is the next big step in our CPSC 2.0 modernization initiative and will allow consumers to 1) report incidents of harm to the agency; 2) search for reports on similar products they have purchased or seek to purchase; and 3) obtain timely information on product recalls, emerging hazards, and seasonal safety hazards. Some have sought to restrict our information sources and unnecessarily narrow the scope of information available to the public. I am committed, however, to having CPSC release as much incident data as possible to the public. In addition, because the free flow of information will empower the agency, consumers, and the public with comprehensive information about the products they buy, the database will be designed to allow us to gather the most information we can from the broadest array of those willing to share their knowledge and experiences with us. They are our partners in this effort.

I recognize the concerns and challenges that have been raised by manufacturers, especially relating to the potential for erroneous information. Congress having already heard these issues, however, struck a balance between concerns about erroneous information and the free flow of critical safety information by allowing manufacturers' responses to be posted directly with reports of harm. Further, Congress also prescribed that manufacturers may request that CPSC correct or remove information that is untrue, and the agency will do so.

What we have approved today, a Notice of Proposed Rulemaking, represents a major milestone in our effort. The public notice period that today's vote will trigger is another step in soliciting comments that started with a Commission hearing last November, which was followed by a two-day

workshop in January of this year, a public briefing last week, and a decisional hearing today. We look forward to the continued engagement of manufacturers, consumers, and all other stakeholders so that we can benefit from their comments as we work towards a final rule and the implementation of this groundbreaking and critically important public safety resource.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE NOTICE OF PROPOSED RULEMAKING ON THE PUBLICLY AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION DATABASE

April 23, 2010

I voted, with pleasure, to approve the Notice of Proposed Rulemaking on the Publicly Available Consumer Product Information Database, the establishment of which was mandated by the Consumer Product Safety Improvement Act of 2008 (CPSIA). The public has long suffered from a lack of timely information about potential product hazards because the Commission has been hamstrung by a governing statute that precluded the agency from providing information about potential product hazards until they had been identified by our agency, and recalls of the products had been negotiated and announced. With the launch of the Database next year, owners of consumer products will have the same ability that owners of motor vehicles, car seats and users of pacemakers or other medical devices have. They will be able to see safety-related complaints that have been filed with our agency about consumer products. Just as there were predictions of harm by automakers when the National Highway Traffic Safety Administration's database was launched, there are predictions about the potential for reputational and other harm to the makers of consumer products from our Database. The predictions did not come to pass with the NHTSA database and the statutory requirements in the CPSIA will prevent it from coming to pass with the CPSC Database.

There is an inherent tension in establishing this type of Database. On one side is the desire to obtain the most information from, and provide the most information to, the public about potential hazards associated with consumer products. On the other side is a desire to include nothing but the most accurate, verified complaints, only from people directly involved in the incident associated with the product. This would eliminate complaints about a product that may be relevant to its safety but are also imprecise or incomplete in some other way. Both are valid viewpoints.

I appreciate the need to make the information in the Database as accurate as possible. However, winnowing out valid reports of harm based simply on the submitter's lack of a relationship with the victim or because the submitter does not have a piece of information about an incident that may aid certain data system tasks, would create blind spots for our public system's users. For example, someone may have witnessed a terrible incident associated with the use of a consumer product and be moved to report on it. If the victim is deceased, the unrelated observer may have the most relevant information as to what happened. I do not believe submitters of reports of harm need to have first-hand knowledge of the incident, and I think that is borne out by the categories of submitters listed in the statute, many of whom will not have first-hand knowledge of the incident. Congress anticipated that not every report will be

accurate in every respect. By requiring that the Commission's Database state that the accuracy, completeness, or adequacy of the database contents is not guaranteed, Congress made it clear that it anticipated broad acceptance of complaint data and that reports of harm would be part of an early warning system and not just a continuation of the old, post-recall way of alerting the public to product hazards.

In addition to the fields required to be in the database, every report will undergo at least three reviews. First, our staff will review the reports to make sure the complaint is safety-related and will remove information that has privacy implications. Next, manufacturers of products will have an opportunity to comment on and challenge the inclusion of any confidential or materially inaccurate information in the report. And, finally, the consumer users of the Database will exercise their own judgment about the content of the reports they read. We should not assume consumers are going to be duped by false reports. Consumers who take the time to review our safety complaints are likely to be very thoughtful consumers.

The details in the information given in the required fields, such as specifics about the product involved, and the description of the incident will, by their very nature, lend credibility to reports both for the agency and for the public users of the Database. We need to encourage as much detail as possible without making the submission of a report of harm so time-consuming that it discourages submitters from completing a report. That was the delicate balance our staff undertook in drafting this proposal. With that in mind, I am sympathetic to trying to get information from the submitters about the location of the incident and some timeframe as to when the incident occurred. This will help with identifying duplicate reports of the same incident, but it may also help in establishing hazard patterns and the geographic reach of products we may seek to investigate. I suspect most reports will have this information anyway, but if there is a way to more strongly encourage the submission of this information (perhaps by asking for it as an optional piece of information at several points in the process), without requiring it for submission of the report, I would be interested in hearing about that.

I must point out that in public discussions on the Database, it has been alleged that including an additional category ("other") in the list of potential submitters of reports of harm is inconsistent with my stance on the first civil penalty proposed rule back in 2006. In fact, my position, now and then, is completely consistent. In the civil penalty proposal, I voted to go out for public comment on the additional factors in the proposal and I asked for comment on whether the Commission had the authority to add factors to the list in the statute. At the time there was discussion among the CPSC staff attorneys as to whether or not the Commission could add other factors to the statutory list. I took no position on the issue, a point I reiterated in my response to then Acting Chairman Nord's reauthorization proposals, which included a request that Congress clarify the Commission's ability to use factors not listed in the statute in determining civil penalty amounts. Every statutory provision must be analyzed based on its unique language and in the context of the statute as a whole. In the Database rule, the "other" category was a staff recommendation based on their reading of the statutory provisions involved. As before, I take no position as to whether an "other" category is allowed by the language in 6A(b)(1)(A). And, as before, I am voting to seek comments on that issue. It would be particularly helpful to hear from people proposed to be listed in that "other" category on their experiences in reporting incidents

to our agency and the loss, if any, to the public if their reports were not in the publicly available database.

Once a report of harm has been submitted, it is the property of the Commission. While we would certainly welcome clarification or correction of information from the original submitter, decisions to delete a report of harm from the public database should be made solely by the Commission to discourage attempts by product manufacturers from influencing a submitter to withdraw a report. The reports of harm are there to inform and protect the entire consuming public. The public good would not be served by private deals that serve only a few.

I see no reason to limit submissions of reports of harm to incidents that happened either after the enactment of the CPSIA or to incidents that happen after the launch of the Database next March. While I imagine that the vast majority of reports we receive will involve recent incidents, an incident, even one not so recent, is an incident, and the value of our Database will grow as the volume of reports it contains grows.

Several suggestions have been made about flagging reports of harm for one reason or another. One would require the identification of reports where the submitter declined to share their contact information with the manufacturer of the product involved in the incident. Singling out these reports would imply that the report of a submitter who declines to provide contact information is somehow less trustworthy than one who did not. This is not an assumption I would be comfortable making. It is perfectly acceptable for a submitter of a report of harm to have many valid and reasonable concerns about providing their contact information to the manufacturer of a product that they believe exposed someone to harm.

A number of privacy concerns have been raised about information reported to the Database and the Commission will be mindful of them. The Database is a collection of records under the Privacy Act and personally identifiable information will be protected unless the person to whom it pertains agrees to its disclosure.

For years I have supported the creation of a Consumer Product Safety Information Database. Now we are moving forward to launch a Database that will finally level the playing field and give consumers information that will help them use and choose their products more wisely. The Database will be part of the agency's more refined data collection and data mining system, which should lead to faster and better decision making at the agency. I applaud Congress for giving us this tool and the resources to develop it. I believe one day it will be the most important consumer protection resource in this country.

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STATEMENT OF COMMISSIONER NANCY NORD ON THE NOTICE OF PROPOSED RULE FOR THE CPSC PUBLIC DATABASE April 23, 2010

Reluctantly, I have voted against publishing for comment the notice of proposed rulemaking (NPR) to establish a searchable database of consumer complaints. It would be an error to interpret my vote as somehow opposing the concept of a database. My vote is premised on the fact that this proposal is significantly flawed. Our obligation is to create as good and useful a resource as we can. What is being proposed is not that resource.

As was discussed extensively with Congress when this provision was being drafted, section 212 of the CPSIA provides an opportunity for much more than just a public database. It provides the impetus to revamp the agency's data collection procedures so that the data we get into the agency is shared across the agency using modern technology that allows for sorting, searching, analyzing and using the data regardless of how it comes to us. That is a capability that we did not have under our old and outmoded technology. However, that is a capability we have been aiming at for some time and section 212 and related appropriations have given us the direction and resources for getting that job done.

The public database is only one part of a much bigger project, but especially because the public will be using this database, it is important that it be done right. Unfortunately, the proposal does not get it right in a number of ways.

First, the quality of the information allowed to go onto the public site is potentially so poor as to limit its usefulness. While we keep all information submitted for reference, my understanding of the intent of Congress is that we post reports on the public site that can actually be of use to consumers. Consumers are not helped by complaints that are inaccurate, unfounded, fabricated, based on rumors, or "information" gleaned from newspapers or the internet. Under this proposal, all that information—even when it is obtained second and third hand--may go onto the public site. Further, we are not even requiring the most basic type of information, such as date and location, be in the complaint before we post it. Indeed, beyond the general requirement that submitters verify (i.e., that they are who they say they are and are submitting what is on the form), there is not even any statement warning submitters that there are consequences of making intentionally false submissions.

Second, while the agency will "review" the complaints, this review is only a "capture and post" process without screening for facts through a filter of required information. It is important that the public using the data understand that any review of the agency is not directed at the substance of the complaint. In addition, we will not be investigating, and do not have the capacity to investigate, the vast majority of the complaints that come in and are posted. This point is not clearly made in the NPR, and it may well create a public expectation that complaints posted to the federal government's database have had some level of investigation and therefore can be relied on for making safety assessments or purchasing decisions.

Third, the mechanism for transmitting complaints to and considering information from manufacturers is flawed. While every effort will be made to transmit complaints to a manufacturer, a complaint will be posted regardless of whether it is actually sent to the company. The company has only ten days to complete an investigation and respond before a complaint is posted. Because the information required from submitters is so sketchy, a company may not even know if the product is one of theirs and hence can only make that comment. If a company believes that the complaint contains material inaccuracies, the company may tell us why and, if we have the resources, we may do an investigation to determine if a correction needs to be made. There is no time limit for doing that investigation so the potentially inaccurate complaint sits out in public view misleading consumers who will not even know that we are investigating its accuracy. The NPR has a convoluted discussion of limiting the company's submittal regarding inaccuracy to five pages if it wishes us to undertake an expedited investigation. This approach is patently inappropriate; the timing and scope of investigations should be based on the seriousness of the issues in question and not on how briefly they can be described.

Fourth, the NPR does not include appropriate safeguards to allow parents and guardians to remove information about their families submitted by a third person. This potential for intrusiveness should be corrected.

I am disappointed that the proposal was not one I could support. Nevertheless I do hope that the public will provide comments so that any final rule will be as good as we can make it. Specifically, I am interested in comments that address the following:

- Whether the definition of consumer (which seems very broad and certainly does not comport to any dictionary definition) needs to be revised;
- Whether it is legal to include the category of "others" in the list of submitters, and if so, whether we should include it;
- Whether the type of information that makes up the submittal should be expanded with additional required fields (such as date, location and how submitter learned of incident) so that both the company and the consumer have a better sense of the details of the complaint;
- Whether the complaint should reference a specific incident rather than generalized concerns;
- Whether the site's value would be enhanced if it contained complaints about incidents that occurred after a particular date (such as the date of CPSIA enactment) rather than including complaints that go back indefinitely in time;
- Whether it is clear that the majority of complaints will not be substantively reviewed and investigated by staff;
- Whether the mechanism for transmitting complaints to companies, posting responses and handling materially inaccurate complaints are sufficient to assure high-quality data; and
- How will this rule impact your business.

This NPR is just "not ready for prime time." Perhaps with considerable work we can design a tool—carrying the imprimatur of the federal government--that will help, rather than mislead consumers and, hence, advance safety.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

April 15, 2010

Statement of Commissioner Robert S. Adler on the Notice of Proposed Rulemaking establishing a Publicly Available Consumer Product Safety Information Database

I am pleased to vote today to issue a notice of proposed rulemaking that would establish a publicly available consumer product safety information database as mandated by the Consumer Product Safety Improvement Act (CPSIA). Section 212 of the CPSIA requires the Commission to establish and maintain a publicly available, searchable database on the safety of consumer products. I believe this can be one of the most significant projects ever undertaken by the CPSC.

In sum, the product safety information database has the potential to provide consumers, manufacturers, members of the media, academics, non-profit public interest groups, as well as the Commission itself with a quantity of real time product safety complaint data that has never before been so readily available for the world to see. What Congress chose to do when it established the database was to peel back the veil from information that the Commission has been reduced to doling out in a stingy manner for more than 35 years. There are many advantages, and unquestionably a few risks, to having such a wealth of information publicly available. There are a few of both I would like to highlight here.

The establishment of the database will provide a substantial quantity of searchable, sortable, and down-loadable consumer product safety data, allowing an exponential increase in the Commission's reach through the use of technology. The Commission regulates over 15,000 product categories – with just over 500 employees. The reality is that we cannot be everywhere all the time, and we cannot respond to every complaint, no matter how justified. I believe this database will increase the agency's ability to accomplish our mission of protecting consumers by allowing any interested party to have access to much of the same data that we do – permitting all of those interested in consumer safety to assist us in assessing unreasonable risks of injury, evaluating the comparative safety of products, and in the long run helping us to prevent product-related deaths, illnesses and injuries. In other words, this database will be a benefit to the greater good of consumer safety.

The database will also provide manufacturers with substantially more information than they currently have regarding consumers complaints. At the moment, we cannot notify manufacturers of every one of the more than 16,000 incident reports we receive annually regarding their products and similar products produced by other manufacturers. The database will change that. From now on, when the Commission receives a report of harm involving a consumer product, manufacturers will be sent that report in a matter of days. This information will surely enable the many conscientious manufacturers of consumer products, where appropriate, to make corrections to their products quickly and more cost-effectively than they would have been able to do otherwise. Furthermore, companies that take a more casual approach to product safety will no longer be able to claim they have never heard of a complaint regarding their products.

The database will provide an invaluable service to consumers as well. With the click of a mouse, they will be able to learn critical safety information about a product that is in their home or that they are about to purchase. Eventually, the database will permit users to search from a mobile device – a feature that will allow consumers in a store to look up information on the products on the shelf in real time. Further, consumers will now have an easier and faster forum for entering their own incidents of risk involving consumer products. In some ways, the database will simply bring the Commission into the 21st century – after all, this is how a growing number of American consumers already communicate about consumer products.

To our friends (and critics) in the manufacturing community who may question whether the database allows for unconfirmed reports about their products, I say that every report of harm that is submitted will be reviewed by a member of the agency's staff and, further, every report that identifies a manufacturer will be sent to that manufacturer, generally within 5 business days. (I encourage members of the business community to sign up for the manufacturer portal to speed receipt of these reports.) Also, the Commission will, depending on resources, attempt to weed out the obviously inaccurate reports before publication – and in some very obvious cases even before the report is sent to the manufacturer. This certainly cannot be said of the many existing public commercial databases and web sites that contain consumer complaints.

Not only will a manufacturer be sent copies of reports entered into the CPSC database, they will always have an opportunity to make claims that the reports contain confidential information or materially inaccurate information – and when those claims have merit, the Commission will either correct or remove that report. In fact, the proposed rule creates a type of expedited review process for manufacturer claims of material inaccuracy. If a claim is succinct and provides sufficient information demonstrating that a report of harm was materially inaccurate, the Commission will make every effort possible to reach a quick decision regarding that claim and then either correct it or exclude it from the database. What's more, every report on the database will clearly note that the Commission does not guarantee the accuracy, completeness, or adequacy of any report.

As a final observation, I believe that the database will enhance the Commission's ability to serve consumers by creating an early warning system for consumer products. In what

may be the most exciting piece of the project from my perspective, the database will allow information to be compiled systematically to allow for data mining to help identify the most harmful products even faster and more efficiently than our current systems. In other words, the Commission, as well as manufacturers, and consumers will now be alerted faster than ever before as to recurring problems with potentially dangerous consumer products. This is an exciting – and daunting – prospect. I, for one, am confident that the Commission is up to the task, with a little help from our friends.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
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STATEMENT OF COMMISSIONER ANNE M. NORTHUP REGARDING THE NOTICE OF PROPOSED RULEMAKING ON THE PUBLICLY AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION DATABASE

April 22, 2010

Imagine that early one morning a man wearing slippers and a bathrobe props a frost-covered Looeyville ladder against the gutter of his house and starts climbing up to retrieve the family cat. Holding his morning cup of coffee and nursing a severely sprained ankle from the previous night out dancing, he slips off the ladder when he reaches for the cat and tumbles to the ground unharmed. Scenes like this involving all varieties of consumer products play out across the country every day, but they do not represent an epidemic of defective products. Yet, combining such scenarios with the proposed database rule the Commission has now passed, these ordinary incidents will become the basis for confusion and possibly mischief via unreliable and unverifiable reports of harm.

Under the proposed rule, the nosy neighbor next door could submit a report of harm to the national database indicating that an Acme ladder caused a man to fall and break his ankle. Such a well-intended but inaccurate report—wrong manufacturer, wrong injury information, lots of missing context—would not help consumers differentiate properly between safe products and unsafe ones. It would not help regulators decide whether current product safety standards need updating. Nor would it help manufacturers to produce better and safer products. About the only person such a report might help is someone suing Acme. However, promoting lawsuits against improperly named defendants or based on false information is hardly a justifiable rationale for the CPSC's new database.

In an effort to improve the database's reliability, Commissioner Nancy Nord and I offered over twenty amendments that would have corrected most of the biggest defects in the proposed rule during a highly unusual five-hour long debate. Unfortunately, nearly every one of those amendments was rejected and the consumer product safety database notice of proposed rulemaking ("NPR") was approved on a partisan 3-2 vote. Thus, the proposed rule that passed still suffers from admitting too many unreliable reports with far too few details into the public database. It will accept reports not only from bystanders, but also from attorneys, engineers, consumer advocates, nongovernmental organizations, and trade associations. This scattershot approach to data collection will generate a database of dubious reliability. As a result, the database will become useless at best—and potentially far more destructive than that.

Although some philosophical differences over the database undoubtedly exist, we all agree that a properly constructed safety database could advance the Commission's mission of protecting consumers and promoting product safety. My staunch opposition to the Commission's action stems from the crippling practical problems that the proposed rule builds into the database. In my view not only has the agency blatantly misinterpreted the statute, but it has done so in ways that will: (1) mislead and confuse consumers with inaccurate database information; (2) invade the privacy of injured consumers; (3) waste scarce taxpayer

funds and the time of agency personnel; and (4) inflict reputational damage on manufacturers unrelated to legitimate product safety concerns.

The Agency's Misreading of the Statute

In order to enhance the utility and workability of the database, Congress wrote a statute that *does* limit the set of people who may submit reports of harm but *does not* limit the mandatory pieces of information the agency may require in those reports. Congress recognized that only specified parties (consumers, treating physicians, emergency responders, child care providers, etc.) with a relationship to an incident should submit reports of harm, and it judiciously limited the statutory list accordingly. In contrast, when it came to specifying what data fields should be mandatory in reports of harm, Congress largely left it to the agency to sort out, naming a bare minimum number of fields and inviting the agency to fill in the rest. Unfortunately, the agency has produced a rule that does the exact opposite of what the law demands. The proposed database rule completely ignores the statutory limit on who may submit reports of harm while simultaneously it fails to add enough mandatory fields to make the database useful and workable.

The statutory language specifying who may submit reports of harm is quite clear. The database must include reports received by the Commission from "(i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities." There is no language at all inviting the Commission to add additional persons to the list of who may submit reports of harm. Yet, in the proposed rule, the Commission defines "consumers" so broadly that even bystanders and/or people that may hear about the accident can submit a report. In addition, the Commission adds a sixth category of "*Others* including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." This addition of special interest groups has zero basis in the statute.

By comparison, the statute also clearly indicates where the agency may supplement lists in the database. For example, in listing the requirements that any report of harm must include, the statute requires five specific items "at a minimum." In listing the ways in which database information must be sortable, the statute mentions four categories and then "such other elements as the Commission considers in the public interest." So twice—in the very same section as the reports of harm language—the statute makes it perfectly clear when lists are not exclusive. But in the case of who may submit reports of harm, the statute includes no such language inviting the Commission to supplement the list. Thus, that list must be finite.

Inaccurate Information

The proposed rule will reduce the accuracy of information published to the database and mislead consumers who use it to obtain safety data—thereby undermining the very reason for creating the database in the first place. This result will occur because the proposed rule allows too many reports from people without direct knowledge of incidents to submit reports that are subject to too little verification. In addition, because the proposed rule mandates too few required fields in reports of harm, the database will include undated reports without enough details to permit verification, de-duplication, or prioritization.

First of all, the proposed rule allows bystanders without direct knowledge of an incident to make a report. This mistake comes from the staff's interpreting "consumers" way beyond its common meaning, even to include "observers of the consumer products being used." But these additional reporters, like the

nosy neighbor, will not have the full information necessary to evaluate whether a product was unsafe, whether harm occurred, and whether the harm sustained was truly caused by the product. Most bystanders will lack sufficient knowledge to know whether a report should even be filed, and the vast majority of them will not be able to provide enough context to make their reports of harm reliably useful. It could always be worse. One Commissioner has opined that since "we're all consumers" anyone can submit a report to the database. But that is an unserious way to interpret statutory language. If the term "consumers" were meant to encompass everyone, then Congress would not have bothered to list further specific categories of those who may submit a report.

Next, as discussed above, the rule permits reports filed by "*Others*." Even if the agency were right that the statute may be read to permit expanding the list of who may submit reports of harm, nothing in the statute supports extending it so widely. The categories of people listed under "*Others*" are different in kind from the statute's specified list of entities who may submit reports of harm. Consumers, government agencies, health care professionals, child service providers, and public safety entities are all in a position to have direct contact with the victim at or near the time of the incident and/or they are in positions of responsibility with respect to public health for which they may be held to account. In stark contrast, attorneys, engineers, investigators, NGOs, consumer groups, and trade associations are not likely to have direct contact with the victim at or near the time of the incident and are not necessarily in positions of responsibility to care for the victim. The reliability of reports submitted by these special interest groups will not match the reliability of reports from objective sources, and these entities may "data dump" information into the database that will swamp everyday consumers trying to share valid information.

These concerns would be reduced if reports had to be adequately verified before being published, but the rule does not require that either. Unlike the kind of elaborate verification the staff has called for in other CPSIA regulations interpreting statutory demands for verification (like the 15-month rule), here the proposed rule merely asks the submitter of a report of harm to check a box stating that the report they are submitting is accurate to the best of their knowledge. That limited degree of verification is essentially worthless considering that few people would be making a report if they did not *believe* it to be true.

If the rule at least required reporters of harm to include the victim's identity and contact information with a report, others could verify some reports. Instead, the proposed rule neither requires that information, nor permits an injured person to determine whether a report of harm that seems to be about them actually is, nor even allows a victim to vet a report of harm that they are sure concerns them. Because reporters of harm also do not have to make public their identities (other than to the agency), it will be difficult if not impossible for victims to police the accuracy of reports filed about them. Without any of this information required, reporters of harm will be able to submit hearsay, second-hand information, and urban legends. Even well-intentioned reporters of harm—such as hospitals—may not provide accurate reports, because victims may not be completely candid about the details of the incident in the course of obtaining medical treatment.

The proposed rule further reduces the accuracy of database information by not requiring the date and geographic location of reported harms. This basic information is crucial to helping remove duplicative reports from the database, as well as to comparing multiple reports on the same incident to compile a single incident report that is as complete and as accurate as possible. The presence of duplicates makes any database less useful, particularly a safety database where the number of incidents caused by a particular product is perhaps the single most important piece of data. Contrary to the Chairman's assertion that we

have software to eliminate duplications, that software is not magic. It depends on useful input data. As with the rest of the database, "garbage in" will mean "garbage out."

In addition to helping eliminate duplicate reports, making the date of an incident (as opposed to the date when a report is filed) mandatory would help prioritize the level of concern to attach to a report. Safety standards change over time. A report about an older version of a product is less meaningful than a report on the newest version of that same product. If a manufacturer, for instance, does not know the date of an incident, it will be impossible to know if a particular report pertains to a currently available product. Furthermore, the more distant the incident is in the past, the more likely a person's memory may be mistaken. By way of contrast, the National Highway Traffic Safety Administration's web-based form for submitting consumer safety complaints (including complaints about child car seats) requires complainants to give both the approximate incident date and the date the product was manufactured.

Since the database is not explicitly prospective in terms of when incidents must have occurred to be entered, this will be a particular problem at the outset. New database entries about old incidents will confuse consumers seeking safety information about new products for sale as well as manufacturers trying to improve their latest models.

Commissioner Nord and I offered amendments to address all of these deficiencies that would have: narrowed the definition of "consumers" to exclude observers; defined consumer as the owner/user/victim of a product or that person's parent/guardian; required those submitting reports of harm to have first-hand knowledge of the incident or the harm caused; struck "Others" as a category of who may submit reports of harm (or limited the scope of that category); permitted the victim to confirm or refute the details in any report of harm; allowed a harmed party to verify a report of harm about them; required the identity of the harmed party and valid contact information for them; permitted reporters of harm to retract reports from the database without having to prove they supplied materially inaccurate information; mandated the date and location of every reported incident; made the database apply prospectively, and; required a federal criminal penalty warning about supplying false information at the verification stage. The majority refused to adopt any of these amendments.

Invasion of Privacy

In addition to providing unreliable information to mislead consumers, the proposed rule will allow the database to invade the privacy of those persons injured by consumer products. Although submitters of reports of harm can choose whether or not to submit a report, whether or not to make their name and contact information available to the manufacturer, and whether or not to reveal any private information in the course of making a report, victims do not enjoy the same rights. Although a victim's name will not be published and photographs containing personally identifying information will be redacted, every other detail of an accident involving a consumer product could be published on the national database for all to see. While more details are good for purposes like de-duping, they also invade privacy when the details involve someone who has no say in whether they are disclosed. In small towns and notorious cases, the invasion of personal privacy could be extreme.

Even minors are not exempt from this invasion of privacy. The rule stipulates that minors may not enter data about their own incidents without parental permission; however, any other person named in the rule is perfectly free to publish a report to the national database about a minor without parental permission.

This approach turns respect for the privacy rights of minors and their parents on its head. Most parents will likely be alarmed to learn that they will not be able to take down a report published on the national database involving their child. Even if a report is materially inaccurate, a parent would have to prove the inaccuracy in order to persuade agency staff to remove the report. Such proof could itself involve revealing information that a victim would rather not reveal. Nor can parents even confirm that a report on the database is about their child.

The proposed rule even goes so far as to permit the posting of medical records on the national database for public inspection. These records will not be posted unless some unspecified level of "consent" is given, but it does not take much imagination to see how an inadvertent "consent" could cause real regret later. Any parent who has experienced an emergency room visit with their child can remember signing multiple releases to quickly have their child seen. The agency has assured the public that knowingly false and confidential information will not be published on the database, but there are no embedded safeguards. One cannot—at least not credibly—simultaneously say that the agency is not going to publish confidential information and then also insist that victims not have any say over whether reports of harm involving them (and their personal information) get published. "We want the busybodies reporting to us," as was argued in the public meeting, is not a philosophy consistent with respecting individual privacy interests.

Commissioner Nord and I offered amendments that would have prevented adding privacy-invading insult on top of consumer product-related injury. The changes we proposed would have: required a harmed party's consent to have their information published in the public database; required a parent's express consent for a report of harm involving a minor child; required the identity of the harmed party and valid contact information as mandated fields, and; allowed victims who believe they are described in a report of harm to get confirmation from the agency and the ability to have that report removed from public view. Again, the majority refused to adopt any of these amendments, so the proposed rule respects the privacy of submitters but not the privacy of victims.

A Waste of Resources

Still another problem with the proposed database rule is that it will squander taxpayer funds and waste agency resources. A current television ad for a job search website features two players getting ready to begin a game of tennis. Just as the first player begins to serve, spectators descend onto the court armed with their own racquets intent on participating in the match themselves. Naturally, the ensuing chaos makes it impossible for the original two players to play their game. By admitting too many unverified reports from too many unreliable sources, the proposed database rule will similarly pollute what good data goes into the system to the point that consumers trying to use the database will not find it helpful.

The estimated cost to get this database up and running is in the millions of dollars. The additional cost in annual agency staff resources that will be expended keeping up the database will no doubt total additional millions. The staff has said that every report in the database will be personally reviewed by a CPSC employee, who will send the information to the manufacturer, assess whether a CPSC investigation is warranted, and try to resolve questions of accuracy raised by manufacturers. For such a large and ongoing expenditure of taxpayer funds, we should do better than to produce a tool of dubious worth. Indeed, the agency has long had access internally to a world-class storehouse of carefully cultivated product safety information to guide our consideration of regulatory and enforcement activities. Modernizing the existing, proven database and making it publicly available—with a couple of additional tweaks to satisfy the statute—

would have been a far superior approach to devising a new database from scratch with all the defects inherent in this one. Unlike the current design, that approach would also not have required massive agency resources, including dedicated new staff, to supervise it.

But rather than emulate the reliable internal database or even stick to the statutory scheme, a majority of the Commission has now endorsed a proposed rule that turns the database in a direction contrary to both law and common sense. In our haste to tout the potential benefits of a consumer product safety database, we must not gloss over the very real risks that such an endeavor entails. Worse than wasting dollars, the new database threatens to reduce safety in at least two respects.

First, because the new database will lack exposure data, it could well mislead consumers about the comparative safety of products. Ostensibly, the database is meant to allow consumers to judge the comparative safety of different consumer products. However, *comparative* safety is not possible to measure unless the database gives the number of products in circulation. There is a huge "compared to what?" problem without such information being part of the database. Without that data, consumers may be misled. The most popular products will have more numbers in circulation. Holding all else equal, those products produced in the greatest quantities will generate more reports, but that does not mean they are less safe. We do not want to push people away from products with 1:10,000,000 deaths to products with 1:10,000 deaths because a small numbers problem causes the former products to show up more frequently in the database or the latter products to show up at a later point in time in the database. But depending on what information goes into this database, a consumer could actually be led away from a safer product and toward a riskier one.

Second, safety could also suffer counterproductively when the new database identifies priorities different from ones generated by more reliable internal metrics. To the extent that headlines drive agency priorities (or at least divert agency attention), the problems surfaced by the less reliable information in the public database could take time and resources away from greater risks in order to deal with externally created public relations crises. Responding to such events instead of focusing on what our careful internal analysis reveals are the top safety concerns will reduce overall safety.

Commissioner Nord and I again offered amendments to ensure the staff's hard work in creating the database framework would not go for naught. These amendments would have: limited reports of harm to particular incidents, not generalized concerns; mandated date and location information in every report; limited reports of harm to those incidents occurring after the database launches (or at least after the statute passed), and; indicated the unreliability of database records by refusing to treat them as agency records or certify them as official business records. The majority once again refused to adopt any of these amendments.

Indiscriminate Harm to Manufacturers

One major function of the consumer safety database should be to inform consumers' purchasing decisions, enabling them to acquire safer products. The main byproduct of a successful database would thus be to reward manufacturers who make safe products and penalize those who make less safe or unsafe products. But because the proposed rule will create a database chock-full of inaccurate and unverifiable information, it will not incentivize companies appropriately. Instead, the proposed rule will create a database that fails to reinforce responsible corporate behavior and harms good companies indiscriminately.

A good database would provide companies with the ability to take full advantage of reports of harm. For example, it would give enough detail to enable them to compare reports against internal company data. That way they could identify hazard trends more quickly, get in front of safety problems, and perfect their products going forward. It would also enable manufacturers to garner additional details, allowing them to discern what kind of product improvements could have made a difference as well as when incidents involve factors that a better design could not have helped.

Unfortunately, the paltry information in this database will not enable such learning. All too often companies will not be able to differentiate between multiple entries on the same incident and reports representing multiple incidents. Manufacturers will not be able to discern whether a report pertains to a product currently on the market or a much older model. In many cases they will not be able to follow up with the submitter (or the injured party) to verify the accuracy of a report, obtain additional specifics, or debunk erroneous reports. They may not be able to tell, for instance, whether a reporter of harm mistook the company's product for a similar model manufactured by another firm. With no real way to separate genuine reports from bogus ones, the database will put manufacturers in the impossible position of being asked to comment on incidents they know very little about. Most manufacturers in that situation will be likely to provide very little response for publication in the database. Consumers will be the poorer for that, but companies cannot afford to comment on incidents where they do not have all the relevant facts.

These same failings will cause the database to inflict reputational damage and other harm on companies without regard to their safety track records. Just as the public database will distract the agency's attention, so too will it preoccupy manufacturers who must be even more responsive to negative publicity to protect their brands. Some of this crisis response may come in reaction to legitimate safety issues, but most will not—meaning that frequently companies' attention will be diverted from real safety concerns in order to handle public relations flare-ups generated by the database. Furthermore, when reputational risk appears disconnected from safety issues, it incentivizes manufacturers to improve their public relations capacity instead of their products.

In addition to reputational black eyes, the database is apt to generate more lawsuits against consumer product manufacturers. In part this is because the saferproducts.gov website will put a government imprimatur on voluntarily supplied external data that the agency has not validated. Moreover, the sheer volume of incident and injury data the database contains will attract plaintiffs' trial lawyers to use it as a search engine. Such objections would not have merit if these effects stemmed from accurate data. But they will not. Regrettably, the extra litigation costs for borderline cases will lead to higher prices for consumers, some safe products getting pulled from the market, and even some good companies going out of business.

Commissioner Nord and I introduced amendments to address these concerns, but yet again the majority did not adopt them. Our revisions would have: required the date and location of incidents; flagged reports of harm where submitters refused to share their contact information; flagged reports of harm challenged as materially inaccurate while any investigation was pending; provided a timeline for such investigations and for immediate removal of materially inaccurate information; decreased the likelihood of mistaking a manufacturer's identity; indicated the unreliability of database records by refusing to treat them as agency records or certify them as official business records, and; allowed submitters to indicate their level of certainty regarding particular facts. We also discussed with staff the possibility of enabling the manufacturer to communicate with submitters of reports of harm who do not want their contact information released through some kind of anonymous electronic bulletin board.

Conclusion

The Notice of Proposed Rulemaking for the consumer product safety database that the Commission approved this past week could have been written as a balanced rule that adheres faithfully to the statute and maximizes the database's chances for success. Instead, the rule deviates from the statute's mandate and shapes a database that will be unreliable to the point, essentially, of uselessness. Worse yet, the database will mislead consumers, invade their privacy, waste their tax dollars, and inflict random reputational harm on makers of consumer products. Any modest benefits that flow from the public database will not be commensurate to the extensive harm it will cause. Because I believe that the proposed rule adopted this past week is likely to compromise safety, lead to less well informed agency decision making, and do more overall harm than good, I cannot support it.

* * * *

Because I do not think it a coincidence that the resulting rule is so unsatisfactory, I would like to add a few words about the unfortunate process that accompanied this past week's disappointing vote. Although the Chairman could not be there, the initial public hearing and discussion on the database was vigorous and respectful among those Commissioners in attendance. Several of the concerns outlined in this statement were first aired at that time, and I believe that many of them could (and would) have been addressed had normal procedure been followed.

Until the package for a proposed rule comes up to the Commissioners for our consideration, there is nothing concrete for the various offices to discuss. Although preliminary briefings may occur, the public hearing is generally the first opportunity for us to read the exact language being proposed and hear each other's reactions to the policy under consideration. Following the public hearing, the various offices usually send around marked up versions of the proposed rule or other shorter documents listing their proposed changes. Because the Sunshine Act forbids more than two Commissioners from meeting privately to discuss these changes ourselves, staff assistants from each of the five offices typically meet together in so-called junior fishbowl sessions to hash out changes instead.

Despite a request for such a meeting, in this instance, the Commissioners of the majority party first ignored the request and then produced a document agreed to by all three Democrat offices as a fait accompli. At the last minute a fishbowl was conducted cursorily with only four offices in attendance. Even then, rather than begin a search for common ground, that meeting was treated merely as an opportunity to craft talking points for the public decisional meeting in opposition to any ideas for changes that were raised. This breach of decorum forced Commissioner Nord and me to draft numerous amendments to propose at the public decisional meeting, which lasted several hours longer than usual in order to consider them. I sincerely hope that whatever circumstance led to the departure from our customary mode of operations on this proposed rule does not recur. I value the constructive input to our rulemaking that comes from every Commissioner's office, and I believe the quality of our work product suffers when the collaborative process is bypassed.