



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD ON
THE VOTE TO APPROVE THE NOTICE OF REQUIREMENTS FOR
THE PHTHALATES PROVISION OF THE CPSIA

July 29, 2011

Today, the Consumer Product Safety Commission (CPSC) has issued a Notice of Requirements (NOR) to fully implement the portions of the Consumer Product Safety Improvement Act of 2008 (CPSIA) that ban the use of certain chemicals called phthalates in toys and children's products. I supported this move, and voted for the NOR. This completes another of the tasks the CPSIA gave us.

However, I was and remain dismayed by the secretive process we used to produce this NOR and the fog of confusion we have created as a result. I hope that, in the future, our other efforts will not be similarly damaged by non-transparent tactics.

Phthalates are chemicals manufacturers use in some kinds of plastic to make the plastic more pliable and flexible, to produce things like children's bath toys. In the CPSIA Congress banned the use of certain phthalates in toys and child care articles until after the agency considered the scientific findings of a Chronic Hazard Advisory Panel (CHAP), which is now working on this issue. The CPSIA phthalate provision we addressed on July 27 is a requirement for labs to be accredited to test products for the presence of the banned phthalates. Testing for phthalates will begin on January 1, 2012.

In February of 2009, as we began work on the phthalates provisions of the CPSIA, we put out general guidance on those provisions and what they meant for manufacturers and retailers. In that enforcement guidance, we included a series of questions, asking the community about such critical issues as what the definitions of "children's toy" and "child care article" should be for the phthalates policy. Definitions determine how broadly or narrowly a law or rule applies, so it was and is important that we get it right. Manufacturers need to know which products they are supposed to test for phthalates; CPSC staff needs to know for enforcement action.

We received much thoughtful input from industry, consumer groups, and others who responded to our call for comments. Our staff carefully read and considered all of those comments, and began including them in the briefing package for an interpretative rule, the device administrative agencies often use to clarify what their statutes and rules mean. This is how the process works best: we invite the community to participate, the community accepts that invitation, and we incorporate their input in a proper rulemaking process.

But that is not what we did. Literally the night before that interpretative rule proposal was to land on Commissioners' doorsteps back in 2009, the majority decided we would not consider it. No explanation for pulling the interpretative rule was given. The agency therefore provided no substantive answers to the questions we had posed to the community. The Commission wasted the efforts of everyone who had

participated in the process—industry, consumers, our own talented and dedicated staff—with this last minute action. I still am not sure why that effort was derailed. I am sure questions both we and the community had about the phthalates ban remained unanswered.

Fast forward to 2011. This week, the majority did it again. Our staff put together a package that contained the proposed NOR and all the considerations that went into drafting it. That proposal included some of the same clarifying information that was in the proposed rule that was pulled two years ago. It also included a list of materials that we thought so unlikely to contain phthalates that they might not need to be tested, a topic we discussed at a public hearing just a few weeks ago.

With an insouciance that is startling, this majority simply pulled this week's packet of information on clarifying definitions, just 48 hours before we could vote on it. This effectively denied the public definitional clarifications we had led them to believe we would provide to help them understand what needs to be tested.

A list of materials that were determined to be phthalate-free (and therefore not requiring testing) was developed, and this list was included in our vote: "wood, metal, natural fibers, natural latex and mineral products." This was a plus for clarity. However, I suspect that many will be surprised by the brevity of the list and will still have questions about testing for other materials.

More notable is the fact that, by pulling the staff material on what constitutes a toy or a child care product for the phthalates ban, we lost the opportunity to discuss that point fully, and the public lost the opportunity for much-needed clarification. Instead, beyond the short list of phthalate-free materials, the majority just referred the community to the guidance we put out in 2009, which, as you will recall, posed a series of questions. In other words, the majority decided to answer a series of current questions with a series of previous questions. (It would not surprise me if many of the affected stakeholders decide to contact our Ombudsman, or other Commissioner offices requesting answers.)

The majority suggested manufacturers were "quite clear" on what products did or did not fit within the definitions. Obviously, this is directly contrary to the stack of comments we got from manufacturers telling us their issues. The Commission has the responsibility to interpret this law and by doing so, further compliance. Instead, the majority effectively said: "We know what fits in the definitions. Hope you can read our minds before enforcement shows up at your door."

I voted for the phthalates NOR today because I have little objection to what it actually does. The CPSIA requires us to accredit labs so phthalate testing can take place, and we complied with that mandate. However, my support was reluctant and my objection was great because of what this NOR could have done and the tactics that caused it to fall short. The Majority, not once but twice, pulled information from the public and stopped the Commission from properly considering critical provisions of the CPSIA.

This is a regulatory embarrassment.