U.S. CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER NANCY A. NORD

Statement on the Commission's vote on the final rule: amendment to regulation on testing and labeling pertaining to product certification regarding representative samples for periodic testing of children's products

December 4, 2012

I voted against the final rule regarding representative samples for periodic testing of children's products (the Representative Samples Rule) because it is unclear and ambiguous in its requirements, it imposes unnecessary burdens on those required to test and certify, and it creates uncertainty with respect to compliance with the requirements of the Periodic Testing Rule, 16 C.F.R. § 1107. I do not believe that the Representative Samples Rule will provide any more protection to consumers. Instead I believe it will cause confusion in the marketplace, and, as a result, raise costs and limit consumer choice, as we have seen with other rules we have recently issued. And it is certain to impose an unnecessary burden on American businesses—particularly small businesses. As detailed below, the Commission should not have adopted this rule.

Background

The CPSIA, as originally passed, required the Commission to establish standards and protocols for the periodic testing of products subject to a children's product safety rule (those requirements are set out in the Periodic Testing Rule). The law also required that the product samples tested be selected on a random basis. The Commission initially proposed to define the term "random" in a statistically-based manner which would have imposed an excessively burdensome process for selecting samples. This led Congress to amend the law to require, instead of a random selection process, that samples be representative of the untested products.

The Commission sought comments on how to implement this change in the law. In June 2012, the Commission was briefed on the proposed final rule defining the term "representative." [1] Both then-Commissioner Northup and I raised a number of questions

[1] That briefing illustrated the Commission's lack of clarity on the requirements of this rule. For example, one commissioner (who voted for this rule) explained its meaning thus: "if somebody were to come to me and say, 'well what does all of this mean?' I'd say 'what it means is, don't make golden samples', and if you've got a good procedure that means you're not doing golden samples, you're probably o.k. . . ." While it is likely that Congress shared this view when it changed the law and that incorporating a 'non-golden sample' definition into the rule could

and concerns about the recordkeeping requirements that were included in the proposed Representative Samples Rule. Rather than try to find a compromise that would try to address our concerns, the rule was withdrawn and resubmitted to the Commission after Commissioner Northup's term had expired and when there was an assurance that the majority could prevail without having to seek a compromise.

The scope of the rule is unclear.

The Representative Sample Rule requires that manufacturers and importers (1) establish a separate procedure for selecting representative samples to test and (2) document the basis for inferring that the procedure demonstrates the compliance of untested products. Standing alone, this is not an objectionable requirement. However, it does not stand alone. It needs to be read in the context of the other requirements of the Periodic Testing Rule, which it is amending.

The Periodic Testing Rule sets out a comprehensive and complex system for periodic testing: it states that a product manufacturer or importer must pick testing intervals and the number of samples to be tested to "ensure a high degree of assurance" that the untested products comply with applicable safety standards.[2] To achieve this high degree of assurance, the manufacturer or importer must have an *evidence-based* process to demonstrate the consistent performance of a product regarding compliance.[3] Numerous provisions emphasize that testing intervals and the number of products selected for periodic testing must be adequate to demonstrate that the untested products also comply. Further, this information must be included in periodic or production testing plans.[4] In other words, it would be impossible to comply with the extant Periodic Testing Rule with non-representative samples.

Yet atop the current requirements come the additional requirements of this Representative Samples Rule. Neither the rule nor my colleagues adequately explain why the existing requirements do not already assure the representativeness of testing samples. But logically, these new requirements must add something to the Periodic Testing Rule or else they would not have been adopted.

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ameliorate some of the burden it imposes, the preamble of the rule indicates that this is not what the rule intends."

[2] I continue to believe that the Periodic Testing Rule is unwieldy and overly-burdensome. My concerns about this rule are outlined in my statement accompanying the vote on this rule. See *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,* (October 20, 2011), http://www.cpsc.gov/pr/nord10202011.pdf.

[3] *See* 16 C.F.R. § 1107.2.

[4] *See* 16 C.F.R. § 1107.21(b) (1) & 1107.21(c) (2).

The recordkeeping requirements are unnecessary and burdensome.

While it is not totally clear what new requirements the final rule imposes, it is clear that, whatever they are, they must be documented with records, those records must be kept for five years, and failure to have documentation that the CPSC considers adequate is a violation of the rule. The rationale for the recordkeeping requirement is that we will need this information for compliance and enforcement purposes.

The fact that the recordkeeping requirements create a burden is without question. This is what our own staff has told us about this aspect of the final sampling rule:

> Although it might take a manufacturer several hours, perhaps several days to analyze its products and manufacturing processes to determine its options for selecting representative samples (and some might need to hire consultants for this purpose), the actual documentation of the procedure and basis for inferring compliance will probably take less time. On the assumption that because this document is required by regulation, manufacturers will make sure that the document is reviewed and edited properly, it could take an average of 4 hours to prepare this document, once the procedure that will be used is decided and the number of samples has been determined. Developing the sampling procedure and documenting it are managerial or professional functions . . . .
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> Once a sampling plan is developed and documented, manufacturers will probably not incur the full cost of documenting their sampling plans in subsequent years because the same plan and documentation should be valid. However, each year, it is expected that manufacturers will retire some product lines and introduce new ones. Moreover, some manufacturers will leave the market, and other manufacturers will enter the market. Therefore, there will be some ongoing costs associated with documenting sampling plans.[5]

The staff has made the (conservative) estimate that the document drafting process (as distinct from the work actually creating the procedures) could cost as much as $32.5 million initially and as much as $13 million on an ongoing basis. My colleagues may think that is a small number and so not really a burden. While this may be true for a large company, we have heard repeatedly—in this proceeding and others—that medium and small companies are finding compliance with the Periodic Testing Rule to be a large, expensive challenge. This rule with its recordkeeping requirement just adds to that challenge.

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[5] Staff Briefing Package, CPSC, Final Rule: Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products. (November 6, 2012). http://www.cpsc.gov/library/foia/foia13/brief/periodicamend.pdf

The reality is that we will investigate and bring enforcement actions against only a handful of the thousands of manufacturers and importers who will be required to keep these records. In other words, *we are requiring many records to be created and maintained that no one will ever look at.* A competent regulatory agency would devise a way to get access to the needed information *when* it is needed without imposing a sweeping requirement on the universe of regulated companies. Certainly Congress did not require this. And the White House recently specifically asked agencies to reexamine their regulations to eliminate unnecessary record collections—yet another White House direction which we are ignoring in our zeal to over-regulate.[6]

Given that the required periodic and production testing plans must already include much of the information that now must be broken out (and presumably supplemented) to comply with the Periodic Testing Rule, and given that those plans must be retained, we could fulfill our enforcement responsibilities with that information alone. The plans must include information justifying the testing interval, the number of products selected for testing, and why those products demonstrate compliance of the untested population. It is unclear to me why this information does not satisfy our enforcement needs or why those needs would be appropriately furthered by creating more records on this point. The burden of the rule is not offset by its need.

The rule creates compliance uncertainty.

The un-amended Periodic Testing Rule set out a comprehensive process for periodic testing ensuring that compliance of untested products could be predicted by the chosen testing samples. This rule adds additional requirements, although it is not clear what the additional requirements are or what value they add to the existing requirements. What is clear is that the new requirements bring compliance obligations that trigger penalties if not followed.

As a matter of good administrative practice, regulations should impose clear requirements that are justified by an administrative record. Regulations that impose unclear obligations that are subject to after-the-fact second guessing when being enforced should be avoided. As the Supreme Court has explained: "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[7]

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[6] Office of Management and Budget , Memorandum For the Heads of Executive Departments and Agencies (June 22, 2012).

[7] *Grayned v. City of Rockford*, 408 U.S. 104, 108–9 (1972).

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In this case we have fallen short in our responsibility as regulators by promulgating unclear requirements that carry with them the opportunity for "gotcha" enforcement. The public expects better.

Conclusion

Our mission is not to impose regulations that add costs or limit consumers' choice without justification. Nor is it our mission to impose superfluous or ambiguous requirements on the regulated community. With this rule, however, we accomplish all these things. Instead, we should be accomplishing our mission—to protect consumers against unreasonable risks—by adopting necessary, well-thought-out, and well-tailored rules. This rule fails on those counts.