



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**FURTHER STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE FINAL RULE
IMPLEMENTING A PUBLICLY AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION
DATABASE**

January 7, 2011

The rule adopted by the Commission's majority on a partisan 3-2 vote on November 24 is flawed both substantively and procedurally. Substantively, the final rule deviates to an unacceptable degree from the underlying statute and would—if upheld—create a public Database incapable of achieving the statutory purposes assigned to it. Procedurally, the final rule dispensed with requisite administrative processes. Given the extent to which the final rule misconstrues the statute, and the manner in which the agency disregarded administrative procedure, this rule is unlikely to survive the now inevitable (and perhaps numerous) legal challenges.

My November 24 [statement](#) detailed many of the substantive legal defects with the Commission's Final Rule. I am writing a second statement to clarify the facts surrounding the procedural path that this rule took on its way to final passage. I understand and respect the importance of maintaining the confidentiality of internal Commission deliberations. However, in light of Chairman Tenenbaum's public representations concerning her understanding of the actions taken in this rulemaking, I feel compelled to correct the public record. In fact, the Commission has: (i) failed to give adequate consideration to a reasonable alternative proposal; (ii) refused to re-propose the rule despite reversing its position without warning on a major aspect of the rule between the Notice of Proposed Rulemaking and the Final Proposed Rule stages; and (iii) neglected to carry out its duty to examine the economic effects that this rule will have, particularly on small businesses.

Although I disagree substantively with the rule passed by the Commission's majority, I recognize that my fellow Commissioners in the majority have the right to dictate their policy preferences (at least to the extent that those do not contradict the statute). However, the majority may not short-circuit the requirements of the Administrative Procedure Act and other procedural obligations that attend our rulemaking. Thus, even if the majority might have been able to arrive at the same place by a different route, I believe that the path they have chosen to follow is not a permissible one. The fact that these procedural deficiencies were so flagrant as to promise legal jeopardy for our regulation provides additional support for my vote against the Final Database Rule.

Failure to Give Adequate Consideration to an Alternative Proposal

At the decisional meeting, Chairman Tenenbaum posed a question that deserves a direct answer. She asked publicly how much of my disagreement with the concept of the public Database drove my dissatisfaction with the process and then asked, "Were you always against the Database?" In the face of an entire alternative proposal crafted by Commissioner Nancy Nord and myself, which we said that we would

support (without prejudging that we would *not* support something shy of our full proposal) it should be clear that I understand the requirements of the law and the Commission's responsibility to provide a protocol for the Database required by the law.

Commissioner Nord and I wrote an alternative Database Rule because we felt that the staff draft of the proposed final rule disregarded the preponderance of the public comments to the proposed rule and raised serious and legitimate concerns that the proposed rule was so flawed that, if finalized along the same lines, it would result in a Database completely unhelpful to consumers. We wrote an alternative rule to provide a holistic, as opposed to a line-by-line, proposal that would better adhere to Congressional intent. Furthermore, as I made clear to the Commission's Executive Director immediately after the contentious Public Briefing on the Database, I was eager to seek common ground, believed there was a creative middle ground that could be found, and would have supported any rule that ensured the publication of accurate data to achieve the statutory objective of providing consumers with useful product safety information. But I do not support wasting \$29 million of taxpayers' money on a Database that I believe will be useless at best and could even drive some consumers away from relatively safe products to products that are less safe.

The majority dismissed the Nord/Northup proposal with virtually no discussion and not a single meeting with all offices to consider it. This rulemaking procedure violates the Administrative Procedure Act (APA). In *Chamber of Commerce of the United States of America v. Securities and Exchange Commission*, 412 F.3d 133, 144 (D.C. Cir. June 21, 2005), the court struck down a regulation in part on the grounds that the Commission gave inadequate consideration to the proposal endorsed by the two dissenting Commissioners. Although the SEC argued that it does not have to discuss every alternative raised, and that it had considered major alternatives proposed in public comments, the Court concluded that the Commission violated the APA by failing to consider an alternative raised by two dissenting Commissioners: "[The] alternative was neither frivolous nor out of bounds and the Commission therefore had an obligation to consider it."¹ That obligation always exists, but it becomes especially important to meet where the final rule undermines the underlying purpose of the organic statute, as here. The final rule ignores the Consumer Product Safety Act's admonition "to assist consumers in evaluating the comparative safety of consumer products."² The alternative proposed by dissenting commissioners would have addressed that flaw.

While I was not aware of the particulars of *Chamber of Commerce* when we proposed the alternative Database Rule and did not write the alternative rule proposal to parallel this case, the majority's failure to give adequate consideration here is incredibly similar and creates the same opportunity for a legal challenge to the Database Rule. The Consumer Product Safety Commission's majority had the same obligation as did the SEC to adequately consider all aspects of the alternative proposal suggested by Commissioner Nord and myself. A Commission majority may not ignore the serious and permissible alternatives raised for consideration by the minority.

It would be impossible to make a valid claim that the alternative Database Rule received any legitimate consideration. Rather, it met with outright hostility. Instead of focusing on the merits of the proposal, the majority's efforts were directed toward challenging its legitimacy and a failed effort to prevent

¹ *Chamber of Commerce*, 412 F. 3d at 145; Cf. *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C.Cir. 1989)("[W]here a party raises facially reasonable alternatives ... the agency must either consider those alternatives or give some reason ... for declining to do so.") (emphases removed); see also *American Gas Ass'n v. FERC*, 593 F.3d 14 (D.C. Cir. Jan. 22, 2010); 2010 U.S. App. LEXIS 1638, *18 ("Where a dissenting Commissioner raises a reasonable alternative, the majority is obligated to consider it.").

² CPSA § 2(b)(2); see also CPSA § 6A(e)(1)(A)(requiring a GAO study to assess whether consumers find the Database 'useful').

its publication on the Commission's website. Meanwhile, precious days were lost that could have been devoted to considering the substance of the alternative. After the alternative proposal's legitimacy was established, and despite our repeated requests to meet among all of the Commissioners' offices to discuss the various elements of the proposal, the majority never agreed to do so. They instead avoided any serious discussion of our proposal. In fact, in the days preceding the scheduled Decisional Meeting, the majority Commissioners were locked in long negotiations of their own, rewriting portions of the Database Rule without minority participation.

This procedure was inconsistent with the Commission's established precedent governing rulemaking. Every other major rule this agency has promulgated during my tenure has received full-fledged attention from commissioners and staff alike and has been reviewed line by line in a tedious yet deliberative fashion. Senior staff from each of the Commissioners' Offices, senior Commission staff, and technical staff involved in the relevant areas have participated in what are colloquially referred to as "fishbowls" to hammer out final rules. In stark contrast, no "fishbowls" were held to consider this rule, despite five weeks between the public briefing meeting to discuss the Proposed Final Rule and the decisional meeting where the Final Rule was adopted.

When it became clear that Commissioner Nord and myself were to be handed a copy of the Final Rule so shortly before the actual meeting that it would be impossible to read all of it, much less craft amendments, I exercised my prerogative under our internal decisionmaking procedures to bump the initially scheduled decisional meeting for one week's time. Then, when the facts of *Chamber of Commerce* became known, the Chair hurriedly tried to contrive a record to provide a defense of the proceedings, despite the failure to follow regular order. The general counsel's office sponsored a single meeting with one majority staff assistant, one of Commissioner Nord's staff assistants, and one of my staff assistants. However, contrary to Chairman Tenenbaum's assertions at the decisional meeting on Nov. 24, that meeting did not involve "going through in every detail many if not all of the key provisions in [our] proposal." Rather, the meeting, which included only attorneys and not any other key staff whose judgment would have been relevant, focused on two issues and touched on a few others. It was merely a meeting for show, without even representatives from two of the three majority Commissioners' offices in attendance. After that meeting, there were no follow-up meetings as commonly occurs. Instead, the majority continued to meet among themselves, and five days later presented Commissioner Nord and myself with the final rule, upon which we were scheduled to vote in less than 48 hours.

As an example of the disregard our proposal received, I do not believe that the staff ever formally reviewed the appeals process that we proposed—despite requests from the Chairman's office, my office, and Commissioner Nord's office. Even though my office was instructed to await staff input before redrafting the proposed appeals process (which we recognized needed some further work), we never received the input we sought. Apparently agency staff ran out of time to consider our appeals process—and the same may very well be true of our dozens of other suggestions—but I do not believe that excuse suffices as a legal justification under the APA for not giving adequate consideration to an alternative proposal.³

³ As a further example, the majority nowhere explains why it does not adopt the part of the alternative proposal that would prohibit downloading data from the Database unless and until such data can be downloaded with an intact disclaimer. The preamble to the Final Rule explains that the agency's current software will not permit such a disclaimer, but the Commission never addresses the legal problem that their Final Rule permits data to be downloaded without the statutorily-prescribed disclaimer.

In any event, as the *Chamber of Commerce* court explained, “The Commission—not its counsel...—is charged by the Congress with bringing its expertise and its best judgment to bear... .”⁴ Consequently, even if the Office of General Counsel adequately considered the alternative Database proposal, its doing so does not constitute adequate consideration by the Commission as a whole.

Refusal to Re-Propose the Rule

My second procedural concern with the Final Database Rule stems from the fact that the Commission refused to re-propose the rule despite reversing its position on a major aspect of the rule between the Notice of Proposed Rulemaking and the Final Proposed Rule stages.⁵ Specifically, in the NPR, in numerous public briefings, and in speeches by the Chair, the Commission treated the 10-day ‘deadline’ in § 6A(c)(3)(A) with discretion in cases where a claim of materially inaccurate or confidential information is under review.⁶ However, in the Final Rule, the Commission dictates that reports of harm must go “live” in the Database even when claims of material inaccuracy are pending—and it does so of its own volition, not as a result of a demand contained in any public comment. Accuracy is at the core of most of the voluminous comments received by the agency both from the regulated community and the consumer advocates and both sides commented based on their understanding from all previous Commission statements that the Commission would exercise discretion when a claim of inaccuracy was pending. Most of those who commented asked for an appeals process for resolving these claims, a timeline for such a resolution, transparency in the process, etc. They had no chance to make their case for withholding dubious or incorrect information because all the previous reassurances lulled them into a false sense of complacency on that point.

Changing the final rule in regard to such a core issue deprived all groups from commenting on the legal choices the agency might make and from offering suggestions and arguments to better handle the issue. I believe the kind of reversal dropped on the regulated industry here is precisely the kind that requires the agency to re-propose a rule and thereby provide the affected stakeholders an opportunity to comment on the agency’s change in position. *See, e.g., Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. March 18, 1994) (striking down a Department of Labor Interim Final Rule that “prohibited what the rule had permitted”). Likewise, in this case, the agency’s final rule prohibits something that the NPR had permitted. And, as in *Kooritzky*, the Commission never “alerted interested parties to the possibility of the agency’s adopting a rule different than the one proposed” and it never informed the non-expert reader of the NPR of the possibility that the final rule would prohibit delaying publication of reports of harm when claims of material inaccuracy were pending. The same thing is true of the agency’s deleting the ‘Others’ category and then including all of the people mentioned in that category within the definition of ‘Consumers’ or ‘Public safety entities.’

To be clear, while I might object for the substantive reasons outlined in my earlier statements, I believe the agency could have adopted most of what it proposed in the final rule had it gone through proper notice-and-comment rulemaking. Alternatively, the agency could have adopted a final rule closer to what was proposed in the NPR. Unfortunately, it did not choose either of these paths. Rather the agency changed its position 180 degrees without warning. Given that the agency consistently treated the deadline as suspendable at the agency’s discretion at every earlier stage of the rulemaking process, affected interests had no reason to expect that the final rule might come out differently. Therefore, they had no opportunity to take

⁴ *Chamber of Commerce*, 412 F.3d at 145.

⁵ My motion to re-propose the rule was defeated at the decisional meeting by a 3-2 vote.

⁶ See my first statement of Nov. 24 for cites to the Federal Register establishing the contradiction in language between the NPR and the Final Rule.

issue with an interpretation that would treat the 10-day deadline as absolute. The agency cannot adopt a rule with a key provision that is a complete reversal from the NPR without providing a fair opportunity for notice and comment. In this case, the agency made a choice that is not permissible under the APA, and I believe that a court would strike down the Database Rule on this basis.

One might argue that the agency has no obligation to re-propose a rule when the reversal of its previous positions is based on a new interpretation of the law. The agency has never admitted that its legal opinion has changed; however, one can deduce this from two public sources. First, the NPR could not have issued in its original form without a legal opinion supporting the language. Second, the statements made by Chairman Tenenbaum and Commissioner Adler at the public meeting suggested that their own views on the matter had changed as a result of a changed legal interpretation of the provision. But it cannot be the case that an agency may change its view 180 degrees after notice-and-comment rulemaking without fair notice and not based on any comments received so long as the basis for the change is a legal opinion.⁷ If that logic were right, then an agency would merely need to couch any change that would otherwise require re-proposal as a legal change rather than a policy change in order to avoid the need to re-propose. Indeed, the APA requires the Commission to provide “interested persons an opportunity to participate in the rulemaking through submission of written data, views, *or arguments*.” 5 U.S.C. Sec. 553(c) (emphasis added). Presumably that includes legal arguments that might persuade the Commission to stick with its original legal interpretation.

One might also argue that in fact the regulated community did have fair notice of the final legal interpretation—in other words, that it should not have come as a surprise because, if we could interpret the law thusly, every interested party should have seen that possible legal interpretation also. However, the fact that virtually no commenters assumed that reports of harm would go into the Database automatically even if a claim of material inaccuracy was pending suggests otherwise. It is clear from the public meeting that the Commission changed its view from the NPR to the final rule because some Commissioners believe that such an outcome is legally required. But that legal viewpoint was never presented for public comment. There is a big difference between putting a proposed rule out for public comment that people assume is legally possible and then adopting a final rule that is completely opposite because the proposed rule is supposedly no longer a legally permissible approach. Changing the premise of the question so drastically undercuts the possibility of receiving public comments based on adequate notice.

Neglected Responsibility to Assess Impact on Small Businesses

The Regulatory Flexibility Act requires the CPSC to review proposed rules for their potential economic impact on small entities, including small businesses. Section 603 of the RFA requires the CPSC to prepare and make available for public comment an initial “reg-flex” analysis assessing the economic impact of the proposed rule and identifying alternatives that would have a reduced impact. 5 U.S.C. 603. Section 605(b) of the RFA, however, lifts this requirement when the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The head of the CPSC for these purposes is the five commissioners acting as a group. *See Free Enterprise Fund et al. v. Public Company Accounting Oversight Board et al.*, 561 U.S. ___ (2010) (slip. op. at 30-32).

⁷ Such a secret legal interpretation would likely fare no better than “appellate counsel’s post hoc rationalizations for agency action” which “courts may not accept[.]” *Chamber of Commerce*, 412 F.3d at 143, citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Despite what I anticipate could well be a significant impact on small businesses, the proposed rule in this case did not contain an initial reg-flex analysis. Although the head of the agency purports to certify that this rule will not have a significant economic impact on a substantial number of small entities, the only testimony received on the subject by the Commission in November, 2009 argued otherwise—as did a comment received on the matter during the comment period. The best information the agency has indicates that small businesses will face significant costs registering for the business portal, preparing to receive reports of harm from the agency, and planning how to reply to such reports of harm. Indeed, as the agency has seen in just the past year, a materially inaccurate claim against a small business can quickly become a bet-the-company matter. The risk of reputational harm from materially inaccurate reports of harm in the Database is significant under this rule, and an alternative was readily available that would not have threatened the same costs.

Thus, for my part, I explicitly disavow the notion that this rule will not have a significant economic impact on a substantial number of small entities. Especially given the current economic environment, this rule could easily impose sufficient costs to bankrupt some enterprises. This rule is precisely the kind of regulation that chokes off new business and creates unproductive costs.

Agency staff have presented the Commissioners with only the most cursory and conclusory evidence of negligible economic impact, and it has not been a topic of discussion in the run-up to consideration of the final rule. I believe that this failure to conduct a regulatory flexibility analysis—and the concomitant failure to adopt available alternatives that would have threatened far fewer costs—comprise fatal flaws in the administrative process for the current rule and should prevent this rule from going into effect.

Conclusion

I consider the condition of the Final Rule quite unfortunate, because the Database Rule did not have to turn out this way. The 37 public comments we received on the NPR provided the agency with plenty of guidance on how to improve the rule to achieve the statutory objective while avoiding unnecessary costs. Regrettably, the staff draft failed to heed those comments. And so, sixteen days before the final vote, Commissioner Nord and I offered an alternative to the staff-generated final proposed rule that would have achieved all of the statutory objectives of the Publicly Available Consumer Product Safety Information Database without misleading consumers with inaccurate data, invading the privacy of injured consumers, or inflicting indiscriminate reputational damage on manufacturers of safe products. Like the thrust of the public comments, our effort was largely ignored too.

As is, I am not for the Database. The final rule suffers from so many substantive problems that it will never achieve the purpose envisioned by Congress. But substance aside, this final rule also suffers from multiple procedural defects: It failed to give adequate consideration to an alternative proposal; it refused to re-propose the rule despite a major unanticipated change between the NPR and Final Rule; and it failed to conduct the required assessment of the impact on small business. It feels a bit like they invited me to a restaurant, ordered something off the menu for me, and then reassured me that they adequately considered what I should have for dinner without ever asking me my preference. I fear these procedural defects in the majority's consideration of the Final Rule ensure that legal challenges will be forthcoming against the Database Rule. For these further reasons, I continue to oppose the Database final rule.