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

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Section 212 of the Consumer Product Safety Improvement Act of 2008 calls for the CPSC to establish and maintain a Publicly Available Consumer Product Safety Information Database ("Database"). My statement from April 22, 2010 thoroughly explained several of my policy concerns with the draft rule,[1] only a couple of which were addressed in the final rule adopted today. Although the statute is somewhat detailed and prescriptive in its particulars, it does leave some decisions up to the discretion of the Consumer Product Safety Commission ("CPSC"). Where the statute is susceptible to more than one legal interpretation, we ought to embrace the one that enables the agency to construct a Database with greater accuracy and clarity. Only accurate information is helpful to consumers trying to make purchasing decisions based on safety factors. The final rule adopted today by a partisan 3-2 majority of this Commission does not share that perspective. Instead, it promises to produce an inaccurate and confusing Database that would fail to fulfill its primary purpose.

Much of the problem with the final rule results from misreading its authorizing statute. First, the rule misconstrues who may submit reports of harm under the statute. Second, it misinterprets whether a report of harm must be published on the Database within 10 days when an investigation is still pending into the material inaccuracy of the report. For these reasons the decision to implement this final rule will most likely produce an unworkable Database, a rule vulnerable to legal challenge, and possibly a well-deserved decision by Congress to defund operation of the public Database.

I. Who can submit

The Plain Language of the Statute

Section 6A(b)(1)(A) of the statute contains a finite list of who may submit reports of harm to the Database, but § (b)(2)(b) of the statute provides an open-ended list of the pieces of information the agency may require in those reports. The statute envisions that only specified parties (injured parties, treating physicians, emergency responders, child care providers, etc.) with a direct relationship to an incident will submit reports of harm, and judiciously limits who may submit reports of harm to a narrow list. Reading this list, one can see a common thread running through these submitters. They are the people most likely to have a direct relationship to an incident or harmed consumer and thus be able to provide accurate details and a meaningful verification of key facts. In contrast, when it comes to specifying what data fields should be mandatory in reports of harm, Congress has largely left it to the agency to sort out, naming a bare minimum number of fields and inviting the agency to fill in the remainder. Unfortunately, the agency has produced a

[1] I will issue an additional statement next week further explaining, in part, some of the other issues I raised publicly at today's decisional meeting.

rule that does the exact opposite of what the law demands. The final rule ignores the statutory limit on who may submit reports of harm while it simultaneously fails to add enough mandatory fields to make the Database useful and workable.

The statutory language listing who may submit reports of harm is quite clear:

> Except as provided in subsection (c)(4) [which deals with inaccurate information], the database shall include the following: (A) Reports of harm relating to the use of consumer products, and other products or substances regulated by the Commission, that are 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.

CPSA § 6A (b)(1)(A)(i)-(v). Self-evidently, there is no language at all inviting the Commission to add additional persons to the list of who may submit reports of harm. If anything, by listing the one exception for inaccurate information, the language suggests that the list is exclusive. Yet, in the notice of proposed rulemaking, the Commission added a sixth category of "*Others* including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." 75 FR 99 (May 24, 2010), at 29176.

Comparing the above language to both the language in the same part of the statute listing the requirements that any report of harm must include—*and* the language detailing ways in which the information in the Database must be sortable—further demonstrates the finite nature of the statute's list of who may submit reports of harm. The first list states:

> In implementing the database, the Commission shall establish the following: … (B) A requirement that any report described in paragraph (1)(A) submitted for inclusion in such database include, *at a minimum*—(i) a description of the consumer product …; (ii) identification of the manufacturer…; (iii) a description of the harm…; (iv) contact information for the person submitting the report; and (v) a verification by the person submitting the information… .

CPSA § 6A (b)(2)(B)(i)-(v)(emphasis added). Now, consider the language specifying the ways in which the information in the Database must be sortable:

> The Commission … shall ensure, to the extent practicable, that the database is sortable and accessible by—(A) the date … ; (B) the name of the consumer product … ; (C) the model name; (D) the manufacturer's or private labeler's name; *and (E) such other elements as the Commission considers in the public interest.*

CPSA § 6A (b)(4)(A)-(E). So, in both of the latter cases—quite unlike the list of who may submit reports of harm—the lists make it explicitly clear they are not exclusive. The first list is not exclusive, because it says "at a minimum." The second list is not exclusive because it invites the Commission to include "other elements." While numerous cases suggest that a statutory list is not necessarily finite, those cases do not involve a list like this one contained in the same section with two other lists that are unequivocally open-ended. Given that unique context, the statutory list of five categories of submitters appears finite.

Adding Additional Information to the Database

Immediately after listing who may submit reports of harm and what such reports shall include (at a minimum), the statute describes additional information that the Commission must include in the Database:

> (3) Additional Information—*In addition to the reports received* under paragraph (1), the Commission shall include in the database, consistent with the requirements of section 6(a) and (b), any additional information it determines to be in the public interest.

CPSA § 6A (b)(3) (emphasis added). Even here then, the "additional information" that shall be included is *in addition to* reports of harm, which implies that the Commission is not free to obtain additional information—as the final rule tries to do—by simply expanding the list of who may submit reports of harm beyond persons listed in paragraph (b)(1)(A). In trying to do this, the final rule simultaneously subverts the finite list in (b)(1)(A) and the standard statutory requirements for adding additional information to the Database in (b)(3).

Paragraph (b)(3) clearly specifies that there is an alternative gateway for "additional information" that the Commission has to include in the Database if doing so is in the public interest, but such information is held to a different standard of admissibility. According to the statute, such additional information "shall" be included "consistent with the requirements of section 6(a) and (b) … ." The majority has essentially treated the Database as doing away with §§ 6(a) and (b), but that is a mistaken reading of CPSIA § 6A. Although Congress came up with a new, alternative process that applies for reporting specific incidents *in reports of harm* in lieu of §§ 6(a) and 6(b), it preserved the traditional regime for everything else that the Commission might want to put in the Database. To expand that alternative process too broadly or to interpret §§ 6(a) and (b) as somehow not applying to the publication of "additional information" leaves the Database open to mischief that the statute meant to prevent.

'Bait and Switch': Elimination of "Others"

Although the final rule has ostensibly eliminated the separate category of "Others," it has now shoehorned every single kind of submitter formerly occupying the "Others" category into the five statutory categories. For example, in addition to the original "users of consumer products, family members, relatives, parents, guardians, friends, and observers[,]" the final rule has now added to the definition of "Consumers" such groups as "attorneys, investigators, professional engineers, [and] agents of a user of a consumer product[.]" In addition to the original "police, fire, ambulance, emergency medical services, Federal, State, and local law enforcement entities, and other public safety officials[,]" the majority has now added to the definition of "Public safety entities" such groups as "consumer advocates or individuals who work for

nongovernmental organizations, consumer advocacy organizations, and trade associations, so long as they have a public safety purpose."

Such an interpretive ruse is not going to fool those commenters who objected to the inclusion of "Others," and it does not save the rule from disregarding the statute. If the persons originally included within the "Others" category could reasonably have been included within the five statutory categories, the staff would have suggested putting them there in the NPR. Trying to put them there now not only continues to ignore the statute's strictures, but it also insults the intelligence of those who made a compelling argument that adding an "Others" category in the NPR was going beyond the clear language of the statute and would undermine the accuracy and reliability of the Database.

Moreover, the categories of people originally listed in the definition of "Others" (and now transplanted into "Consumers" and "Public safety entities") are different in kind from the statute's specified list of entities that 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 injured consumer at or near the time of the incident and/or they are in positions of responsibility to care for that person. In stark contrast, attorneys, engineers, investigators, NGOs, consumer groups, and trade associations are not likely to have direct contact with the injured consumer at or near the time of the incident and are not necessarily in positions of responsibility to care for that person. Furthermore, they are in no position to attest in good faith to the facts being reported as required by the law, notwithstanding the caveat "to the best of my knowledge"—a phrase that would be reduced to meaningless under a rule that includes submitters with such attenuated knowledge. So, even if one reads the statute to permit expansion of the list of people who may submit reports of harm, nothing in the statute suggests that it could extend this broadly or to *these* categories.

Consequently, the final rule's definition of "Consumers" is not a legitimate, legally defensible interpretation of the term. That term has a long and well understood meaning, both within the context of the CPSA and in general usage. Neither the historic use of the word in the agency nor its ordinary use in public includes "attorneys, investigators, professional engineers, [and] agents of a user of a consumer product" within the definition. Nor does the term "Consumers" traditionally include "friends" of the consumer or "observers of the consumer products being used." The majority has not, and likely cannot, point to a single other instance in the agency's regulations where the term "Consumers" refers to attorneys, engineers, friends, bystanders and the like. Of course anyone can be a consumer and may file a report of harm if they are harmed *in their capacity as a consumer*. But the final rule goes much further and tries to read the term "Consumers" to allow attorneys and others to submit reports of harm about third parties. The only apparent logic for this position is that "we're all consumers." But, if Congress meant for the term to be so broad, it would not have needed to include several of the other categories on the list. Thus, saying that we are all consumers seems like a fairly frivolous, glib, and intellectually dishonest way to interpret the statute.

Practically speaking, defining everyone as a consumer would also undermine the accuracy and usefulness of the Database to consumers making purchasing decisions. For instance, the final rule includes the requirement that the submitter of a new incident identify the category into which he or she falls because it will be helpful to prospective purchasers to know who reported the incident. However, under the expansive definition of "Consumer" adopted today, every single submitter to the Database could (and well might) honestly check the category "Consumer" as the one into which he or she fits. This broad definition completely devalues the reports of harm supplied by true consumers—the ones who own or purchase the product involved in an incident—by intermingling them with hearsay and third-hand submissions.

Similarly, the final rule's definition of "Public safety entities" is not a valid, legally defensible interpretation of that term. The sensible original definition encompassed police, fire, EMS, law enforcement, and other officials. However, the final rule's definition now adds consumer advocates, trade associations, and nongovernmental organizations. Such a definition turns the meaning of "public" on its head by calling something public that is actually "nongovernmental." By definition, a public safety entity is an entity charged with responsibility for the public's safety. Private groups might take an interest in public safety as one of their missions, but the public does not exert control over such groups or entrust them with an obligation to ensure public safety.

Playing fast and loose with terms like "Consumers" and "Public safety entities" is bad policy, because it will allow many reports of harm into the Database that do not have the indicia of reliability that the statute demands—thereby undermining the statutory purpose for the Database. More importantly, however, such insupportable definitions of those terms make the Database rule vulnerable to legal challenge.

II. When reports of harm must be posted, according to the statute

Just as the final rule misinterprets who may submit reports of harm, so too it misreads the statutory deadline regarding publication of reports of harm to the Database to apply when claims of material inaccuracy are still pending. The rule insists that virtually every report of harm must be published on the Database "not later than the 10th business day after the date on which the Commission transmits the report under paragraph (1) of this subsection." The majority reaches this conclusion by misapplying a deadline contained in § 6A(c)(3)(A) as though it also applies to § 6A(c)(4)(A), even though it does not. There are several reasons why the majority's broad application of a single phrase in § 6A(c)(3)(A) is untenable.[2]

In the first place, the Commission's Notice of Proposed Rulemaking expressly adopted the exact opposite interpretation of the statute from what the final rule proposes on this point. For example, § 1102.24 of the NPR states: "[T]he Commission may, in its discretion, withhold a report of harm from publication in the Database until it makes a determination regarding confidential treatment." 75 FR 99, at 29179 (May 24, 2010). Likewise, § 1102.26 states: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the Database until it makes a determination."[3] 75 FR 99, at 29180. The NPR could not have been issued this way without a legal opinion supporting the permissibility of this policy choice. The agency apparently believed at one time that this approach is legally permissible, which at least suggests there is a statutory ambiguity regarding this point.

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[2] There is a stark contrast between how the agency treats the language here about "not later than the 10th business day" and how it treated the phrase "in no case later than 10 months after the date of enactment" in § 14(a)(3)(B)(vi) of the CPSA a few months ago. Whereas the Commission did not find the latter language to pose any kind of impediment to publishing notices of the requirements for accreditation of third party conformity assessment bodies for "other children's product safety rules[,]" it now treats the 10 business day limit in § 6A(c)(3)(A) of the CPSA as an absolute in the Database rule and even tries to ignore exceptions.

[3] The preamble of the NPR contains analogous language: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the database until it makes a determination." 75 FR 99, at 29161. And this: "We propose that in cases where a claim of materially inaccurate or confidential information is under review, the Commission, in its discretion, may withhold a report of harm *in part or in full* until such a determination is made." 75 FR 99, at 29170 (Response to summary 26)(emphasis added).

Not surprisingly, given the NPR, many if not most of the commenters assumed that incidents would *not* go into the Database when a determination regarding a confidentiality or material inaccuracy claim was still pending. Although at least one commenter expressed the policy view that reports of harm should go up on the 10th day even when such claims are unresolved, no one—not even the consumer groups—argued that the statute legally *prohibits* the agency from withholding reports from publication for the duration of its investigation. Of all the seasoned law firms and veteran agency observers reacting to the draft rule, none doubted the legal basis for delaying publication. To the contrary, several commenters premised their suggestions for a more detailed protocol for handling requests for determinations regarding confidentiality and material inaccuracy on the statute's permitting reports to be withheld from publication when such requests are under review. And yet the majority has inexplicably adopted a final rule that now forbids delaying publication in those circumstances and fails to establish a specific protocol for handling requests for determinations. This action—which disregards the NPR itself, the bulk of comments received, and their reasonable interpretation of the statute—undermines the fundamental purpose for notice and comment rulemaking.

The Plain Language of the Statute

Turning next to the statutory text, unlike (c)(3), paragraph (c)(4)(A) contains no mention of a deadline for the Commission:

> (4) Inaccurate Information.—(A) Inaccurate information in reports and comments received.—If, prior to making a report described in subsection (b)(1)(A) or a comment described in paragraph (2) of this subsection available in the database, the Commission determines that the information in such report of comment is materially inaccurate, the Commission *shall*—(i) decline to add the materially inaccurate information to the database; (ii) correct the materially inaccurate information in the report or comment and add the report or comment to the database; or (iii) add information to correct inaccurate information in the database.

CPSA § 6A (c)(4)(A) (emphasis added). Simply put, there is no requirement for the Commission to decide a claim of material inaccuracy within 10 days after sending the report to the manufacturer. Nor would such a requirement make sense given that a claim of material inaccuracy could come in as late as the tenth day following the report of harm's transmission to the manufacturer at a point in time where it might not be possible to resolve the claim by day ten. Moreover, even if a claim of material inaccuracy were received sooner, the validity of some claims could well take longer than a few days to investigate and determine.

Section (c)(4) operates on a wholly different basis than (c)(3) and is meant to be applied *in the alternative*. Under (c)(3)(A), which applies when no claim of material inaccuracy has been made, the Commission must publish a report of harm on the Database within 10 days after transmitting the report to the manufacturer. (And even that deadline is excused when problems arise with transmitting the report to the proper party.) However, under (c)(4)(A), if the Commission receives notice that a report of harm contains materially inaccurate information before that report of harm has been posted on the Database, "the Commission shall" do one of three things: decline to add the information, correct the information and add the

report, or add further information to correct the inaccurate information. The final rule errs in treating the phrase "If … the Commission determines" to mean that the Commission does not have to make a determination at all. A better reading would recognize that the Commission once informed of an alleged material inaccuracy *does* have to make a determination—after which a finding of no material inaccuracy triggers (3)(A), whereas a finding of material inaccuracy triggers (4)(A)(i)-(iii).

In order to satisfy (c)(4)(A), the agency must not have to post a report on the Database within 10 days when its material inaccuracy is still under examination. Because the Commission *shall* take one of the three actions under (4)(A), it may *not* take a fourth action to simply publish the report of harm and decide the material inaccuracy question after the fact. To do that would be to treat a report of harm the same way under (4)(A) that a report is treated under (3)(A) where no claim of material inaccuracy exists, thus ignoring the mandate of (4)(A). Publishing the report in the face of an unresolved claim of inaccuracy would also implicitly decide that the claim of material inaccuracy is not valid, since that is the other circumstance under (3)(A) where a report of harm will be published not later than 10 days after transmitting it to the manufacturer.

If the Commission does not receive notice of a claim of material inaccuracy until after a report of harm has already been published, then (4)(B) comes into play. But the Commission cannot convert a (4)(A) situation (advance notice of material inaccuracy) into a (4)(B) situation (belated notice of material inaccuracy) simply by failing to make a timely determination before publishing a report of harm. Reading the statute to permit that eliminates the main statutory distinction between (4)(A) and (4)(B). Furthermore, the final rule's reading of the statute turns (4)(A) on its head, because it means that when the agency learns about a material inaccuracy that is already in the Database the agency must fix it within seven days; however, when the agency learns about a material inaccuracy in a report that is *not* yet in the Database, the Commission has no deadline for fixing it. That makes no sense. That artificial discrepancy disappears as soon as one recognizes that the statute actually requires claims of material inaccuracy to be resolved before reports of harm are published on the public Database.

Aside from being a better textual reading of the statute, reading (3)(A) and (4)(A) to apply in the alternative preserves an important policy consequence of the statute's design. If manufacturers want to get claims of material inaccuracy addressed before a report of harm is published, they must file claims no later than 10 days after receiving notice of a report of harm. That creates a strong incentive to get comments in under the wire. In contrast, an interpretation whereby a report of harm is published on day 10 regardless of whether a claim of material inaccuracy comes in on day 9 or day 11 reduces the incentive for manufacturers to make timely comments.

Another reason why the majority's effort to import the 10-day deadline from (3)(A) into (4)(A) is untenable is that paragraph (3)(A) explicitly excepts the publication of materially inaccurate information under paragraph (4)(A) from its terms:

> (A) Reports.—*Except as provided in paragraph (4)(A)*, if the Commission receives a report described in subsection (b)(1)(A), the Commission shall make the report available in the database not later than the 10th business day after the date on which the Commission transmits the report under paragraph (1) of this subsection.

§ 6A(c)(3)(A) (emphasis added). The first clause of this provision indicates that the 10-day deadline is subject to paragraph (4)(A), which deals with inaccurate information. The next clause reiterates that (4)(A) limits what the Database shall include, because paragraph (b)(1)(A) to which it refers states: "(1) CONTENTS.—*Except as provided in subsection (c)(4)*, the database shall include … ."[4] Thus the statute explicitly exempts (c)(4) material from the "shall include" imperative in (b)(1)(A) and logically implies that the Database shall *not* include materially inaccurate or duplicative information.

Hence, before ever getting to the deadline language, paragraph (3)(A) twice qualifies application of the 10-day deadline to (4)(A). In fact the text of the statute goes even further. By saying that (3)(A) only applies to the publication of reports of harm described in subsection (b)(1)(A), the statute actually treats meeting the requirements of (4)(A) as a prerequisite for publication of a report of harm. The statute could hardly have repeated more often or explained more comprehensively that the deadline in paragraph (3)(A) *does not apply* in the context of (4)(A).

Even if one construes the "shall" in (3)(A) still to be applicable under (4)(A), that does not justify ignoring the "shall" in (4)(A). If a claim of material inaccuracy is lodged, then under (4)(A) the Commission "*shall*— (i) decline to add the materially inaccurate information to the database; (ii) correct the materially inaccurate information in the report or comment and add the report or comment to the database; or (iii) add information to correct inaccurate information in the database." If the Commission puts the material into the Database after 10 days just because it has not yet been able to make a determination about whether or not the information is materially inaccurate, then the Commission has failed to give effect to (4)(A). For example, it will no longer be possible to "decline to add the materially inaccurate information to the database" under (4)(a)(i). Publishing the report in the Database when the Commission has not yet ruled on material inaccuracy is the functional equivalent of making a determination that the report is not materially inaccurate. If the agency chooses not to decide, it still has made a choice.

Yet another reason to reject a broad application of the (3)(A) deadline is that it makes no sense to apply the deadline to paragraph (c)(2)(C), which deals with confidential material. Under that provision, the Commission is told that it "shall redact" information designated as confidential "before it is placed in the database." In other words, a supposed looming 10-day deadline cannot be used as an excuse, and the deadline must be ignored, if necessary, in order to ensure that confidential information is redacted *before* a report of harm is posted. Significantly, paragraph (c)(2)(C) contains almost the exact same ("If the Commission determines…") conditional phrase as (c)(4)(A). So, if it does not make sense to import the deadline from (3)(A) to (2)(C)—as the majority implicitly concedes—then it hardly makes sense to import it to (4)(A), especially not based on that same phrase. Rather, it makes far more sense to read the statute as treating confidential and materially inaccurate information the same.

Taken together, CPSA §§ 6A(b)(1), (c)(2)(C)(ii), (c)(3)(A) and (c)(4)(A) convey a sense of what the statute is trying to accomplish functionally (or purposively). The goal here is to produce a useful and reliable Database by making publicly available all of the reports of harm received *to the extent that they are not materially inaccurate or confidential.*

[4] Subsection (c)(4) includes both (c)(4)(A) and (c)(4)(B), so this language reiterates that (3)(A) is subject to the exception in (4)(A).

Conclusion

The Commission's misguided decision to implement this version of the final rule will produce a Database that wastes taxpayer money, confuses and misleads consumers, raises prices, kills jobs, and damages the reputations of safe and responsible manufacturers. Had the Commission instead adopted the more reasonable interpretation of the statute outlined herein—and fixed the legal problems with the draft of the staff's final proposed rule in the way that Commissioner Nord's and my alternative proposal did—the resulting Database could have successfully identified unsafe products, helped consumers select relatively safer products, and enhanced overall consumer product safety levels.