



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**STATEMENT OF CHAIRMAN INEZ M. TENENBAUM AND COMMISSIONER ROBERT ADLER ON THE
CPSC STAFF PLAN FOR RETROSPECTIVE REVIEW OF EXISTING CPSC REGULATIONS**

September 12, 2012

Background

On April 25, 2012, CPSC staff submitted for Commission review a Draft Plan for Retrospective Review of Existing Rules. The staff draft responded to direction from the Commission to restart the agency's rule review process. The process had been stopped in 2008 by the previous CPSC leadership, citing a lack of agency resources to continue the reviews.

Although we voiced strong approval of the staff draft, our colleagues, Commissioners Nord and Northup, raised numerous objections to the staff's proposal. To accommodate our colleagues, we engaged in three months of good faith negotiations in an attempt to reach a compromise on the staff's plan.¹ Regrettably, after exchanging drafts and redrafts too numerous to count, we found ourselves in fundamental disagreement with our colleagues about the nature of the task before us, so we have voted to approve the draft plan as proposed by the staff.

We believe our disagreement can be summarized as follows: we propose to follow the staff's recommendation to undertake a comprehensive review of existing CPSC rules, in accordance with President Obama's Executive Orders and within our available resources. Our colleagues, while professing support of the President's Executive Orders, actually wish to modify the plan in a manner that would focus the rule review process almost exclusively on the relitigation of recent Commission votes on statutorily required rules that have barely taken effect (or are still in the process of being implemented).

A CPSC Career Staff Plan, Not a "Democrat" Plan

At the outset, we must address a charge leveled by our colleague, Commissioner Northup, that we find deeply regrettable. On August 15, she issued a statement denouncing the staff's draft plan as the

¹ We note that, in the middle of the negotiations with our colleagues, without notice to us, they submitted a joint statement to the U.S. House Judiciary Subcommittee on Courts, Commercial and Administrative Law regarding our regulatory reform activities. In the statement, Commissioners Nord and Northup attacked the staff's regulatory review draft as not using the retrospective rule review process recommended in Executive Order 13579, focusing on "rules that qualify as 'minor housekeeping,' at best," and advocating for the review of three rules that were never raised in our negotiations. In addition to lacking merit, our colleagues' action in raising these issues with Congress rather than talking to us did little to advance a spirit of collegiality useful in resolving disagreements among the Commissioners.

“Democrat” Plan, with her usual colorful and strong language. Although we have grown used to such rhetoric, in this case, we must object. Her characterization of the document in such overtly political terms is false, misleading, and inappropriate. We urge anyone who has any doubts about the matter to go to the document in question² to see that it is a very thoughtful proposal developed by CPSC career staff that carries not a hint of partisanship or a whiff of politics.

Viewing the rule review process developed by CPSC staff through a political prism as our colleague does is counterproductive to the Commission’s safety mission. Product safety is not the exclusive domain of any political party nor should it ever be framed that way. One need only look to the overwhelming votes in favor of the Consumer Product Safety Improvement Act (CPSIA) and the recent amendments to this act, P.L. 112-28, to see that both of the major political parties strongly support product safety. Given our colleague’s overtly political perspective on a nonpolitical staff proposal, one can see why agreement on the staff’s plan has proved so elusive.

Past Regulatory Review Activities

Less than 10 years after passage of the Consumer Product Safety Act, the CPSC began reviewing the regulations it enforced. This effort has continued over the last 30 years. It began with passage of the Regulatory Flexibility Act (RFA)³ and has expanded over time. The staff’s draft plan continues this tradition.

As a starting point, section 610 of the RFA requires agencies to periodically review rules that have a significant impact on a substantial number of small entities.⁴ Each agency is required to publish a plan demonstrating its approach to its review. Accordingly, on September 14, 1981, the CPSC published its plan for reviewing existing rules under the RFA, as well as subsequent rules within 10 years of their publication.⁵

The CPSC went far beyond the requirements of the RFA in its 1981 plan. In fact, the agency not only solicited and reviewed comments for rules that we determined would have a significant economic impact on a substantial number of small entities, we actually conducted a review of every safety rule under our jurisdiction. On the whole, we believe these reviews have been good both for consumers and the regulated community. In addition to the rule reviews required by the RFA, the Commission has also voluntarily undertaken additional efforts in the past to review its regulations in a manner consistent with the spirit of Executive Order 12866 and similar Executive Orders.⁶ Between 2005 and 2007, the CPSC clarified its rules regarding standards for carpets, rugs and bicycles.⁷ In addition, the

² <http://www.cpsc.gov/library/foia/foia12/brief/rulereviewplan.pdf>

³ 5 U.S.C. §§ 601-612.

⁴ 5 U.S.C. § 610.

⁵ 46 Fed. Reg. 45621.

⁶ See *Pilot Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 69 Fed. Reg. 4095 (Jan. 28, 2004) (requesting comments on Commission regulations for walk-behind power mowers, electrically operated toys, standards for flammability of vinyl plastic film, and child resistant packaging for certain salicylate compounds).

⁷ See e.g. *Fiscal Year 2005 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 70 Fed. Reg. 18,338 (April 11, 2005) (requesting comments on Commission regulations for cigarette lighter and multi-purpose lighter safety standards, bicycles, surface flammability of carpets and rugs, and child resistant packaging for controlled substances).

Commission also established projects to examine amendments to the electrical toy and cigarette and multipurpose lighter rules.

The voluntary rule review program was suspended in 2008 by the previous CPSC leadership, citing limited resources. Although resources remain short, we have committed to reinstate the review process in the spirit of the President's Executive Orders, 13563 and 13579, which call on independent agencies to conduct retrospective reviews of existing regulations.

The Executive Orders: Reduce Burdens and Improve Regulations

Both of our colleagues have invoked President Obama's Executive Orders 13563 and 13579 in support of their objections to the staff's draft plan. Recognizing at the outset that, as an independent regulatory agency, we are not required to follow these Executive Orders; nonetheless, we think that the staff plan fully follows the guidance in these Executive Orders.

That said, we have a specific disagreement with Commissioner Northup. To explain, we quote from Executive Order 13579:

[E]ach independent agency should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.⁸

Our disagreement with Commissioner Northup arises from her insistence that the Commission disregard the clear language of the Executive Order. She argues that reviewing CPSC rules to see whether they need to be expanded or strengthened undermines the intent of 13579. To quote her, it would be "inconsistent with the President's intent to select rules in order to strengthen them, rather than to reduce their unnecessary burdens."⁹ In other words, should our rule review determine that a safety standard has failed to protect consumers from an unreasonable risk, we should do nothing and remain focused exclusively on burden reduction activities. The only approach our colleague supports is to cut regulations. But, the Executive Order says otherwise. It specifically directs agencies to seek out rules that are "outmoded, ineffective, insufficient, or excessively burdensome" in order to "modify, streamline, expand, or repeal them"¹⁰ (emphasis added). In other words, if we were to undertake retrospective reviews only of rules that impose unnecessary burdens without considering rules with safety gaps or deficiencies, we would ignore the Executive Order's explicit directive to modify or expand our regulations to make the agency's regulatory program more effective as well as less burdensome.

⁸ See Executive Order 13579, "Regulation and Independent Regulatory Agencies: (2011) (emphasis added).

⁹ *Statement of Commissioner Anne Northup on the Vote to Approve A Plan for the Retrospective Review of Existing Rules* at: <http://www.cpsc.gov/pr/northup08152012.pdf>.

¹⁰ *Supra* note 12.

Needless to say, we find our colleague's narrow interpretation of the President's Executive Orders unpersuasive given the clear meaning of their words. That said, we should add that nothing in the staff's draft even hints that they intend to focus exclusively or even primarily on expanding our current rules. The point is that they plan their analysis to proceed on the basis of data and science, not on the basis of an ideological agenda.

CPSC Staff's Proposal: More Comprehensive than the Executive Orders

As stated above, our review not only meets the particulars of the Executive Orders, but extends well beyond them. In fact, the Executive Orders apply only to "existing significant regulations," defined as those having an annual effect on the economy of \$100 million or more.¹¹ Reading the Executive Orders this narrowly would effectively remove virtually all existing CPSC regulations from review because only three of them meet this threshold test.¹²

Instead, in the full spirit of the Executive Orders, the staff proposal contemplates reviewing all existing CPSC rules. This review would include an analysis of the impact of these rules on small entities, as defined in the Regulatory Flexibility Act (RFA). We applaud this approach because small businesses often face greater challenges in meeting new regulations than their larger, better-financed competitors.

Keeping with the spirit of the Office of Management and Budget (OMB) guidance with respect to regulatory reviews, the staff has explicitly adopted the official template recommended by the Office of Information and Regulatory Affairs (OIRA) of OMB for retrospective review.¹³ In so doing, the staff leaves open the possibility that requirements in guidance documents, unfinished proposed rules, and items on our regulatory agenda could be considered possible candidates for retrospective review. Of course, the primary focus of the Executive Orders is on existing rules, but this shows just how faithful to the suggested OMB guidance the staff's proposal is.

It also shows how, once again, the staff has chosen to look farther afield than the minimum requested of us and how committed CPSC staff is to opening up our entire regulatory structure for review.

The Executive Orders and Cost-Benefit Analysis

Our colleagues have complained that, by our vote to approve the staff's proposal, we have refused to consider the costs of our rules or to permit staff to engage in cost-benefit analysis.¹⁴ These criticisms are demonstrably false.

¹¹ See, Executive Order 12866, "Regulatory Planning and Review" (1993). The Executive Order's definition has been adopted in 13563 and 13579.

¹² According to staff, only three regulations would meet this test: Standard for the Flammability (Open Flames) of Mattress sets, 71 Fed. Reg. 13472 (March 15, 2006); Standard for Full-Size Baby Cribs and Non-Full-Size Cribs, 75 Fed. Reg. 81766 (December 28, 2010); and Final Rule on Testing and Labeling Pertaining to Product Certification, 76 Fed. Reg. 69482 (November 8, 2011).

¹³Memorandum for the Heads of Independent Regulatory Agencies, M-11-28 regarding Executive Order 13579, "Regulation and Independent Regulatory Agencies" (July 22, 2011).

¹⁴ Nancy Nord, *Nord: Democratic Commissioners Marching to a Different Drummer*, Washington Times, August 20, 2012, at: <http://www.washingtontimes.com/news/2012/aug/20/democratic-commissioners-marching-to-a-different-d/>.

The staff's draft plan uses OMB's guidance for regulatory review, which suggests the use of a retrospective analysis of the costs and benefits of rules.¹⁵ Section VII of staff's draft plan is entitled, "Components of Retrospective Cost-Benefit Analysis," and it states:

"We will use the metrics appropriate to the particular regulation being reviewed in order to evaluate the effectiveness of the regulation. Such metrics may include: reductions in deaths, injuries, and property loss; record keeping burdens; testing costs; and other costs related to the rule."

To even the most casual observer, this is a description of a cost-benefit analysis. In short, the issue is not whether we support the type of cost-benefit analysis proposed by staff, but whether we support our *colleagues'* notion of what this analysis should be. We don't. Our colleagues apparently believe that the only appropriate "cost-benefit analysis" is the extensive analysis called for by many of our statutes when we are first promulgating rules. This is the type of analysis that has produced a grand total of nine mandatory safety rules in 31 years and, on occasion, has led Congress to step in and legislatively mandate rules rather than wait for the results of our cumbersome regulatory process. This is the type of analysis that is best described as "paralysis by analysis." And it is our statutorily required analysis that led Congress in 2008 to allow the CPSC to use "notice and comment" rulemaking for certain children's product safety rules, as almost every other health and safety agency does, because they considered our lengthy process to be counterproductive and not sufficiently protective of children.

The staff draft plan also explicitly states that the Commission will "continue to measure the impact of regulations on small entities as required by the Regulatory Flexibility Act [RFA]." Inexplicably, our colleagues have proposed an approach that removes all references to this key protection for small businesses. This is perplexing. We think RFA review is an essential part of responsible rulemaking because it focuses the agency's cost-benefit analysis on those entities that will be hardest hit by our regulations: small businesses.

We realize that our colleagues dismiss RFA cost-benefit analysis as inconsequential. On this point, both OMB and the Small Business Administration would take strong issue. In fact, SBA estimates a savings to American taxpayers of over \$10 billion annually from the RFA—over \$200 billion since 1998.

To state that we do not support cost-benefit analysis as a part of retrospective rule review is wrong and misleading. We simply do not support our colleagues' approach.

The Criteria for Retrospective Review and Agency Resources

Our colleagues insist that the single most important criterion for setting priorities should be the cost of the regulation to business. While we agree that cost should always be a major concern, we do not believe any one factor should automatically take precedence over the others except, perhaps, for preventing or reducing deaths and injuries. That said, we note that the staff draft plan for prioritizing

¹⁵ Supra note 18.

candidates for retrospective review includes numerous criteria that recognize the importance of costs in the reviews. Among these criteria are the following:

- the cost of the regulation, including the impact on small businesses,
- the cost associated with the regulation,
- overlapping regulatory requirements, and
- the paperwork burden associated with the regulation.

In addition to these cost related criteria, staff has recommended a number of non-cost related factors, e.g., advancements in technology, age of a regulation, and input from stakeholders. We believe that all of staff's proposed factors should be considered when selecting rule review projects.

Specific Priorities for Retrospective Review in FY 2012

The staff plan proposes three rules for review in FY 2012: 1) reducing the burdens associated with third party testing while still assuring compliance with applicable rules, regulations, standards, or bans, 2) toy caps, and 3) animal testing. As we explain below, we think their proposal makes good sense.

At the outset, it is important to explain why staff selected the third party testing burden reduction efforts as a major component of CPSC's 2012 rule review plan. In addition to the agency's decision to undertake a retrospective review of our existing regulations in FY 2012, the Commission was also required by P.L. 112-28 to seek and consider public comments on specific steps suggested by Congress to reduce the testing burdens, while still assuring compliance with of our third party testing rules. This consideration, which we fully endorse, has consumed an enormous number of CPSC staff resources because the Commission also unanimously agreed to direct staff to undertake significant additional work beyond the requirements of P.L. 112-28.

One of the reasons this consideration has used so many agency resources is the decision by the Commission not just to seek comments on the specific steps suggested by Congress in P.L. 112-28, but to expand the scope of the inquiry and to request (and review) public comments on any useful opportunities to reduce burdens in our third party testing rules. Additionally, the Commission agreed to direct the staff to develop a briefing package summarizing and responding to the comments received, including staff recommendations for potential burden reduction opportunities while still assuring compliance. The Commission also instructed staff to conduct an independent review of the third party testing rule, one of the three "significant" regulations CPSC has ever passed.

The significance of this review is that it helps us accomplish two critical goals. First, we meet and greatly exceed our statutory obligations under P.L. 112-28 to look for ways to reduce the burdens of our third party testing rules while assuring compliance with applicable rules, regulations, standards, or bans. Second, in light of this major expenditure of our limited resources it permits us to count this expanded review as one of the rules for review under Executive Order 13579. This important point is unfortunately ignored by Commissioner Northup, who apparently reads the statute to require much more than what it plainly says. Thus, the CPSC staff sensibly proposed in our FY 2012 Operating Plan to undertake the expanded review of our third party testing rule as part of our retrospective rule review program for FY 2012 and 2013. We agree with this plan.

In addition to the review of our third party testing rules, the staff proposed two rule reviews that fit within the parameters of the rule review program but that would take significantly less time and be less resource intensive than that for the third party testing rules: the CPSC toy cap rule and the agency's rule on animal testing. These proposed reviews were part of the FY 2012 Operating Plan and were unanimously approved by the Commission. Notwithstanding their approval of this plan, our colleagues now decry these additional reviews as "insignificant" and mere "regulatory housekeeping." Yet, despite their objections, they approved these "insignificant" rules for retrospective review without complaint when they voted for the Commission's FY 2012 operating plan. Lest there be any misunderstanding on the point, the section that included these rules in the operating plan they voted for was titled "Rule Review."

Moreover, notwithstanding their dismissal of the significance of these rules, our colleagues do not argue that these rules should be ignored and not revised—just that this work should not count as part of our rule review. That would be fine if staff did not have to work on the review of these rules. Unfortunately, CPSC staff had to spend real time and effort to review and revise these rules. Even projects of lesser priority consume scarce resources.

Accordingly, we believe the staff's plan is extremely realistic and thoughtful given our limited resources and the urgent safety work we have on our agenda. The staff draft plan clearly maintains the spirit of the Executive Orders, which explicitly acknowledge that any review plan must operate within our resource constraints.

Conclusion

We voted to approve the CPSC career staff's rule review plan because it is a thoughtful plan that captures the spirit of the President's Executive Orders while allowing the agency to meet our existing safety mission within our very limited budgetary authority. It is disappointing that our colleagues have mischaracterized our actions and used this vote to politicize this issue.

On a positive note, we do not believe that this impasse will stop CPSC's staff from continuing to carry out the Commission's rule review as described in our Fiscal Year 2012 Operating Plan, or continuing to look for opportunities to make our rules even better for consumers and businesses alike.