



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

**Statement of
Robert S. Adler
Commissioner
United States Product Safety Commission**

**Before the
House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations**

**July 7, 2011
Rayburn House Office Building, Room 2322**

**“The Views of the Independent Agencies on Regulatory
Reform”**

Good morning Chairman Stearns, Ranking Member DeGette, and the members of the Subcommittee on Oversight and Investigations. Thank you for the opportunity to testify along with my colleague Anne Northup on behalf of the Consumer Product Safety Commission (CPSC). My name is Bob Adler, and I have been a Commissioner at the CPSC since August 2009. I am honored to sit in the company of so many of my fellow independent agency commissioners.

An Overview of CPSC and Regulatory Reform

In order for me to respond fully to the subcommittee's request for the agency's response to Executive Order 13563 and similar executive orders, I briefly need to review the history of the CPSC's rulemaking. I do so to make the point that we have undertaken both the promulgation of regulations and their retrospective review in the full spirit of the policies incorporated in the executive orders. So, I begin with several observations:

1. Since 1981, the CPSC has been required under amendments to the Consumer Product Safety Act (and the other acts it enforces) to conduct an extensive cost-benefit analysis when we promulgate safety rules. Under these amendments, our cost-benefit approach is as comprehensive, if not more so, as that set forth in any executive order issued by the Office of the President.
2. Over the years, the CPSC has promulgated extremely few mandatory safety rules requiring cost-benefit analyses, a grand total of nine in thirty years – or about one every 3 1/3 years – opting instead to work with the voluntary standards sector and to negotiate individual Corrective Action Plans for the recall of specific hazardous products.

3. Under the Regulatory Flexibility Act of 1980,¹ the CPSC chose to undertake a retrospective review of every safety rule under its jurisdiction from its beginning, not just those identified as having a substantial impact on a number of small entities (and, therefore, requiring a mandatory review).
4. In addition to the retrospective review of agency regulations mandated by the Regulatory Flexibility Act, the CPSC voluntarily undertook a comprehensive review of its regulations beginning in 2004 in a spirit consistent with Executive Order 13563 and anticipates continuing to do so in the future.
5. The only departure from the approach I've just described arises because of the enactment of the Consumer Product Safety Improvement Act in 2008. In response to its grave concerns about the need to protect the lives of young children, Congress voted overwhelmingly to streamline the CPSC's rulemaking authority when writing children's safety rules and to limit (but not eliminate) the requirements in our laws for economic analyses of the impact of CPSC rules.

1. Cost-Benefit Analysis

In 1981, Congress added a broad and comprehensive set of cost-benefit requirements to the Consumer Product Safety Act (and the other acts enforced by the CPSC) for consumer product safety rules promulgated by the CPSC. These provisions easily match, if not surpass, in their stringency and scope the cost-benefit provisions of the various executive orders on cost-benefit

¹ 5 U.S.C. §§ 601-12.

analysis recommended by the Office of Management and Budget. Among other things, prior to promulgating almost every safety rule,² they require the CPSC to:

- Make findings with respect to the degree and nature of the risk of injury the rule is designed to eliminate or reduce; the approximate number of consumer products, or types or classes thereof, subject to such rule; the need of the public for the consumer products subject to such rule, and the probable effect of such rule on the utility, cost, or availability of such products to meet such need; and any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.³
- Prepare a final regulatory analysis of the rule containing the following information: a description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs; a description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen; a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.⁴

² While the 1981 changes to the acts enforced by the CPSC require the agency to undertake cost-benefit analysis with respect to almost every safety rule it promulgates, some labeling requirements under § 3(b) of the FHSA do not require the same regulatory analysis.

³ 15 U.S.C. §2058(f)(1).

⁴ 15 U.S.C. § 2058(f)(2).

- Find that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product; that the promulgation of the rule is in the public interest; in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under the CPSA would adequately protect the public from the unreasonable risk of injury associated with the product; in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard that compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or it is unlikely that there will be substantial compliance with such voluntary consumer product safety standard.⁵
- Find that the benefits expected from the rule bear a reasonable relation to its costs and that rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.⁶
- Give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions.⁷

Speaking from personal experience, I note that the analysis and findings contained in section 9 of the CPSA (and similar provisions in other acts the agency enforces) have resulted in rulemaking proceedings that span years of effort and cost the agency millions of dollars. I find it hard to

⁵ 15 U.S.C. § 2058(f)(3).

⁶ 15 U.S.C. § 2058(f)(3).

⁷ 15 U.S.C § 2058(d)(2).

believe that OMB or Congress could expect any more analysis by a regulatory agency, especially one that is directed to protect the lives and safety of young children.

2. Alternative Approaches to Protecting the Public

Both in response to the extremely detailed, time-consuming requirements in section 9 of the CPSA⁸ (and our other laws) and because of its success in working with the voluntary standards sector, the CPSC has opted, wherever possible, to look to the promulgation and strengthening of voluntary standards as an alternative to developing mandatory standards. The Commission, of course, has always retained the option to undertake mandatory rulemaking where voluntary standards have proven to be inadequate. As I noted, the burdens of mandatory rulemaking have resulted in the Commission's promulgation of only nine standards in the 30 years since the 1981 amendments. In sharp contrast, the Commission has actively participated in the development or enhancement of hundreds of voluntary standards in that same time period. As I shall mention, the Commission's infrequent promulgation of mandatory rules and reliance on voluntary standards has not gone without criticism in Congress, especially when it comes to protecting the lives and safety of young children.

The Commission has also used its recall authority to great effect over the years. Under section 15(b) of the Consumer Product Safety Act, companies are required to notify the Commission whenever they obtain information that one of the products they have placed in commerce:

- fails to comply with an applicable consumer product safety rule,

⁸ Section 9 specifically requires that, before CPSC promulgates a mandatory consumer product safety rule, the agency must determine that no voluntary consumer product safety standard would adequately reduce or eliminate a risk of injury. Where an adequate voluntary standard exists and is substantially complied with, the agency must defer to the voluntary standard.

- fails to comply with a voluntary consumer product safety standard upon which the Commission has relied,
- fails to comply with any other rule enforced by the agency,
- contains a defect which could create a substantial product hazard, or
- creates an unreasonable risk of serious injury or death.⁹

These so-called “15(b) reports” have become the basis upon which the Commission has taken action to negotiate Corrective Action Plans (CAP) with companies that have led to the recall of numerous dangerous products. The Commission has participated in thousands of recalls over the years involving hundreds of millions of potentially hazardous products. Although it is impossible to quantify the number of lives saved and injuries avoided through this program, they undoubtedly number in the millions.

There are limits both on the use of voluntary standards and recalls in protecting American consumers, but they have, of necessity, become important tools in CPSC’s approach to product safety.

3. CPSC and the Regulatory Flexibility Act (RFA)

Section 610 of the RFA requires agencies to periodically review rules that have a significant impact on a substantial number of small entities.¹⁰ Each agency is required to publish a plan demonstrating its approach to its review. Accordingly, on September 14, 1981, the CPSC

⁹ 15 U.S.C. § 2064.

¹⁰ 5 U.S.C. § 610.

published its plan for reviewing existing rules under the RFA, as well as subsequent rules within 10 years of their publication.¹¹

The CPSC went far beyond the requirements of the RFA in its 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. In addition to soliciting comments from the general public in the Federal Register, we directly contacted affected parties and their trade associations through appropriate trade publications. Moreover, the Commission made an effort personally to contact those persons who submitted comments during the earlier rulemaking proceedings.

Based on the information received in the comments, as well as other information available to the Commission, CPSC staff then conducted an assessment of the degree of economic impact on small entities and sought to identify appropriate actions required to minimize the impact on those entities consistent with the objective of the statute under which the regulations were issued.

Under section 610(b) of the RFA, the Commission sought comments on, and reviewed its rules according to, the following factors: (1) the continued need for the rule, (2) the nature of complaints or comments received concerning the rule from the public, (3) the complexity of the rule, (4) the extent to which the rule overlapped, duplicated, or conflicted with other federal rules (and the Commission also considered, to the extent feasible, the extent to which the rule overlapped, duplicated, or conflicted with state and local government rules), and (5) the length of

¹¹ 46 Fed. Reg. 45621.

time since the rule had been evaluated or the degree to which technology, economic conditions, or other factors had changed in the area affected by the rule.

Since 1981 and the passage of the RFA, our agency has carefully reviewed its regulations. This effort has continued over the last 30 years. On the whole, I believe these reviews have been good both for consumers and the regulated community. Under the RFA (and other provisions of the CPSA requiring rule reviews), the Commission issued reports involving 17 rules under the CPSA, as well as nine rules promulgated under the Federal Hazardous Substances Act (FHSA),¹² eight rules under the Flammable Fabrics Act (FFA),¹³ and four rules under the Poison Prevention Packaging Act (PPPA).¹⁴

4. Voluntary Regulatory Review Efforts

In addition to the rule reviews required by the RFA, the Commission also has recently voluntarily undertaken efforts to review its regulations in a manner consistent with the spirit of Executive Order 13563 and similar executive orders. Specifically, on January 28, 2004, the Commission published a notice in the Federal Register announcing a pilot rule review program.¹⁵ In the notice, the agency committed itself to using OMB's Program Assessment Rating Tool

¹² 15 U.S.C. §§ 1261-1278.

¹³ 15 U.S.C. §§ 1191-1204.

¹⁴ 15 U.S.C. §§ 1471-1477.

¹⁵ 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).

(PART) to help provide a consistent approach to rating programs across the federal government.¹⁶

In the notice, the Commission listed four rules for review, and asked for public comment on each regulation. Specifically, the notice asked: (1) whether the regulation is consistent with CPSC program goals, (2) whether the regulation is consistent with other CPSC regulations, (3) whether the regulation is current with respect to technology, economic or market conditions, and other mandatory or voluntary standards, and (4) whether the regulation could be streamlined to minimize regulatory burdens, particularly those affecting small businesses.

Out of this pilot program, the Commission then conducted annual reviews that looked at four to six rules per year in 2005,¹⁷ 2006,¹⁸ and 2007.¹⁹ Out of this review, the CPSC clarified its rules regarding standards for carpets, rugs and bicycles. In addition, the Commission also established projects to examine amendments to the electrical toy and cigarette and multi-purpose lighter rules.

¹⁶ A description of the PART process and associated program evaluation materials is available at http://www.whithouse.gov/omb/budintegration/part_assessing2004.html.

¹⁷ See *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).

¹⁸ See *Fiscal Year 2006 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 71 Fed. Reg. 32,882 (June 7, 2006) (requesting comments on Commission regulations for matchbooks, toy rattles, baby bouncers, walkers-jumpers, and baby walkers).

¹⁹ See *Fiscal Year 2007 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 72 Fed. Reg. 40,265 (July 24, 2007) (requesting comments on Commission regulations banning certain unstable refuse bins and safety requirements for pacifiers).

The voluntary rule review program was temporarily suspended in 2008 with the passage of CPSIA due to limited resources, tight deadlines, and Congress' specific directions for the Commission to review and revise many of its existing regulations as part of that legislation.

As we wind down the bulk of our CPSIA rulemakings, it is my understanding that CPSC Chairman Tenenbaum has directed staff to develop options to continue the voluntary review process. As part of this review, staff will be looking at ways to maximize openness and public participation, as well as ways to most effectively target rules that may require revision, repeal, or strengthening to protect the public against the risk of unreasonable danger from consumer products.

5. The Consumer Product Safety Improvement Act of 2008

In 2008, Congress became concerned about the large number of violative toys and other children's products recalled by the CPSC in 2006 and 2007 – as well as the slow pace of agency rulemaking under existing procedures. Accordingly, Congress enacted by overwhelmingly large bipartisan majorities (424-1 in the House and 89-3 in the Senate) the Consumer Product Safety Improvement Act (CPSIA). Focusing particularly on children's hazards, Congress added several new provisions to the agency's acts: (1) Congress legislatively imposed several safety standards for children's products,²⁰ (2) Congress set numerous deadlines within which the CPSC was obligated to write safety standards for children's products, and (3) Congress streamlined the rulemaking process that the Commission must follow, lifting some of the burdens of section 9 of the CPSA, and similar provisions in our other laws.

²⁰ Because these provisions were added by act of Congress, they automatically applied without the need for CPSC rulemaking.

The rationale behind Congress' action seems to be clear. Congress wanted to protect young children – society's most vulnerable and involuntary risk takers – as fully and expeditiously as possible. Congress did not eliminate economic analyses – the agency remains obligated to conduct such analyses under the RFA – but it did remove some of the more time-consuming procedures from the laws enforced by the CPSC. The result has been more expeditious drafting of new safety standards specifically designed to protect the lives and safety of young children. Among the new standards promulgated by the agency since passage of the CPSIA have been improved safety requirements for baby walkers, bath seats, and children's toys. Perhaps the most significant new standard advancing children's safety has been the Commission's safety standard for cribs, unanimously approved by the Commissioners and effective this past Tuesday, June 28. This standard sets the most stringent safety requirements for cribs in the world and should save numerous lives in the coming years.

Even with this new authority, however, the Commission has taken steps to insure that the economic impact of new rules and regulations is considered during the rulemaking process. In fact, other than regulations where Congress, by law, made an exception every substantive safety rule the Commission has written under the CPSIA has been analyzed under the RFA to determine the impact of that requirement on small businesses – assuring that our most vulnerable business sector is safeguarded along with protecting our most vulnerable consumers.

Speaking for myself, I applaud the streamlined authority the Congress gave the agency to write standards for children's hazards. I think we all appreciate how critical it is to protect children – who can't read safety labels and who don't realize how dangerous some consumer products can

be – to the greatest extent possible. Accordingly, I think Congress struck the proper balance between minimizing unnecessary costs imposed on businesses (and, ultimately, consumers) and safeguarding our most vulnerable consumers.

Conclusion

The CPSC's jurisdiction is very broad: roughly speaking we regulate most products found in a department store, sporting goods store, hardware store, toy store, or in a school (with the exception of items regulated by other agencies, such as food, drugs, cars, boats, planes, guns, and tobacco). Yet we are an agency of barely 500 people with a budget just over \$118 million. Given these limits on resources, I believe that the agency has done a good job in advancing consumer safety with minimal disruption to the marketplace.