



UNITED STATES  
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**COMMISSIONER ANNE M. NORTHUP**

**STATEMENT OF COMMISSIONER ANNE NORTHUP ON THE VOTE TO  
APPROVE A PLAN FOR THE RETROSPECTIVE REVIEW OF EXISTING RULES.**

August 15, 2012

The Consumer Product Safety Commission failed to reach agreement on a Rule Review Plan because the Democrat Commissioners do not share the President's regulatory vision. Beginning by Executive Orders in early 2011 and continuing to the present, President Obama and his regulatory "czar", Cass Sunstein, have urged regulatory agencies to reduce economic burdens on commerce and have taken credit for doing so. Central tenets of this effort have been the requirements that a rigorous qualitative and quantitative cost benefit analysis precede rulemaking, agencies go forward with a regulation only after determining that its benefits justify its costs, agencies always select the least burdensome alternative that achieves a regulation's purpose, and agencies undertake retrospective review of existing significant rules to ensure that the maintenance of a regulation remains justified under these principles.

The Plan for Retrospective Review of Existing Rules supported by the Commission Democrats (the Democrat Plan) does not adhere to these principles. Instead, the Democrats disingenuously seek to take credit for broadening the scope of the regulations subject to review beyond those requested by the President, when their obvious intent is to avoid tackling our most burdensome rules. They ensure that outcome by failing even to consider the total cost of a rule as a factor in selection for review, let alone to prioritize the selection of rules to reduce the greatest burdens, as urged by the President. The Democrat Plan also fails to commit to undertake cost benefit analyses as part of rule review under any circumstances, even where we have the legal discretion to do so. Indeed, instead of honoring the President's goal of burden reduction, the Democrat Plan would use retrospective rule review as a pretext for *increasing* regulatory burdens. While I am a strong supporter of the President's efforts to reduce the economic burdens of the nation's regulatory system through meaningful regulatory review, I will not sign my name to a Rule Review Plan that makes a mockery of that effort. The alternative plan supported by the Commission's Republicans would honor the President's request by creating a framework that could lead to real cost reductions while maintaining public health and safety.

**The President Asked for a Rule Review Plan that Focuses on Removing the Greatest Unnecessary Economic Burdens and Uses a Rigorous Cost Benefit Analysis to Ensure that Existing Regulations Whose Benefits Do Not Justify their Costs are Modified or Repealed.**

The President's intent is clear from Executive Orders 13563, 13579 and 13610. Regulatory agencies are to develop plans for the retrospective review of existing regulations that prioritize the greatest reduction in economic burdens and use cost benefit analysis to modify or repeal regulations whose benefits do not justify their costs. In the President's words:

Our regulatory system must protect the public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. . . . It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. . . . It must measure, and seek to improve, the actual results of regulatory requirements.

[E]ach agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); [and] (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives . . .

E.O. 13563 (January 18, 2011).

In May 2011, President Obama urged independent regulatory agencies to adhere to these principals, including that "to the extent permitted by law, [regulatory] decisions should be made only after consideration of their costs and benefits (both qualitative and quantitative)." E.O. 13579 (July 11, 2011). The President also called on each independent regulatory agency to "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 significant 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 regulatory objectives." *Id.* In a memorandum advising the heads of independent regulatory agencies, Cass Sunstein explained that the regulatory principles outlined by President Obama in E.O. 13563 are also relevant to the process of retrospective rule review. Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, office of Mgmt. & Budget, Exec. Office of the President, Memorandum on Regulation and Independent Regulatory Agencies 4 (July 22, 2011) ("July 22, 2011 Sunstein Memo").

More recently, the President emphasized that the primary purpose of retrospective rule review is the reduction of economic burdens:

In implementing and improving their retrospective review plans, and in considering retrospective review suggestions from the public, agencies shall give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment. . . . [A]gencies should give consideration to the cumulative effects of their own regulations, including cumulative burdens, and shall to the extent practicable and consistent with law give priority to reforms that would make significant progress in reducing those burdens . . .

Executive Order 13610 (May 10, 2012).

Cass Sunstein has also made clear that the primary goal of retrospective rule review is the reduction of regulatory burdens: “The aim [of retrospective rule review] is to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, redundant, unjustified, excessively burdensome, or counterproductive.” July 22, 2011 Sunstein Memo at 4. *See also* Cass Sunstein, *Toward a 21<sup>st</sup>-Century Regulatory System*, Wall Street Journal, January 18, 2011 (Calling for “a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive . . . to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.” Moreover, he has urged that priority be given to regulations that impose the greatest burdens: “[I]t is important to obtain a clear and concrete sense, to the extent feasible, of the potential savings of reforms in terms of monetary amounts or burden hours. Agencies should attempt to identify and quantify those savings, and should prioritize those reforms with the potential to have significant impact.” *Id.* at 5-6.

The Obama administration has also publically touted the cost savings impact of regulatory review. In a Wall Street Journal editorial last year, Cass Sunstein described President Obama’s rule review initiative as “an unprecedented government-wide review of regulations already on the books so that we can improve or remove those that are out-of-date, unnecessary, excessively burdensome or in conflict with other rules.” Cass Sunstein, *21<sup>st</sup>-Century Regulation: An Update on the President’s Reforms*, Wall Street Journal, May 25, 2011. He went on to announce that the “results” to date were

reforms that will save private-sector dollars and unlock economic growth by eliminating unjustified regulations, including what the President has called ‘absurd and unnecessary paperwork requirements that waste time and money.’

We are taking immediate steps to save individuals, businesses, and state and local governments hundreds of millions of dollars every year in regulatory burdens. The reforms have the potential to save billions of dollars more over time while maintaining critical health and safety protections for the American people.

*Id.* See also Cass Sunstein, *Reducing Red Tape: Regulatory Reform Goes International*, Wall Street Journal, May 1, 2012 (“Executive Order 13563 also calls for an ambitious, government-wide ‘lookback’ at existing rules, with the central goal of eliminating outdated requirements and unjustified costs.”); Cass Sunstein, *Washington Is Eliminating Red Tape*, Wall Street Journal, August 23, 2011 (announcing the release of agency rule review plans containing “hundreds of initiatives that will reduce costs, simplify the system, and eliminate redundancy and inconsistency”).

### **The Rule Review Plan Approved by the Commission’s Democrats Ignores the President’s Request.**

The Democrat Plan ignores the repeated admonitions by the President and his spokesman that retrospective rule review target the most burdensome rules in order to yield the greatest potential cost savings. Instead, the plan takes credit for cost reduction measures that the Commission is already statutorily obligated to consider, and initiates the review of insignificant additional rules.

Specifically, Public Law 112-28 requires the Commission to seek public comment on opportunities to reduce the cost of third-party testing requirements and to prescribe new or revised third-party testing regulations if doing so will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules. Public Law 112-28 also requires the Commission to consider alternative third-party testing requirements for manufacturers who meet the statutory definition of “small batch manufacturers.” The Commission is obligated to carry out those statutory mandates in 2012 and 2013, and would do so irrespective of the President’s Executive Orders.

Once these mandatory measures are stripped away, the Democrats crabbed view of regulatory review becomes apparent. In 2012, they would include as part of the Rule Review Plan the Commission’s reconsideration of its Toy Caps Rule and Animal Testing Rules. The Toy Caps Rule was revoked because its requirements were superseded by the Commission’s adoption of the more stringent toy caps standard contained in ASTM F 963. In other words, no manufacturer was testing to the standard contained in our Toy Caps Rule, and it therefore imposed no burden whatsoever. Similarly, the Commission’s recent revisions to the Animal Testing Rules resulted in very minor changes that had negligible, if any, impact on the economic burden of testing to the rules. The change to Federal Caustic Poison Act regulations promulgated under the Federal Hazardous Substances Act proposed to be undertaken pursuant to the rule review plan in 2013 also amounts to nothing more than a housekeeping measure that will not meaningfully reduce the costs of compliance. Including each of those initiatives among the rules selected for review is incompatible with the intent of E.O. 13579, and would set the precedent that the Commission does not share the President’s goal of reforms “with the potential to have significant economic impact.”

Even worse, the fourth and final new initiative – contained in the Democrat plan among the rules to be reviewed in fiscal year 2013 – is intended to strengthen existing rules and

would *increase not decrease* the regulation's compliance costs. Specifically, the plan calls for a review of the carpet and rug flammability standards in order to fill a gap in coverage that has permitted some rugs and carpets to avoid testing. While I support the extension of existing rules where necessary to ensure product safety, rule review in response to the President's Executive Order is not the place to do that. Our core mission is to protect product safety, and we should always be on the lookout for opportunities to address product hazards. Rule review, in contrast, is a separate initiative intended to reduce unnecessary economic burdens.

Consistent with the inconsequential rules the Democrats would select for the Commission's first two fiscal years of rule review, the Democrat Plan sets in a place a framework and selection criteria that is unlikely to ever result in meaningful cost reduction. This is because the Democrat Plan does not explain how the selection of rules for review will be prioritized. This omission would be less important if the Democrats had not also opted to "broaden" the scope of rules potentially subject to review beyond the "significant" rules identified by the President. E.O. 13579 asks independent regulatory agencies to review existing "significant" regulations, defined as those that have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety.<sup>1</sup> Rather than focus on such significant regulations, the Democrat plan includes as potential candidates for review all of the agency's existing regulations, guidance documents, and unfinished proposed rules, and would even use the regulatory review process to perform clean up on the regulatory agenda – the list of regulatory actions the Commission proposes undertaking in the future. The President asked that agencies "give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork." The Democrat Plan does no such thing, and, by lumping in every action the Commission ever has or ever will take, ensures that the regulatory actions selected for review are unlikely to result in meaningful cost reductions. The unavoidability of that outcome based on the language of the Democrat Plan belies the Chair's repeated public claims that she is going further than the President requested. The truth is that the President wanted a plan that focused on "significant" – meaning most burdensome – regulations, and the Democrats would trivialize the President's initiative.

Equally damning, no cost benefit analyses would inform the Commission's review of the regulations selected under the Democrat Plan. Without such an analysis, there is no way to ensure that the benefits of a rule justify its costs, or to take appropriate action when they do not. This is a far cry from the Obama administration's vision of "chang[ing] the

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<sup>1</sup> 58 Federal Register 190 (October 4, 1993). The President. Executive Order 12866 of September 30, 1993. Regulatory Review and Planning. A "significant regulatory action" means any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

regulatory culture of Washington by constantly asking what's working and what isn't" based on "real-world evidence and data." Cass Sunstein, *21<sup>st</sup>-Century Regulation: An Update on the President's Reforms*, Wall Street Journal, May 25, 2011. Where is the "insistence on pragmatic, evidence-based, cost-effective rules" that Cass Sunstein claims has "informed [the Obama administration's] regulatory approach"? *Id.*

### **The Republican Commissioners' Plan for Retrospective Review of Existing Rules Is True to the Letter and Spirit of the President's Request.**

The Plan for Retrospective Review of Existing Rules supported by my Republican colleague Nancy Nord and I would have realized the President's vision of rule review with the potential to meaningfully reduce the burden of unnecessary regulation. It would have done so without straining the Commission's resources or substituting housekeeping measures for real regulatory reform.

The Republican Plan recognizes that in both 2012 and 2013, substantial resources will be devoted to carrying out the cost reduction mandates of P.L. 112-28. As a result, it does not call for any additional resources to be dedicated to Rule Review in 2012 or 2013. More importantly, it also does not undermine the long term goal of real burden reduction by characterizing housekeeping measures such as revision of the Toy Caps Rule, Animal Testing Rules and Federal Caustic Poison Act Regulations as retrospective rule review. I do not object to revising those rules, and the Republican Plan expressly acknowledges the importance of such work, so long as it does not substitute for meaningful rule review.<sup>2</sup>

The Republican Plan also ensures that rules selected for review in future years will have the potential to significantly reduce the unnecessary economic burdens of compliance with the Commission's regulations. This is achieved first by requiring, consistent with the President's request, that the Commission's selection of rules for review give priority to "those requirements imposing the highest burden and cost of compliance."

In addition, unlike the Democrat Plan, our plan requires that cost-benefit analyses be performed during the course of rule review so that rational, informed decisions can be made regarding whether the benefits of a regulation justify its costs. This exercise is particularly important for regulations promulgated under the Consumer Product Safety Improvement Act over the last several years, none of which were required to be justified by cost-benefit analyses. I understand that Congress intended the expedition of certain rules due to a perceived need for immediate action, and that cost-benefit analyses could therefore not be performed. For instance, we could not have issued mandatory standards for two durable nursery and toddler products every six months if such standards needed to be justified based on a cost-benefit analysis. But I do not believe that the President intended the Commission to exclude such rules from a cost-benefit analysis during

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<sup>2</sup> The Republican Plan states: "Adopting this Plan does not change or substitute for the Commission's independent responsibility to modify, replace, adopt, or rescind rules as a matter of good administrative practice. This Plan is intended to identify rules potentially needing significant changes in order to reduce unjustified burdens. Minor changes designed to clarify or modernize a rule will continue to be undertaken outside of this Plan."

retrospective review, nor do I think Congress would object. If a cost-benefit analysis reveals that a toddler product safety standard or test has no safety benefit but imposes substantial costs, the rule should be changed.

On the other hand, we could and should have performed cost-benefit analyses before issuing rules governing the periodic third-party testing of children's products to ensure continued compliance. We were not precluded by statute from doing so, and there was ample time. Retrospective rule review would be our first opportunity to determine whether all of the requirements of those rules can be justified under a cost-benefit analysis, and the Republican Plan would have allowed for that.

Other differences between the Republican and Democrat Rule Review Plans also illustrate our commitment to, and the Democrats' rejection of, meaningful rule review. For instance, the Democrat Plan repeatedly emphasizes the need for a rule to be in place for a substantial time period before retrospective review is undertaken. Whether intentional or not, such an approach would ensure that our rules that impose the greatest burden – those promulgated over the last several years and which were never justified by a cost-benefit analysis – would not be subject to review. The Republican Plan instead recognizes that retrospective review of even a relatively new rule is warranted where “its burdens quickly prove to be more substantial than anticipated or out of proportion with the benefits realized or because the burden and/or cost of the regulation were never given the consideration required by the EOs in the rulemaking process.”

The Democrat Plan is also replete with references to the review of rules whose burdens can only be characterized as trivial compared to our most costly rules. For instance the Democrat Plan touts minor changes to address manufacturer confusion over our durable infant and toddler product registration program. In discussing the consideration of “technological advances” as a factor in the selection of rules for review, the Democrat Plan focuses on past revisions of rules “to remove requirements for obsolete testing equipment that is no longer available.” But removing requirements for testing that cannot possibly still be performed does not reduce anyone's compliance burden. Such requirements should be removed as a housekeeping measure, not a burden reduction exercise. The Republican Plan correctly focuses consideration of technological advances on the way in which new technology can make a rule less burdensome.<sup>3</sup>

Finally, the Democrat Plan gives equal, if not greater, weight to selecting rules for review in order to strengthen them. Thus, the Democrat Plan views the Plan's review processes as “intended to facilitate the identification of rules that warrant repeal or modification, including those that require strengthening, complimenting, or modernizing.” While I agree that a rule subject to review may require strengthening or complimenting, I believe

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<sup>3</sup> Under the Republican Plan, technological advances are a factor in the selection of rules for review, because “[t]he technology relevant to a rule may have changed significantly since the rule was originally adopted, making the rule unnecessarily burdensome. A rule may need to be eliminated or modified to correct the excess burden. For example, when a test used to determine compliance with a standard has been supplanted by an equally or more effective method that is substantially less costly to perform, the test may need to be modified or replaced.”

it is inconsistent with the President's intent to select rules in order to strengthen them, rather than to reduce their unnecessary burdens.

I am disappointed that the Republicans and Democrats on the Commission cannot even reach agreement on advancing the regulatory policy of a Democratic administration. But I understand there are unbridgeable philosophical differences between us. I believe with the President that public health and safety can be maintained while still avoiding unnecessary and unjustified economic burdens. My Democrat colleagues not only believe that no cost is too great to bear in order to reduce even the smallest theoretical risk, but also object even to quantifying the costs and benefits of government regulation in the first place. These disagreements are unfortunate, but what is truly objectionable is the Democrats' attempt to assume the mantle of regulatory reform while rejecting all of its core principles. It would be more honorable simply to reject the President's request, than to pretend to share in his goals by publishing a Rule Review Plan designed to avoid any possibility of meaningful cost reduction.