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December 19, 2011

Office of the Secretary
Consumer Product Safety Commission
Room 820
4330 East-West Highway
Bethesda, Maryland 20814

Via: <http://www.regulations.gov>

Re: Docket No. CPSC-2011-0078, Comments Regarding the Review of the Commission's Regulations

Introduction

Public Citizen, a national nonprofit consumer advocacy organization with over 225,000 members and supporters, appreciates the opportunity to offer comments concerning the review of the Commission's regulations. Public Citizen believes that the Commission has a number of existing methods for rule review and that the process for reviewing its rules should not be modified to provide for more frequent reviews. However, we ask the Commission to consider the recommendations below as it undertakes the process suggested in Executive Order 13579.

Background

On July 14, 2011, President Obama issued Executive Order 13579 "Regulation and Independent Regulatory Agencies," which, among other suggestions, states that independent agencies should develop a plan to periodically review existing regulations. The Office of Management and Budget issued a guidance memorandum suggesting that the plans should provide for review of unnecessary or excessively burdensome rules as well as consideration of whether to strengthen, complement modernize rules through new rulemakings.¹

The Commission already reviews its regulations:

¹ Office of Management and Budget, Memorandum to the Heads of Independent Regulatory Agencies, July 22, 2011, at <http://1.usa.gov/u0bpve>.

- Under Section 610(a) of the Regulatory Flexibility Act, the Commission is required to review after ten years each new rule it promulgates that has or will have a significant economic impact on a substantial number of small entities. As the agency describes in its notice, it published a review plan in 1981, and since then has conducted a review of the economic impact on small entities of each rule as it is proposed and finalized.
- In addition, between 2004 and 2007, the agency initiated a pilot program to review existing regulations as a result of a recommendation from the Office of Management and Budget. Subsequently, the Commission suspended the regulatory review to direct its resources to the newly passed Consumer Product Safety Improvement Act of 2008 (CPSIA). Congress passed the CPSIA in response to the presence of a record number of unsafe consumer products on the market which had caused an unnecessary number of injuries and deaths to adults and children. The new law required the promulgation of substantive new rules to protect consumers from unreasonable risks of injury or deaths caused by hazardous products.

Recommendations

(1) The Commission must focus on carrying out its vast mission with its limited resources: The Commission's top priority must remain to protect consumers from the unreasonable risk of harm caused by hazardous products. As part of its mission to protect consumers, the Commission's time is justifiably very focused on the efficient and effective implementation of strong regulations. The agency is tasked with overseeing more than 15,000 types of products. It is also charged with enforcing a number of consumer protection laws, including the Consumer Product Safety Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Virginia Graeme Baker Pool and Spa Safety Act, and the recent Consumer Product Safety Improvement Act of 2008. The enforcement and promulgation of new rules under these laws are critical to protecting consumers from unreasonable risk of harm.

Given its responsibilities, the agency is operating with deeply inadequate resources. Over the past 30 years, the number of Commission employees fell from a high of 1,000 in 1980 to 385 in 2007, and the agency now operates with approximately 550 employees.² In 2008, the CPSIA presented the agency with additional resources and authority to carry out its mission. Although merely three years have passed since the CPSIA became law, the agency's resources have been threatened again and its budget will likely decline in the near future.³ More frequent rule reviews, without a corresponding increase in the agency's budget, may not only waste valuable resources that would be better spent on strengthening the country's product safety system, but could result in less thorough and ultimately less informed Commission decisions.

² *Statement of Inez Tenenbaum, Chairman, U.S. Consumer Product Safety Commission.* Before the House Committee on Appropriations, Subcommittee on Financial Services and General Government, March 31, 2011, <http://www.cpsc.gov/pr/tenenbaum03312011.pdf>.

³ U.S. House Committee on Appropriations. *Report on Financial Services and General Government Appropriations Bill, 2012*, 112th Cong., 1st Session. http://appropriations.house.gov/UploadedFiles/FY_2012_FIN-SERVICES_FULL_COMMITTEE_REPORT.pdf

Thus, the Commission should prioritize its limited staff time and resources to first carry out its mission to protect consumers before indulging in the call for duplicative rule reviews, which are, at best, a matter of secondary concern. Although identifying and removing outdated and inefficient regulations is sensible in theory, in practice the results from retrospective reviews recently conducted by executive agencies have been modest and underwhelming.⁴ Meanwhile the annual net benefits of major federal regulations have been significant, ranging from \$70 billion to \$593 billion over the past 10 years, according to a report to Congress by the Office and Management and Budget.⁵ These facts suggest that even for agencies that do not face resource challenges similar to the Commission's, resources would be better spent on promulgating and enforcing new protections rather than conducting duplicative reviews of existing rules.

(2) Review regulations once every ten years as required by the Regulatory Flexibility Act, not more frequently. The ten-year timeframe allows the Commission to assess more thoroughly both the benefits and costs of a regulation as well as stakeholder compliance. Allowing for a shorter period of review, for example every five years, could potentially distort the Commission's assessment of compliance with a regulation, since compliance costs are typically greater in the initial years after a regulation is introduced as industry adapts to the new regulation, then often fall sharply.

(3) Avoid examination of rules under Executive Order 13579 that were (a) recently reviewed, (b) are nonsubstantive, or (c) are already subject to review due to statutory requirements.

a. In accordance with the ten-year review recommendation, the Commission should refrain from revisiting recently reviewed rules. For example, the Commission should not examine rules previously reviewed under the Systematic Review Program, which ran between 2004 and 2007. The agency should also refrain from reviewing rules promulgated under the Consumer Product Safety Improvement Act of 2008. These rules need time to be implemented properly as well as time for the regulated industry to comply with, and become accustomed to, their requirements.

b. We agree with the Commission's previous decision to exclude non-substantive rules from review, such as those that were administrative or procedural, exemptions, labeling,

⁴*Eliminating Job-Sapping Federal Rules through Retrospective Reviews – Oversight of the President's Efforts.*, 112th Cong. (2011) (Statement of Cass Sunstein) available at http://smbiz.house.gov/UploadedFiles/Sunstein_Testimony.pdf. According to Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, the elimination of regulations identified by the retrospective review process will yield up to \$10 billion in savings across all executive agencies over the next five years.

⁵ OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, DRAFT 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES available at http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/Draft_2011_CBA_Report_AllSection.s.pdf.

test methods, or definitions. Review of these rules most likely would not elicit any substantial savings or benefits, and instead would waste the agency's resources.

c. The requirement to review and strengthen rules has been a longstanding and continuous obligation, mandated by numerous provisions in the relevant statutes. Many provisions also require reports of rule reviews to the relevant Congressional committees. For example, under Section 104 of the CPSIA, which implements the Danny Keysar Child Product Safety Notification Act, the Commission must "periodically review and revise the standards . . . to ensure that such standards provide the highest level of safety for such products that is feasible." The statutory provisions also encourage public participation, in that stakeholders and voluntary standard-setting organizations may petition the agency to revise and update regulations, as well as to consider exceptions.⁶ Attached Appendix A provides examples of statutory review requirements placed on the Commission. The agency should refrain from excessively reviewing these rules because repetitive efforts would unduly burden the Commission. The Commission should treat any review it conducts as simultaneously satisfying all relevant review requirements or recommendations, whether they stem from the CPSIA, the Regulatory Flexibility Act, executive orders, or any other source.

(4) Focus on strengthening rules. The OMB memorandum addressing the Executive Order suggests that the Commission should consider whether to strengthen and modernize rules. In addition, many of the periodic reviews mandated in the relevant statutes, including the review of safety standards, require that the reviews be conducted with a view towards strengthening and maximizing product safety.⁷ We agree with these recommendations and requirements. We urge the Commission to treat each rule-review period as an opportunity to consider stronger regulations to protect the public from unreasonable risks of harm.

Sincerely,

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⁶ E.g. Sec. 101(b), CPSIA, as amended by Public Law 112-28 (August 2011), regarding Alternative Limits and Exceptions to Limitation of Lead in Children's Products.

⁷ See, Appendix A.

Appendix A

Examples of Statutory Provisions That Mandate Regulatory Reviews

Sec. 101(a)(E) of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110-314, 122 Stat. 3016, 15 USC 1278a, regarding Children's Products Containing Lead; Lead Paint: "(E) PERIODIC REVIEW AND FURTHER REDUCTIONS.—The Commission shall, based on the best available scientific and technical information, periodically review and revise downward the limit set forth in this subsection, no less frequently than every 5 years after promulgation of the limit under subparagraph (C) or (D) to require the lowest amount of lead that the Commission determines is technologically feasible to achieve."

Sec. 101(b), CPSIA as amended by Public Law 112-28 (August 2011), regarding Alternative Limits and Exceptions to Limitation of Lead in Children's Products: "(A) IN GENERAL.—The Commission, on its own initiative or upon petition by an interested party, shall grant an exception to the limit in subsection (a) for a specific product, class of product, material, or component part..."

Sec. 101(b)(5), CPSIA, regarding Exclusion of Certain Materials or Products and Inaccessible Component Parts: "(5) PERIODIC REVIEW.—The Commission shall, based on the best available scientific and technical information, periodically review and revise the regulations promulgated pursuant to this subsection no less frequently than every 5 years after the first promulgation of a regulation under this subsection to make them more stringent and to require the lowest amount of lead the Commission determines is technologically feasible to achieve."

Sec. 101(f), CPSIA, regarding More Stringent Lead Paint Ban: "(2) PERIODIC REVIEW AND REDUCTION.—The Commission shall, no less frequently than every 5 years after the date on which the Commission modifies the regulations pursuant to paragraph (1), review the limit for lead in paint set forth in section 1303.1 of title 16, Code of Federal Regulations (as revised by paragraph (1)), and shall by regulation revise downward the limit to require the lowest amount of lead that the Commission determines is technologically feasible to achieve."

Sec. 101(f), CPSIA, regarding More Stringent Lead Paint Ban: "(5) PERIODIC REVIEW.—The Commission shall, no less frequently than every 5 years after the Commission completes the study required by paragraph (4)(A), review and revise any methods for measurement utilized by the Commission pursuant to paragraph (3) or pursuant to any regulations promulgated under paragraph (4) to ensure that such methods are the most effective methods available to protect children's health."

Sec. 102(a)(3), CPSIA regarding Mandatory Third Party Testing For Certain Children's Products: "(D) PERIODIC REVIEW.—The Commission shall periodically review and revise the accreditation requirements established under subparagraph (B) to ensure that the requirements assure the highest conformity assessment body quality that is feasible."

Sec. 104(b)(2), CPSIA, regarding the Standards and Consumer Registration of Durable Nursery Products: “The Commission shall periodically review and revise the standards set forth under this subsection to ensure that such standards provide the highest level of safety for such products that is feasible.”

Sec. 104(e)(1)(A) & (B), CPSIA, regarding Requirements for Consumer Registration of Durable Infant or Toddler Products: “(A) beginning 2 years after a rule is promulgated under subsection (d), regularly review recall notification technology and assess the effectiveness of such technology in facilitating recalls of durable infant or toddler products; and (B) not later than 3 years after the date of enactment of this Act and periodically thereafter as the Commission considers appropriate, transmit a report on such assessments to the appropriate Congressional committees.”

Sec. 106(c), CPSIA, regarding Mandatory Toy Safety Standards: “(c) PERIODIC REVIEW.-- The Commission shall periodically review and revise the rules set forth under this section to ensure that such rules provide the highest level of safety for such products that is feasible.”

Sec. 205, CPSIA, regarding Inspector General Audits and Reports: “The Inspector General of the Commission shall conduct reviews and audits to assess...”

Sec. 1404, Virginia Graeme Baker Pool and Spa Safety Act, Public Law 110-140, regarding the Federal Swimming Pool And Spa Drain Cover Standard:

“(b) Drain Cover Standard.--Effective 1 year after the date of enactment of this title, each swimming pool or spa drain cover manufactured, distributed, or entered into commerce in the United States shall conform to the entrapment protection standards of the ASME/ANSI A112.19.8 performance standard, or any successor standard regulating such swimming pool or drain cover. If a successor standard is proposed, the American Society of Mechanical Engineers shall notify the Commission of the proposed revision. If the Commission determines that the proposed revision is in the public interest, it shall incorporate the revision into the standard after providing 30 days notice to the public.”