DRAFT PLAN FOR RETROSPECTIVE REVIEW OF EXISTING RULES

The views expressed in this report are those of CPSC staff, and this report has not been reviewed or approved by, and may not reflect the views of, the Commission.

September 2015

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I. EXECUTIVE SUMMARY OF THE PLAN

The U.S. Consumer Product Safety Commission's ("CPSC" or "Commission") mission is to protect the public against unreasonable risks of injury or death from consumer products through education, safety standards activities, regulation, and enforcement. CPSC has jurisdiction over thousands of diverse types of consumer products used in and around the home, in recreation, in schools, and elsewhere – including products ranging from children's toys to portable generators and toasters to swimming pool drains.

Executive Orders ("E.O.") 13579,[1] 13563,[2] and 13610[3] recognize the importance of maintaining a culture of retrospective review and analysis throughout the federal government. Before a rule has been tested through experience, it is difficult to know all of its effects, including its costs and benefits. CPSC's *Plan for Retrospective Review of Existing Rules* ("Plan") is designed to create a defined method for identifying and reconsidering certain rules that are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive, or ineffective, or that otherwise would benefit from modification and/or updating for consistency with updated methods, technologies, and for consistency with other related standards and regulations. The Plan's review processes are intended to facilitate the identification of rules that warrant repeal or modification, including rules that would benefit from strengthening, complementing, or modernizing. CPSC staff will conduct reviews consistent with the laws governing the CPSC and that reflect the agency's resources, regulatory priorities, and processes.

The Plan is designed and intended to be flexible to permit changes to the schedule, allow senior management to assess the extent of resources needed, identify procedures to expedite the process, and ensure that critical hazard reduction work – the agency's core function – is not hindered.

II. SCOPE OF THE PLAN

The Plan is more comprehensive than the reviews contemplated by the Regulatory Flexibility Act ("RFA"), E.O. 13579, and 13563, because the Plan does not limit evaluation to regulations that have a significant economic impact on a substantial number of small entities, or to significant regulatory actions, as defined by E.O. 12866.[4] The reviews contemplated by this Plan include CPSC rules that have a

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[1] 76 Federal Register 41587 (July 11, 2011). The President. Executive Order 13579 of July 11, 2011. Regulation and Independent Regulatory Agencies.

[2] 76 Federal Register 3821 (January 18, 2011). The President. Executive Order 13563 of January 18, 2011. Improving Regulation and Regulatory Review.

[3] 77 Federal Register 28469 (May 10, 2012). The President. Executive Order 13610 of May 10, 2012. Identifying and Reducing Regulatory Burdens.

[4] 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

significant economic impact on a substantial number of small entities, as required by section 610 of the RFA, as well as significant rules (as defined by E.O. 12866). However, the Plan also includes, as potential candidates for review, all of the agency's existing regulations issued under the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), which updated and expanded the original Consumer Product Safety Act ("CPSA"), as well as rules issued under the CPSA and its other statutory authorities (such as the Federal Hazardous Substances Act, the Poison Prevention Act, and the Flammable Fabrics Act). Unlike the agency's previous Systematic Review Program, potential review requirements that are administrative or procedural, exemptions, labeling, test methods, or definitions are not excluded. The review process also can be used by the Commission to streamline and update the regulatory agenda, which has some items that are dated and may need to be withdrawn.

III. PUBLIC ACCESS AND PARTICIPATION

The Plan is designed to encourage public input and participation. CPSC is engaged in a plan to put forth agency data, deliberations, decisions, determinations, collaborations and actions in an open, accessible manner to consumers, stakeholders, and the general public in accordance with our Open Government Plan.[5]

To increase transparency, public understanding, and participation in the agency's regulatory review process, CPSC will provide information about the Plan and rules under review on the www.cpsc.gov website. This will bring together, in one place, information on the regulatory review program and provide the public with access to the schedule of reviews, links to comments on rules under review, a link for direct feedback on the CPSC's regulatory review program, and other pertinent information. Each fiscal year the agency's Operating Plan will identify the rules scheduled for retrospective review.

IV. PREVIOUS AND CURRENT EFFORTS UNDERWAY CONSISTENT WITH EO 13579

This Plan builds upon CPSC's previous and current regulatory review efforts. In addition to the following specific programs, many of the Commission's voluntary and mandatory standards activities also contribute to the objectives of the retrospective reviews. For example, voluntary standards are routinely reviewed as experience, technology and other data change and existing standards become outdated, outmoded,

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adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health and 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.

[5] U.S. Consumer Product Safety Commission Open Government Plan, April 22, 2010. http://www.cpsc.gov/en/about-cpsc/agency-reports/open/

inefficient, and/or ineffective. Similarly, CPSC continues to evaluate agency mandatory standards and make refinements as experience and data highlight.

a. Previous Review Programs

The Systematic Review Program (2004 to 2007). In 2004, CPSC began a program to review existing regulations. In fiscal year ("FY") 2004, the agency conducted a pilot review program as the initial step. The notice announcing the pilot program published in the *Federal Register* on January 28, 2004 (69 Fed. Reg. 4095), and the review program continued for several years thereafter.

The rule review focused on determining whether the CPSC's regulations were:

- consistent with CPSC's program goals;
- consistent with other CPSC regulations;
- current with respect to technology, economic or market conditions, and other mandatory or voluntary standards; and
- subject to revision to reduce regulatory burdens, particularly burdens on small entities.

The agency followed this approach from 2004 through 2007.[6]

In 2008, the enactment of the CPSIA required the CPSC to reassign resources to implement the new law. After 2008, CPSC has not followed the systematic review process set out in 2004 in light of limited resources available for this effort.

Periodic Review under the Regulatory Flexibility Act. The RFA requires agencies to review within 10 years of publication, rules that have or will have a significant economic impact on a substantial number of small entities. (5 U.S.C. § 610(c)).

The review is to "determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities." The review must consider:

[6] The rules reviewed in the 2004 pilot program included the safety standard for walk-behind mowers; requirements for electrically operated toys; the standard for the flammability of vinyl plastic film; and the child-resistant packaging requirements for aspirin and methyl salicylate. 69 FR 4095 (Jan. 28, 2004). In FY 2005, the CPSC reviewed the safety standard for cigarette lighters and multipurpose lighters; the requirements for bicycles; the standards for surface flammability of carpets and rugs; and the regulation requiring child-resistant packaging for preparations subject to the Comprehensive Drug Abuse Prevention and Control Act that are in a form intended for oral administration. 70 FR 18338 (April 11, 2005). In FY 2006, the CPSC reviewed the safety standard for matchbooks; the requirements for toy rattles; and the requirements for baby bouncers, walker-jumpers, or baby walkers. 71 FR 32882 (June 7, 2006). In FY 2007, the CPSC reviewed the ban of unstable refuse bins and the requirements for pacifiers. 72 FR 40265 (July 24, 2007).

- the continued need for the rule;
- the nature of complaints or comments received from the public concerning the rule;
- the complexity of the rule;
- the extent to which the rule overlaps, duplicates, or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
- the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

In the *Federal Register* of September 14, 1981,[7] the Commission published a plan for review under the RFA, along with a list of rules the Commission had issued before January 1981, and had found did not have a significant economic impact on a substantial number of small entities. Since the RFA took effect, CPSC has issued the following rules that could have a significant economic effect on a substantial number of small entities:

- *The Standard for the Flammability (Open-Flame) of Mattress Sets*, 16 C.F.R. part 1633, published in 2006;
- *The Safety Standards for Full-Size and Non-Full-Size Cribs*, 16 C.F.R. parts 1219 and 1220, published in 2010;
- *The Testing and Labeling Pertaining to Product Certification Rule*, 16 C.F.R. part 1107, published in 2011; and
- *The Safety Standard for Magnet Sets*, 16 C.F.R. part 1240, published in 2014.

On October 19, 2011, the agency published a notice in the *Federal Register*, informing the public of the Commission's intent to formulate a Regulatory Review Plan that builds on our past efforts, while incorporating the principles outlined in E.O. 13579.[8] CPSC invited public comments and sought information to help develop a plan for review of existing rules, to be consistent with (and not duplicate) previous and ongoing reviews, and to fulfill the spirit of E.O. 13579. On April 24, 2012 a draft Plan for Retrospective Review of Existing Rules was sent to the Commission for their consideration. On August 8, 2012 the Commission voted (2-2) on whether to approve the draft Plan.

In FY 2015 staff began a project to review *The Standard for the Flammability (Open-Flame) of Mattress Sets*, 16 CFR part 1633, consistent with the RFA.[9]

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[7] 46 Federal Register 45621 (September 14, 1981). Regulatory Flexibility Act: Plan for Periodic Review of Rules.

[8] 76 Federal Register 64864 (October 19, 2011). Review of Commission's Regulations; Request for Comments and Information.

[9] 80 Federal Register 18218 (April 3, 2015). Regulatory Flexibility Act Section 610 Review of the Standard for the Flammability (Open Flame) of Mattress Sets. Notice Of Section 610 Review And Request For Comments

V. ELEMENTS OF THE PLAN

a. Development of a Strong, Ongoing Culture of Retrospective Analysis

Review of existing rules is intended to be systematic and continuing. To strengthen the culture of retrospective analysis of existing rules, the agency will consider retrospective review when developing the yearly Operating Plan and Performance Budget Request. The Commission's annual Priorities Hearing will include the opportunity for stakeholders to suggest candidates for retrospective review; request for stakeholder input will be included in the *Federal Register* notice announcing the Priorities Hearing, and will be posted on www.cpsc.gov. Rules that are being reviewed will also be included in the CPSC's Semiannual Regulatory Agenda, which will include reviews under section 610 of the RFA. The Commission may also consider including retrospective review provisions in new rulemakings.

To encourage and maintain an ongoing culture of retrospective analysis, the agency will use interdisciplinary teams to conduct retrospective reviews made up of staff from offices including but not limited to the Office of Hazard Identification and Reduction ("EXHR"), the Small Business Ombudsman, the Office of Compliance and Field Operations, the Office of the General Counsel, the Office of International Programs, and the Office of Import Surveillance and Inspection.

b. Prioritization: Selection Criteria and Processes Used in Setting Priorities

The Commission directed staff to include in the Plan consideration of a variety of factors, as applicable, to assist in prioritizing the staff's recommendation of rules to be reviewed, listed here in no particular order:

- Is the rule a "significant" as defined by E.O. 12866?
- Does the rule remain justified, as written?
- Is the rule still effective, or does it need to be modified, streamlined, expanded, or repealed?
- Is the rule sufficiently clear as to the intended requirements?
- Does the rule align with other CPSC rules?
- Does the rule contribute to cumulative burdens?
- Are there significant and unnecessary international differences that provide no increase in safety?
- Does the rule impose an economically significant burden, particularly to small business?
- Does the rule require a significant and unnecessary paperwork burden that can be alleviated to any degree without sacrificing the intended benefits?
- Are the benefits of the rule significant?
- Has legislative authority changed over time?
- Has a change in technology affected the rule's effectiveness?

Accordingly, staff will consider these factors when determining which rules to recommend for review.

c. The Review Process

The Office of the Executive Director is responsible for the regulatory review process. The Plan resides with the Deputy Executive Director for Safety Operations; inquiries on the Plan may be submitted via email to: rulereview@cpsc.gov. CPSC's interdisciplinary Program Area Teams ("PATs") will be responsible for soliciting, evaluating and nominating potential projects, including selection of candidate regulations for retrospective review. The PAT Leaders will present candidate rules for review during Operating Plan and Performance Budget Request development.

Once candidates for retrospective review are identified in the Operating Plan, CPSC will use interdisciplinary teams, including subject matter experts ("SMEs"), to review regulations and, if needed, to develop a project to modify, revoke, amend or otherwise change the regulation in accordance with the results of the review, agency resources, and our legal authorities. If appropriate, when making recommendations for changes to rules, staff will consider randomized controlled trials of proposed rules and will consider including retrospective review provisions in new rulemakings. To the extent possible, reviews will be conducted independent from staff that drafted the rules subject to review.

To the extent staff concludes the Commission will not be able to accommodate the work required by a Commission-adopted final CPSC Retrospective Review Plan without materially impacting the Commission's core safety work, staff will propose the Commission seek through annual Performance Budget Requests any additional resources needed to fully execute the Retrospective Review Plan.

d. Metrics Used to Evaluate Regulations Under Review

The CPSC is a data-driven agency, and relies on data when developing regulations. Similarly, staff will rely on the agency's extensive databases when reviewing existing rules. Information on injuries, deaths, and other consumer product safety incidents comes from a wide range of sources, including consumers and consumer groups, hospitals and clinics, and industry.

Staff will use the metrics appropriate to the particular regulation being reviewed to evaluate the effectiveness of the regulation. Such metrics may include: reductions in deaths, injuries, and property loss; recordkeeping burdens; testing costs; and other costs related to the rule. Some CPSC rules implement specific statutory requirements. With these rules, the Commission's discretion to adjust the rule may be limited.

Staff will continue to measure the impact of regulations on small entities using the criteria listed in the RFA.

VI. PUBLISHING THE PLAN ONLINE

CPSC will publish the Plan on the agency's website at: www.cpsc.gov, under a page dedicated to rules, regulations and standards. When the Plan is available online, CPSC will also publish a notice in the *Federal Register* seeking comments on the Plan.

The Retrospective Review of Existing Rules Plan will be reevaluated, with public input, at least every two years. CPSC will publish a notice in the *Federal Register* and appropriate social media outlets will be used to notify stakeholders that the Plan is available for review and comment.