



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Inez M. Tenenbaum
 Commissioner Nancy A. Nord
 Commissioner Anne M. Northup
 Commissioner Robert S. Adler

ITEM:

Draft Plan for Retrospective Review of Existing Rules
(Briefing package dated April 25, 2012, OS No. 4792)

DECISION:

A majority decision has not been reached regarding the draft Plan for Retrospective Review of Existing Rules. The Commission voted (2-2) on whether to approve the draft Plan. Chairman Tenenbaum and Commissioner Adler voted to approve the draft Plan without changes. Commissioners Nord and Northup voted to approve the draft Plan with changes. Commissioner Northup issued the attached statement regarding this matter.

For the Commission:

A handwritten signature in black ink that reads "Todd A. Stevenson".

Todd A. Stevenson
Secretary

* Ballot vote due August 8, 2012
(By Commission agreement the vote due date was extended from May 1, 2012.)

Attachments: Statement of Commissioner Northup
Proposed Amendments of Commissioners Nord and Northup



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

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 21st-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, *21st-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.¹ 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 unavailability 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

¹ 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, *21st-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.²

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

² 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.³

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

³ 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.



**PLAN FOR
RETROSPECTIVE REVIEW OF EXISTING RULES**

August 8, 2012

For further information contact:

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Proposed Amendments of Commissioner Nord and Northup, August 8, 2012

The U.S. Consumer Product Safety Commission's
Plan for
Retrospective Review of Existing Rules
August 2012

I. Executive Summary of the Plan and Compliance with Executive Orders 13563 and 13579

Executive Orders (E.O.) 13579 and 13563 recognize the importance of maintaining a consistent culture of retrospective review and analysis throughout the federal government. The Consumer Product Safety Commission's Plan for Retrospective Review of Existing Rules (the Plan) is designed to create a defined method and schedule for identifying and reconsidering certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Its review processes are intended to facilitate the identification of rules that warrant repeal or modification, or strengthening, complementing, or modernizing rules where necessary or appropriate.

E.O. 13579 and 13563 set forth as the general principles of regulation that our regulatory system must protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness, and job creation. The E.O.s direct agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, and to tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives. Agencies must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends, and must measure, and seek to improve, the actual results of regulatory requirements. The E.O.s require that these same principles be applied in the course of the retrospective review.

As further guidance from the White House Office of Information and Regulatory Affairs notes, before a rule has been tested, it may be difficult to be certain of its consequences, including its costs and benefits. Retrospective reviews provide an opportunity to more accurately assess the costs and benefits of a rule. That opportunity is especially important to the CPSC, because its primary rulemaking focus over the past four years has been the implementation of the Consumer Product Safety Improvement Act (CPSIA), which suspended the otherwise applicable requirement for cost-benefit analysis in connection with regulating pursuant to the CPSIA. While cost-benefit analysis was not prohibited in the course of CPSIA rulemaking, the Commission opted to proceed without that analysis. For that reason, our retrospective review will for some

rules be the first time the agency performs a cost-benefit analysis, identifies alternatives, and tailors the regulation to impose the least burden on society.

II. Scope of the Plan

E.O. 13579 requests that independent agencies develop a plan for the periodic review of existing significant regulations. Significant regulatory actions include 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.¹ Our goal is to insure that, regardless of the form of the rule or guidance, those requirements imposing the highest burden and cost of compliance are given priority. The Plan includes as potential candidates for review all of the agency's existing regulations issued under the CPSIA, which updated and expanded the original CPSA, as well as rules issued under the CPSA and its other statutory authorities (the Federal Hazardous Substances Act, the Poison Prevention Packaging Act, and the Flammable Fabrics Act). We are not excluding from potential review requirements that are administrative or procedural; exemptions; labeling; test methods; or definitions or guidance documents. We will assess the full cost of the burden these documents impose. For example, in reviewing a Notice of Requirements, we would consider costs imposed on manufacturers to ensure their products can pass the tests, in addition to the cost of the tests themselves.

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.

III. Rules for Retrospective Review

On August 12, 2011, the President signed H.R. 2715 into law (Public Law 112-28 (P.L. 112-28)). Among other things, it added a provision, now codified in section 14(d)(3)(A) of the CPSA, requiring the CPSC to seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with an applicable consumer product safety rule, ban, standard, or regulation. On November 8, 2011, we published a Federal Register notice, inviting comment generally consistent with the statute. Furthermore, the new law requires the CPSC to provide to small businesses specific relief from the cost burdens associated with the new testing requirements, or to exempt them from the requirements altogether.

¹ 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.

The Commission has also committed staff in its 2012 Operating Plan to conduct a review of the public comments submitted in response to the Federal Register Notice and to independently review 16 CFR parts 1107 and 1109 in an effort to identify opportunities for reducing the costs of third-party testing consistent with assuring compliance with any applicable consumer product safety rules, bans, standards, or regulations.

P.L. 112-28 also requires the Commission to consider alternative third party testing requirements or an exemption from third party testing for manufacturers who meet the statutory definition of "small batch manufacturers." The CPSC held a public hearing on October 26, 2011, to receive input from the public about such alternative testing requirements.

The goals of section 14(d)(3)(A) and E.O.s 13579 and 13563 are generally consistent. The Executive Orders and this statutory provision emphasize reducing regulatory burdens, including significant, quantifiable cost savings and significant, quantifiable reductions in paperwork burdens, as well as regulatory harmonization, without compromising public safety. While section 14(d)(3)(A) does not require a cost-benefit analysis, performing one in connection with carrying out that statutory mandate will be consistent with the E.O.s.

Although the work the Commission will undertake pursuant to the small batch manufacturer provision of P.L. 112-28 and CPSA section 14(d)(3)(A), will not be performed under the auspices of the retrospective review program called for by E.O.s 13579 and 13563, it will advance the purpose of the E.O.s.

Due to the substantial resources that will be devoted during fiscal year 2012 to carrying out the requirements of CPSA section 14(d)(3)(A), including the cost-benefit analysis required by the E.O.s, and the small batch alternative testing/exemption provision of P.L. 112-28, we are unable to select and complete the review of any other significant rules this fiscal year.

IV. Public Access and Participation

Our Plan is designed to encourage public input and participation. On October 19, 2011, we published a notice in the *Federal Register*, informing the public of our intent to formulate a Regulatory Review Plan that builds on our past review efforts, while incorporating the principles outlined in E.O. 13579.² We 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.

² 76 Fed. Reg. 64,864 (October 19, 2011). Review of Commission's Regulations; Request for Comments and Information.

In the *Federal Register* notice, we sought public comment on all aspects of the review process, and in particular, on the: (1) selection of rules for review, including criteria and possible exclusions; (2) process of review, including timing, public participation, coordination with other mandates and agencies, and prioritization; and (3) substance of reviews.

In response to the *Federal Register* notice, we received comments from trade associations and consumer groups and from a testing and certification organization. Some commenters suggested that when reviewing existing rules, we should seek to reduce some of the burdens of the CPSIA, which the commenters felt imposed overly prescriptive and burdensome requirements. Other commenters suggested that we should strengthen our existing rules to protect the public better.

Going forward, we will solicit further input from the public to assist in identifying specific rules for review. In providing that input, the public will be guided by the criteria set forth in the Plan and can address their recommendations to the factors deemed relevant. In that way, we can achieve a transparent and participatory process.

V. Elements of the Plan

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

We will evaluate rules for their consistency with program goals and the criteria emphasized in E.O. 13579. To the extent permitted by CPSC's legal authorities and our resources, we will change or remove aspects of our rules that impose excessive cost or paperwork burdens, are outdated or otherwise inefficient, or are insufficiently protective of consumer safety.

Review of existing rules will be systematic and continuing. To ensure broad-based consideration of rules for retrospective analysis, we will use interdisciplinary teams made up of staff from the Office of Hazard Identification and Reduction; the Office of Education, Global Outreach, and Small Business Ombudsman; the Office of Compliance and Field Operations; the Office of General Counsel; and the Office of Import Surveillance and Inspection to conduct retrospective reviews. To strengthen the culture of retrospective analysis of existing rules, we will consider the priorities of retrospective review of existing rules in development of our yearly Operating Plan and Performance Budget Request. They will also be included in the CPSC's Semiannual Regulatory Agenda.

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

To prioritize candidates for regulatory review, we will generally seek to insure that significant rules or those that impose the highest burden of compliance are given priority. In doing so, we will consider a variety of factors, including:

- *Costs associated with the regulation.* When choosing candidates for review, we will consider whether the benefits of a rule justify its cost, taking into account that we are charged with using the least burdensome alternative to achieve a rule's objectives.
- *Effect on deaths and injuries.* Our overriding focus is on the prevention and reduction of deaths and injuries related to the unreasonable risk of consumer products. Therefore, when determining which existing rules should be reviewed, we will consider whether the rule is fulfilling its intent: preventing or reducing deaths and injuries related to that product.
- *Age of the regulation.* The burdens and limitations of a rule may not be readily apparent when a regulation is first implemented. Some burdens may increase or decrease over time, and some inefficiencies or gaps may surface soon after implementation of the rule. An older rule whose burdens have grown out of proportion with its benefits may be a candidate for review. A relatively new rule may also be an appropriate candidate either because 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 E.O.s in the rulemaking process
- *Overlapping regulatory requirements.* Overlapping (and sometimes conflicting) requirements can impose burdens without providing much benefit to consumer safety. To the extent allowed by our laws, we will consider, as candidates for review, rules with duplicative or overlapping requirements.
- *Input from stakeholders.* We have multiple and varied stakeholders. These consumers, companies, testing organizations, and others are the ones who experience first-hand the effect of the CPSC's rules. They are in a good position to know if particular rules are excessively burdensome or insufficiently protective. We initially obtained stakeholder input regarding rule review through the *Federal Register* notice of October 19, 2011, seeking comments on our formulation of this Plan. We will continue to seek stakeholder input by accepting through our website suggestions from the public for rules that should be reviewed.
- *Evidence of noncompliance.* If we see continued noncompliance with a rule, such noncompliance could be an indication that the rule is confusing, overly costly, or burdensome to comply with, or otherwise is not addressing the intended hazard effectively. Thus, noncompliance with a regulation could be a signal that reassessment of the regulation is needed. On the other hand, if we see very few violations of a particular rule, the absence of violations could indicate that the rule is no longer needed.
- *Paperwork burden associated with the regulation.* We are aware that paperwork and recordkeeping requirements can impose significant time and monetary burdens on companies trying to comply with regulations. In fact, the paper work

can become more costly than the actual requirements of the rule. When choosing candidates for review, we will consider whether the cost and burden of the paperwork is disproportionate to the benefit.

- *Technological advances.* The 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.
- *Transparency and clarity.* Regulations that are unclear impose meaningless burdens on companies trying to comply with them, and such rules are not protecting consumers as they should. We have, for example, revised our textile flammability standard and the consumer registration rule to improve their clarity. Whether a rule's burdens can be reduced by improving its transparency and clarity is a factor we will consider.

c. Structure and Staffing

The Office of the Executive Director is responsible for the regulatory review process. Our Plan resides with the Deputy Executive Director for Safety Operations; inquiries on the Plan may be submitted via email to: rulereview@cpsc.gov. In addition, our Program Area Teams (PATs) will be responsible for proposing regulatory priorities, including selection of regulations for regulatory review, for presentation to the Deputy Executive Director for Safety Operations, for development of our Operating Plan. As described in section V, we will use interdisciplinary teams, including subject matter experts (SMEs), to review our 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, our resources, and our legal authorities.

d. Agency mechanism for ensuring the independence of regulatory review process from the offices responsible for writing and implementing regulations

CPSC staff will suggest candidates for review, but the ultimate decision of which rules will be reviewed will rest with the CPSC's Commissioners. The Commission will vote on the candidates for review as part of its vote on the annual Operating Plan. Any action to modify, revoke, amend, or otherwise change an existing rule will occur through regulatory action that would require a vote of the Commission.

e. Plans for retrospective analysis over the next two years, and beyond

Our work addressing the requirements of P.L. 112-28 will take the place of rule review under the Plan over the next two years. In future years, we will select rules for review based on the criteria set forth in the Plan.

f. How we will decide what to do with the analysis

We will use the analysis from the rule review to develop a project to modify, revoke, amend, or otherwise change the regulation in accordance with the results of the review, our resources, and our legal authorities. Following Commission direction, we will include the project in our Operating Plan.

g. Coordination with other federal agencies that have overlapping jurisdiction or expertise

We coordinate our activities with other federal agencies through various working groups and partnerships on an ongoing basis. Some of the agencies with whom we regularly work are the U.S. Food and Drug Administration (FDA), the U.S. Environmental Protection Agency (EPA), the National Institute for Standards and Technology (NIST), and U.S. Customs and Border Protection (CBP). For example, we rely on data from the FDA to assess the need for new child-resistant packaging standards. As another example, we are currently engaged with NIST, EPA, the National Institutes of Health (NIH), and the National Institute for Occupational Safety and Health (NIOSH) to assess the potential for release of nanoparticles from selected consumer products and to determine the potential health effects from such exposure. We will use these same strong relationships with other federal agencies when there is a need to coordinate concerning review of existing rules.

Because we are part of an interconnected global economy, we will also consider international standards when we evaluate existing rules. To the extent permitted by our laws, we will look toward harmonizing CPSC's requirements with international requirements as one aspect of our rule review.

h. The use of peer review in rule reviews

As appropriate to the particular review, we will follow guidance issued by the Office of Management and Budget on the use of peer review.³

VI. Components of Retrospective Cost-Benefit Analysis

a. Metrics used to evaluate regulations after they have been implemented

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; recordkeeping burdens; testing costs; and other economic costs related to the rule. Some of our rules implement specific statutory requirements. With these rules, our discretion to adjust the rule based on cost-benefit analysis may be limited. Thus, our use of cost-benefit analysis may vary from one regulation to another.

³ <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

b. Data collection techniques

The CPSC is a data-driven agency, and we rely on data when developing regulations. Similarly, we will rely on our extensive databases when reviewing existing rules. Our 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. Each year, we collect more than 360,000 National Electronic Injury Surveillance System (NEISS) reports, 8,000 death certificates, and more than 23,000 manufacturer and retailer reports on product safety concerns. We also receive incident reports through our hotline and the CPSC.gov and saferproducts.gov websites. We continue to improve our technology systems to support the data collection that is essential to our mission. We will use our extensive databases to determine appropriate candidates for rule review, to evaluate their effectiveness, and to determine ways to modify them to improve their effectiveness and efficiency.

c. Use of experimental designs for retrospective analysis

To the extent necessary and practicable, we will use experimental design techniques when reviewing and revising test methods in existing regulations.

VII. Publishing the Agency's Plan Online

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