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Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway, Room 820
Bethesda, MD 20814

Submitted via www.regulations.gov.

**Comments of Consumers Union, Consumer Federation of America, Kids in Danger, and Public Citizen to the Consumer Product Safety Commission on the Request for Information on Potentially Reducing Regulatory Burdens Without Harming Consumers
Docket No. CPSC-2017-0029**

Consumers Union, Consumer Federation of America, Kids in Danger, and Public Citizen respectfully submit these comments to the U.S. Consumer Product Safety Commission (CPSC) regarding the agency's request for suggestions on how to potentially lessen burdens and reduce costs of its existing rules, regulations, or practices without increasing the risk of deaths or injuries to consumers. As indicated in the Federal Register notice,¹ the Commission seeks comments that account for its Retrospective Review Plan, which lays out the CPSC's methods for identifying and reconsidering federal product safety rules that may warrant changes.²

We appreciate the opportunity to comment on the Commission's request for information because it is important that federal agencies, including the CPSC, ensure that regulations developed in the past are still achieving their purposes in the most effective manner, and are strengthened or revised as warranted with that goal in mind. Regulations can be complex, and after a period of experience,³ ways to improve their functioning and outcomes can become

¹ Consumer Product Safety Commission (CPSC), *Request for Information on Potentially Reducing Regulatory Burdens Without Harming Consumers*, 82 Fed. Reg. 27636 (June 16, 2017).

² CPSC, "Plan for Retrospective Review of Existing Rules" (Apr. 2016) (online at www.cpsc.gov/Global/Regulations-Laws-and-Standards/Rulemaking/FINALrulereviewplanAPRIL2016.pdf) ("Retrospective Review Plan").

³ We urge the CPSC to recognize that regulations must be given time to work, and sufficient time needs to pass between implementation and review in order to allow for appropriate data collection regarding the effectiveness of the rule. Some rules may impose greater burdens on industry at the very beginning, which then decrease over time; also, data about safety benefits may take several years to accumulate. Selecting a recently developed rule for review may not yield an accurate picture of its true impact on industry and on safety, and we urge the CPSC not to do so—bearing in mind the extensive process of comment and review already undertaken in developing the rule.

apparent. However, it is critical that any reviews of this type maintain a primary focus on the regulation’s safety objectives and do not come at the expense of critical product safety issues. Cost considerations, including regulated entities’ desire to minimize compliance burdens, should not compromise the protective purposes for which a regulation was initially developed.

I. Consistent with Its Retrospective Review Plan, the CPSC Should Focus on Strengthening and Implementing Safeguards—Not Just on Burdens and Costs

As groups dedicated to advancing consumer safety, we appreciate that the CPSC’s rule review processes under its Retrospective Review Plan are intended to help identify rules including those that “would benefit from strengthening, complementing, or modernizing.”⁴ It has long been a part of rule review activities in both Republican and Democratic administrations for agencies to evaluate how they can modify rules for the purposes of better implementing their regulatory programs. The Retrospective Review Plan accounts for this important consideration, and we strongly urge the CPSC to follow its processes for any rule review activity. Where the CPSC finds current rules that are not sufficiently protective of public health and safety, the agency should strengthen them.

For example, the small parts rule has been in effect for almost 40 years and has protected countless children from choking and asphyxiation hazards posed by toys with small parts. The rule requires that a small parts cylinder be used in testing a part to ensure that it would not lodge in a child’s windpipe and choke the child. However, some leading safety experts think that a larger cylinder measurement might be necessary to better protect children.⁵ This example demonstrates that the Commission’s review of existing rules should not be synonymous with a weakening of rules; in this case, a strengthening of the rule may be warranted.

The Retrospective Review Plan is also a critical guidepost because it accounts for the CPSC’s mission and its capabilities. The Plan is flexible, so that senior CPSC leadership proceeds at an appropriate schedule and expense that ensures “critical hazard reduction work – the agency’s core function – is not hindered.”⁶ We interpret this function to include, at a minimum, all work done to reduce hazards that meet the criteria to be a Commission priority.⁷

While the CPSC’s promulgation of product safety rules is an essential tool for protecting the public from hazards, the agency’s ability to enact rules quickly is limited by its statute, even

⁴ CPSC Retrospective Review Plan, *supra*.

⁵ See, e.g., American Academy of Pediatrics, Committee on Injury, Violence, and Poison Prevention, *Policy Statement—Prevention of Choking Among Children* (Feb. 22, 2010) (online at pediatrics.aappublications.org/content/pediatrics/early/2010/02/22/peds.2009-2862.full.pdf); “Toys That Meet Safety Standards Can Still Pose Choking Hazards,” ABC News (Nov. 25, 2010) (online at abcnews.go.com/GMA/ConsumerNews/children-safe-avoid-toy-choking-hazards-holiday/story?id=12219290).

⁶ CPSC Retrospective Review Plan, *supra*.

⁷ See, e.g., CPSC, *Strategic Plan 2016-2020* (Apr. 2016) (online at www.cpsc.gov/s3fs-public/CPSC_2016-2020_Strategic_Plan.pdf); See also Comments of Consumers Union, Comments of Consumer Federation of America, Comments of Kids In Danger, and Comments of Public Citizen to the CPSC on the Commission’s Agenda and Priorities for FY 2018 and/or 2019 (July 26, 2017) (online at www.cpsc.gov/content/public-hearing-commission-agenda-and-priorities-fy-2018-and-or-fy-2019-oral-presentations-and).

in the face of clear and significant hazards to consumers.⁸ This has meant, historically, that the CPSC has issued rules—with the exception of those mandated by Congress—only after a long delay and after avoidable injuries and deaths have occurred. To minimize the human costs of delays that result from these misguided statutory constraints, it is particularly important for the agency to ensure that the process of reviewing existing rules does not hinder progress on completing new safety standards for consumers.

Additionally, it is very important that the CPSC, with limited resources to perform its vital safety mission, is not burdened with repetitious, excessively costly, or unduly distracting reviews or related projects. Under the Retrospective Review Plan, we appreciate that projects to change a rule following a retrospective review will only occur “if needed.”⁹ Indeed, the Commission should only require these projects when a review has demonstrated that modifying a rule would result in an actual benefit, and without undermining safety. We also appreciate that in cases where review of a rule demands work requiring more resources than the CPSC has available without impacting its core safety work, the Plan directs staff to propose seeking these additional resources in the Commission’s budget request. This message explicitly tells staff that rule review activities must not materially impact the CPSC’s core safety work, and we urge the Commission to reiterate this message on a consistent basis.

II. The CPSC Is an Independent Regulatory Agency with a Critical Public Health and Safety Mission That Must Not Be Undermined by Incompatible Executive Orders

Because it is an independent regulatory agency, the CPSC is not required to follow recent executive orders on the subject of regulatory reform. This includes the arbitrary executive order that requires an agency to remove two existing safety rules in order to promulgate a new one, and the equally inappropriate provision that institutes budget-like allowances for the cost of regulations on businesses.¹⁰ The CPSC should not voluntarily follow these executive orders in any manner.

As we have commented previously, it is important that federal agencies, including the CPSC, ensure that regulations developed in the past are still achieving their purposes, and are strengthened or revised as warranted with that goal in mind. However, any such revision should occur as part of a well-considered process that has the advancement of safety at its core. In

⁸ This is largely due to section 9 of the Consumer Product Safety Act, which requires that the Commission first allow voluntary standard-setting bodies to develop standards to address product safety hazards before it can act to promulgate mandatory standards. The CPSC can promulgate a rule only if the voluntary standard is not adequate to eliminate or substantially reduce the hazard, or if there is substantial non-compliance with the voluntary standard. 15 U.S.C. 2058.

⁹ CPSC Retrospective Review Plan, *supra*.

¹⁰ The Office of Management and Budget (OMB) has explicitly stated that EO 13771 and EO 13777 do not apply to independent regulatory agencies. See OMB, “Memorandum: Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (Apr. 5, 2017) (online at www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation); See also OMB, “Memorandum: Guidance on Regulatory Reform Accountability under Executive Order 13777, titled ‘Enforcing the Regulatory Reform Agenda’” (Apr. 28, 2017) (online at www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-23.pdf).

addition, any proposed deregulatory action must include consideration of the loss of benefits of the affected rules to public health and safety.

Instead of following the recent executive orders identified above, the Commission should follow the generally appropriate process detailed in its Retrospective Review Plan. We appreciate that the Plan recognizes the importance of conducting reviews that are “consistent with the laws governing the CPSC and that reflect the agency’s resources, regulatory priorities, and processes.”¹¹ This is in line with the CPSC’s statute and its status as an independent regulatory agency.

In conducting any review of an existing rule, we caution the CPSC on the metrics used to determine the rule’s effectiveness. Regulation costs and benefits should be quantified as accurately as possible, when those data exist. The immense—but difficult-to-quantify—benefits of saving lives and avoiding injuries over time should not be discounted. Further, there are substantial costs to not promulgating a product safety rule that must be considered in any assessment of benefits and costs, such as more families having to suffer the unquantifiable cost of losing a child, or of raising a child whose IQ has been diminished due to lead in toys. The agency must ensure that sufficient weight is given to the benefits of safety rules, and that there is a meaningful evaluation of the public health costs of doing nothing at all.

III. The CPSC Should Push for Broad Public Participation in Any Rule Review Activity

Public participation in agency rule review is critical to ensure a positive impact on public health and safety. Consumers protected by the CPSC may be harder to reach than members of regulated industries. Most consumers are likely unaware of the existence of an individual rule, let alone its review. However, their input is just as valuable in weighing the effectiveness of the rule, and constitutes an important factor in the analysis. Moreover, the stories that parents and caregivers tell about the real-life impact of product hazards upon them and their loved ones should be a part of the public record.

As a result, we urge the agency to not only post all rule review information on websites such as *cpsc.gov* and *regulations.gov*—which is very important—but also seek innovative ways to directly engage the public at large and invite more input from the end-users of regulated products. Consumer groups, state agencies, safety advocates, and others can help with outreach, but the Commission should also reach out to the broader public on its own.

Conclusion

In conclusion, while it is important to ensure that regulations developed in the past are still achieving their purposes, the CPSC must maintain a primary focus on its safety objectives. Examining safety rules should not lead to weakening or eliminating those rules unless they are

¹¹ Under the Plan, rules selected by the CPSC staff as candidates for retrospective review will be considered in the Operating Plan process and presented for stakeholder input at the annual Priorities Hearing. If a rule is included in the final Operating Plan, interdisciplinary teams of the CPSC staff, including subject matter experts, would review the rule and, if needed, develop a project on how to change it in accordance with the results of the review, the CPSC’s resources, and the agency’s legal authorities. CPSC Retrospective Review Plan, *supra*.

determined, through a transparent process, to no longer serve a beneficial function; in fact, if a rule is inadequate to protect public health and safety, the CPSC should use the review process to strengthen it. When undertaking activities under its Retrospective Review Plan—which should govern all rule review activities—the CPSC must not compromise the protective purposes for which a rule was initially developed, nor divert resources that are necessary for core safety work.

We appreciate your consideration of our comments.

Respectfully submitted,

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