



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
BETHESDA, MD 20814

This document has been electronically
approved and signed.

DATE: March 23, 2016

BALLOT VOTE SHEET

TO: The Commission
Todd A. Stevenson, Secretary

THROUGH: Stephanie Tsacoumis, General Counsel
Patricia H. Adkins, Executive Director

FROM: Patricia M. Pollitzer, Assistant General Counsel

SUBJECT: Plan for Retrospective Review of Existing Rules

BALLOT VOTE DUE: March 29, 2016

Commission staff is forwarding to the Commission a Plan for Retrospective Review of Existing Rules (“Plan”) for the Commission’s approval. In addition, staff provides a memorandum discussing the comments received in response to the Commission’s *Federal Register* notice that requested comments on the Plan.

Please indicate your vote on the following options:

I. Approve the Plan, as drafted.

(Signature)

(Date)

II. Approve the Plan, with changes. (Please specify.)

(Signature)

(Date)

CPSC Hotline: 1-800-638-CPSC(2772) * CPSC's Web Site: <http://www.cpsc.gov>

III. Do not approve the Plan.

(Signature)

(Date)

IV. Take other action.

(Signature)

(Date)

Attachment: Plan for Retrospective Review of Existing Rules



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814**

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March 23, 2016

MEMORANDUM

TO : The Commission

THROUGH: Stephanie Tsacoumis, General Counsel
Patricia H. Adkins, Executive Director

FROM: George A. Borlase, Ph.D., P.E., Assistant Executive Director
Office of Hazard Identification and Reduction

Patricia K. Adair
Supervisory Program Analyst
Office of Hazard Identification and Reduction

SUBJECT: Plan for Retrospective Review of Existing Rules

1 BACKGROUND

On October 6, 2015, the Commission voted unanimously to approve a Plan for Retrospective Review of Existing Rules (“Plan”), as drafted, and to approve publication of the notice of availability of the Plan in the *Federal Register*, as drafted, seeking comments and information on the Plan.

The Plan sets forth a method for identifying and reconsidering certain rules that are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive, or ineffective, or that otherwise would benefit from modification. The Plan’s review processes are intended to facilitate identifying rules that warrant repeal or modification, including rules that could benefit from strengthening, complementing, or modernizing. The Plan is consistent with Executive Orders 13579,¹ 13563² and 13610.³

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.

2 PUBLIC COMMENTS ON THE PLAN

On October 26, 2015, the Commission published a notice of availability in the *Federal Register*, seeking comments and information on the Plan (80 FR 65173). CPSC received three comments: two from industry associations and one from a collection of consumer interest groups. The commenters agreed, in general, that the Plan is consistent with Executive Orders 13563, 13579, and 13610, and that a rule review may lead to “strengthening,” or increasing the rule’s requirements, but differed on priorities for rule review.

Summary of Comment CPSC-2015-0030-0002 from Consumer Federation of America (CFA), Consumers Union (CU) and Kids in Danger (KID):

In this joint submission, CFA, CU and KID urge the Commission to ensure that “the retrospective review process does not result in a weakening or elimination of hard-won safety standards for consumers.” The commenters address several topics, summarized below:

- *Use rule review process to complete proposed rules:* The commenters urge the Commission to recognize that any rule review activity is not limited to considering the withdrawal of items from the regulatory agenda, but that the rule review process can lead to the completion of proposed rules that have not been finalized.
- *Actively inform/engage the public:* The commenters recommend that, in addition to posting information on websites, such as cpsc.gov and regulations.gov, the Commission seek “innovative ways to directly engage the public at large and invite more input from the end-users of regulated products.” The commenters suggest that the Commission should reach out to the public to inform them of rule review activities.
- *Wait at least 10 years:* The commenters suggest that the rule review process include a requirement that only rules that have been in effect for at least 10 years should be considered for review because that time is needed to generate the data required to determine the rule’s effectiveness and safety benefits. Furthermore, some rules’ costs may decrease with time, reducing their overall burden. The commenters conclude by stating that a review of a recently promulgated rule “may not yield an accurate picture of its true impact on industry and on safety.”
- *Benefits and costs of a rule:* The commenters suggest that the Commission ensure that sufficient “weight” is given to the benefits of safety rules relative to the often (according to the commenter) subjective determination of costs. The commenters note that costs can be associated with *not* promulgating a safety rule, such as deaths and injuries that would otherwise have been prevented. The commenters suggest that any projects to amend a rule after a review only occur if the review has demonstrated that a modification would result in an actual benefit and would not undermine the safety aspects of the rule.

- *CPSC’s core safety mission:* The commenters urge the Commission to reiterate that the staff resources dedicated to rule reviews will not impact the agency’s core safety work.

Summary of Comment CPSC-2015-0030-0003 from the Toy Industry Association (TIA):

TIA suggests that the Testing and Labeling rule (16 C.F.R. part 1107) be considered the first candidate rule for review. The commenter notes the sweeping scope of the rule and also states: “[b]ecause this rule was not subject to full APA [Administrative Procedure Act] rulemaking procedures . . . , a full cost/benefit analysis was not performed.” The commenter adds that this rule is considered a “significant regulatory action” (has an annual effect on the economy of \$100 million or more or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety) and that (according to the commenter) there is an “opportunity to retrospectively evaluate whether the benefits of this rule continue to outweigh the considerable compliance costs incurred by the regulated community.” The commenter asserts that the Commission could “tweak” the rule to reduce its burden, especially the third party testing burden, while maintaining the essential requirements of the CPSIA.

Summary of Comment CPSC-2015-0030-0004 from the American Apparel and Footwear Association (AAFA):

AAFA recommends four changes to existing requirements applicable to the apparel and footwear industry that should happen through the CPSC’s rule review process:

- Clarify that no General Certificate of Conformity (“GCC”) is required when an item is exempt from testing, including, but not limited to, items exempt under the Flammable Fabrics Act (“FFA”);
- Amend the determination on inaccessibility and fabric barriers by eliminating the requirement that a fabric-covered component part less than 5 centimeters in any dimension be subject to required third party testing;
- Allow paints or other surface coatings to serve to render materials underneath the paint or surface coating inaccessible with respect to the lead content requirements of section 101 of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”); and,
- Reinterpret the definition of a “child care article” to exclude sleepwear. As a result of the reinterpretation, children’s sleepwear would not be subject to the phthalate content limits of section 108 of the CPSIA.

3 STAFF’S RESPONSE TO COMMENTS ON THE PLAN

Staff appreciates receiving input from consumer and industry stakeholders on the Plan, including suggestions of existing rules that may warrant review, and suggestions for greater

public engagement in the process. Staff notes that 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. Under the Plan, CPSC staff would conduct reviews consistent with the laws governing the CPSC and that reflect the agency's resources, regulatory priorities, and processes.

As stated in the Plan, strengthening the agency's culture of retrospective analysis of existing rules so that review becomes ingrained in the planning and budget process, is essential. Under the Plan, candidate rules for retrospective review would be considered when developing the yearly Operating Plan and Performance Budget Request.

Staff has not made any changes to the Plan in response to the public comments; however, staff will consider the comments received when proposing possible candidate rules for review in the draft FY 2017 Operating Plan and FY 2018 Performance Budget Request.

4 STAFF RECOMMENDATION

Staff recommends that the Commission approve the Plan, with no changes, and publish the Plan on cpsc.gov.



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.

March 2016

For further information, contact:

Patricia K. Adair
Office of Hazard Identification and Reduction
U.S. Consumer Product Safety Commission
301-504-7335

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 13610³ 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

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,

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

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.