

CPSC Cuts Needless Red Tape

Paperwork reduction will save businesses \$250 million per year

February 24, 2016 – Today, U.S. Consumer Product Safety Commissioner Joe Mohorovic introduced a proposal, adopted unanimously by the Commission, to eliminate a costly and unnecessary paperwork burden on clothing manufacturers and importers. Under the Consumer Product Safety Act, products covered by a mandatory CPSC regulation must have certificates reflecting their compliance with safety standards. The Commission exercised its enforcement discretion to free businesses from having to create certificates for clothing made from fabrics that the CPSC says are inherently safe and compliant.

- **Cutting red tape while ensuring product safety**
 - This enforcement discretion will only apply to clothing made with fabrics CPSC has already found to be safe and compliant with flammability standards.
 - Exemptions are based on fabric weight and material.
 - Does not apply to children's apparel.
 - Fabrics more likely to be flammable will still need testing and certification.

- **Saving businesses \$250 million annually**
 - Importers and manufacturers create an estimated 26.6 million certificates for adult apparel each year, at a cost per certificate of approximately \$9.34
 - Small businesses are disproportionately impacted:
 - They order smaller batches of clothing, with each small batch needing its own certificate.
 - More than 60% of all certificates are created by small businesses – today's action will save them more than \$150 million per year.
 - A \$250 million annual red tape reduction would be comparable to actions taken by much larger agencies:
 - EPA vapor recovery changes for gas stations: \$67 million per year
 - Department of Energy two-year grace period for showerhead efficiency standards to allow manufacturers to sell remaining inventory: \$400 million *one-time* savings.
 - EPA's "spilled milk" exemption: \$1.4 billion over 10 years (avg. \$140m annualized)

- **Following the spirit of Paperwork Reduction Act (44 USC 3501 et seq.) & Executive Orders**
 - The stated purpose of the Paperwork Reduction Act includes the following maxims:
 - "[T]o minimize the paperwork burden for individuals, small businesses, State and local governments, and other persons;
 - "minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information; [and]
 - "maximize the usefulness of information collected by the Federal Government[.]
 - President Clinton's Executive Order 12866 stated:
 - "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities . . . consistent with obtaining the regulatory objectives[.]"
 - President Obama's Executive Order 13610 added:
 - "[A]gencies 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."

- **Enclosed:**
 - CPSC Statement of Policy on Enforcement Discretion Regarding General Conformity Certificates for Adult Wearing Apparel Exempt from Testing
 - Statement of Commissioner Joseph P. Mohorovic Regarding the Commission's Decision to Exercise Enforcement Discretion Regarding Certificates of Compliance for Low-Risk Adult Apparel

Enforcement Policy on GCCS for Exempt Adult Apparel

Statement of Policy on Enforcement Discretion Regarding General Conformity Certificates for Adult Wearing Apparel Exempt from Testing**A. Background**

The Consumer Product Safety Improvement Act (CPSIA) was enacted on August 14, 2008 (Pub. L. 110-314). Section 102(A) of the CPSIA requires that all manufacturers of consumer products subject to a rule, standard, or ban enforced by the CPSC issue a general conformity certificate (GCC) certifying that “based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product.”¹

B. Flammable Fabrics Act and Related Regulations

In 1953, Congress enacted the Flammable Fabrics Act (FFA) in response to a number of serious injuries and deaths resulting from burns associated with garments made from high-pile rayon.² The clothing flammability standard at 16 C.F.R. part 1610 (1610, the Standard) provides for classification of various types of fabrics and describes in detail the test method to determine flammability.

Section 1610.1(c) excepts from the flammability standard certain hats, gloves, footwear, and interlining fabrics. Because this section specifically says that the “standard shall not apply to” these articles, they are not “subject to” a rule, standard, or ban under section 102(a) of the CPSIA, and therefore manufacturers and importers are neither subject to the regulation nor required to produce a GCC for these products.

Section 1610.1(d), conversely, exempts from *testing*, but not from the standard as a whole, garments made entirely from certain fabrics that the Commission has consistently found not to be flammable. These include:

- (1) Plain surface fabrics, regardless of fiber content, weighing 2.6 ounces per square yard or more; and
- (2) All fabrics, both plain surface and raised-fiber surface textiles, regardless of weight, made entirely from any of the following fibers or entirely from combination of the following fibers: acrylic, modacrylic, nylon, olefin, polyester, wool.

Because products made from these fabrics are exempt from testing but *not* excepted from the standard as a whole, they are still “subject to” a rule, standard, or ban and manufacturers and importers of these exempted products have been required to issue a GCC.

C. Rationale for Enforcement Discretion

Experience gained from years of testing in accordance with 16 C.F.R. part 1610 demonstrates that the exempted fabrics referenced above consistently yield acceptable results when tested in accordance with the Standard. This experience allowed an exemption from testing in the

¹ 122 Stat. at 3022, § 102(a).

² Floyd B. Oglesby, *The Flammable Fabrics Problem*, 44 *Pediatrics* 827 (1969), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1730418/pdf/v004p00317.pdf>.

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Standard, for the purpose of issuing guaranties.³ The Standard allows persons or firms issuing an initial guaranty of any of the referenced fabrics, or of products made entirely from one or more of these fabrics, an exemption from any requirement for testing to support guaranties of those fabrics.

Certificates of compliance for children's products and other consumer products regulated by the Commission serve many vital purposes, not least of which is to assure our compliance staff that these goods have met the testing requirements set forth in our rules. Adult apparel is rarely, if ever, subject to more than one CPSC regulation. Many retailers are issuing GCCs simply noting an exemption from testing to the Standard. The Commission believes the issuance of GCCs for these products is not necessary for CPSC staff to enforce the Standard because the Commission has granted a testing exemption to these fabrics and adult apparel made from these fabrics is unlikely to be subject to other consumer product safety rules, standards, or bans. This proposal provides an opportunity to reduce costs to manufacturers and importers without affecting consumer safety.

D. Statement of Policy

The Commission votes to exercise the following enforcement discretion:

Effective [30 days from the date of Commission approval], the Commission will not pursue compliance or enforcement actions against manufacturers, importers or private labelers for failure to certify or to issue, provide or make available to the Commission a general conformity certificate as required by 15 U.S.C. § 2063(a)(1) with respect to adult wearing apparel that is exempt from testing pursuant to 16 C.F.R. § 1610.1(d).

E. Limitations of Enforcement Discretion

The intent of this enforcement discretion should be read narrowly within its precise terms. The Commission will use enforcement discretion only for *certificate* violations related to the indicated product category. *These products must still comply with all flammability requirements under the FFA; failure to comply with flammability standards will still subject the products to enforcement action.*

Further, this enforcement discretion does not apply to any adult wearing apparel that does not fit the specific testing exemptions provided for in 16 CFR § 1610.1(d). For example, if a manufacturer produced a garment made from a plain surface silk fabric that weighs less than 2.6 ounces per square yard, that garment would not fall within the exemption, and the manufacturer would still be expected to produce a GCC.

Should the Commission become aware of unsafe products entering the market as a result of this statement of policy, it reserves the right to withdraw the policy prospectively with no less than 90 days' notice.

This statement of policy, and the enforcement discretion described herein, is limited to certificates required for adult wearing apparel that is exempt from testing pursuant to 16 C.F.R. §1610.1(d). If the adult wearing apparel is not exempt from testing under 16 C.F.R. §1610.1(d),

³ 16 C.F.R. § 1610.1(d).

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none of this policy, the enforcement discretion described in this policy nor the implications of such enforcement discretion shall apply. In addition, any misrepresentation or omission regarding the applicable facts or application of 16 C.F.R. §1610.1(d) under the circumstances could subject the applicable firm to applicable compliance or enforcement action and potential civil and/or criminal penalties.

The Commission's exercise of the enforcement discretion described in this policy is not intended to, does not and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party against the CPSC or otherwise against the United States government.



U.S. CONSUMER PRODUCT SAFETY COMMISSION

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STATEMENT OF COMMISSIONER JOSEPH P. MOHOROVIC REGARDING THE COMMISSION'S DECISION TO EXERCISE ENFORCEMENT DISCRETION REGARDING CERTIFICATES OF COMPLIANCE FOR LOW-RISK ADULT APPAREL

WEDNESDAY, FEBRUARY 24, 2016

Merriam-Webster defines “red tape” as “a series of actions or complicated tasks that seem unnecessary but that a government organization requires you to do in order to get or do something.”¹ American Heritage defines the phrase as “the collection or sequence of forms and procedures required to gain bureaucratic approval for something, especially when oppressively complex and time-consuming.”²

If I did not know better, I would have assumed those definitions were based on the idea that companies that make and sell adult apparel the Consumer Product Safety Commission (CPSC) has, for years, considered categorically safe were nonetheless required to certify that those products were, in fact, safe. Thankfully, with the unanimous support of my colleagues, the agency has cut that red tape to the tune of \$250 million a year.

In making this sensible, risk-based change,³ we have discharged our duty as regulators to impose the lightest burden we can to achieve our safety objectives.⁴ We have also answered the calls of Executive Orders issued by presidents of both parties across decades.⁵ Those orders reflect the same spirit embodied in the appropriately named Paperwork Reduction Act, which seeks to “minimize the paperwork burden for individuals, small businesses, State and local governments,

¹ *Definition of Red Tape*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/red%20tape> (last accessed Feb. 18, 2016).

² American Heritage Dictionary of the English Language, Fifth Edition (2011), *available at* <http://www.thefreedictionary.com/red+tape>.

³ In fact, this decision was based on a *lack* of risk.

⁴ 15 U.S.C. § 2058(f)(3)(F).

⁵ *See, e.g.*, Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (issued by President Reagan); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (issued by President Clinton); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (issued by President Obama); Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012) (issued by President Obama).

and other persons.”⁶ Taking this simple but remarkable step is a great credit to the CPSC and everyone who is a part of it.

What We Are Doing

The Consumer Product Safety Improvement Act of 2008 (CPSIA)⁷ requires that a manufacturer or importer of a product subject to a CPSC rule certify that the product complies with that rule. Ordinary adult apparel is subject to a single rule, the flammability standards⁸ established under the Flammable Fabrics Act (FFA).⁹ CPSIA, then, would seem to require certification solely to demonstrate that any adult apparel product complies with those standards.

However, our rule under the FFA also establishes a list of fabrics that we have determined will necessarily and consistently meet the flammability standard.¹⁰ In light of that determination, relying on our authority and discretion as a law enforcement agency,¹¹ the Commission will not pursue enforcement action regarding a lack of certification for apparel made entirely from one or more of the listed fabrics.¹²

Why We Are Doing It

The list of fabrics covered by this enforcement discretion is no mere accident. It was adopted¹³ over 30 years ago as the result of a decade of CPSC experience that made clear that those fabrics are inherently compliant with the flammability standards.¹⁴ Nothing has altered this conclusion.¹⁵ Because of this woven-in compliance, we already know they are inherently safe. There is no

⁶ Two other purposes of the PRA are to “minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information” and to “maximize the usefulness of information collected by the Federal Government,” purposes our action today serves, as well. 44 U.S.C. § 3501.

⁷ Pub. L. No. 110-314, 122 Stat. 3016 (2008) (codified as amended in various sections of Title 15, U.S.C.).

⁸ 16 C.F.R. part 1610.

⁹ Pub. L. No. 83-88, 38 Stat. 717 (1953) (codified as amended at 15 U.S.C. § 1191 *et seq.*).

¹⁰ These are “plain surface fabrics, regardless of fiber content, weighing 2.6 ounces per square yard or more” and “all fabrics, both plain surface and raised-fiber surface textiles, regardless of weight, made entirely from any of the following fibers or entirely from combination of the following fibers: acrylic, modacrylic, nylon, olefin, polyester, wool.” 16 C.F.R. § 1610.1(d). Garments made with any other fabric – or with adulterations of the listed fabrics – will still require certification of compliance with the FFA flammability standards.

¹¹ *See generally, e.g.,* Heckler v. Chaney, 470 U.S. 821 (1985).

¹² It is important to note three things we did not do with this action. First, we did not set a precedent for the exercise of enforcement discretion for other products. Adult apparel products made from the listed fabrics are unique in that we have already determined – by rule – that they are so likely (virtually certain) to comply with the only relevant requirement that they present, at most, negligible risk; for other high risk or children’s products, certification has real value. Second, we did not lift the underlying requirements the products face. As unlikely as any violations are, if they occur, they are still subject to enforcement action. Third, we did not set anything in stone, but we did at least freeze the frame. Any enforcement discretion is subject to revocation, but we committed to giving industry at least 90 days’ notice before we do so, in the unlikely event that these historically safe products begin to present any appreciable risk.

¹³ Standard for the Flammability of Clothing Textiles, 49 Fed. Reg. 48,683 (Dec. 14, 1984).

¹⁴ *Id.* at 48,687.

¹⁵ In fact, when we refreshed the clothing flammability standard less than eight years ago, we expressly noted that, “No change has been made” to the list and referred interested readers to the reasoning of the 1984 amendments. 73 Fed. Reg. 15,636, 15,638 (Mar. 25, 2008).

added safety value in companies attesting to compliance the Commission has pre-determined because, certified or not, they are quintessential low-risk products.

Contrast this with other products that are subject to more requirements or present higher risks. In those cases, certificates are either based on demonstrable evidence of compliance (such as test data) or are a more meaningful affirmation that the company followed the law. In the case of adult apparel, using a fabric on the CPSC list *necessarily* follows the law.

No clothing is made any safer because of a certificate that tells us what we already know; it is only made more expensive. How much more expensive?

Based on the data we have collected, and excluding the tiny fraction of adult apparel that is not made of fabrics on the list, the industry has to produce over 26 million certificates at a cost of roughly \$250 million *each year*.¹⁶ That is a quarter-billion dollar annual price tag for confidence we already have that these products meet the standard and present little risk.

Worse still, the burden is heaviest on the small businesses that are the backbone of the American economy. Not only do they lack the infrastructure to minimize per-certificate costs, but their smaller product runs and purchase orders mean they have fewer units under each certificate. As a result, more than 60% of this burden – again, for products we know are safe and compliant – falls on small businesses.

This certificate requirement was the definition of red tape. It was an unnecessary action or task required in order to make or import low-risk adult apparel. It was a needless form and procedure required to gain bureaucratic approval. And it was costing an enormous sum, particularly for the people least able to absorb the cost. So, we cut it.

Why It Matters

The American economy is laboring under a substantial regulatory burden. Some have estimated that burden at nearly \$1.88 trillion,¹⁷ suggesting that, “If it were a country, U.S. regulation would be the world’s tenth-largest economy, ranking behind Russia and ahead of India.”¹⁸ While it is fair to question how that or any total is calculated, any reasonable math would yield a hefty sum.

Whether or not that regulatory cost is excessive is also a fair subject for debate, though polls consistently indicate that roughly half of the country would agree with me that businesses do spend too much on regulatory compliance.¹⁹ As reflected in the Executive Orders²⁰ and the

¹⁶ The roughly 16.8 billion units of clothing imported each year are covered by an estimated 26.6 million certificates at a cost of \$9.34 each, or \$248.4 million.

¹⁷ Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise institute, 2 (2015).

¹⁸ *Id.* at 3.

¹⁹ In a September survey, “a sturdy 49% of Americans say the government regulates business too much, [and] a near-low percentage instead say it regulates too little (21%).” Andrew Dugan, *In U.S., Half Still Say Gov't Regulates*

Paperwork Reduction Act, however, there is broad consensus that pure red tape should be cut. Leaders from a variety of political camps have agreed that rules that have costs but no benefits should go.

I am grateful for the support of my colleagues and our expert career staff in recognizing that requiring companies to attest to the safety of products we already know are safe was a pure red tape regulation. As we both evaluate potential new rules and pursue the Commission's unanimous direction to enhance our efforts at retrospective review,²¹ I hope we can continue to find common ground regarding the dead weight in our regulations.

I also hope we will continue to pursue the burden reduction Congress has directed us to find in our third-party testing and certification rules for children's products. Today's action unfortunately cannot tally on that scorecard. Since we have already deemed almost all adult apparel compliant, it is not subject to any testing requirement, much less a third-party mandate, and there is no third-party testing burden to relieve. But, whatever label is appropriate, a \$250 million reduction in annual paperwork compliance costs is sizeable, and it ranks among the largest burden reductions federal agencies have enacted.²²

Too often, we in government prove the wisdom of President Reagan's theory that "the nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.'"²³ Today, we have helped, 250 million times over.

Business Too Much, Gallup, <http://www.gallup.com/poll/185609/half-say-gov-regulates-business.aspx> (last accessed Feb. 19, 2016).

²⁰ "[A]gencies shall give priority . . . to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens." 77 Fed. Reg. at 28,470.

²¹ Manager's Amendment to the FY 2015 Midyear Review and Proposed Operating Plan Adjustments, 2 (2015), available at <http://go.usa.gov/cBAVV>.

²² For example, when the Environmental Protection Agency concluded that a milk spill is not equivalent to an oil spill and did not require the same level of remediation, it saved dairies an estimated \$133 million a year. Amendments for Milk and Milk Product Containers, 76 Fed. Reg. 21,652, 21,653 (Apr. 18, 2011), available at <http://go.usa.gov/cp4GV>.

²³ Presidential News Conference (Aug. 12, 1986), available at <http://www.reaganfoundation.org/reagan-quotes-detail.aspx?tx=2079>. A popular website posits a similar theory: "Government – If you think the problems we create are bad, just wait until you see our solutions." GOVERNMENT – DESPAIR, INC., <http://despair.com/products/government> (last visited Feb. 17, 2016).