Statement of Pamela Gilbert on

"Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing Regulatory Process"

Before the

Subcommittee on Regulatory Affairs and Federal Management of the Committee on Homeland Security and Governmental Affairs

U.S. Senate

March 19, 2015

Chairman Lankford, Ranking Member Heitkamp, members of the Subcommittee, thank you for the opportunity to testify on the issue of improving the efficiency and effectiveness of the federal regulatory process. My name is Pamela Gilbert and I am a partner in the law firm of Cuneo Gilbert & LaDuca. I served as executive director of the U.S. Consumer Product Safety Commission from 1996 through May, 2001. I am testifying on my own behalf and all the opinions expressed are my own.

When we discuss effective regulation, it is crucial that we remember what happens when the regulatory system breaks down. The public, the news media, and public officials from both parties and every geographic region rise up, and ask how it could have happened and commit to changes so that the same thing never happens again.

We saw this last year when the National Highway Traffic Safety Administration oversaw recalls involving more than 60 million vehicles. The record-breaking number of recalls began when it was discovered that General Motors waited for over a decade to recall cars with a deadly ignition switch defect that has now been linked to scores of deaths and serious injuries. I sat in hearings held by the Senate Commerce Committee in which Senator after Senator asked NHTSA's then-acting administrator "what went wrong?"

In 2007, the U.S. experienced a different "year of the recall," in which hundreds of consumer products were recalled under the supervision of the CPSC. Many of them were toys with household names that we all grew up with and gave to our children and grandchildren to play with, such as Barbie Dolls, Thomas the Tank, and Easy-Bake Ovens. The relatively unknown CPSC was all of a sudden front page news and a topic of conversation at the playground and at the water cooler. Americans throughout the country, in red states and blue states and purple states, wanted to know what this federal agency was doing to keep children safe. Congress responded by passing, by an almost unanimous vote, the Consumer Product Safety Improvement Act (CPSIA), the most far-reaching reform of the agency since its founding in 1973.

Congress established the federal regulatory system to protect the public health, safety and welfare. American consumers expect that this system is working to keep the products they purchase safe, the air they breathe clean and the vehicles they drive free from defects. American businesses thrive, in part, because consumers have confidence in the safety of the marketplace. Just ask the executives at General Motors and Mattel if they wished that the problems with their products had been caught and remedied before the issues got out of hand the way they did. Nobody benefits when the regulatory system fails.

The message I want to share today is that our current regulatory system is already burdened with insufficient resources and bureaucratic requirements that add unnecessary cost and inefficiencies.

These burdens have real costs. Unsafe cribs killed innocent babies; children were sent to hospital emergency rooms to undergo painful and repeated surgeries after swallowing tiny magnet in toys; scores of people have been injured and killed in defective cars. The pain to families is incalculable. Companies suffer financial losses and reputational harm as well.

The Importance of Effective Regulations

A critical function of government is to protect us from preventable hazards and harm. We expect our government to keep contaminated food off the grocery store shelves and out of restaurants; to ensure employers follow health and safety rules, obey labor standards, and prevent toxic emissions from poisoning our air, water, and communities, to keep unsafe drugs off the market and hazardous toys out of the hands of children. The system of standards and safeguards that has been put in place in this country over the past hundred years has encouraged our businesses to innovate, produced broadly shared prosperity, and given us among the highest living standards on the planet.

Our system of public protections has made this country a safer, better place to live. Workplace fatality rates have dropped dramatically. Our air and water is less polluted. Cars are substantially safer than just a few decades ago. Tainted food is a public health emergency, not a regular occurrence. American companies produce and import safer toys in response to the work of the CPSC .

Corporations and their trade associations, ideological advocates and other parties with vested interests like to claim that our regulatory system is overly-burdensome, costing the U.S. jobs and economic prosperity. These parties are well-funded, which gives them a big megaphone to reach the public. "Deregulation" becomes a popular notion when it is disconnected from the real-life results of regulatory failures. As a result, we are in danger of losing sight of the importance of rule-making as a critical dimension of democratic practice and economic success. Regulation is fundamentally about making the right rules to balance society's multiple and often conflicting interests. Regulation, in concert with healthy markets and effective social policy, is essential for securing the common good.

The Impact of Cost-Benefit Analysis and Other Process Requirements on Delaying the Regulatory Process

Agencies expend substantial time and staff resources to address the extensive requirements for assessing the costs and benefits of regulations as required in statutes and in several Executive

Orders issued over the past two decades[1]. Over this period, there has been an increasing shift in the federal regulatory process to rely on cost-benefit analysis as the primary basis for regulatory decision-making. This shift is concerning because cost-benefit analysis has substantial inherent flaws, including limited ability to quantify and value the potential benefits of regulations, the tendency to overestimate future compliance costs that are based on industry estimates that inflate cost estimates and ignore potential cost savings due to innovation, and the practice of discounting the value of future benefits for current actions that may actually increase public protections in future decades. In addition, as CPSC Commissioner Robert Adler noted in an op-ed in the *New York Times*, "… health and safety agencies rarely impose new costs on society when we issue safety regulations. We simply re-allocate who pays the costs."[2] Indeed, when cost-benefit analysis is a factor in preventing health and safety agencies from protecting the public, the public ends up paying the price. As a result, cost-benefit analysis is a truly distorted approach to regulatory decision-making that is tilted heavily against adoption of new regulations, particularly those identified by agency experts as the most effective in protecting the public.

Likewise, judicial review of agency cost-benefit analyses is another significant factor that "chills" rulemaking. Given the highly subjective nature of cost-benefit analysis, it is no surprise that even the most ardent supporters of the practice have repeatedly cautioned that allowing courts to second-guess agency expertise is harmful and inappropriate.[3] While agency compliance with the previous Executive Orders related to regulatory analysis is not subject to judicial review, codification of those analytical requirements would result in judicial review. This would, in turn, result in a flood of litigation disputing agency cost estimates with industry cost figures, force judges to intrusively investigate highly technical agency cost calculations, and pressure agency officials to adopt regulations that are least likely to offend regulated industries, and thus end up in court, rather than the regulations that are the most effective at protecting the public.

Rather than allowing the results of cost-benefit analyses to drive regulatory decision-making, agencies need to give primacy to the legislative mandates that provide the basis for regulations. As the 2008 ABA report to the President notes in considering the utility of cost-benefit analysis "the rulemaking proceedings within which it [cost-benefit analysis] is conducted must ultimately culminate in a decision that implements the normative values embodied in the agency's enabling legislation"[4]

It is worth noting, however, that despite these significant limitations, the evidence from cost-benefit analyses of major regulations consistently finds that the economic value of these

---

[1] For example, Executive Orders 12866(58 FR 51735; October 4, 1993), 13563 (76 FR 3821, January 21, 2011) and13579 (76 FR 41587, July 14, 2011)

[2] "Safety Regulators Don't Add Costs, They Decide Who Pays Them," by Robert S. Adler, *The New York Times*, October 16, 2011.

[3] Cass Sunstein, *Arithmetic of Arsenic*, 90 Geo. L.J. 2255, 2258-59 (2002).

[4] American Bar Association Section of Administrative Law and Regulatory Practice; *Improving the Administrative Process, A Report to the President-elect of the United States*; 2008.

regulations far outweigh their costs. For example, the most recent draft report to Congress from the Office of Management and Budget on the benefits and costs of regulations finds that the benefits of major regulations issued over the past decade outweigh the costs by a factor of four to ten[5].

The CPSC Experience

The experience of the Consumer Product Safety Commission is instructive regarding the impact of extensive regulatory process requirements such as cost-benefit analysis on the ability of agencies to issue timely regulations. Though as an independent agency the CPSC is not subject to the Executive Order regulatory review requirements, the cost-benefit requirements added in 1981 to the Consumer Product Safety Act required analyses that exceed the scope and stringency of the Executive Order requirements. As a result, for more than 30 years, while the CPSC was required to comply with these requirements, the agency was able to issue only *nine* consumer product safety rules, or approximately one rule every three years.

As I stated previously, in 2008 Congress passed the CPSIA in response to a crisis of public confidence in the safety of toys and other children's products. A key cause of this crisis was the inability of the CPSC, due to the incredibly extensive and practically paralyzing analytical requirements, to address the hazards posed by unsafe children's products. The CPSIA, acknowledging this impediment, directed the CPSC to enact a series of mandatory safety standards for children's products, including toys, cribs, infant walkers, baby bath seats, toddler beds and bed rails, and portable play yards, among others, under strict time deadlines. In order to enable the Commission to proceed expeditiously to protect children, the CPSIA directed CPSC to bypass its existing burdensome regulatory requirements and proceed under the streamlined procedures of the Administrative Procedures Act. In fact, every time Congress has stepped in over the decades to direct the CPSC to enact product safety standards in response to a public uproar, which also occurred after deaths from automatic garage door openers and lawn darts, the legislation has required the Commission to use APA procedures in order to protect the public in a timely fashion. This pattern should tell us something – even Congress agrees that CPSC's burdensome regulatory requirements stand in the way of an effective and efficient regulatory response.

CPSC Case Study

In recent years, I have been involved in a CPSC rulemaking, first as a consultant to a company that invented a landmark safety technology and now, as a consultant to a national consumer organization that stands as a good example of the regulatory paralysis that can occur at the Commission. In October 2011 the agency's three Democratic Commissioners and two

[5] Office of Management and Budget; *Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities*; 2014. The report finds that benefits of major regulations issued between 2003 and 2013 range from $217 to $863 billion while the costs of these rules were estimated between $57 and $84 billion.

Republican Commissioners unanimously voted to publish an Advance Notice of Proposed Rulemaking (ANPR) to develop a standard to address lacerations and amputations caused by table saw injuries. The agency vote came *eight years* after receiving a petition to address this hazard.

According to a CPSC study of table saw injuries in the U.S. in 2007 and 2008, there are over 37,000 table saw injuries treated in hospital emergency rooms every year. Astonishingly, approximately 4,000 of those injuries, or about 10 a day, are amputations. In 1999, an inventor, working in his garage, invented a safety technology that stops a spinning saw blade in milliseconds after coming in contact with human flesh. That inventor started a company that produces table saws with this injury-mitigation technology. The company has sold tens of thousands of safer table saws, and they have testimonials from thousands of their customers about table saw injuries that did not occur.[6] From this experience, we know a safety technology exists that can work to prevent tens of thousands of serious, life-altering injuries every year. The CPSC has known about this potential safety benefit for over a decade. We are into the fourth year of the CPSC ANPR on table saws, and still, the staff has been unable to issue a Notice of Proposed Rulemaking, which is the next step in the CPSC regulatory process. (Although CPSC's three-step rulemaking process was changed by the CPSIA so that the first step is now discretionary, the three-stage process is still used.[7] In contrast, most agencies have a two-step process.)

You may wonder why it is taking CPSC so long to move forward on table saw safety. One reason is that the trade association that represents the majority of the table saw industry in the U.S., made up largely of foreign-owned companies, is opposed to a table saw safety regulation. The trade association submitted comments to the CPSC, stating that, since a new voluntary table saw safety standard became effective in 2007, the Commission could not issue a safety standard without assessing the effectiveness of that new standard. The industry made this claim even though the so-called "new" standard required the same safety device that has been used on table saws since they were first marketed – blade guards that have been shown not to be effective in preventing the tens of thousands of emergency-room visits from table saw injuries every year. But because CPSC staff thought its cost-benefit analysis of a new table saw standard would be called into question if the agency did not conduct yet another study of table saws, the Commission decided to do a survey of table saw users. In order to conduct a survey, the Paperwork Reduction Act requires approval of the Office of Information and Regulatory Affairs at OMB. It took over one year for CPSC to receive that approval. I understand that the survey is finally underway. In the meantime, ten amputations occur *every* day.

[6] "SawStop Testimonials", 2013 http://www.sawstop.com/why-sawstop/testimonials

[7] CPSC issued an advanced notice of proposed rulemaking for window coverings in January of 2015. Federal Register," *Corded Window Coverings; Request for Comments and Information*" Jan, 16,2015 https://www.federalregister.gov/articles/2015/01/16/2015-00566/corded-window-coverings-request-for-comments-and-information

Streamlining the Regulatory Process

It simply takes too long to modernize rules so that they reflect current scientific and technical evidence about needed public protections. And as more obstacles, duplicative analysis, and legal challenges have been put in place to slow or prevent scientific knowledge and technical evidence from being translated into public action, children and elderly people develop preventable cancers, toddlers are run over in driveways, workers are debilitated by respiratory diseases, and dangerous products continue to kill and maim.

Over time, both Congress and the executive branch have laden the process of informal rulemaking with multiple requirements for regulatory analysis. These include the Regulatory Flexibility Act, the Paperwork Reduction Act, Unfunded Mandates Reform Act, and numerous executive orders. The cumulative effect of the impact of these requirements has been unfortunate. The addition of too many analytical requirements deters the initiation of needed rulemaking. In 1992, the American Bar Association (ABA) House of Delegates highlighted these concerns when it unanimously called upon the President and Congress to "exercise restraint in the overall number of required rulemaking impact analyses" and "assess the usefulness of existing and planned impact analyses."[8] The ABA reiterated this call to streamline the regulatory process in its 2008 report, suggesting that the current patchwork of analytical requirements found in various statutes and Executive Orders be replaced by one coordinated regulatory structure[9].

Finally, agencies need adequate resources to fulfill their statutory missions in a timely and efficient manner. The steady accumulation of statutory requirements that have lengthened the rulemaking process, without a corollary increase in resources, is part of why delays in the current rulemaking process are so prevalent. If the committee is contemplating adding further statutory requirements on top of the existing ones, it is crucial that agencies are provided the resources they need to comply with these new requirements. Asking agencies to do more, without more resources, is a recipe for more delays and fewer regulations intended to protect the public.

Conclusion

In the United States' system of "checks and balances," Congress passes the laws and the executive branch executes them. In a perfect world, the lag time between the passage of legislation and promulgation of rules would be short, so that a president who signs a piece of legislation would also be responsible for its implementation. In the real world, one Congress creates new regulatory authority and it is likely that a very different Congress and/or president will oversee the rules that implement that law. This time lag creates the space for all manner of mischief.

[8] American Bar Association Section of Administrative Law and Regulatory Practice; *Report to the House of Delegates – Recommendation*; 1992.
[9] *Op. Cit.*

Government scientists and career civil servants have the scientific and technical expertise and regulatory experience to develop the rules that protect public health and safety while balancing myriad competing economic and political interests. Regulated industries should weigh in, and do. Public interest groups, citizens, and communities hurt by the absence of effective regulation should also be heard but rarely have the time and resources to devote to a process that occurs primarily behind closed doors over years. Extensive multiple and in some cases redundant analytical requirements stymie the ability to issue the rules needed to respond to Congress's legislative mandates.

We have many successes to celebrate in our regulatory history – cleaner air, purer water, safer drugs and products. But our rulemaking system needs reform. As the experience at the Consumer Products Safety Commission has demonstrated, timely and effective response to threats to public health, safety and welfare can only occur if agencies are not bogged down with nonproductive, extensive analytical requirements, and are provided with specific deadlines for action and the resources necessary to carry out those actions.

Thank you for the opportunity to present this testimony. I would be pleased to answer any questions.