New Civil Liberties Alliance

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Acting Chairman
Alberta E. Mills
Secretary of the Commission
Keysha Walker
Compliance Officer
Office of Compliance and Field Operations
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408
Docket No. CPSC-2009-0064

Re: *Revisions to Safety Standard for Infant Bath Seats*, Docket Number CPSC-2009-0064

Acting Chairman Adler:

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the direct final rule proposed by the Consumer Product Safety Commission (CPSC), *Revisions to Safety Standard for Infant Bath Seats*, 84 Fed. Reg. 49435 (Sept. 20, 2019) (*Proposed Rule*).

NCLA sincerely appreciates this opportunity to comment and express its concerns about the Proposed Rule. Due process, at a minimum, assumes that the public is adequately informed of its legal obligations before it can be held accountable for them. It offends basic notions of fairness for the public to be forced to pay for access to the law. But the Proposed Rule continues an odious trend of incorporating private standards into the law only by reference, thereby hiding the binding law behind a paywall. The Proposed Rule is therefore unconstitutional and must not be enacted as

written. This comment is intended to serve as a significant adverse commentary, which should require CPSC to withdraw the Proposed Rule.

I. STATEMENT OF INTEREST

NCLA is a nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law (which includes fair notice of legal obligations), the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.[1] This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's attention.

Even where NCLA has not yet brought a suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA) and with the Constitution.

[1] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

II. CPSC'S USE OF INCORPORATION BY REFERENCE

The Consumer Product Safety Act (15 U.S.C. § 2051 *et seq.*) requires manufacturers of products that are subject to the Consumer Product Safety Commission's authority to certify that the product complies with all applicable CPSC requirements. 15 U.S.C. § 2063(a). For children's products, the manufacturer must base this certification on tests of a sufficient number of samples by a third-party conformity assessment body accredited by CPSC to test according to the applicable requirements. *Id.* at § 2063(a)(2).

CPSC is required to set product safety standards for children's products. 15 U.S.C. § 2056a(b)(1). However, CPSC is authorized to promulgate standards that "are substantially the same as [] voluntary standards" set within the industry by private third parties. *Id.* at § 2056a(b)(1)(B)(i).

The Freedom of Information Act requires "each agency" to "make available to the public" and "separately state and currently publish in the Federal Register for the guidance of the public" "substantive rules of general applicability adopted as authorized by law." 5 U.S.C. § 552(a)(1)(D).

Nevertheless, "When agencies or legislatures incorporate private standards into law, they often do so by reference—that is, instead of spelling out the requirements of a standard within legislative or regulatory text, they reference the standard being incorporated and direct interested parties to consult that standard in order to understand their obligations." *Am. Soc'y for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018). To do so, the agency follows a process set out in 1 C.F.R. § 51.5(b), which allows the Director of the Federal Register to deem the rule published by reference "provided that the 'matter is reasonably available' to the class of persons affected[.]" *Id.* (quoting 1 C.F.R. § 51.5(b)(5)).

Reasonable availability does not always equate, in the Director's eyes, to *freely* available. *Id.* As of 2015, the CFR "contain[ed] nearly 9,500 'incorporations by reference' of standards." Nina A. Mendelson, *Taking Public Access to the Law Seriously: The Problem of Private Control over the Availability of Federal Standards*, 45 Envtl. L. Rep. News & Analysis 10776, 10766 (2015). For each, "An individual who seeks access to this binding law generally cannot freely read it online or in a governmental depository library, as she can the U.S. Code or the Code of Federal Regulations. Instead, she

generally must pay a significant fee to the drafting organization, or else she must travel to Washington, D.C., to the Office of the Federal Register's reading room." Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737, 737 (2014).

CPSC has now proposed to incorporate one more private standard by reference. *See Proposed Rule*, 84 Fed. Reg. at 49435. Indeed, this proposed rule exists solely to update the reference to the ASTM International voluntary standard governing infant bath seats, and, rather than set out the standard in full, proposes to incorporate it by reference. *Id.* at 49436. And instead of informing the public of the precise requirements set by law, CPSC insists the law "is reasonably available to interested parties" for "purchase" "from ASTM International" or for "inspect[ion]" in person at CPSC'S office in Bethesda, MD. *Id.* at 49437-38. A copy of ASTM F1967-19 costs $56.00 to purchase. ASTM International, ASTM F1967-19, Standard Consumer Safety Specification for Infant Bath Seats, https://www.astm.org/Standards/F1967.htm.

III. INCORPORATION BY REFERENCE VIOLATES DUE PROCESS

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Due process under the Fifth and Fourteenth Amendments requires no less. *Id.*

The public must also have notice of the *laws* themselves. "[C]itizens must have free access to the laws which govern them." *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980); *see also Armstrong v. Maple Leaf Apartments, Ltd.*, 436 F. Supp. 1125, 1145 (N.D. Okla. 1977), *aff'd in part*, 622 F.2d 466 (10th Cir. 1979) ("The Court further concludes that the due process of law rights of the defendant as guaranteed by the Fifth Amendment of the United States Constitution were violated in the application to this case for the reason that Congress did not provide any reasonable means by which the defendants or their attorneys could have acquired notice or knowledge of the existence or content of the Act.) As James Madison wrote in Federalist No. 62, "It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulged, or undergo such incessant changes that no man

who knows what the law is to-day can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?" *The Federalist* 421 (Jacob E. Cooke, Ed.1961).

Making the law inaccessible is a trick of tyrants. *See* Suetonius, *The Lives of the Twelve Caesars*, *Caligula* 470 (1907) ("When taxes of this kind had been proclaimed, but not published in writing, inasmuch as many offences were committed through ignorance of the letter of the law, he at last, on the urgent demand of the people, had the law posted up, but in a very narrow place and in excessively small letters, to prevent the making of a copy.").

Indeed, courts have long recognized that limiting access to legal requirements offends basic precepts of due process. In *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888) the Supreme Court easily concluded that judicial opinions could not be copyrighted, in part because of the "public policy" requirement that "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute." More recently, also in copyright disputes, courts have recognized that "[d]ue process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them." *BOCA*, 628 F.2d at 734; *see also Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 799–800 (5th Cir. 2002) (en banc) (following *Banks* and *BOCA*). Indeed, the D.C. Circuit Court of Appeals acknowledged the "serious constitutional concerns" raised by the unavailability of ASTM standards, while also deciding an issue of copyright law. *ASTM*, 869 F.3d at 441.[2]

[2] The related question concerning whether legal commentary is subject to copyright protection is currently pending before the United States Supreme Court. *See Code Revision Comm'n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1232 (11th Cir. 2018) ("no valid copyright interest can be asserted in any part of the [Official Code of Georgia Annotated]"), *cert. granted sub nom. Georgia v. Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019).

The Federal Register and the Code of Federal Regulations were created to ensure that regulatory requirements would also be publicly and freely available. The New Deal's massive amount of new administrative regulations were mostly available only in "separate paper pamphlets;" creating "chaos" because the regulated public lacked easy access to legal obligations. Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198, 199, 204-05 (1934). The situation was so bad that even the *government* lacked notice of regulatory requirements, and "was seriously embarrassed" when it brought major prosecutions to enforce regulations that had been repealed or altered. *The Federal Register and the Code of Federal Regulations-A Reappraisal*, 80 Harv. L. Rev. 439, 440-41 (1966). In one such instance, the Supreme Court observed, "Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 412 (1935). Publication in a single, freely available source was meant to solve this problem. *The Federal Register and the Code of Federal Regulations-A Reappraisal*, 80 Harv. L. Rev. at 440-41.

Incorporation by reference, in general, and CPSC's current attempt to incorporate by reference, in particular, violate the basic premise that the law should be freely accessible to everyone. "[R]egulatory beneficiaries of all sorts, as well as regulated entities, have a strong and direct interest in access to the content of regulatory standards—including [incorporated-by-reference] material—because it directly affects their interests and can potentially affect their conduct. Accordingly, if notice is to be effective, ready public access must be provided to anyone potentially affected by the law, not just to those who must comply." Mendelson, *Private Control over Access to Public Law*, 112 Mich. L. Rev. at 771. But CPSC proposes to issue legal requirements that will be binding on the industry, and affect consumers who use regulated products, that are *not* publicly available. Instead CPSC proposes that anyone seeking access to the contents of the law must either pay a private entity for the privilege, or make the trip to Bethesda, MD, for the right to simply see (but not copy) the law in the agency's reading room. *Proposed Rule*, 84 Fed. Reg. at 49437-38. This absurd policy is offensive to the most basic requirement that the law be knowable and is no better than placing the law "in a very narrow place and in excessively small letters, to prevent the making of a copy." *See* Suetonius, *The Lives of the Twelve Caesars, Caligula* 470.

CPSC's practice of incorporation by reference is also bad policy. CPSC should want its rules to be publicly available and known by all. Certainly regulated entities need to be aware of their legal obligations, and it does not serve CPSC's interests to limit that access through a third party. Compliance, and ensuring consumer safety, are hardly furthered by *limiting* availability of safety standards. But consumers also need to know what CPSC has required of manufacturers. Consumers have an interest in knowing the safety standards governing their products, as it does them little good to know the product is compliant with a standard without knowing what that entails. For that matter, a consumer has no ability to confirm that a product is genuinely compliant without access to the underlying standard. It is unreasonable, moreover, to expect consumers to pay $56.00 for access to the ASTM standard for infant bath seats when the products themselves often cost far less. Finally, as was shown in the 1930s, even regulators might lose sight of the legal requirements if they are not freely accessible to all.

Of course, CPSC could avoid these problems by simply publishing the legal standard instead of incorporating it by reference. CPSC has no obligation to adopt the ASTM standards. And to the extent it wishes to adopt the ASTM standards, it always has the option of reproducing those standards in full in the Code of Federal Regulations. In order to protect fundamental constitutional rights, CPSC should amend its proposed rule and do so here.

Ultimately, CPSC should not continue to repeat the mistakes that led Congress to create the Federal Register and the Code of Federal Regulations. If the regulated public cannot discern its legal obligations, then the public has no hope of conforming its behavior to these requirements. Should CPSC nevertheless insist on incorporating the ASTM standard by reference despite these "serious constitutional concerns" *ASTM*, 869 F.3d at 441, NCLA will not hesitate to bring appropriate legal action to challenge the rule in court.

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Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Caleb Kruckenberg, Litigation Counsel, at caleb.kruckenberg@ncla.legal.

Sincerely,

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New Civil Liberties Alliance