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Robert S. Adler
Acting Chairman
Alberta E. Mills
Secretary of the Commission
Justin Jirgl
Compliance Officer
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408
Docket No. CPSC-2011-0019

Re: *Revisions to Safety Standards for Children's Folding Chairs & Stools*, Docket Number CPSC-2015-0029

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 Children's Folding Chairs & Stools*, 85 Fed. Reg. 18111 (April 1, 2020) (*Proposed Rule*).

NCLA sincerely appreciates this opportunity to comment and express its concerns about the Proposed Rule. It is important to note, however, that the public's ability to participate meaningfully in notice-and-comment rulemaking is drastically undermined by CPSC's refusing to provide free and open access to the safety standards (or revisions thereto) it proposes. Considering the constraints imposed by CPSC's secret lawmaking, NCLA confines its commentary to procedural objections.

Due process requires that the government, at a minimum, adequately inform the public of its legal obligations before proceeding to hold the public accountable for proscribed conduct. Forcing the public to pay for access to the law offends due process and basic notions of fairness. The Proposed Rule continues an odious trend of CPSC's incorporating private standards into the law only by reference, thereby hiding the law behind a paywall. The Proposed Rule is therefore unconstitutional

and must not be enacted as written.

NCLA intends this comment to serve as significant adverse commentary, which should require CPSC to withdraw the Proposed Rule. On three prior occasions, NCLA offered similar objections to CPSC's incorporating safety standards by reference.[1] CPSC's General Counsel responded to NCLA, in three letters dated February 6, 2020, stating that CPSC did not treat NCLA's comments as significantly adverse. On behalf of Lisa Milice (now a new parent), NCLA has petitioned the U.S. Court of Appeals for the Third Circuit to review CPSC's incorporating by reference Safety Standards for Infant Bath Seats, Docket No. CPSC-2009-0064. As a victory in that lawsuit ultimately will require CPSC to publish or repeal *all* rules incorporated by reference, it would be prudent for CPSC to take this opportunity to reverse course.

I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The administrative state poses 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, a vastly different sort of government has developed within it—a type, in fact, that the Framers designed the Constitution to prevent.[2] This unconstitutional administrative state is the focus of NCLA's attention.

In addition to suing agencies to enforce constitutional limits on the exercise of administrative power, NCLA encourages agencies to curb their own unlawful exercise of such power by establishing

[1] *See* NCLA Comment Re: Revisions to Safety Standards for Infant Bath Seats, Docket No. CPSC-2009-0064 (submitted Oct. 25, 2019); NCLA Comment Re: Revisions to Safety Standards for Non-Full-Size Baby Cribs and Play Yards, Docket No. CPSC-2019-0025 (submitted Nov. 22, 2019); NCLA Comment Re: Revisions to Safety Standards for Toddler Beds, Docket No. CPSC-2017-0012 (submitted Nov. 25, 2019); NCLA Comment Re: Revisions to Safety Standards for Portable Bed Rails, Docket No. CPSC-2011-0019 (submitted March 26, 2019).

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

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. All agencies and agency heads must ensure that their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA) and with the Constitution.

II. CPSC'S USE OF INCORPORATION BY REFERENCE

The Consumer Product Safety Act (15 U.S.C. § 2051 *et seq.*) requires manufacturers of products under the Consumer Product Safety Commission's regulatory 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).

Section 2056a(b)(1) requires CPSC to set product safety standards for children's products. 15 U.S.C. § 2056a(b)(1). In doing so, CPSC may promulgate standards that "are substantially the same as" or "more stringent than" voluntary standards set in the industry by private third parties. *Id.* at § 2056a(b)(1)(B). As with other standards that CPSC promulgates, the Freedom of Information Act requires the 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, "[w]hen 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) (*ASTM*). 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)).

In the Director's eyes, reasonable availability does not always mean *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, "[a]n 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." Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737, 807 & n.14 (2014) (explaining the instructions for making an appointment to view incorporated-by-reference standards, as set out at http://www.archives.gov/federal-register/cfr/ibr-locations.html [last visited March 25, 2020]).

CPSC has now proposed to incorporate by reference yet another private standard. *See Proposed Rule*, 85 Fed. Reg. 18111. Indeed, the Proposed Rule exists solely to update the reference to the ASTM International voluntary standard governing children's folding chairs and stools. Rather than set out the standard in full, CPSC proposes to incorporate it by reference. *Id.* at 18112. And instead of informing the public of the precise requirements (or changes) 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 181113. Then, only after the rule becomes effective, CPSC represents that ASTM will make a read-only copy of the standard available for viewing on its website. *Id.*

Put simply, the public's access to the law rests entirely on the whims of ASTM. The Proposed Rule does not suggest that ASTM is under any legal compulsion to keep the standard available for free in its online reading room. Indeed, ASTM is under no legal compulsion to keep the standard published at all. Rather, it remains ASTM's prerogative to amend or withdraw or increase the price of the standard at any time—without regard for notice-and-comment rulemaking or the public's right to free access to the law. Right now, a copy of ASTM F2613-19 costs $56.00 to purchase; for a redline version that denotes the changes to the standard, ASTM charges $67.00 to purchase. *See* ASTM International, ASTM F2613-19, Standard Consumer Safety Specification for Children's Chairs and Stools. https://www.astm.org/standards/F2613.htm. These fees to purchase a standard often exceed the retail cost of the product to which the standard applies, and nothing prevents ASTM from further increasing its fees whenever demand fluctuates for purchase of a standard. ASTM also has every incentive to update the standard as often as possible, forcing all interested parties to repurchase it.

Just this week, the Supreme Court rejected the idea that the government could make law available only to purchasers who subscribe to a "pay-per-law service." *Georgia v. Public.Resource.Org, Inc.*, --- U.S. ---, slip op. at 17 (2020). Yet, a "pay-per-law service" is exactly what CPSC has created by incorporating ASTM's standards by reference. Worse still, CPSC has created a system in which the price per law is not even set by the government but by an unaccountable private entity. Furthermore, as the D.C. Circuit has held, access to the law should not "be conditioned on the consent of a private party," *ASTM*, 896 F.3d at 458 (Katsas, J., concurring), and made available only to ASTM's customers and not to other citizens. CPSC's use of incorporation by reference violates these basic principles.

III. INCORPORATION BY REFERENCE VIOLATES DUE PROCESS

It is a longstanding "rule [] that no one can own the law." *Public.Resource.Org, Inc.*, slip op. at 7.

Citizens are the authors of the Republic's laws, so the laws must remain in the public domain. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 799–800 (5th Cir. 2002) (en banc). As such, citizens "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 Public.Resource.Org*, slip op. at 7 ("'Every citizen is presumed to know the law,' and 'it needs no argument to show … that all should have free access' to its contents.") (quoting *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886)). Without access to the law, citizens cannot give their informed consent to be governed. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality) ("It is difficult for [the People] to accept what they are prohibited from observing.").

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."). "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

Preventing free public access to the law not only violates basic fairness, it also 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 Amendment requires at least this much. *Id.*; *see also Armstrong v. Maple Leaf Apartments, Ltd.*, 436 F. Supp. 1125, 1145 (N.D. Okla. 1977) ("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."), *aff'd in part*, 622

F.2d 466 (10th Cir. 1979).

Indeed, courts have long recognized that limiting access to legal requirements offends basic precepts of due process. In *Banks v. Manchester*, the Supreme Court 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." 128 U.S. 244, 253-54 (1888). 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*, 293 F.3d at 799–800 (following *Banks* and *BOCA*). Indeed, placing a price on viewership of the law would cause many "to think twice before using official legal works that illuminate the law we are all presumed to know and understand." *Public.Resource.Org*, slip op. at 18.

In another recent copyright dispute, the Court of Appeals for the D.C. Circuit specifically acknowledged that the unavailability of ASTM standards raises "serious constitutional concerns." *ASTM*, 896 F.3d at 447 (Tatel, Wilkins, and Katsas, JJ.). But the court limited its decision to the fair-use doctrine, holding that, depending on the nature of the standard at issue, "it may be fair use … to reproduce part or all of a technical standard in order to inform the public about the law."[3] *Id.* at 453. Judge Katsas wrote separately to enunciate that reprinting a copyrighted standard is likely a fair use

[3] The Supreme Court just resolved the related question of whether legal commentary is subject to copyright protection—concluding that it is not. *See Public.Resource.Org*, slip op. at 18..

"when an incorporated standard sets forth binding legal obligations, and when the defendant does no more and no less than disseminate an exact copy of it." *Id.* at 459 (Katsas, J., concurring). In "the unlikely event that disseminating 'the law' might be held not to be fair use," Judge Katsas concluded, the court would address the constitutional issues inherent in denying free access to the law. *Id.*

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 created massive amounts of new administrative regulations that were mostly available only in "separate paper pamphlets," which created "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. *A Reappraisal*, 80 Harv. L. Rev. at 440-41.

Incorporating by reference, generally, and CPSC's current attempt to incorporate by reference, specifically, 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 content 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 even then, not copy) the law in the agency's reading room. *Proposed Rule*, 84 Fed. Reg. at 56687. This absurd policy offends the most basic requirement that the law be knowable, and it smacks of 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 incorporating by reference is also bad policy. *Cf. Nash*, 6 N.E. at 560 ("[I]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes."). CPSC should want its rules to be publicly available and known by all. Certainly, regulated entities need to be aware of their legal obligations. Promoting compliance—and ensuring consumer safety—are hardly furthered by *limiting* the availability of important safety standards.[4] Limiting that access through third-party control does not serve CPSC's interests.

Consumers also need to know what CPSC has required of manufacturers. Like manufacturers, consumers have an interest in knowing the safety standards governing the products they acquire, as it does them little good to know a product purports to be compliant with a standard without knowing what that entails. For that matter, a consumer has no ability to confirm that a product is genuinely

[4] NCLA must assume that any updates incorporated in the Proposed Rule reflect important, material changes to the standard, because CPSC adopted the revisions rather than notifying ASTM that "it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard and that the Commission is retaining the existing consumer product safety standard." 15 U.S.C. § 2056a(b)(4)(B). Unfortunately, however, there is no public check on CPSC's determination because the proposed updates to the rule are not freely available.

compliant without access to the underlying standard. Nor does a conscientious consumer have any ability to discern whether the safety changes being introduced in a given rule are material enough to justify investing in a version of the product that comports with the updated safety standard (let alone whether purchasing access to an updated safety standard is worth the investment). 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 in full in the Code of Federal Regulations instead of incorporating it by reference. Publication of these binding standards would likely fall within the fair-use doctrine, *see ASTM*, 896 F.3d 437 at 458, and CPSC is in a better position than individual members of the public to litigate any copyright dispute or negotiate a fee with ASTM to make the standard publicly available. *Cf. Public.Resource.Org*, slip op. at 14-15 (recognizing that courts must apply precedent that holds law is not subject to copyright, even if that holding makes it more difficult for a government agency to negotiate price with private organizations that draft legal provisions; this problem, the Court concluded, is one for Congress to solve).

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. NCLA has already petitioned the Third Circuit to review CPSC's incorporating one ASTM standard by reference. *Milice v. CPSC*, CA3 Case No. 20-1373 (filed Feb. 20, 2020). Should CPSC insist on continuing to incorporate ASTM standards by reference despite the "serious constitutional concerns" such a practice creates, *ASTM*, 869 F.3d at 447, NCLA will not hesitate to bring further legal action to challenge these rules in federal 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 Jared McClain, Staff Counsel, at jared.mcclain@ncla.legal

Sincerely,

__/s/______________________
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