

Comment from Government Member Daniel Vice on *Public Engagement in Agency Rulemaking Under the Good Cause Exemption*

October 21, 2024

I am writing in response to an October 6, 2024, comment from Senior Fellow Ronald M. Levin, criticizing CPSC and its process of updating regulations that incorporate voluntary standards by reference – renewing criticism in a lengthier blog from August 2, 2021.

Mr. Levin cited the D.C. Circuit case *Milice v. Consumer Prod. Safety Comm'n*, 2 F.4th 994 (D.C. Cir. 2021), where the court rejected a challenge to a CPSC direct final rule.

Mr. Levin asserts that CPSC “misunderstood the mechanics and purpose of direct final rulemaking” by adopting a direct final rule “without notice and comment by claiming that such procedure is ‘unnecessary,’ where the agency has received a serious, good-faith objection to the anticipated rule but happens to disagree with the objection.”

As this committee is aware, direct final rulemaking may be used where an agency believes a rule is noncontroversial and adverse comments will not be received.

Contrary to the criticism leveled by Mr. Levin, CPSC’s rulemaking was non-controversial, notice and comment was unnecessary, and CPSC did not receive a significant adverse comment. CPSC’s direct final rule process followed ACUS guidelines and contained all the safeguards necessary to ensure the transparency and integrity of direct final rulemaking.

The *Milice* case

*Milice* concerned a challenge to a direct final rule to update 16 C.F.R. part 1215 to correct an outdated citation to a voluntary standard incorporated by reference in CPSC’s rule.

CPSC’s rule stated that infant bath seats must comply with the voluntary standard ASTM F1967-13. ASTM, however, updated its standard in 2019 to ASTM F1967-19. By operation of law, following ASTM’s 2019 update, all infant bath seats now had to comply with F1967-19. *See* 15 U.S.C. § 2056a(b)(4)(B) (mandating that the revised voluntary standard shall automatically become the new CPSC mandatory standard unless the Commission affirmatively rejects it). Because the Commission did not block ASTM F1967-19 from taking effect, ASTM F1967-19 automatically became the new mandatory standard.

Because the C.F.R. stated that infant bath seats must comply with ASTM F1967-13, but by statute infant bath seats had to comply with F1967-19, CPSC’s rule no longer contained the correct citation to ASTM F1967.

CPSC then promulgated a direct final rule to correct the C.F.R. by deleting “F1967-13” and replacing it with “F1967-19,” so that it properly stated the statutory obligation to comply with F1967-19.

Although CPSC's direct final rule corrected an outdated citation, the *Milice* petitioner submitted a comment that the D.C. Circuit characterized as "a broadside attack on the practice of federal agencies incorporating privately drafted technical standards into their regulations by reference." *Milice*, 2 F.4th at 996.

CPSC properly determined that a comment attacking the practice of incorporation of reference had no bearing on CPSC's direct final rule to correct the C.F.R. by replacing "F1967-13" with "F1967-19."

Indeed, had CPSC withdrawn its direct final rule as Mr. Levin suggests, the statutory obligation to comply with F1967-19 would not have changed. Instead, the C.F.R. would have contained an incorrect statement of the law. Therefore, CPSC properly utilized direct final rulemaking to update the C.F.R. and properly determined that the *Milice* petitioner's comment was not a significant adverse comment.

#### Additional Safeguards

Following *Milice*, CPSC has implemented a process that allows the public to submit comments on any revised voluntary standard before it takes effect as a new standard. This allows the public to comment on a voluntary standard revision before the Commission decides whether to block it from taking effect. This comment process is done in advance of any direct final rulemaking and allows public participation at the earliest time. The Commission receives the public's views about whether any revision to the voluntary standard, including adoption of a revised voluntary standard, does not improve the safety of the consumer product covered by the standard. As in *Milice*, the Commission then uses direct final rulemaking to correct the C.F.R. when a revised standard becomes the new mandatory standard by operation of law.

#### Conclusion

In sum, CPSC's direct final rulemaking comports with ACUS guidelines and CPSC properly determined in *Milice* that the petitioner's comment was not a significant adverse comment.

*This comment was prepared by CPSC staff. It has not been reviewed or approved by, and may not represent the views of, the Commission.*