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Third supplemental statement on the Commission's decision to provisionally accept a civil penalty settlement with Williams-Sonoma, Inc.

May 23, 2013

To set the record straight, I again write regarding the Commission's recent provisional acceptance of a civil penalty settlement with Williams-Sonoma, Inc. The settlement included a provision I objected to which required the company to adopt an overly-broad commission-monitored compliance program even though the underlying violation at issue was limited to an alleged failure to report. Following Commissioner Adler's most recent statement, I have several points of clarification and amplification.[1]

As should be clear from my previous statements, I disagree with my colleague when he argues that

- official Commission determinations of violations are not a necessary predicate of punitive measures like the imposition of civil penalties , nor is an official determination necessary before the Commission uses the threat of such penalties to extract settlement provisions; and
- Fast Track recalls will not be jeopardized by their use as an aggravating factor in the assessment of civil penalty amounts and the imposition of penalties in settlement provisions.

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[1]In past practice, Commissioners used statements to explain the rationale for their votes, not to vet and criticize the statements filed by their colleagues. Though my colleague says he never agreed to this practice—and obviously *he* never did—it certainly has been *my* experience in earlier years at the Commission, an experience that has been bolstered by similar behavior of other past Commissioners. I never described it as a binding policy, but that does not change its nature as a practice. That is precisely how practice works.

To the extent that the practice obviously has now been abandoned, I believe this to be wrong. The failure to abide by that practice has devolved into a sometimes frustrating, sometimes amusing set of exchanges between my colleague and me about an otherwise important subject. These exchanges make precisely the point—that statements should be the venue for explaining one's own votes, not attacking another's statements. And again, since my earlier statement has been directly criticized, I write to defend my views.

Since his positions on these matters are assertions based on his philosophical positions, at this point we may have to agree to disagree.

This exchange has served, perhaps, to bring a very small bit of clarity on one issue and to bring us a very small bit closer together on another. In the first statement he issued on the use of mandated broad compliance programs based on past recalls, Commission Adler (with the Chairman) wrote that he was concerned that "since 1989 the company has conducted more than a dozen recalls." That statement further indicated that such recalls were related to a number of specific products, but did not differentiate between recalls that were more or less concerning.[2] One could interpret, then, that he thought a tally of the number of recalls a company voluntarily conducted was relevant to determining the need for a mandated compliance program. In subsequent statements, my colleague clarified this by claiming that he had never said every recall was relevant. While this clarification is marginally helpful, the parties are still left not knowing which past recalls (in his eyes) will count and which will not in the context of a settlement for an alleged failure to report.

In defending his appetite to use the opaque venue of privately negotiated settlements to enact broad policy, my colleague questions my "flexibility in . . . protecting the public." Flexibility can be a virtue, but like any virtue it can become a vice absent moderation. We should not be so flexible as to lead ourselves into illegal, improper, or unwise behavior. While I do not argue the backdoor rulemaking my colleagues are insisting on here is illegal, I reiterate that it is both improper and unwise and that it robs this agency of the transparency the public demands and the credibility our staff needs.

Therefore, it is welcome that my colleague expresses his openness to using notice-and-comment rulemaking to effect this apparent policy change. Having seen several rounds of comments from Commissioners on this subject, the public should have the chance to participate in the discussion. I believe we all would benefit from such a broadened conversation.

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[2] *See* Chairman Inez M. Tenenbaum & Robert S. Adler, "Joint Statement on the Vote to Approve Provisionally a Civil Penalty Settlement with Kolcraft" (Mar. 12, 2013), http://www.cpsc.gov//Global/About-CPSC/Chairman-Tenenbaum/tenebaumadler03122013.pdf.