U.S. CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER NANCY A. NORD

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

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Yet again declining to follow the Commission's long practice of Commissioners using their written statements to explain what led *them* to particular decisions, my colleague, Commissioner Adler, has taken issue with the concerns I expressed in my statement on our provisionally-approved settlement with Williams-Sonoma, Inc., over alleged reporting violations. I argued—and hold—that the provision in the settlement insisting on a broad compliance program was inappropriate in the context of this particular settlement. Because my colleague has directly challenged the rationale underlying the concerns expressed in my statement, I feel I must respond.

To reiterate, I fully support the notion of robust compliance programs. I voted to accept this settlement despite my reservations because—as I noted and my colleague repeated—the company was represented by capable counsel and reached this agreement with our staff voluntarily. (Contrast this with a prior compliance program mandate that my colleagues insisted on inserting in a settlement after counsel for both the agency and the company had concluded their work, our staff having been satisfied that safety concerns were appropriately addressed.) My concerns about the provision are about the process we have used to enact a de facto mandate versus the process we should use to enact a de jure one, if we feel it is good policy.

My colleague begins by disputing my use of the word *punishment*. I would suggest that the compliance program's appearance in this context and its placement alongside monetary penalties give it, at the very least, a punitive aspect. And while my colleague argues the agreement was voluntary and thus non-punitive (citing what can only be described as the kind of "boilerplate paragraph" he later dismisses), *voluntary* has a different meaning in the settlement realm, where the probable alternative is more costly litigation and stiffer penalties. The formally voluntary nature of the settlement is not in dispute. Yet we should not close our eyes to the true nature of settlement agreement as, fundamentally, an enforcement tool. This semantic discussion, however, misses the point.

The corrective actions we take when a company is accused of and agrees to settle a violation should bear some connection to the violation in both scope and character; it should be a proportionate response. Demanding a comprehensive, agency-monitored

compliance program where the violation alleged was failure to timely report a possible problem is disproportionate.

As justification, my colleague cites a need to protect the public, but, with respect to the matter that brought Williams-Sonoma to us, that burden was already met. The public was protected from the faulty product by a voluntary recall, although presumably later than it should have been because of the reporting failure that we allege occurred. To guard against future reporting delays that could put the public at risk, the settlement imposes both a monetary penalty and a requirement that the company implement better internal and external communication policies for safety-related information. Had the settlement agreement ended there, I could find no fault with it. However, there is no indication that Williams-Sonoma has violated any other regulation, so there is no reason to believe the comprehensive compliance language also included in the settlement will necessarily enhance public safety. It may be a good idea, but it is not a rational response to the accusation and thus is inappropriate in the settlement of that accusation.[1]

As further justification, my colleague cites Williams-Sonoma's prior voluntary recalls. I maintain, despite his protests, that it is improper to treat prior such recalls as ipso facto violations and exacerbating factors in a subsequent enforcement action. He dismisses non-admission language in recall agreements as pro forma, but my argument is about the nature of the recalls themselves, not the phraseology of the agreements initiating them. Voluntary recalls can and do happen where no violation is alleged, as occurred with Williams-Sonoma's recall in this case. Treating such recalls as indicators of violations or violations in themselves and using them as penalty enhancement factors misrepresents their nature and misapplies them for purposes that are not only beyond their intent—getting harmful (violative or not) products off the market—but possibly contrary to that intent.

Presumably Commissioner Adler is correct that conscientious companies are less likely to see future punitive use of a voluntary recall as reason to forego or delay one. Yet, our statute and the manner in which we enforce it make the decision to report a potential hazard—with the possible subsequent responsibility to conduct a recall—a difficult judgment call, even for conscientious companies. Attaching a potential future

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[1] My colleague calls for legal precedent to underscore my unease about demanding a comprehensive compliance program in a reporting violation settlement context. He should recall that, by their very nature, settlements are unlikely to produce any litigation, precedential or otherwise. A party that agrees to a settlement term, however grudgingly, is not apt to then challenge that term through the expensive litigation process (even if the language of the settlement did not preclude such litigation, which it generally does).

punitive burden to recalls may provide a deterrent to following our oft-stated advice: "When in doubt, report." Consumers see the most safety benefit from recalls if we make conducting one as effective, speedy, and cooperative as possible. Treating recalls as violations even where none occurred takes us away from that goal.

Finally, on the notion of backdoor rulemaking, my colleague misstates my position. I did not suggest that we could not use the enforcement process, or even the settlement mechanism, to establish a policy that has the effect of a rule. I argue that we should not.

Here we appear to be implementing significant policy through litigation—or, more accurately, through privately-negotiated tools to avoid litigation. As any student of geometry knows, two points establish a line, and administrative- and CPSC-law professionals have spotted these two points and are advising their clients to expect us to demand comprehensive compliance programs even where there is no accusation of a comprehensive compliance failure. Whether or not it was our intent to create a broad policy through these two settlements, we have effectively done so.

If we do not mean to shift our policy, then we should ensure our settlements really are about crafting individual solutions to individual problems. That claim, however, is made more difficult when we are demanding comprehensive compliance programs in pure reporting violation settlements and using identical language (a compliance "boilerplate paragraph") to govern disparate settlements with disparate companies. If we do want a new policy, then we should say so through a process that implements that policy fairly and with appropriate public input. The result would be a compliance program policy—and an agency—with greater credibility (and likely sounder substantive footing) than if we continue to rely on privately negotiated settlements to establish broad public policy.