DISSENTING OPINION OF COMMISSIONER ROBERT ADLER
ON
ORGANOHALOGEN AMENDMENT TO THE CPSC FY 2020 OPERATING PLAN

The Operating Plan Vote

On October 16, 2019, the members of the Consumer Product Safety Commission, by a 4-1 vote, approved CPSC staff's recommended FY 2020 Operating Plan with a number of amendments. I voted to approve the amended Operating Plan, but with some strong objections.

That said, I commend my colleagues for the collaborative and cooperative spirit they showed during the many hours of debate and votes. We are a multi-member body with a variety of policy perspectives, so no one should be surprised that the Commissioners disagree with one another – often passionately – on certain changes to the Operating Plan. What pleased and reassured me was the willingness of the Commissioners to listen carefully to arguments made by their colleagues and occasionally change their minds in response to the points made.

Although I object to some of the amendments that were enacted at the Commission meeting, I must voice strong opposition to one in particular: the amendment to direct staff to draft a notice withdrawing the Commission's Guidance Document on Organohalogen Flame Retardants.[1]

Organohalogen Flame Retardants: Important CPSC Guidance

Background: On July 1, 2015, a number of consumer and public health groups[2] petitioned CPSC to ban certain consumer products[3] containing additive organohalogen flame retardants (OFRs). Most notably, the petition sought to have the Commission treat OFRs as a class of hazardous products rather than address each of the hundreds of OFRs separately.[4]

[1] Guidance Document on Hazardous Additive, Non-Polymeric Organohalogen Flame Retardants in Certain Consumer Products, 82 Fed. Reg. 45268 (September 28, 2017).

[2] American Academy of Pediatrics, American Medical Women's Association, Consumer Federation of America, Consumers Union, Green Science Policy Institute, International Association of Fire Fighters, Kids in Danger, Philip J. Landrigan, M.D., M.P.H., League of United Latin American Citizens, Learning Disabilities Association of America, National Hispanic Medical Association, and Worksafe.

[3] Petition HP 15-1. Specifically, the groups requested that the following products be banned if they contained OFRs: (i) any durable infant or toddler product, children's toy, child care article, or other children's product (other than children's car seats), (ii) any article of residential upholstered furniture, (iii) any mattress or mattress pad, and (iv) the plastic casing of any electronic device.

[4] Proceeding on a one-by-one basis would no doubt result in decades, if not centuries, of analysis. Moreover, doing so would permit what might be termed informally as "whack-a-mole" wherein the minute that an OFR was banned, manufacturers of consumer products would simply move to a chemical "kissing cousin" where the hazards were not yet determined, but very likely similar, if not worse. This scenario is often referred to as "regrettable substitution."

On September 20, 2017, after lengthy consideration, the Commission voted 3-2 to grant the petition. In granting it, the Commission directed staff to convene a Chronic Hazard Advisory Panel (CHAP)[5] and to complete a scoping and feasibility study with the National Academy of Sciences (NAS) to determine the viability of a class approach.

The NAS Report: On April 4, 2019, NAS submitted a report to the Commission[6] providing a detailed set of recommendations for the Commission to conduct hazard assessments of OFRs. Among other things, the NAS Report concluded that OFRs could not be addressed as one class, but likely needed to be subdivided into classes on the basis of their chemical structure, physicochemical properties, and predicted bioactivity.[7] That said, NAS concluded that a class approach was the only realistic way to approach the hazards of OFRS:

> Although the challenges to a class approach might appear daunting, the alternative – individual assessments of hundreds of chemicals – is unrealistic. The only possible practical approach for a set of chemicals as large as the OFRs is a class approach.[8]

CPSC Guidance Document: Given that any regulatory action against OFRs even as a class will likely take years, a majority of the Commission voted in 2017 to issue a Guidance Document that alerted various stakeholders, including manufacturers, distributors, retailers, and consumers that certain consumer products might contain harmful OFRs.[9] Noting that the scientific evidence before the agency suggested that OFRs present a serious public health issue, the Guidance Document concluded that the agency should share this concern with the public. For this reason, the Commission stated that it considered the use of OFRs in the product categories identified in the petition to be ill-advised.[10] Accordingly, we encouraged manufacturers to eliminate OFRs in those product categories, and we recommended that those in the supply chain obtain assurances that the products that they imported or distributed did not contain OFRs.[11] Finally, we recommended that consumers, especially those who might be pregnant or have young children, obtain assurances from retailers that the products they purchased did not contain OFRs.[12]

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[5] See 15 USC § 2077. A Chronic Hazard Advisory Panel (CHAP) is required any time the Commission proposes to regulate the chronic hazards of cancer, birth defects, and gene mutations associated with consumer products under the agency's jurisdiction.

[6] "A Class Approach to Hazard Assessment of Organohalogen Flame Retardants," National Academies of Sciences, Engineering, and Medicine ("NAS Report").

[7] NAS Report, at 2.

[8] Id. at 4. Later, the Report reiterated this point: "Traditional hazard-assessment methods take years and are too expensive to cover all chemicals under production." Id. at 47.

[9] Supra, note 1 and accompanying text.

[10] Guidance Document, at 45269. To reiterate petitioners' concerns: due to OFRs' physical-chemical properties, these chemicals are toxic, migrate widely out of products regardless of how the products are used, bioaccumulate, and present a serious public health concern.

[11] Id.

[12] Id.

In promulgating the Guidance Document, we acted to implement one of the most important purposes set forth in the Consumer Product Safety Act, namely to "assist consumers in evaluating the comparative safety of consumer products."[13] Furthermore, I cannot help noting that the Guidance Document did what many conservative critics of health and safety regulation advocate: giving the public information on health and safety matters and letting citizens decide whether to heed the information.[14]

The Vote to Withdraw the Guidance Document: In voting to direct staff to prepare a draft notice to withdraw the Guidance Document, my colleagues raised two arguments that I consider unpersuasive. First, they argued that CPSC's Guidance Document somehow contradicts new Executive Orders and OMB guidance regarding guidance documents.[15] Having carefully reviewed these policies, I see nothing in them that would invalidate or contradict CPSC's OFR Guidance Document. As I read them, the Executive Orders' purpose is "to require that agencies treat guidance documents as non-binding both in law and practice"[16] and to avoid the "implicit threat of enforcement action if the regulated public does not comply."[17] Similarly, the Executive Orders reaffirm the principle that "no person should be subjected to a civil administrative action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct."[18]

I realize that these pronouncements from the Administration are intended to chill agency actions – an approach that somewhat concerns me.[19] That said, my reading of them reveals no blanket prohibition of guidance documents; rather, they serve as a reminder that agencies should not improperly seek to substitute guidance for necessary regulation.

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[13] 15 USC § 2051(b)(2).

[14] Perhaps the strongest advocate for this view was Milton and Rose Friedman in their book, "Free to Choose: A Personal Statement, (1980) at 227 (arguing that government should provide health and safety information, but leave citizens "free to choose what chances we take with our lives.")

[15] See Office of Management and Budget, "Guidance on Compliance with the Congressional Review Act," https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf (April 11, 2019); Office of the President, "Executive Order Promoting the Rule of Law Through Improved Agency Guidance Documents," ["OMB Guidance Document"]; https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/ (October 9, 2019)["Executive Order on Agency Guidance Documents"]; and Office of the President, "Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/ (October 9, 2019)["Executive Order on Transparency"].

[16] Executive Order on Agency Guidance Documents, at 2.

[17] Id.

[18] Executive Order on Transparency, at 2.

[19] As a factual matter, CPSC rarely issues guidance documents. Moreover, one is entitled to be skeptical about the consistency of the Administration's policy pronouncements that discourage guidance documents given its heavy use of such documents to weaken existing rules such as Clean Air safeguards. See Nadja Popovich, Livia Albeck-Ripa, and Kendra Pierre-Louis, "85 Environmental Rules Being Pulled Back by Trump," https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html, New York Times (September 12, 2019)

I see no major issue with CPSC's guidance. Nothing in our Guidance Document threatens or hints at regulatory or enforcement action if a stakeholder chooses to ignore the warning or advice in the Document. It simply shares critical safety information available to the Commission and encourages members of the public to take appropriate action to safeguard their health. In short, the Administration's newly-announced policies do not explicitly or implicitly require that CPSC's Guidance Document be withdrawn.

Frankly, I believe that CPSC would be derelict in its duties if it did not warn the public about the serious hazards of OFRs – especially given that any regulatory action the Commission might take against these chemicals is likely years in the future.[20]

My colleagues' second argument is that the NAS Report somehow contradicts CPSC's Guidance Document, leading them to the conclusion that the Guidance Document is misleading. As I understand their argument, they note that NAS identified some OFRs where there is little, if any, data to support a finding that these OFRs are harmful. Accordingly, they conclude that CPSC should not warn about any OFRs where no specific data showing harm of particular OFRs exists. In fact, by their vote to take down the entire Guidance Document without any attempt to update, modify, or narrow it, my colleagues arguably endorse the notion that CPSC should not warn about *any* OFRs until we know the hazards of each and every one.

I strongly disagree. My colleagues' assumption seems to be that where there is no data, there is no risk.[21] But, that contradicts what most scientists believe about OFRs. Based on years of research and hundreds of studies, health expert after health expert who testified before the Commission at our September 15, 2017 public hearing on OFRs insisted that these chemicals *as a class* present serious risks of harm to the public, especially to vulnerable populations.[22] In particular, the nation's preeminent toxicologist, Dr. Linda Birnbaum, Director of the National Institute of Environmental Health Sciences (NIEHS) and the National Toxicology Program (NTP) testified, "Every chemical tested in this class has adverse effects."

My colleagues' objection might carry more weight if they could cite examples of OFRs that have been thoroughly studied and determined *not* to be hazardous. Despite my asking almost every witness who has appeared before the Commission whether they knew of any documented cases of non-hazardous OFRs, the less-than-persuasive response has been that some OFRs,

[20] I say this because the procedural requirements for moving to a safety rule are laden with multitudes of findings and determinations.

[21] This logic is wrong. As the noted astronomer, Carl Sagan, often stated, "The absence of evidence is not evidence of absence."

[22] See https://earthjustice.org/features/scientists-quotes-organohalogen-flame-retardants. In addition to this testimony, numerous other distinguished scientists and public health experts across the country joined in warning about OFR hazards and calling for these chemicals to be regulated.

although dangerously toxic, may not be as dangerous as others. That clearly fails to exonerate OFRs.[23]

In fact, as I understand the research in this area, time after time when scientists compile data on previously unstudied OFRs, they invariably turn out to be hazardous. Given this, I struggle to understand how the Commission's Guidance Document is erroneous or misleading.

Regulation versus Warning: One final point: health and safety agencies have obligations both to regulate unsafe products in the market and to warn the public when agencies obtain evidence suggesting that certain products may be hazardous. The requirements for these different functions are not the same. Because regulation has a much greater impact on firms and the public, the rules for regulating carry a higher burden of proof than the rules for warning the public. In the latter case, agencies certainly need to be able to justify their hazard alerts, but alerts simply direct the public's attention to possible hazards. They do not require anyone to take any particular action. Their value lies in providing early warnings about emerging or potential dangers, typically well in advance of regulations – if regulation ultimately is called for. Accordingly, I would hate to see the Commission continue its narrow view of its duty to protect the public.

Conclusion

The implications of my colleagues' vote are troubling. The idea that the agency cannot warn the public about hazards of a class of products unless we have tested every unit in the class would bring our public health messaging to a grinding halt. One wonders, for example, whether CPSC should have warned consumers about the hazards of CO poisoning by portable gas generators over the past decade when we had not tested each and every model of this product. Similarly, we have warned consumers about models of recalled products with manufacturing defects where we cannot document that each and every one of the units of that model are hazardous. Yet, as a matter of prudence, we warn consumers of these potential hazards. In short, my colleagues' approach, if upheld, would produce "paralysis by analysis" on a massive scale and expose millions of consumers to unnecessary risks.

[23] Even if someone were to step forward with exhaustive documentation – which has yet to occur – demonstrating that at least one OFR carries little risk, that would not invalidate the Guidance Document's essential point that these chemicals, because of their inherent characteristics, present a broad risk to public health.