Statement of Acting Chairman Ann Marie Buerkle on the Decision Granting the Petition for Rulemaking to Ban All Additive, Non-Polymeric Organohalogen Flame Retardants in Four Specific Classes of Products

Today the Commission voted 3-2 to grant a petition requesting this agency to ban a large class of flame retardants in four classes of products. It did so against the recommendation of the CPSC staff. The majority did not stop there. In addition, it directed the staff to convene a Chronic Hazard Advisory Panel (CHAP) on the same substances and product classes. And finally, it issued a guidance document, prepared by the majority Commissioners and their staff, recommending against the use of the same fire retardants in the same classes of products.

Without question, the petition before us presented a challenging problem for regulators. There appears to be little doubt that some organohalogen flame retardants (OFRs) may be toxic. At this point, however, I am not convinced that it is appropriate to treat this huge, unwieldy, amorphous group of chemicals as if they are a homogeneous class.

We know from our recent work on phthalates that a seemingly minor difference in the structure of a molecule, even within a much smaller family of chemicals, can make a huge difference when it comes to human health effects. When it comes to organohalogens, the differences are far more profound. Not all

organohalogens are man-made; many occur in nature. As CPSC staff pointed out in the briefing memo, the readily available data show widely varying toxicity and exposure potential among different OFR compounds.

My Democrat colleagues claim that there is "overwhelming scientific evidence" of toxicity across the class; indeed, we heard witnesses at our hearing last week maintain that every organohalogen that has been adequately studied has been found to cause adverse effects. Even if that claim is accepted at face value, do all such adverse effects result from prevailing exposures? We know that substances as benign as oxygen and water—two of the most essential requirements for human existence—can cause death when too much is inhaled or imbibed. Is there something exceptional about organohalogens such that the dose becomes unimportant?

We also heard last week that European regulators—famous for their precautionary principle, not for their solicitude of chemical manufacturers—after long study have chosen not to regulate some organohalogen flame retardants in recent years. These are not the "financially interested" manufacturers whose expertise my colleagues are so quick to discount, but our own counterparts. Are American children so different from European children? Is there something about organohalogens that makes them uniquely different from other substances? I

would like to know much more about the subject before I adopt that view, which conflicts with much of what we know about chemicals generally.

Here is where I thought a CHAP might be useful. I would welcome having a panel of independent experts advising us on matters such as this. But, for the very reason that a CHAP could be useful, it is premature to grant the petition and commit to rulemaking. If we are going to the trouble and expense of convening a CHAP, then we should hear what they have to say before deciding whether it makes sense to proceed with regulation, and how. Here the majority insisted on initiating a CHAP proceeding but refused to hear from those experts before deciding to regulate.

It is even more premature to issue guidance recommending against the use of organohalogen flame retardants before we have the CHAP's input. My colleagues seem rather cavalier about passing sentence on untold number of chemicals over the objection of the staff and before we hear from the CHAP they insist upon. Why invest the resources in engaging a CHAP if we already know enough to recommend discontinuing the whole class of chemicals?

The truth is we don't know enough. I am not aware of many cases when federal agencies have banned large classes of chemicals, and the few I have heard about seem to have ended badly.

There is another layer of complexity to this matter. Organohalogens are used as flame retardants for a reason. If their use is discontinued, based on our recommendation, how will fire safety be affected? Are there equally effective, less toxic fire retardants for all current applications of organohalogens? Who is considering the tradeoff? The Commission must be alert to fire hazards no less than chemical hazards.[1]

To justify class treatment of OFRs, my colleagues point to the petitioners' claim that adopting a narrower focus would only lead to the "regrettable substitution" of a new OFR for the one condemned. They do not explain why forcing manufacturers to find substitutes for many different OFRs all at once is likely to avoid this problem.

It seems obvious that one way to limit the use of organohalogens without spurring regrettable substitutions would be to adopt California's recently revised furniture flammability standard (TB 117-13). Indeed, many of the petitioners and

[1] See Kids in Danger, Playing with Fire Hazards: an Analysis of Children's Products Recalled for Fire and Burn Hazards From June 2007 to July 2017 (Sept. 2017).

participants in this proceeding have advocated that very course. If this Commission is so concerned about the use of OFR's in consumer products, then why not embrace TB 117-13 as a standard that eliminates the need for many of the flame retardants used in furniture? It would be far more effective and efficient to adopt TB 117-13 as a federal standard than to initiate a CHAP which, as we know from our recent experience with the Congressionally-mandated phthalates CHAP, can take almost a decade to produce results.

In the last few years, Congress has become very concerned about federal agencies' use of guidance documents. Today's action highlights the problem. The guidance document approved by the majority takes a strong position on a controversial subject without the usual safeguards of rulemaking. My colleagues admittedly hope to achieve the same result as a ban, but without affording the due process we owe to firms whose products they have determined are harmful.

Finally, I do not think that our agency is best suited to decide whether the use of certain chemicals should be banned. Congress just spent a tremendous amount of effort on TSCA reform. It would seem that EPA is in a far better position to address petitioners' concerns than is the CPSC.

In closing, I want to thank the CPSC staff for their hard work on this extremely complex matter. I regret that the Commission majority not only rejected the staff's recommendation to deny the petition, but also afforded the staff no opportunity to advise us on how to proceed from this point. Instead, the Commission took the matter into its own hands, dictating the initiation of a CHAP, pronouncing on significant legal questions, and getting into detail about the scope of the matter without allowing the staff to propose the next steps. The staff has a much better appreciation of the scale of this project than we do, not to mention the impact on resources. We should have given them a chance to advise us rather than hijack the process.