U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING
September 20, 2017

Acting Chairman Ann Marie Buerkle convened the September 20, 2017, 10:00 a.m., meeting of the U.S. Consumer Product Safety Commission in open session. Commissioners Robert S. Adler, Marietta S. Robinson, Elliot F. Kaye and Joseph P. Mohorovic were in attendance. Acting Chairman Buerkle made welcoming remarks and summarized the agenda for the meeting.

Decisional Matter: Petition HP15-1 Request Rulemaking on Certain Products Containing Organohalgen Flame Retardants
(Briefing package dated May 24, 2017 and OS No. 4844)

After introducing the matter and making an opening statement, Acting Chairman Buerkle called for any questions on the matter. The Commissioners commented and asked questions of the staff on the matter. Dr. Alice Thaler, Associate Executive Director, Health Sciences, Dr. Kristina Hatlelid, Toxicologist, Division of Toxicology and Risk Assessment and Patricia Pollitzer, Assistant General Counsel for Regulatory Affairs, Office of the General Counsel were available to respond to questions.

Acting Chairman Buerkle called for any motions. Commissioner Adler moved to grant the petition to initiate rulemaking under the Federal Hazardous Substances Act (FHSA) 15 U.S.C. 1261) and direct staff to convene a Chronic Hazard Advisory panel (CHAP) pursuant to section 28 of the Consumer Product Safety Act (15 U.S.C. 2077) to assess and issue a report on the risks to consumers' health and safety from the use of addition, non-polymeric organohalogen flame retardants as a class of chemicals in the following products: (1) durable infant or toddler products, children's toys, child care articles or other children's products (other than children's car seats); (2) upholstered furniture sold for use in residences; (3) mattresses and mattress pads; and (4) plastic casings surrounding electronics. Commissioner Robinson seconded the motion. Commissioner Adler explained the purpose of the motion and the Commission discussed the motion. Acting Chairman Buerkle and Commissioner Mohorovic expressed that they would be willing to support the CHAP recommendation by Commissioner Adler if Commissioner Adler would defer the vote on the petition for further examination by staff. At this time, the Commissioners took a brief recess to address some procedural matters.

The Commissioners reconvened the meeting and continued discussion of Commissioner Adler's motion. Acting Chairman Buerkle offered an amendment to Commissioner Adler's motion as follows:

1) Strike the language: "Grant the petition to initiate rulemaking under the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261), and..."

Commissioner Kaye seconded the motion. Acting Chairman Buerkle explained the amendment. The Commission discussed the amendment. The Commission recessed again briefly to address procedural matters.

The Commissioners reconvened the meeting and continued discussion of Acting Chairman Buerkle's amendment. Acting Chairman Buerkle called for a vote on the amendment. The Commission voted (3-2) to not adopt the amendment. Commissioner Adler, Commissioner Robinson and Commission Kaye voted to not adopt the amendment. Acting Chairman Buerkle and Commissioner Mohorovic voted to adopt the amendment. Acting Chairman Buerkle then called for a vote on Commissioner Adler's motion. The Commission voted (3-2) to adopt the motion. Commissioner Adler, Commissioner Robinson and Commission Kaye voted to adopt the motion. Acting Chairman Buerkle and Commissioner Mohorovic voted to not adopt the motion. (The adopted motion is attached).

Acting Chairman Buerkle called for further motions. Commissioner Adler moved to direct staff to publish in the Federal Register a prepared guidance document on hazardous additive, non-polymeric organohalogen flame retardants in certain consumer products. Commissioner Kaye seconded the motion. Commissioner Adler explained the purpose of the motion and the Commission discussed the motion. Acting Chairman Buerkle called for a vote on the motion. The Commission voted (3-2) to adopt the motion. Commissioner Adler, Commissioner Robinson and Commission Kaye voted to adopt the motion. Acting Chairman Buerkle and Commissioner Mohorovic voted to not adopt the motion. (The adopted motion is attached).

Acting Chairman Buerkle called for any other questions. Hearing none, Acting Chairman Buerkle called for closing statements. Each Commissioner gave closing statements.

Acting Chairman Buerkle, Commissioner Adler, and Commissioner Kaye submitted the attached statements regarding the issue.

There being no other business, Acting Chairman Buerkle adjourned the meeting at 12:25 p.m.

For the Commission:

Alberta E. Mills
Acting Secretariat

Attachments: The (adopted) Motion of Commissioner Adler to Take Other Action on Staff Recommendation for Petition HP 15-1, Requesting Rulemaking on Certain Products Containing Organohalogen Flame Retardants

The (adopted) Motion of Commissioner Adler to Issue Guidance Document on Hazardous Additive, Non-Polymeric Organohalogen Flame Retardants in Certain Consumer Products

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

Statement of Commissioner Adler on the Vote to Grant Petition HP 15-1 Regarding Organohalogen Flame Retardants

Statement of Commissioner Kaye on the Petition on Organohalogen Flame Retardants

MOTION 1:

Commissioner Adler Motion to Take Other Action on Staff Recommendation for Petition HP 15-1, Requesting Rulemaking on Certain Products Containing Organohalogen Flame Retardants

IV. Take Other Action:

Grant the petition to initiate rulemaking under the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261), and direct staff to convene a Chronic Hazard Advisory Panel (CHAP) pursuant to the procedures set forth in section 28 of the Consumer Product Safety Act (15 U.S.C. 2077) to assess and issue a report on the risks to consumers' health and safety from the use of additive, non-polymeric organohalogen flame retardants ("OFRs"), as a class of chemicals, in the following products: (1) durable infant or toddler products, children's toys, child care articles or other children's products (other than children's car seats); (2) upholstered furniture sold for use in residences; (3) mattresses and mattress pads; and (4) plastic casings surrounding electronics. In assessing the toxicity of and exposure to this class of chemicals from the four product categories listed above, the CHAP is directed to review all relevant data, including the most recent, best-available, peer-reviewed, scientific studies, and where limited or no data are available, the CHAP may use any generally accepted scientific methodology to fill in the data gaps, as appropriate. As part of its assessment, the CHAP shall consider that consumers are exposed not just to a single additive, non-polymeric organohalogen flame retardant, but rather to mixtures of the chemicals.

Under the FHSA, the Commission notes that it has the authority to address products containing OFRs on a class-wide basis. The Commission further notes that in order to determine that OFRs as a class constitute a "hazardous substance" under the FHSA, the agency needs only to determine that OFRs are toxic, that is, they have the *capacity* to produce injury or illness through ingestion, inhalation, or absorption through any bodily surface, and *may* cause substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use of those products. *See* 15 U.S.C. 1261(f)-(g).

MOTION 2:

Commissioner Adler Motion to Issue Guidance Document on Hazardous Additive, Non-Polymeric Organohalogen Flame Retardants in Certain Consumer Products

IV. Take Other Action:

Staff is directed to publish in the Federal Register the attached Guidance Document on Hazardous Additive, Non-Polymeric Organohalogen Flame Retardants in Certain Consumer Products

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. CPSC-XXX-XXXX]

Guidance Document on Hazardous Additive, Non-Polymeric Organohalogen Flame Retardants in Certain Consumer Products

AGENCY: Consumer Product Safety Commission.

ACTION: Guidance Document on Hazardous Additive, Non-Polymeric Organohalogen Flame Retardants in Certain Consumer Products.

SUMMARY: The Commission announces that it has approved a statement that provides guidance for manufacturers, importers, distributors, retailers, and consumers of certain consumer products that may contain harmful organohalogen flame retardants in an additive form. To protect consumers and children from the potential toxic effects of exposure to these chemicals, the Commission recommends that manufacturers of children's products, upholstered furniture sold for use in residences, mattresses (and mattress pads), and plastic casings surrounding electronics refrain from intentionally adding non-polymeric, organohalogen flame retardants ("OFRs") to their products. Further, the Commission recommends that, before purchasing such products for resale, importers, distributors, and retailers obtain assurances from manufacturers that such products do not contain OFRs. Finally, the Commission recommends that consumers, especially those who are pregnant or with young children, inquire and obtain assurances from retailers that such products do not contain OFRs.

FOR FURTHER INFORMATION CONTACT: DeWane Ray, Deputy Director, Safety Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504-7547, or e-mail: JRay@cpsc.gov.

SUPPLEMENTARY INFORMATION: The text of the guidance document is as follows:

Guidance for Hazardous Additive, Non-Polymeric Organohalogen Flame Retardants in Certain Consumer Products

SUMMARY: The U.S. Consumer Product Safety Commission issues this guidance to manufacturers, importers, distributors, retailers, and consumers to protect consumers (particularly children) from exposure to additive, non-polymeric organohalogen flame retardants ("OFRs")[1] found in the following products: (1) durable infant or toddler products, children's toys, child care articles or other children's products (other than children's car seats); (2) upholstered furniture sold for use in residences; (3) mattresses and mattress pads; and (4) plastic casings surrounding electronics.[2] OFRs, also referred to as halogenated flame retardants, typically are added to foams, textiles, and polymers before, during or after production in theory to improve their resistance to fire. OFRs are not chemically bound to the substrate and may be released from the product, thereby leading to potential human and environmental exposures. On June 30, 2015, a coalition of consumer advocates and health professionals petitioned the Commission to declare four categories of consumer products containing OFRs to be "banned hazardous substances" under the Federal Hazardous Substances Act (FHSA). The petitioners claim that due to their inherent physical-chemical properties, OFRs, among other things, are toxic, migrate widely out of products regardless of how the products are used, bioaccumulate, and present a serious public health concern. On September 20, 2017, the

[1] For purposes of this guidance, OFRs refers to additive, non-polymeric chemicals only; it does not include reactive or polymeric OFRs.

[2] This guidance is not a binding or enforceable rule and would not change any person's rights, duties, or obligations under the Federal Hazardous Substances Act or any other Act administered by the Commission.

Commission voted to grant the petition to initiate rulemaking under the FHSA and directed the staff to convene a Chronic Hazard Advisory Panel pursuant to the procedures of section 28 of the Consumer Product Safety Act (15 U.S.C. 2077) to further study the effects of these OFRs as a class of chemicals on consumers' health. In the meantime, based on the overwhelming scientific evidence presented to the Commission to date, the Commission has serious concerns regarding the potential toxicity of OFRs, and the risks of exposure, particularly to vulnerable populations, to OFRs, from the four categories of products listed in the petition. Accordingly, the Commission requests that manufacturers of children's products, furniture, mattresses, and electronics casings eliminate the use of such chemicals in these products. The Commission also recommends that, before purchasing such products for resale, importers, distributors, and retailers obtain assurances from manufacturers that such products do not contain OFRs. Finally, the Commission recommends that consumers, especially those who are pregnant or with young children, inquire and obtain assurances from retailers that such products do not contain OFRs.

HAZARD: Scientific evidence to date demonstrates that OFRs, when used in non-polymeric, additive form, migrate from consumer products, leading to widespread human exposure to mixtures of these chemicals. Exposures to OFRs occur because of the semi-volatile property of these chemicals that results in migration of the chemicals and the chemicals' absorption into household dust and other surfaces where they persist in the indoor environment. At this time, there is no known way to direct consumers to use affected products in a manner that would guarantee reducing exposures to the American population to an acceptable level. Numerous peer-reviewed, published studies show that

the vast majority of consumers have measurable quantities of OFRs in their blood. The known adverse health effects of these chemicals to consumers include: reproductive impairment (e.g., abnormal gonadal development, reduced number of ovarian follicles, reduced sperm count, increased time to pregnancy); neurological impacts (e.g., decreased IQ in children, impaired memory, learning deficits, altered motor behavior, hyperactivity); endocrine disruption and interference with thyroid hormone action (potentially contributing to diabetes and obesity); genotoxicity; cancer; and immune disorders. These chemicals have a disproportionately negative health effect on vulnerable populations, including children.

GUIDANCE: Under the FHSA, 15 U.S.C. 1261(g) and (f)(1)(A), any substance or mixture of substances which is toxic, i.e., that has the capacity to produce illness through ingestion, inhalation, or absorption through any bodily surface, and may cause substantial injury or illness during or as a proximate result of customary or reasonably foreseeable handing or use is a "hazardous substance." A product intended or packaged for household use containing a hazardous substance may be required to have precautionary labeling under the FHSA (15 U.S.C. 1261(p)), but if labeling is not adequate to protect against the potential hazard, or if an article intended for use by children is a hazardous substance or bears or contains a hazardous substance, the Commission may declare the product banned. (15 U.S.C. 1261(q)(1)).

To date, the Commission has not banned household product containing OFRs or required precautionary labeling for such products. However, on September 20, 2017, based on the overwhelming scientific evidence presented to date, the Commission voted to grant the petition to initiate rulemaking under the FHSA and directed the staff to

convene a Chronic Hazard Advisory Panel pursuant to the procedures of section 28 of the Consumer Product Safety Act (15 U.S.C. 2077) to further study the effects of OFRs as a class of chemicals on consumers' health. Much of the evidence currently before the Commission suggests OFRs, as a class of chemicals, present a serious public health issue. Therefore, the Commission has serious concerns regarding the potential toxicity of OFRs, and the risks of exposure, particularly to vulnerable populations, to OFRs, from the four categories of products listed in the petition.

For these reasons, the Commission considers the use of OFRs in children's products, upholstered furniture sold for use in residences, mattresses and mattress pads, and plastic casings surrounding electronics to be ill-advised and encourages manufacturers to eliminate using them in such products. Further, the Commission recommends that, before, purchasing such products for resale, importers, distributors, and retailers obtain assurances from manufacturers that such products do not contain OFRs. Finally, the Commission recommends that consumers, especially those who are pregnant or with young children, inquire and obtain assurances from retailers that such products do not contain OFRs.

Dated: September _, 2017

[INSERT SECRETARY], Secretary
U.S. Consumer Product Safety Commission

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.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF COMMISSIONER ROBERT ADLER ON
VOTE TO GRANT PETITION HP 15-1 REGARDING ORGANOHALOGEN FLAME RETARDANTS

SEPTEMBER 20, 2017

I am thrilled that the Commission voted today to grant the petition (HP 15-1) submitted to the Commission on June 30, 2015 by a coalition of public health groups and consumer groups to ban the use of additive, non-polymeric organohalogen flame retardants, as a class, with respect to four specific product categories. In the interest of brevity, I refer to the additive, non-polymeric organohalogen flame retardants as "OFRs."

The specific product categories identified in the petition are: (1) durable infant or toddler products, children's toys, child care articles or other children's products, (2) upholstered furniture sold for use in residences, (3) mattresses and mattress pads, and (4) plastic casings surrounding electronics.

Today's vote to grant the petition consisted of two elements: we directed staff to convene a Chronic Hazard Advisory Panel (CHAP) and to issue guidance to the public on the hazards of OFRs.

Our first action directed staff to convene a CHAP pursuant to the procedures set forth in section 28 of the Consumer Product Safety Act to assess the risks to consumer health and safety of OFRs as a class of chemicals, and to have the CHAP report its findings to the Commission. On this point, we directed the CHAP to review all relevant data, including the most recent, best-available, peer-reviewed, scientific studies, and, where limited or no data are available, to use any generally accepted scientific methodology to fill in the data gaps, as appropriate. In addition, as part of its assessment, we directed the CHAP to consider that consumers are exposed not just to a single OFR, but rather to mixtures of the chemicals.

I am well aware that CPSC staff recommended that we deny the petition. Let me address what I perceive to be the staff's main objections and explain why I came out differently. As a starting point, let me say that I have little serious disagreement with staff on the science aspect of the issues. To the extent that there was disagreement, it was over the legal and policy issues arising from the science. I note that a large part of staff's recommendation rested on their misgivings about treating OFRs as a broad class of chemicals given OFRs' differing levels of toxicity and exposure to which consumers are subject. I grant staff's point about the differing levels of toxicity for these flame retardants. But what I have not heard from staff, nor from any of the witnesses at our hearings, is credible evidence demonstrating that there are any "safe" organohalogen flame retardants. There are certainly a number of OFRs where we have no studies to provide us with proof of harm, but years of experience confirm that every time we get sufficient data to evaluate the risk of harm of any specific OFR, we always find it to be so toxic that we start to remove it from our products. In other words, the more evidence that accumulates, the stronger we see the case against the use of these chemicals.

The fact is that additive, non-polymeric organohalogens carry a set of common characteristics found in every member of the family, and those characteristics so far turn out to be unreasonably hazardous. I see no indication that we will ever find results to the contrary. Among other things, OFRs pass into cells freely, don't metabolize easily, inhibit a cell's defense system, bioaccumulate, and cause various forms of harm due to their chemical structure. On this point, I remind everyone that Dr. Birnbaum, Director of the National Institute of Environmental Health Sciences, and undoubtedly the nation's preeminent toxicologist, repeatedly stated that, of the numerous OFRs she has studied, she knows not one that has <u>not</u> been shown to cause potential health problems.

Moreover, I believe it to be a useless exercise to try to determine precisely the exposure of consumers to each and every OFR in the environment given their ubiquitous nature and their existence in mixtures of things like household dust. Again, I note that Dr. Birnbaum and almost all other witnesses stressed the impossibility of addressing OFR risks other than as a class. There are simply too many of these chemicals in the market – and <u>entering</u> the market – to regulate them one-by-one. I repeat: it defies common sense to do a one-by-one approach given the reality that consumers, especially children, encounter OFRs as <u>mixtures</u>, not as individual chemicals.

Having listened carefully to the testimony of the witnesses at last week's hearing – and having read and re-read the law – I am convinced that the FHSA permits us to use scientifically approved methods of analyzing known data to fill in any data gaps regarding OFR risks. The FHSA was never meant to be a straitjacket barring us from adequately protecting the public. To

the contrary, the courts remind us again and again to read public health statutes broadly to effectuate their safety goals.

Thus, while I am delighted to defer to staff's judgment on the science of OFR hazards, I believe that the issue of assessing whether we have adequate information regarding exposure and risk is one of law and policy. And, having reviewed the FHSA, I have little doubt that the Commission has the legal authority to address OFR risks as a class.

Given my conclusion about the hazards associated with OFRs, I believe that the most efficient and effective way to address the issue is by convening a CHAP pursuant to the procedures in section 28 of CPSA. The mandate to the CHAP is straightforward and consists of three elements:

1. Direct staff to convene a CHAP pursuant to the procedures set forth in section 28 of the Consumer Product Safety Act to assess and issue a report on the risks to consumer health and safety from the use of additive, non-polymeric organohalogen flame retardants as a class of chemicals in the four product categories set forth in the petition;
2. Instruct the CHAP to review all relevant data, including the most recent, best-available peer-reviewed scientific studies, and, where limited or no data are available, to use any generally accepted scientific methodology to fill in the data gaps, as appropriate, and;
3. Instruct the CHAP to consider consumer exposure to mixtures of OFRs, not just exposure chemical-by-chemical.

Our second action was to instruct staff to publish a Federal Register notice that provides guidance to the public on the hazards of OFRs in the four product categories identified in the 2015 petition.

I am delighted that the Commission voted to grant the petition and to convene a CHAP. In the meantime, however, it seems necessary and appropriate to alert the public to the identified risks of OFRs. As we all know, the work of a CHAP to deal with issues like those before us will take many months, if not years. Accordingly, I am delighted that the Commission approved a guidance document for manufacturers, distributors, retailers, and consumers in which we advise manufacturers to refrain from adding OFRs to their products and urge distributors, retailers, and consumers to inquire about the existence of OFRs in the products they buy and to avoid purchasing such products.

Let me address an objection that was raised at our meeting. In essence, it was how can we undertake the convening of a CHAP with the likely outcome being a rule to ban OFRs when the Commission has already staked out a position that OFRs are too hazardous to use? The simple answer is that a guidance document is just that – guidance. It is not a rule; it imposes no obligations on anyone to do anything or to refrain from doing anything. It is simply advice to

the public about our carefully measured conclusion that OFRs are too hazardous to put in certain consumer products. On this point, I note that the Commission has issued similar guidance documents before: on lead in consumer products and on hazardous chemicals in children's products. In these cases, the Commission did exactly what we propose to do here – indicate the agency's belief that the use of certain chemicals is "ill-advised" and encourage members of the public to avoid using them.

I would remind everyone that one of the four stated purposes of the Consumer Product Safety Act is "to assist consumers in evaluating the comparative safety of consumer products." I would also remind everyone that we have a talented Office of Communications whose everyday job is to provide information to the public similar to what is in this guidance document to carry out this part of our mission. This document is fully consistent with the work that office does and with our obligation to provide meaningful information to the public.

Having listened carefully to the unanimous testimony of some of the most distinguished governmental and academic scientists on the subject, I have concluded that we must not sit idly by and wait for data on the safety of OFRs that all evidence to date suggests will never come. As one of the witnesses at our hearing pointed out, if we took the tobacco industry's word on cigarette safety, we would still be waiting. Similarly, we have waited for years for our friends in the chemical industry to provide us with credible evidence that there are safe OFRs. I have little doubt that we will still be waiting for many more years, to no avail.

In short, the guidance document will serve to alert the public to a serious hazard and will encourage them to exercise their freedom of choice to avoid this hazard.

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STATEMENT OF COMMISSIONER ELLIOT F. KAYE ON THE PETITION ON ORGANOHALOGEN FLAME RETARDANTS

September 20, 2017

Today, the Commission voted 3 to 2 to grant a petition regarding the use of additive, non-polymeric organohalogen flame retardants (OFRs)[1] in certain consumer products and to direct staff to convene a Chronic Hazard Advisory Panel (CHAP) pursuant to the procedures set forth in section 28 of the Consumer Product Safety Act (15 U.S.C. 2077) to assess and issue a report on the risks to consumers' health and safety from the use of OFRs, as a class of chemicals, in the following products: (1) durable infant or toddler products, children's toys, child care articles or other children's products (other than children's car seats); (2) upholstered furniture sold for use in residences; (3) mattresses and mattress pads; and (4) plastic casings surrounding electronics.

I voted to grant the petition and convene a CHAP because the overwhelming evidence received by the Commission to date indicates that OFRs are toxic and the exposure to them through certain consumer products may pose serious health risks to humans, especially pregnant women, young children and socioeconomically vulnerable populations. Parents and caregivers deserve to know that their household furniture, electronics and children's products are not exposing them and their families to toxic chemical dust.

For these reasons, I also was pleased to join Commissioners Adler and Robinson in voting to publish guidance in the Federal Register cautioning manufacturers, importers, distributors, retailers and consumers against certain products that might contain OFRs. One of the presenters last week said it perfectly: We should act based on what we know – not what we do not know. And at this point, the Commission

[1] For purposes of this statement and my votes, the term "OFRs" refers to additive, non-polymeric organohalogen fire retardant chemicals and does not include reactive or polymeric chemicals.

has received a tremendous amount of data with respect to the toxicity of these chemicals as a class and their potential for widespread exposure. One of the nation's – if not the world's – most knowledgeable toxicologists in this area, Dr. Linda Birnbaum, Director of the National Institute of Environmental Health Sciences at the National Institutes of Health and Director of the National Toxicology Program at the U.S. Department of Health and Human Services, has now twice appeared before the Commission to urge us to address the toxicological and health hazards associated with OFRs. In Dr. Birnbaum's expert judgment, OFRs are, of all the chemicals out there, among the riskiest in her mind, and all members of the proposed class of OFRs in the petition that have been studied have significant health concerns. Other leading scientists have submitted scientific evidence demonstrating exposure to OFRs from certain products covered by the petition.

We have a professional and moral duty as safety regulators to caution the public now based on the information that we possess. Contrary to my colleagues' objections, the guidance that we voted to issue today is not a rule, nor an attempt to forgo or replace formal rulemaking on this subject. And there is not any inconsistency in our guidance and the idea that we are a data-driven agency. In fact, it is the opposite. The data that have been presented from the petition to the first public hearing to now is overwhelming, and I cannot in good faith ignore it.

As a policy maker, and more importantly, as a parent, I am horrified and outraged at how chemicals are addressed in this country. It is completely irrational that we wait for children to be poisoned before the government is allowed to step in. Rational and thoughtful public policy in this area would involve the government and industry coming together to agree which chemicals are safe for human exposure, especially for pregnant women and children, and which ones are not. And more importantly, rational and thoughtful public policy would have these assessments occur before these chemicals are permitted to come onto the market. Waiting to assess the safety of chemicals after they are already in consumers' homes and our children's bloodstreams is totally irrational public policy.

Unfortunately, this is the reality we currently face.

Short of the ideal, at a minimum, the government agencies entrusted with keeping consumers safe should be organized and adequately funded to quickly make those assessments and act to protect public health as necessary, even after chemicals are on the market. If we are going to tolerate a system where chemicals come on the market before we have a sense of their potential health effects, especially on vulnerable populations, it seems fair to expect the government to be equipped to

move more quickly to make determinations on the safety of those chemicals and to have the authority to take action as warranted to protect us all.

The CPSC is too small and as an agency has too few funds to solve the larger public policy failure, but I remain committed to positioning the agency to play as meaningful and effective a role as we can to bring some clarity to the issue of toxic chemicals in consumer products. I believe that the Federal Hazardous Substances Act (FHSA) gives the CPSC such authority.

With respect to OFRs in particular, in undertaking any rulemaking under FHSA, I believe we have authority to address OFRs as a class of chemicals. Further, I believe that in order to treat OFRs as a "hazardous substance" under the FHSA, we need only determine whether OFRs, as a class of chemicals, have the *capacity* to produce illness through ingestion, inhalation or absorption through any bodily surface, and *may* cause substantial illness as a result of any customary or reasonably foreseeable handling or use of those products. *See* 15 U.S.C. 1261(f)-(g). In fact, down the road, should we need it, the FHSA also gives us the flexibility to create an exemptions process. *See* 15 U.S.C. 1262(a)(d). I believe the FHSA provides us with a very workable standard and I look forward to seeing the results of the CHAP and finding a way forward, quickly.

I want to thank the petitioners for bringing this important issue to our attention, and to the CPSC staff for their great work on it. I also very much appreciated reviewing and hearing all of our commenters' submissions and testimony and thank them for their tireless advocacy and willingness to share their lifelong work with us, as well as their personal stories.

Addressing chronic hazards in consumer products is not an easy task, but it is a necessary undertaking. We are never going to have perfect information. The essence of this body is to make reasoned judgments based on the best available information to protect the public. That is our mission. And with less than perfect information, but certainly enough at this juncture, we should always choose to protect children over protecting chemicals.