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

Supplemental Statement of Commissioner Robert Adler on the Consumer Product Safety Commission's Provisional Acceptance of a Settlement Agreement with Williams-Sonoma, Inc.

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Once again, my colleague, Commissioner Nord, insists on writing a supplemental statement deploring my refusal to honor what she characterizes as a long-standing Commission practice of not commenting on one another's statements. And, once again, I note that the practice to which she refers is one that exists only in her mind. It is not a practice to which I or other Commissioners have ever agreed nor one that the Commission has followed in my years at the agency, including back in the 1970s and 1980s.[1]

With respect to my colleague's supplemental statement, I have only one point to address as I believe that we have fully debated the issue of whether the Commission should ever be able to seek a provision that sets forth terms of compliance as part of an agreement on civil penalties.[2] I do so only because my colleague mischaracterizes my point when she states that I consider voluntary recalls as "ipso facto violations and exacerbating factors in a subsequent enforcement action."

In fact, nowhere did I state that I consider voluntary recalls to be "ipso facto" violations. Ipso facto means "by that very fact." I take that to mean Commissioner Nord believes that I think every voluntary recall necessarily denotes that the product being recalled presents a substantial product hazard. Of course, I said no such thing. I merely noted that the existence of numerous voluntary recalls by a company in the course of a few short years should be considered in determining whether the

[1] What appears so strange about my colleague's self-professed tradition is her insistence that Commissioners should limit their statements to explaining only what led them to particular decisions, not to commenting on other Commissioners' statements. Yet, that principle evidently does not extend to her criticism of other Commissioners' views – only to the Commissioners responding to her criticisms.

[2] See Statement of Commissioner Robert Adler on the Consumer Product Safety Commission's Provisional Acceptance of a Settlement Agreement with Williams-Sonoma. See: http://www.cpsc.gov//Global/About-CPSC/Adler/AdlerWilliamsSonoma.pdf.

Commission might seek a broader agreement to ensure future compliance.[3] I never claimed that prior voluntary recalls always present grounds for the inclusion of a compliance provision.

Unfortunately, Commissioner Nord seems to push the opposite, and what I consider an extreme, view. To her, absent a determination that a "violation" has occurred, voluntary recalls can never be an indicator that a company has compliance issues warranting a more comprehensive agency response. My colleague argues this by deftly finessing a critical point: she draws a distinction between "harmful" and "violative" products. She seems willing to concede that most products involved in voluntary recalls are harmful, but because they have not been officially determined to be "violative," she insists that the Commission should take no action to seek a compliance provision to protect the public. In this policy debate, however, "harmful" versus "violative" is a distinction without a difference. The Commission never formally alleges that a violation has occurred when it engages in a voluntary recall of a defective product. As she well knows, that is the whole point of a "voluntary" recall. In other words, her interpretation means that the Commission must blind itself to a company's recall history.

To be clear: the absence of a formal allegation of a violation in a voluntary recall does not mean that the agency has failed to allege that a <u>hazard</u> exists. To the contrary, the press release that accompanied the hammock recall in this case described the "hazard" as "when used outdoors, the wood in the hammock stand can deteriorate over time and break, posing a risk of falls and lacerations to consumers." Moreover, the press release listed numerous injuries requiring medical attention, including "lacerations, neck and back pain, bruising, and one incident involving fractured ribs and about 50 reports of the hammock stand breaking." So, notwithstanding the lack of a formal allegation of a violation, anyone who suggests that the Commission should close its eyes to the very serious hazard in this and similar cases operates in a world of hyper-formalism that exists only in theory.

I long ago gave up counting angels on the heads of pins, so I find it difficult to buy my colleague's argument. Instead, I reside in the real world where companies who produce goods that present serious enough risks to warrant repeated recalls should be dealt with in a manner different from that of less risky producers. Were we to act only after an official determination of a violation has occurred, we would tie our own hands for no good reason, thereby unnecessarily placing the public in harm's way.

[3] On a side note, I am intrigued by her description of such an agreement as "[i]t may be a good idea, but it is not a rational approach to the accusation and thus is inappropriate in the settlement of that accusation." Describing an approach as an *irrational* "good idea" surely constitutes a new and exotic oxymoron.