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Statement of Commissioner Robert Adler on Approval of a Final Rule to Establish Requirements Pertaining to Third Party Conformity Assessment Bodies

February 22, 2013

On February 21, 2013 the Commission voted unanimously to issue regulations for laboratory accreditation under our children's product testing and certification program. Although the vote was unanimous, my colleague, Commissioner Nancy Nord, issued a statement, among other things, voicing objection to one revised section of the rule, claiming that it presented a "key example of the compulsion to over-police." I disagree with my colleague's characterization and want to clarify my support for the change in this provision of the rule.

The specific provision that my colleague objected to is section 1112.11(b)(ii)(C), which states that a laboratory will be considered to be a "firewalled" laboratory, i.e., one that is owned or controlled, in whole or in part, by a manufacturer or private labeler, if --

> (C) A manufacturer or private labeler of the children's product has the ability to appoint <u>any</u> of the third party conformity assessment body's senior internal governing body (such as, but not limited to, a board of directors), the ability to appoint the presiding official (such as, but not limited to, the chair or president) of the third party conformity assessment body's senior internal governing body, the ability to hire, dismiss, or set the compensation level for third party conformity assessment body personnel, regardless of whether this ability is ever exercised. (Emphasis added)

The revision to which my colleague objected is the underlined word "any" above. As originally drafted by staff, the provision applied only when the manufacturer or private labeler had the ability to appoint a <u>majority</u> of the lab's senior internal body. She characterizes the rationale for the change in wording as being "even a single board member with manufacturer ties can be so persuasive as to steer the lab in directions that benefit the manufacturer."

That is my colleague's characterization, not mine. My reason is much simpler and has nothing to do with a board member's persuasive abilities. The issue is whether a lab that can be forced by a manufacturer or private labeler – against its will – to appoint a board member or senior executive can truly be considered independent. To me, the answer is simple— no. The classic definition of power is the ability to get someone to do something even when he or she does not want to do it. That is the point. A manufacturer's ability to make a lab take such a critical personnel action has nothing to do with the number of board appointees and everything to do with the power to bend the lab to the manufacturer's will.

Does a manufacturer's ability to influence a lab's senior personnel decisions constitute complete control of the lab? The answer is "maybe, but not necessarily." The test, however, is not whether the manufacturer totally controls a lab. The test is whether the customer controls the lab "in whole or in part." Where a manufacturer has the ability to control a lab's senior personnel decisions, there should be no question about that.

I would further note that the disagreement with my colleague is not whether a lab can be accredited to test for compliance with CPSC rules. Either an independent or a firewalled lab can be accredited. The point is that a lab that can be compelled by its customer to hire personnel favored by the customer cannot truly be considered independent. That said, I see nothing inherently wrong in such an arrangement so long as all parties recognize and disclose the underlying power structure. Nor does the CPSC regulation bar the lab from doing business. It simply places the lab in a different – and more appropriate – category.