U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Inez M. Tenenbaum
Commissioner Nancy A. Nord
Commissioner Robert S. Adler

ITEM:

Williams-Sonoma, Inc. - Proposed Civil Penalty Settlement of $987,500 and Additional Obligations for Alleged Violation of Section 15(b) of the Consumer Product Safety Act (Briefing package dated April 25, 2013, OS No. 4535)

DECISION:

The Commission voted unanimously (3-0) to provisionally accept the attached Settlement Agreement and Order, which would order Williams-Sonoma, Inc. (WS or the Firm) of San Francisco, CA to pay a civil penalty of $987,500, and comply with additional obligations. The provisional Settlement Agreement and Final Order will be announced in a *Federal Register* Notice. The Commission's Compliance Division of the Office of the General Counsel negotiated the proposed agreement to settle staff allegations that the Firm knowingly failed to report in a timely manner under section 15(b) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(b), defects with its wooden hammock stands. Section 20(a)(1) of the CPSA, 15 U.S.C. § 2069(a)(1), permits the imposition of civil penalties for any person who knowingly violates section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4), by failing to report information under section 15(b). Commissioners Nord and Adler submitted the attached statements regarding the issue.

For the Commission:

Todd A. Stevenson
Secretary

*Ballot vote due May 2, 2013

Attachments:

Statement of Commissioner Nord
Statement of Commissioner Adler
Supplemental Statement of Commissioner Nord
Supplemental Statement of Commissioner Adler
Further Supplemental Statement of Commissioner Nord
Further Supplemental Statement of Commissioner Adler
Third Supplemental Statement of Commissioner Nord

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COMMISSIONER NANCY A. NORD

Statement on the Commission's decision to provisionally accept a civil penalty settlement with Williams-Sonoma, Inc.

May 6, 2013

The Consumer Product Safety Commission has provisionally agreed to a settlement with Williams-Sonoma, Inc., regarding the company's alleged failure to notify CPSC promptly when safety concerns arose for one of its products[1] as required by Section 15 of the Consumer Product Safety Act. While I joined in approving the settlement, I am concerned that one provision of the settlement is inappropriate in that it smells of regulatory opportunism disguised as enforcement.

This settlement demands the company institute a broad compliance program for all "statutes and regulations enforced by the Commission." This is the second recent instance in which the agency has insisted on a comprehensive compliance program even absent any evidence of wide-spread noncompliance. To be clear, I am a strong advocate for corporate compliance programs. What I question, however, is the piecemeal creation of a mandate for such programs through enforcement. I am concerned that the compliance program language in this settlement is another step toward just such a de facto rule.

In this case, the scope of the compliance program included in the agreement addresses actions well beyond those that are subject to the penalty. Williams-Sonoma came before us on allegations that it took too long to notify us after it received information that its product might have a safety issue. The settlement addresses that—imposing a monetary penalty and requiring the company to have procedures to timely report safety concerns—but then goes well beyond. It demands a comprehensive compliance program to assure compliance with all our rules and statutes with a variety of related requirements.

This seems inappropriate to me for two reasons. First, using an alleged reporting failure as license to insert ourselves into the company's operations violates the notion that the punishment should fit the "crime." Second, Williams-Sonoma had prior voluntary recalls, but those recalls did not involve findings of defect or regulatory violations. Indeed, many would argue that pursuing a voluntary recall is good policy, and that companies that police their affairs effectively will necessarily have more

[1] The allegedly defective product was an outdoor swing/hammock that did not have sufficient drainage, allowing the wood supports to rot and risking collapse and resulting injury to users.

voluntary recalls than those that do not. Using those recalls to justify mandates unrelated to the current problem risks discouraging companies from participating in the voluntary recall process, as they may feel there is little benefit to doing so.

I joined in approving the settlement in this instance in deference to the negotiation process and the capable attorneys on both sides. Nonetheless, I remain concerned about the regulatory approach this provision signals. As already mentioned, we recently appended a similar compliance program requirement to a settlement with another company in a similar situation. In fact, the language is not merely similar; it is virtually identical. This suggests this is not merely a solution crafted for two particular problems, but rather represents a shift in agency policy that will stretch across all of our enforcement activity.

If we can demonstrate that requiring corporate compliance programs on a wide-spread basis is a good idea, then perhaps we can explore such a requirement. The right way to do this, though, is to use our rulemaking authority, to let the world know what we are considering and give the public the opportunity to weigh in. Trying to sneak a non-rule rule through the enforcement process is the essence of backdoor rulemaking. If the agency sees a need to require comprehensive compliance programs as redress for any rule violation, or even when there has been no rule violation, we should allow the sun to shine on CPSC policy and institute that requirement through appropriate process.

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

May 9, 2013

Background: The Commission recently agreed to accept on a provisional basis a settlement agreement with Williams-Sonoma, Inc. for its alleged failure to notify the CPSC immediately upon obtaining information that reasonably supported the conclusion that its wooden hammock stands contained a defect which could create a substantial product hazard. The defect alleged was the deterioration of the wood in the hammock stands such that when a consumer sat in the hammock, the wooden beams would break, leading to serious injuries when the hammock unexpectedly fell.

According to staff allegations, Williams-Sonoma did not file a report with CPSC until September 11, 2008, almost two years after having received significant information regarding the product's defect. By this time, the company was aware of 45 incidents involving the hammocks, including 12 reports of injuries requiring medical attention for lacerations, neck and back pain, bruising and one incident involving fractured ribs.

In addition to paying a civil penalty of $987,500, Williams-Sonoma agreed to maintain and enforce a program designed to ensure compliance with the safety statutes and regulations enforced by the Commission. This agreement substantially tracks one recently entered into by the CPSC with another company. In that case, the company agreed to pay a civil penalty and maintain and enforce a compliance agreement in connection with its alleged failure to report a possible substantial product hazard.

Commissioner Nord's Objections: My colleague, Commissioner Nord, although agreeing to provisionally accept the proposed settlement agreement, objected to the inclusion of the compliance provision, complaining that "it smells of regulatory opportunism disguised as enforcement." As willing as I am to tip my hat to her creative use of language, I find her criticism to be without merit.

My colleague's specific complaints are two: (1) the Commission's insistence of a compliance provision in a settlement agreement "inserts" the Commission into the company's operations in a manner that violates the notion that the punishment should fit the crime and (2) the fact that Williams-Sonoma had prior voluntary recalls that did not include findings of defect or regulatory violations somehow means that the Commission could not justify a compliance program based on these prior recalls.

Crime and Punishment: With respect to my colleague's first complaint, I strongly disagree. The compliance provision is neither "punishment" nor is it in any way inappropriate. In this case, the Commission noted that the company had undertaken eighteen voluntary recalls in the past five years[1] and concluded that it would be in the public's – and I would argue, the company's – best interest to lay out a specific set of criteria for the company to follow in its future production and sales. In fact, at its heart, this agreement is nothing more than an affirmation of the company's commitment to follow the law.

Far from viewing this settlement as punishment, I view it as the Commission and the company mutually agreeing to a set of reasonable measures designed to lead to safer products and fewer recalls in the future. Indeed, I suspect that the reason that companies agree to such language is their sense that any conscientious, responsible firm should follow such procedures in their approach to compliance. And to the extent that their past practices might have fallen short of these goals, they are eager to demonstrate that their future approach will be one of strict adherence to such provisions.

Moreover, I would draw my colleague's attention to paragraph 25 of the settlement agreement wherein the company represents that the agreement is "freely and voluntarily entered into, without any degree of duress or compulsion whatsoever." I further note that the company was represented by experienced and sophisticated counsel. So, if my colleague is correct that the Commission somehow overreached, it did so with a willing and well-represented partner.

My colleague's objection would have more force if she had any legal basis or precedent, other than her personal distaste, for rejecting the compliance provision outlined in the agreement. There is, of course, no such basis since this agreement easily falls within the Commission's legal authority – and even more easily within sound public policy. In fact, one might argue that her approach, if followed, would simply constitute a self-imposed tying of the Commission's hands for no good reason. Why the CPSC should unilaterally limit its remedial discretion in the face of a demonstrated need to protect the public escapes me.

Voluntary Recall Agreements: My strongest objection to my colleague's statement revolves around her insistence that the Commission could not take prior voluntary recalls into account in seeking a settlement agreement. She claims that since the recalls did not involve findings of defect or regulatory violations, the Commission must somehow ignore them in crafting any agreement with the company.

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[1] I certainly understand that larger companies are likely to have more recalls than smaller companies, and I have considered that in my assessment of the cases before me. Of course, what also matters is the nature of the violations and the level of commitment demonstrated by the companies with respect to their compliance with CPSC regulations.

To the contrary, she argues that such an approach might discourage conscientious companies from engaging in voluntary recalls.[2]

I am well aware that the voluntary recall agreements that the Commission enters into invariably contain a boilerplate paragraph in which the company asserts that its assent to the agreement does not constitute an admission by the company or a determination by the Commission that the company has violated the law. Transforming this language into a blanket implication that no conclusions about a company's past behavior can be drawn, however, transforms a convenient legal fiction into a broad legal lie.

The reason why firms insist on "non-admission" clauses is their concern that their voluntary recalls might lead to product liability lawsuits or shareholder derivative actions. Because such concerns lie outside the Commission's product safety mandate, I have no strong objection to the clauses. It strains credulity, however, to elevate such language to the conclusion that a history of recalls stands for naught. If anything, such a history should make companies more aware of their duty to report possible hazards and to be prepared to take remedial action where necessary.

In fact, were my colleague's presumption to hold sway, the Commission very likely would be forced to adopt the reasoning of several recent courts regarding SEC settlements in which the courts have insisted on explicit acknowledgement that the companies admit guilt regarding their alleged violations of the law. I find it unnecessary at this point for the Commission to move to such an approach because I reject the notion that past recalls cannot be considered when crafting legal settlements.

Backdoor Rulemaking: Although my colleague stated that she has two reasons for opposing the language in the Williams-Sonoma case, in fact she has a third, which needs to be addressed. Here, she argues that placing compliance clauses in settlement agreements constitutes "backdoor rulemaking." Of course, framing the Commission's action as "backdoor rulemaking" seems to suggest that something improper has occurred – which it has not. As any student of administrative law knows, regulatory agencies have great discretion to decide whether to implement policy through litigation or rulemaking – or both.[3] Which tool(s) an agency selects depends on the situation before it. With respect to the recent settlements that the Commission has entered into, I believe the underlying facts strongly support the Commission's actions. The fact that the Commission has sought similar language in the two settlements says little at this point about whether there has been a shift in agency policy in the future. Even if it did, there is nothing improper about implementing the policy in individual case settlements. That said, I do not rule out asking for such clauses in future non-civil penalty settlement agreements nor do I rule out future expansions of the Commission's voluntary recall policies.

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[2] In my experience, the Commission and its staff have always worked closely and effectively with conscientious companies. I see nothing in the provisions at issue that does anything to lessen this cooperation. Moreover, I note that the law requires companies to report potentially hazardous products and to recall them should they present serious risks to the public. I have little doubt that conscientious companies will continue to comply with the law.

[3] See, e.g., *National Labor Relations Board v. Bell Aerospace Company,* 416 U.S. 267 (1974) and *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947).

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COMMISSIONER NANCY A. NORD

Supplemental statement on the Commission's decision to provisionally accept a civil penalty settlement with Williams-Sonoma, Inc.

May 13, 2013

Yet again declining to follow the Commission's long practice of Commissioners using their written statements to explain what led *them* to particular decisions, my colleague, Commissioner Adler, has taken issue with the concerns I expressed in my statement on our provisionally-approved settlement with Williams-Sonoma, Inc., over alleged reporting violations. I argued—and hold—that the provision in the settlement insisting on a broad compliance program was inappropriate in the context of this particular settlement. Because my colleague has directly challenged the rationale underlying the concerns expressed in my statement, I feel I must respond.

To reiterate, I fully support the notion of robust compliance programs. I voted to accept this settlement despite my reservations because—as I noted and my colleague repeated—the company was represented by capable counsel and reached this agreement with our staff voluntarily. (Contrast this with a prior compliance program mandate that my colleagues insisted on inserting in a settlement after counsel for both the agency and the company had concluded their work, our staff having been satisfied that safety concerns were appropriately addressed.) My concerns about the provision are about the process we have used to enact a de facto mandate versus the process we should use to enact a de jure one, if we feel it is good policy.

My colleague begins by disputing my use of the word *punishment*. I would suggest that the compliance program's appearance in this context and its placement alongside monetary penalties give it, at the very least, a punitive aspect. And while my colleague argues the agreement was voluntary and thus non-punitive (citing what can only be described as the kind of "boilerplate paragraph" he later dismisses), *voluntary* has a different meaning in the settlement realm, where the probable alternative is more costly litigation and stiffer penalties. The formally voluntary nature of the settlement is not in dispute. Yet we should not close our eyes to the true nature of settlement agreement as, fundamentally, an enforcement tool. This semantic discussion, however, misses the point.

The corrective actions we take when a company is accused of and agrees to settle a violation should bear some connection to the violation in both scope and character; it should be a proportionate response. Demanding a comprehensive, agency-monitored

compliance program where the violation alleged was failure to timely report a possible problem is disproportionate.

As justification, my colleague cites a need to protect the public, but, with respect to the matter that brought Williams-Sonoma to us, that burden was already met. The public was protected from the faulty product by a voluntary recall, although presumably later than it should have been because of the reporting failure that we allege occurred. To guard against future reporting delays that could put the public at risk, the settlement imposes both a monetary penalty and a requirement that the company implement better internal and external communication policies for safety-related information. Had the settlement agreement ended there, I could find no fault with it. However, there is no indication that Williams-Sonoma has violated any other regulation, so there is no reason to believe the comprehensive compliance language also included in the settlement will necessarily enhance public safety. It may be a good idea, but it is not a rational response to the accusation and thus is inappropriate in the settlement of that accusation.[1]

As further justification, my colleague cites Williams-Sonoma's prior voluntary recalls. I maintain, despite his protests, that it is improper to treat prior such recalls as ipso facto violations and exacerbating factors in a subsequent enforcement action. He dismisses non-admission language in recall agreements as pro forma, but my argument is about the nature of the recalls themselves, not the phraseology of the agreements initiating them. Voluntary recalls can and do happen where no violation is alleged, as occurred with Williams-Sonoma's recall in this case. Treating such recalls as indicators of violations or violations in themselves and using them as penalty enhancement factors misrepresents their nature and misapplies them for purposes that are not only beyond their intent—getting harmful (violative or not) products off the market—but possibly contrary to that intent.

Presumably Commissioner Adler is correct that conscientious companies are less likely to see future punitive use of a voluntary recall as reason to forego or delay one. Yet, our statute and the manner in which we enforce it make the decision to report a potential hazard—with the possible subsequent responsibility to conduct a recall—a difficult judgment call, even for conscientious companies. Attaching a potential future

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[1] My colleague calls for legal precedent to underscore my unease about demanding a comprehensive compliance program in a reporting violation settlement context. He should recall that, by their very nature, settlements are unlikely to produce any litigation, precedential or otherwise. A party that agrees to a settlement term, however grudgingly, is not apt to then challenge that term through the expensive litigation process (even if the language of the settlement did not preclude such litigation, which it generally does).

punitive burden to recalls may provide a deterrent to following our oft-stated advice: "When in doubt, report." Consumers see the most safety benefit from recalls if we make conducting one as effective, speedy, and cooperative as possible. Treating recalls as violations even where none occurred takes us away from that goal.

Finally, on the notion of backdoor rulemaking, my colleague misstates my position. I did not suggest that we could not use the enforcement process, or even the settlement mechanism, to establish a policy that has the effect of a rule. I argue that we should not.

Here we appear to be implementing significant policy through litigation—or, more accurately, through privately-negotiated tools to avoid litigation. As any student of geometry knows, two points establish a line, and administrative- and CPSC-law professionals have spotted these two points and are advising their clients to expect us to demand comprehensive compliance programs even where there is no accusation of a comprehensive compliance failure. Whether or not it was our intent to create a broad policy through these two settlements, we have effectively done so.

If we do not mean to shift our policy, then we should ensure our settlements really are about crafting individual solutions to individual problems. That claim, however, is made more difficult when we are demanding comprehensive compliance programs in pure reporting violation settlements and using identical language (a compliance "boilerplate paragraph") to govern disparate settlements with disparate companies. If we do want a new policy, then we should say so through a process that implements that policy fairly and with appropriate public input. The result would be a compliance program policy—and an agency—with greater credibility (and likely sounder substantive footing) than if we continue to rely on privately negotiated settlements to establish broad public policy.

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

May 15, 2013

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

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[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 hazard 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.

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[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.

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COMMISSIONER NANCY A. NORD

Further supplemental statement on the Commission's decision to provisionally accept a civil penalty settlement with Williams-Sonoma, Inc.

May 17, 2013

As we continue to exchange comments over a policy of including broad compliance program requirements in settlements—not just the reporting requirements tied to the underlying reporting violations, as I believe appropriate—it is welcome to read that Commissioner Adler disclaims the view "that prior voluntary recalls always present grounds for the inclusion of a compliance program." Given that we now have imposed identical mandatory, commission-monitored compliance programs on two different companies with different histories specifically because of prior voluntary recalls, his statement is a useful first step in trying to give some clarity to when such programs will be required as a condition for settling a failure-to-report violation.

It also bolsters my belief that the adoption of a policy requiring broad–compliance-program provisions in settlement agreements should proceed through notice-and-comment rulemaking. Both the public and our staff (and *we*) should be able to identify the relevant factors that distinguish the past recalls that are more concerning from those that are less concerning (assuming for argument's sake that past recalls are even relevant). For example, the implications of this policy on our Fast Track program trouble me greatly. In Fast Track recalls, by definition the agency does not make a preliminary determination of an actionable risk. If such recalls will subject the company to some future penalty expansion, then the incentive for doing them is greatly reduced.[1] Also to be considered is that the older a recall is, the less likely that the attorneys on either side were focusing on the existence or adequacy of a compliance program, which makes present judgments of past adequacy dubious. These are just some of the many issues that have not been explored but should be before we push out this policy.

Our current approach of using privately-negotiated settlements to effect broad policy is troublesome on many levels. Rulemaking is preferable to taking a murky path that borders on inconsistency.

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[1] Both companies affected by this new provision have participated in several Fast Track recalls. It would be unfortunate if the Fast Track recall process became less effective due to a new policy.

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

May 22, 2013

While I doubt that my colleague, Commission Nord, will ever relinquish having the final word regarding any issue on which she and I have voiced disagreement,[1] in this one instance, I will depart from my usual acquiescence to clarify a point that she persists in misstating.

My colleague claims to welcome my disclaiming the view that prior voluntary recalls always present grounds for the inclusion of a compliance program. Of course, since I had never expressed such a view, disclaiming it was easy.

What I would welcome from my colleague would be some acknowledgement that her oft-expressed view that the Commission must disregard a company's voluntary recall history when it comes to crafting remedial measures is overly restrictive. Evidently, she still clings to the belief that, absent formal determinations that recalls involve "violations," the Commission should not consider a firm's recall history.

In fact, my colleague doubles down on this position in her latest statement. Her new argument is that because Fast Track recalls do not involve preliminary determinations of an actionable risk, seeking a compliance provision for companies that engage in Fast Track recalls jeopardizes the future of the program. She states that "[i]f such recalls will subject the company to some future penalty expansion, then the incentive for doing them is greatly reduced." With all due respect, this is unpersuasive. The Commission's Fast Track Program was never designed to be an amnesty program; in fact, the Commission on a number of occasions has pursued civil penalty cases against manufacturers who have conducted Fast Track recalls. Nor was Fast Track designed to be an amnesia program – the Commission, appropriately, gets to remember previous Fast Track recalls when it assesses whether to seek formal compliance provisions.

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[1] Not a matter worth fighting about, as far as I am concerned.

Companies pursue Fast Track recalls because such recalls are in their best interest – and the public's as well. Nothing in the Commission's thoughtful and measured pursuit of a compliance provision for some repeat offenders changes that fact. [2] Fast Track has been and will remain an extremely useful program both for the Commission and for firms that manufacture and distribute consumer products.

With respect to my colleague's endorsement of a policy on compliance provisions developed through notice-and-comment rulemaking, I have already stated that I consider such an approach to be within the Commission's discretion. Unlike my colleague, I do not view it as the only path to enhanced compliance, but I certainly am open to such a policy. I wish my colleague showed similar flexibility in her approach to protecting the public.

[2] My colleague seems particularly disturbed that we have now imposed "identical" compliance programs on two different companies with different histories. I find no inconsistency or impropriety here. Once the Commission determines that a compliance program is warranted, I think it praiseworthy for the agency to hold companies to the same safety obligations in the future.

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COMMISSIONER NANCY A. NORD

Third supplemental statement on the Commission's decision to provisionally accept a civil penalty settlement with Williams-Sonoma, Inc.

May 23, 2013

To set the record straight, I again write regarding the Commission's recent provisional acceptance of a civil penalty settlement with Williams-Sonoma, Inc. The settlement included a provision I objected to which required the company to adopt an overly-broad commission-monitored compliance program even though the underlying violation at issue was limited to an alleged failure to report. Following Commissioner Adler's most recent statement, I have several points of clarification and amplification.[1]

As should be clear from my previous statements, I disagree with my colleague when he argues that

- official Commission determinations of violations are not a necessary predicate of punitive measures like the imposition of civil penalties , nor is an official determination necessary before the Commission uses the threat of such penalties to extract settlement provisions; and
- Fast Track recalls will not be jeopardized by their use as an aggravating factor in the assessment of civil penalty amounts and the imposition of penalties in settlement provisions.

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[1]In past practice, Commissioners used statements to explain the rationale for their votes, not to vet and criticize the statements filed by their colleagues. Though my colleague says he never agreed to this practice—and obviously *he* never did—it certainly has been *my* experience in earlier years at the Commission, an experience that has been bolstered by similar behavior of other past Commissioners. I never described it as a binding policy, but that does not change its nature as a practice. That is precisely how practice works.

To the extent that the practice obviously has now been abandoned, I believe this to be wrong. The failure to abide by that practice has devolved into a sometimes frustrating, sometimes amusing set of exchanges between my colleague and me about an otherwise important subject. These exchanges make precisely the point—that statements should be the venue for explaining one's own votes, not attacking another's statements. And again, since my earlier statement has been directly criticized, I write to defend my views.

Since his positions on these matters are assertions based on his philosophical positions, at this point we may have to agree to disagree.

This exchange has served, perhaps, to bring a very small bit of clarity on one issue and to bring us a very small bit closer together on another. In the first statement he issued on the use of mandated broad compliance programs based on past recalls, Commission Adler (with the Chairman) wrote that he was concerned that "since 1989 the company has conducted more than a dozen recalls." That statement further indicated that such recalls were related to a number of specific products, but did not differentiate between recalls that were more or less concerning.[2] One could interpret, then, that he thought a tally of the number of recalls a company voluntarily conducted was relevant to determining the need for a mandated compliance program. In subsequent statements, my colleague clarified this by claiming that he had never said every recall was relevant. While this clarification is marginally helpful, the parties are still left not knowing which past recalls (in his eyes) will count and which will not in the context of a settlement for an alleged failure to report.

In defending his appetite to use the opaque venue of privately negotiated settlements to enact broad policy, my colleague questions my "flexibility in . . . protecting the public." Flexibility can be a virtue, but like any virtue it can become a vice absent moderation. We should not be so flexible as to lead ourselves into illegal, improper, or unwise behavior. While I do not argue the backdoor rulemaking my colleagues are insisting on here is illegal, I reiterate that it is both improper and unwise and that it robs this agency of the transparency the public demands and the credibility our staff needs.

Therefore, it is welcome that my colleague expresses his openness to using notice-and-comment rulemaking to effect this apparent policy change. Having seen several rounds of comments from Commissioners on this subject, the public should have the chance to participate in the discussion. I believe we all would benefit from such a broadened conversation.

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[2] *See* Chairman Inez M. Tenenbaum & Robert S. Adler, "Joint Statement on the Vote to Approve Provisionally a Civil Penalty Settlement with Kolcraft" (Mar. 12, 2013), http://www.cpsc.gov//Global/About-CPSC/Chairman-Tenenbaum/tenebaumadler03122013.pdf.