

Ranking Member John Thune
Questions for the Record
Nomination of Robert Adler to be
Commissioner, Consumer Product Safety Commission (Reappointment)
Senate Committee on Commerce, Science, and Transportation
Hearing on June 11, 2014

- 1) **In January and July 2011, President Obama issued Executive Orders 13563 and 13579 calling on regulatory agencies to “afford the public a meaningful opportunity to comment” during the rule-making process, “use the best, most innovative, and least burdensome tools for achieving regulatory ends” and to “take into account benefits and costs [of regulation], both quantitative and qualitative.” The President also asked independent regulatory agencies to formulate plans for the retrospective review of existing regulations in order to “determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving regulatory objectives.”**

Please provide a detailed explanation of what steps the CPSC has taken to comply with these Executive Orders.

Although as an independent agency, the Consumer Product Safety Commission is not legally obligated to comply with Executive Orders, we always strive within the framework of our governing statutes to follow the spirit of Presidential Executive Orders. With respect to Executive Orders 13563 and 13579, in order for me to respond adequately, I need to briefly review the history of the CPSC’s rulemaking. I do so to make the point that we have undertaken both the promulgation of regulations and their retrospective review in the full spirit of the policies incorporated in the Executive Orders. So, I begin with several observations:

1. Since 1981, the CPSC has been required under amendments to the Consumer Product Safety Act (and the other acts it enforces) to conduct an extensive cost-benefit analysis when we promulgate safety rules. Under these amendments, our cost-benefit approach is as comprehensive, if not more so, as that set forth in any Executive Order issued by the Office of the President.
2. Over the years, the CPSC has promulgated extremely few mandatory safety rules requiring cost-benefit analyses, a grand total of nine in thirty three years – or about one every 3.5 years – opting instead to work with the voluntary standards sector and to negotiate individual Corrective Action Plans for the recall of specific hazardous products.
3. Under the Regulatory Flexibility Act of 1980, the CPSC chose to undertake a retrospective review of every safety rule under its jurisdiction from its beginning, not just those identified as having a “substantial impact on a number of small entities” (and, therefore, requiring a mandatory review).

4. In addition to the retrospective review of agency regulations mandated by the Regulatory Flexibility Act, the CPSC has voluntarily undertaken a comprehensive review of its regulations in recent years in a spirit consistent with Executive Order 13563 and anticipates continuing to do so in the future.

Least Burdensome Tools: With respect to our utilization of the least burdensome tools for achieving our regulatory ends, in 1981, Congress added a broad and comprehensive set of cost-benefit requirements to the Consumer Product Safety Act (and the other acts enforced by the CPSC) for consumer product safety rules promulgated by the CPSC. These provisions, contained in section 9 of the CPSA, easily match, if not surpass, in their stringency and scope the cost-benefit provisions of the various Executive Orders on cost-benefit analysis recommended by the Office of Management and Budget. Among other things, they require the CPSC, prior to promulgating almost every safety rule, to:

- Make findings with respect to the degree and nature of the risk of injury the rule is designed to eliminate or reduce; the approximate number of consumer products, or types or classes thereof, subject to such rule; the need of the public for the consumer products subject to such rule, and the probable effect of such rule on the utility, cost, or availability of such products to meet such need; and any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.
- Prepare a final regulatory analysis of the rule containing the following information: a description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs; a description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen; a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.
- Find that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product; that the promulgation of the rule is in the public interest; in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under the CPSA would adequately protect the public from the unreasonable risk of injury associated with the product; in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard that compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or it is unlikely

that there will be substantial compliance with such voluntary consumer product safety standard.

- Find that the benefits expected from the rule bear a reasonable relation to its costs and that rule imposes the least burdensome requirement, which prevents or adequately reduces the risk of injury for which the rule is being promulgated.
- Give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions.

Speaking from personal experience, I note that the analysis and findings contained in section 9 of the CPSA (and similar provisions in other acts the agency enforces) have resulted in rulemaking proceedings that span years of effort and cost the agency millions of dollars. I do not believe that one could reasonably expect any more analysis by a regulatory agency, especially one with such limited resources that is directed to save the lives of young children.

Making The Agency's Regulatory Program More Effective or Less Burdensome in Achieving Regulatory Objectives: Both in response to the extremely detailed, time-consuming requirements in section 9 of the CPSA and because of its success in working with the voluntary standards sector, the CPSC has opted, wherever possible, to look to the promulgation and strengthening of voluntary standards as an alternative to developing mandatory standards. The Commission, of course, has always retained the option to undertake mandatory rulemaking where voluntary standards have proven to be inadequate. As I noted, the burdens of mandatory rulemaking have resulted in the Commission's promulgation of only nine standards in the 33 years since the 1981 amendments. In sharp contrast, the Commission has actively participated in the development or enhancement of hundreds of voluntary standards in that same time period. As I shall mention, the Commission's infrequent promulgation of mandatory rules and reliance on voluntary standards has not gone without criticism in Congress, especially when it comes to protecting the lives and safety of young children.

There are limits on the use of voluntary standards in protecting American consumers, but they have, of necessity, become important tools in CPSC's approach to product safety.

CPSC and the Regulatory Flexibility Act (RFA): Section 610 of the RFA requires agencies to periodically review rules that have a significant impact on a substantial number of small entities. Each agency is required to publish a plan demonstrating its approach to its review. Accordingly, as far back as September 1981, the CPSC published its plan for reviewing existing rules under the RFA, as well as subsequent rules within 10 years of their publication.

The CPSC has gone far beyond the requirements of the RFA in its plan. In fact, the agency not only has solicited and reviewed comments for rules that we have determined would have a significant economic impact on a substantial number of small entities, we have actually conducted a review of every safety rule under our jurisdiction. In addition

to soliciting comments from the general public in the Federal Register, we have directly contacted affected parties and their trade associations through appropriate trade publications. Moreover, the Commission has made an effort personally to contact those persons who submitted comments during the earlier rulemaking proceedings. Based on the information received in the comments, as well as other information available to the Commission, CPSC staff has then conducted an assessment of the degree of economic impact on small entities and sought to identify appropriate actions required to minimize the impact on those entities consistent with the objective of the statute under which the regulations were issued.

Under section 610(b) of the RFA, the Commission has sought comments on, and reviewed its rules according to, the following factors: (1) the continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlapped, duplicated, or conflicted with other federal rules (and the Commission also considered, to the extent feasible, the extent to which the rule overlapped, duplicated, or conflicted with state and local government rules); and (5) the length of time since the rule had been evaluated or the degree to which technology, economic conditions, or other factors had changed in the area affected by the rule.

Since 1981 and the passage of the RFA, our agency has carefully reviewed its regulations. This effort has continued over the last 30-plus years. On the whole, I believe these reviews have been good both for consumers and the regulated community. Under the RFA (and other provisions of the CPSA requiring rule reviews), the Commission has issued reports involving 17 rules under the CPSA, as well as nine rules promulgated under the Federal Hazardous Substances Act (FHSA), eight rules under the Flammable Fabrics Act (FFA), and four rules under the Poison Prevention Packaging Act (PPPA).

Voluntary Regulatory Review Efforts: In addition to the rule reviews required by the RFA, the Commission also has recently voluntarily undertaken efforts to review its regulations in a manner consistent with the spirit of Executive Order 13563 and similar Executive Orders. Specifically, almost ten years ago, the Commission published a notice in the Federal Register announcing a pilot rule review program. In the notice, the agency committed itself to using OMB's Program Assessment Rating Tool (PART) to help provide a consistent approach to rating programs across the federal government.

In the notice, the Commission listed four rules for review, and asked for public comment on each regulation. Specifically, the notice asked: 1) whether the regulation is consistent with CPSC program goals, 2) whether the regulation is consistent with other CPSC regulations, 3) whether the regulation is current with respect to technology, economic or market conditions, and other mandatory or voluntary standards, and 4) whether the regulation could be streamlined to minimize regulatory burdens, particularly those affecting small businesses.

Out of this pilot program, the Commission then conducted annual reviews that looked at four to six rules per year in 2005, 2006, and 2007. From this review, the CPSC clarified its rules regarding standards for carpets, rugs and bicycles. In addition, the Commission also recently established projects to examine amendments to the electrical toy and cigarette and multi-purpose lighter rules.

We continue the review process today. In the coming years, staff will be looking at ways to maximize openness and public participation, as well as ways to most effectively target rules that may require revision, repeal, or strengthening to protect the public against the risk of unreasonable danger from consumer products. If re-confirmed, I assure you that I will follow this process closely.

In addition, specifically please:

2) Identify existing CPSC regulations that you believe to be outmoded, ineffective, or excessively burdensome.

As I have noted above, CPSC staff is currently engaged in a comprehensive review of all existing agency rules pursuant to the mandate in the Regulatory Flexibility Act. I am comfortable with the staff approach, which is a methodical and thorough review of agency rules.

a. List all of what you believe to be outdated or obsolete reporting requirements for the CPSC.

Like all other federal agencies and departments, the CPSC faces a multitude of requirements for filing reports with the Congress and OMB. I believe that most of these reporting requirements provide those who oversee us with the necessary information to maintain accountability over the agency. To the extent that our reports are carefully scrutinized, I believe that they serve a useful purpose.

I support periodic review of required reports to identify outdated, obsolete, or duplicative reporting requirements. I know the Government Performance and Results Modernization Act directed the Office of Management and Budget to provide to Congress a list of Congressionally-mandated reports that agencies believe require Congressional modification. In compiling a list of reports, OMB sought the advice of agencies and departments including the CPSC. CPSC staff identified two reports. Specifically, the CPSC Inspector General recommended the consolidation of two duplicative annual reports regarding Inspector General reviews of improvements and employee complaints concerning the CPSC. This recommendation was also included in S. 2109, the Government Reports Elimination Act of 2014, introduced on March 11, 2014 by Senator Mark Warner, and cosponsored by Senators Claire McCaskill and Kelly Ayotte.

b. Provide a plan to this Committee within 60 days outlining specific actions you plan to take to ensure that the CPSC aggressively implements burden reduction opportunities and a timetable for when those actions will occur.

During my time as Acting Chairman I have taken specific actions to attempt to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. These actions have included holding an all-day forum, on April 3, 2014, on burden reduction open to all stakeholders. At this forum, we heard numerous thoughtful nominations of ideas from our stakeholders for product determinations. Unfortunately, because of the highly technical nature of many of these suggestions, CPSC scientific staff must carefully test the claims made by the participants. As I mentioned at my re-nomination hearing, one of the most promising suggestions for exempting phthalate testing based on the hardness of plastics has been shown not to be accurate. Following the forum, several stakeholders asked the Commission to reopen the record so they could submit more information to our staff for consideration in making the scientific case for determinations. The record will remain open until July 16, 2014, and I look forward to reviewing the comments and ideas we receive.

In addition, last month, I introduced an amendment to the Commission's 2014 Mid-Year Review and Proposed Operating Plan Adjustments to examine potential ways to reduce third party testing costs through determinations consistent with assuring compliance with underlying requirements. The amendment was adopted. It provides funds for a study to assist the Commission in determining whether untreated wood or other natural materials are materials that do not, and will not, contain any of the eight specific heavy metals in levels that exceed allowable limits listed in the mandatory Toy Standard, ASTM F-963. Because wood was on the list of determinations for lead first published in August 2009 in the Federal Register, and currently found at 16 CFR § 1500.91, that identify those products or product components that will never contain violative amounts of lead, I am hopeful that this study will find similar results for the eight heavy metals listed in ASTM F-963.

In terms of steps I would take upon re-confirmation as a Commissioner, I look forward to working with my colleagues, particularly Chairman-nominee, Elliot Kaye, to continue to seek ways to reduce third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. During his nomination hearing, he agreed to provide such a plan 60 days from his confirmation as Chairman on this topic, and I assure the Committee I will work closely with Mr. Kaye on this plan.

- c. **Provide detailed recommendations on how you would propose to increase public participation in CPSC's rulemaking process, and how you would propose to reduce uncertainty in the CPSC's rulemaking process.**

I believe that the CPSC's approach to public participation is among the most comprehensive in the federal government. Since the agency was first established,

we have stressed the importance of promoting public participation. Here are some examples of the ways that the agency has addressed this important issue:

- Open Meetings Policy: Unlike most other agencies, whenever CPSC employees meet with outside parties on matters of substantial interest, we require that the meetings be announced in advance in our public calendar and provide that any member of the public, including the press, who wishes to can attend the meeting. See 16 CFR§ 1012, et seq.
- Freedom of Information Act: CPSC has one of the most liberal FOIA policies in the federal government. As part of that policy, the agency states that even records that may be exempted from disclosure will be made available as a matter of discretion when disclosure is not prohibited by law or is not against the public interest. See 16 CFR § 1015, et seq.
- Oral Presentations in Regulatory Proceedings: Unlike most other regulatory agencies, rulemaking under Section 9 of the Consumer Product Safety Act (15 U.S.C. 2058(d)(2)) and Section 4 of the Flammable Fabrics Act (15 U.S.C. 1193(d)) require the agency to provide interested persons an opportunity for the oral presentation of data, views, or arguments in addition to the opportunity to make written submissions. See 16 CFR § 1052.
- Publicly Available Database: Pursuant to section 6A of the Consumer Product Safety Improvement Act of 2008, the Commission, in March 2011, established a user-friendly product safety database in which members of the public can report and read about risks of harm associated with consumer products. See 16 CFR § 1102, et seq.
- Annual Priorities Public Hearing: Section 4(j) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2053(j)) requires the Commission to establish an agenda for action under the laws it administers and, to the extent feasible, to select priorities for action at least 30 days before the beginning of each fiscal year. Section 4(j) of the CPSA provides further that before establishing its agenda and priorities, the Commission must conduct a public hearing and provide an opportunity for the submission of comments.
- Contributions to Costs of Participants in Development of Consumer Product Safety Rules: In appropriate cases, the Commission will contribute to the costs of those who participate in its rulemaking proceedings, particularly where consumer participants need to acquire technical expertise. See 16 CFR § 1105.

With respect to reducing uncertainty, I believe that the agency maintains an effective, open line of communication to the regulated community, both in communicating its intentions and in listening to feedback from this community. I do not see that our approach to the regulatory process promotes substantial uncertainty. One specific approach that I believe Congress could take to reduce uncertainty in our processes would be to provide greater flexibility for CPSC rulemaking. At the moment, whenever we follow the burdensome procedures in the various acts we enforce, years may pass before we enact a rule, and that, no doubt, leaves many stakeholders in a state of uncertainty.

- d. Provide detailed recommendations on how you would propose to improve coordination with other federal agencies to eliminate redundant, inconsistent, and overlapping regulations.**

The CPSC on a regular basis enters into Memoranda of Understanding (MOUs) with fellow agencies such as the Environmental Protection Agency, the Food and Drug Administration, the Occupational Safety and Health Administration, and Customs and Border Protection, to coordinate our regulatory approaches to the extent permitted by our respective laws. On the whole, I think these agreements have been quite successful in eliminating redundant, inconsistent, and overlapping regulations.

- 3) Through passage of H.R. 2715 in August 2011, Congress mandated that the CPSC issue regulations to reduce third party testing costs consistent with assuring compliance with rules, bans, standards and regulations. The deadline for issuing those Congressionally-mandated regulations was August 2012. H.R. 2715 clearly directs the agency to reduce unnecessary testing burdens that are killing small businesses and have prevented small businesses from entering into the children's product market. This should be an agency priority.**

At a recent hearing on the CPSC midyear review of the budget, your colleague Commissioner Buerkle proposed an amendment to develop a plan to reduce third party testing burdens. Each of these proposed rules would amend well-functioning regulations that have been in place for years and would advance safety. She stated that she was extremely disappointed in the agency's progress to fulfill H.R. 2715's mandate to provide meaningful relief to reduce third party testing burdens. You have stated time and again that the Commission does not have the resources to reduce testing burdens, and yet the Commission has recently proposed three regulations that are not congressionally mandated.

Why has the Commission failed to responsibly respond to a Congressional mandate that it reduce the third party testing burden?

To the best of my knowledge, I have never stated that the Commission does not have the resources to reduce testing burdens. I have also stated that burden reduction is and remains a high priority item for me. Further, I have said that we are a very small agency with limited resources for the many worthy projects, including burden reduction, before us.

As I stated before the Committee during my June 11 re-nomination hearing, Congress, in section 2(a)(3) of P.L. 112-28, did not simply direct CPSC to address third party testing burden reduction. Instead, the mandate in that law was, within a year, to seek public comment on opportunities “to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation.” We have done that and have dedicated many staff months to assessing the various approaches suggested in the law and in the many comments we

received in response to our Requests for Information (RFI) published in the Federal Register.

A solid consensus has emerged from the many commenters who have responded to our requests for information. Most see little potential burden reduction in Commission initiatives that retain third party testing costs. Instead, they seek to have the Commission expand on a list of determinations for lead first published in August 2009 in the Federal Register and currently found at 16 CFR § 1500.91. This list identifies those products or product components that will never contain violative amounts of lead. Once a determination is made, such products or product components need not be subject to third party testing. Ideally, based on technical and scientific data, we will be able to expand this list both to include more materials and to also find materials that are used in the manufacture of children's products that will never contain violative amounts of phthalates or the eight heavy metals found in ASTM F-963.

The Commission, on April 3, 2014, held an all-day forum on burden reduction and heard numerous thoughtful nominations from our stakeholders for product determinations. Unfortunately, because of the highly technical nature of many of these suggestions, CPSC scientific staff must carefully test the claims made by the participants. As I mentioned at my re-nomination hearing, one of the most promising suggestions for exempting phthalate testing based on the hardness of plastics has been shown not to be accurate. Nevertheless, the Commission and its staff are proceeding with our work and we hope to provide testing relief as we confirm the scientific validity of the various suggestions.

In addition, last month, I introduced an amendment to the Commission's 2014 Mid-Year Review and Proposed Operating Plan Adjustments to examine potential ways to reduce third party testing costs through determinations consistent with assuring compliance with underlying requirements. The amendment was adopted. It provides funds for a study to assist the Commission in determining whether untreated wood or other natural materials are materials that do not, and will not, contain any of the eight specific heavy metals in levels that exceed allowable limits listed in the mandatory Toy Standard, ASTM F-963. Because wood was on the list of determinations for lead first published in August 2009 in the Federal Register, and currently found at 16 CFR § 1500.91, that identify those products or product components that will never contain violative amounts of lead, I am hopeful that this study will find similar results for the eight heavy metals listed in ASTM F-963.

- 4) In 2010 the agency issued an interpretation of *unblockable drain* (in the VGB Pool & Spa Safety Act) which was revoked 17 months later because you decided to change your vote on that matter. The change in interpretation was counter to the advice of the agency technical and legal staff and was done without notifying the public or seeking input from those who had relied on and expended resources complying with the earlier interpretation. I am deeply troubled that this shows disregard for process and does not allow those impacted by a decision to have a chance to weigh**

in. Pool owners spent their limited, and in many cases public funds, complying with the federal mandate only to have their efforts negated by the reversal and without explanation or process.

a. Are there other examples that you can give me where one commissioner can effect so drastic a reversal in policy?

On December 19, 2007, Congress enacted the Virginia Graeme Baker Pool and Spa Safety Act (VGBA” or “the Act”). The purpose of the Act was to prevent child drowning and entrapment in swimming pools and spas. Among other things, the Act imposed requirements for secondary anti-entrapment devices on most public pools and spas. On April 2, 2010, I cast a vote interpreting the term “unblockable drain” as permitting public pools and spas with an “unblockable drain cover” to comply with the Act without the necessity of installing a secondary anti-entrapment device. After long and painful consideration – and after many meetings with numerous stakeholders, including trade associations, pool manufacturers, pool installers, drain cover manufacturers, and Safety Vacuum Release System (SVRS) manufacturers – I decided to join my colleagues in withdrawing the previous interpretation and establishing a new interpretation of the term “unblockable drain.” Under this new interpretation, the Commission would not allow a removable unblockable drain cover to render a drain unblockable.

Under the VGBA, an “unblockable drain” is defined as a “drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard.” However, in preparation for the vote on April 2, 2010, I could not find additional guidance in the VGBA or its legislative history indicating whether Congress intended that that drains with unblockable drain covers could be considered “unblockable drains.” So, when I attempted to interpret the term, I found myself drawn to the definition that made the most sense to me at the time – a definition that allowed the use of an unblockable drain cover to render a drain unblockable.

After the April 2010 vote, however, I received over 140 letters from citizens and members of Congress, including those who were intimately involved in drafting the statute, who disagreed with my interpretation of the statute. The members of Congress insisted that they did not intend that drains with unblockable drain covers be considered unblockable drains. In addition, I met twice with Representative Debbie Wassermann Schultz, unquestionably one of the members of Congress most involved in writing VGBA, who reiterated this position.

I understand that consumers and industry alike need stability in the marketplace. They look to the decisions of regulators and rely on those decisions when purchasing, using, and manufacturing consumer products. Although I was hesitant at first to reexamine my previous vote, as a policy maker, I believe it is my duty to listen to all points of view, analyze all relevant data, and, if

appropriate, reconsider my vote. So I took it upon myself to reexamine both the safety considerations associated with unblockable drain covers and the legislative history of the VGBA.

I spent considerable amount of time comparing the safety of large unblockable drain covers to the safety of smaller, perhaps less sturdy, drain covers with a secondary anti-entrapment device. When I cast my vote in April 2010, I believed that large unblockable drain covers seemed to provide a greater measure of safety than smaller drain covers with secondary anti-entrapment systems. I reached that conclusion based on my understanding that a properly installed unblockable drain cover protects swimmers from a wide variety of entrapment hazards.

In addition, I believed, if required to install a secondary system, the vast majority of public pools would opt for an anti-entrapment device called a Safety Vacuum Release System, or SVRS, and a small drain cover. The reason was simple: an SVRS, at the time, seemed the cheapest secondary anti-entrapment system on the market. I had safety concerns regarding the use of an SVRS. Unfortunately, an SVRS will not engage if a swimmer's hair becomes entangled in a drain nor will it trigger quickly enough in some instances to prevent a swimmer having his or her organs eviscerated from sitting on a drain. In other words, the usefulness of an SVRS is essentially limited to those instances in which a swimmer's body fully blocks a drain. By contrast, an unblockable drain cover carefully and properly installed would prevent any form of entrapment that a drain might cause.

What made the policy call so difficult, however, was the fact that an unblockable drain cover can operate only if it is properly installed and stays on the drain. In other words, if a drain cover is removed and there is no secondary system like an SVRS then swimmers would be at risk of entrapment in the drain below. Unfortunately, we did not have any significant data regarding the likelihood of drain covers coming off or staying on. But, as critics of my previous vote stated, all drain covers come off from time to time for seasonal maintenance – a point I freely concede.

Based on the communications I received and the discussions I had with many stakeholders, I became persuaded that my interpretation was not what many Members intended when they wrote the law. Given the close call between the safety implications and/or benefits of the two interpretations and my belief that my previous interpretation was contrary to Congressional intent, I cast my vote to reinterpret the term “unblockable drain.”

I am aware that some pool owners purchased and installed unblockable drain covers in reliance on the Commission's previous interpretation. It is my understanding, however, that the number who did so was quite limited because compliant unblockable drain covers turned out to be as expensive – or more expensive – as the SVRS systems. I should add, that in order to give these individuals sufficient time to come into compliance with our new interpretation, I

recommended, and the Commission agreed, to stay enforcement of our new interpretation until the start of the pool season the following year.

- b. Are you concerned by the precedent you have set that allows for one commissioner moving from minority to majority to change the outcome of a statutory interpretation months or even years after the issue has been decided, and do it without public notice and comment?**

Although interpretive rules, under the Administrative Procedure Act, do not require notice-and-comment procedures, I believe that my many open meetings over the course of months leading up to the vote provided most stakeholders with ample notice that I was re-considering my vote. The prospect of a Commissioner changing his or her mind during the course of service on the Commission is a real one. For example, at about the same time I changed my vote on unblockable drain covers, Chairman Tenenbaum changed her vote on whether vacation rental homes with pools could fall within VGBA's jurisdiction. Obviously, such changes should be approached with great care and thought. I regret any disruption my changed vote caused in the market and repeat my apology to anyone adversely affected.

- 5) Did you speak with one or more members of Congress on the issue of unblockable drains, as defined by the VGB Pool & Spa Safety Act, before you decided to reverse your decision? If so, please describe such conversations.**

As stated in my answer above, I received many letters from members of Congress urging me to re-consider my vote on unblockable drain covers. In addition, as described above, I met twice with Congresswoman Debbie Wasserman Schultz, one of the primary authors of the Virginia Graeme Baker Pool and Spa Safety Act. Congresswoman Wasserman Schultz provided me with an extensive narrative about events leading up to passage of the VGBA. As one of the original co-sponsors of the law and a member from Florida with deep concerns about drownings in her district, she had a clear understanding about the legislative intent behind the law.

- 6) There is a perception by many that CPSC has become too political in its approach to product issues. How will you ensure that the CPSC appropriately considers science-based information in the Commission's decision-making process?**

One of best features about the CPSC is its outstanding staff of technical experts, including engineers, epidemiologists, chemists, physicists, communications experts and attorneys. This enables the agency to maintain a scientific and data-based approach to addressing product safety issues. I do not believe product safety should ever be based on partisan politics. In fact, most of the decisions at the agency – roughly 85 percent – are unanimous votes in accordance with staff recommendations. Of course, reasonable minds can disagree regarding policy options for regulation. Different policy makers can look at the same injury and fatality data and reach opposite conclusions about whether

those data demonstrate that an unreasonable risk of injury exists. That is a normal aspect of how collegial bodies with Commissioners having different policy perspectives operate.

- 7) **Mr. Adler, as I noted at the hearing, we all want to ensure the safety of products in the marketplace. Still, the Consumer Product Safety Act is a carefully crafted statute that balances public safety and the rights of individuals engaged in lawful commerce. In the Buckyballs case, when the company did not agree to a voluntary recall, the agency sued to mandate a recall. Yet, rather than going to court to seek an injunction against the sale of the product during the litigation, as the law allows, the agency contacted retailers and asked them to remove the product from shelves, thereby nearly guaranteeing the bankruptcy of the company. If the CPSC was concerned about the dangers of the product during the litigation, why did the agency not follow the law and go to court to seek a court approved injunction?**

The law allows the Commission a variety of regulatory options that we weigh whenever we discover serious hazards in the marketplace. As alleged by CPSC staff, Buckyballs present an extremely serious hazard when someone, often a young child, ingests two or more magnets. The magnets attract each other through the walls of the intestines resulting in progressive tissue injury, beginning with local inflammation and ulceration, progressing to tissue death, then perforation or fistula formation. Such conditions can lead to infection, sepsis, and death. At the time of filing an administrative complaint, CPSC staff had learned of more than two dozen high-power magnet ingestion incidents, with at least one dozen involving Buckyballs. Surgery was required in many of the incidents and ingestion of high-power magnets is alleged to have resulted in at least one death.

What made these incidents so compelling, aside from the destructiveness of the ingestions, is the fact that the magnets, by themselves, look benign and the harm from ingesting them does not occur immediately or obviously. In fact, as alleged in the Commission's complaint, doctors examining patients with ingested magnets could find it difficult to give an immediate or accurate diagnosis because the symptoms mimic other less serious digestive disorders, which could lead to the erroneous belief that no treatment was necessary or a delay in a surgical intervention that could exacerbate life-threatening internal injuries.

All of these high-risk elements led staff to consider a variety of options, including going to various retailers to ask them voluntarily to remove these dangerous products. Section 15 (c) and (d) of the Consumer Product Safety Act [15 USC § 2064(c) and (d)] authorize the Commission to seek remedial action not only from manufacturers, but also from distributors and retailers. Accordingly, in weighing options, CPSC Compliance staff concluded that one effective and expeditious step would be to work with the retailer community in addressing the hazard. I note that, in addition, to working with retailers, staff also took the rare step of filing an administrative complaint against the respondents, signaling their strong concerns about the hazard.

8) In the Buckyballs case, CPSC then sought to extend the “responsible corporate officer” doctrine to establish personal liability for the costs of the recall on Craig Zucker, one of the principals of the bankrupt company that sold Buckyballs.

a. Did the Commission vote to amend its complaint to seek personal liability in this case? If not, why not?

On July 25, 2012, as authorized by the Commission, CPSC staff filed an Administrative Complaint against Maxfield and Oberton seeking a recall of the magnet products sold by the company. Subsequently, staff filed an amended complaint seeking to add Craig Zucker, individually and as an officer of Maxfield and Oberton, after he dissolved Maxfield and Oberton Holdings as an additional respondent. The Administrative Law Judge preliminarily granted CPSC staff’s request to add Mr. Zucker individually as a respondent. Because the Commission negotiated a Consent Agreement with Mr. Zucker that supersedes the judge’s ruling, the Commission did not rule on this issue. My own view is that, in an appropriate case, the Commission has the authority to include individuals as respondents, but I have made no determination whether this was such a case.

b. With regard to the Buckyballs case, if the decision to name the former president of the company as an individual respondent in an administrative complaint was done without the approval of the commissioners, why did Commission staff claim in a pleading that the Commission approved the decision?

The staff decision to name Mr. Zucker as an individual respondent was done with the broad authority granted to staff to file an administrative case pursuant to section 15 of the Consumer Product Safety Act. Because the Administrative Procedure Act (APA) requires that members of the Commission hear appeals from decisions by administrative law judges once we have authorized the filing of a case, we take great precautions to avoid involvement in administrative trial strategy because of our need to avoid even the appearance of bias that might affect our ability to serve as an appellate body. I believe that staff’s decision to name Mr. Zucker as an individual respondent was well within the authority granted them to pursue the case. Whether the Commission, as a matter of policy, should be involved in such a decision is something that I am currently contemplating.

c. Do you believe the CPSC’s Rules of Practice for Adjudications require a vote of the Commission to amend a complaint previously authorized by the Commission to add a new party or to add a different legal theory of liability?

In this case, no. In other cases, depending on what the new legal theory of liability or who the new party is, my answer might differ. The Rules of Practice are designed to empower the Presiding Officer with broad discretion in hearing

cases. In this case, I note the Presiding Officer did issue a preliminary ruling permitting the addition of Mr. Zucker as a respondent.

d. Were you involved in the decision to amend CPSC's complaint against Maxfield and Oberton to name Craig Zucker in his individual capacity?

As I have noted, the decision to amend the complaint was made by CPSC staff pursuant to authority granted them by the Commission to file an administrative case in accordance with section 15 of the CPSA.

e. Should commission staff, without the approval of the Commission, proceed with such a significant move as naming an individual as a respondent?

The decision to name Mr. Zucker was made by CPSC staff pursuant to the broad authority granted by the Commission to file the administrative case. I believe that staff's decision to name Mr. Zucker as an individual respondent was well within the authority granted them to pursue the case. Whether the Commission, as a matter of policy, should be involved in such decisions is something that I am currently contemplating.

9) Do you believe that companies, and individuals managing those companies, have a legal right to challenge a CPSC determination that a product recall is warranted based on legitimate, but different, interpretations of applicable statutes as applied to specific facts?

Yes.

10) There have been suggestions that the CPSC pursued Mr. Zucker personally in response to his aggressive response in fighting the CPSC. Did that happen?

No. As someone who has worked in two branches of government, I know we are constantly subject to criticism, sometimes in very harsh terms. I believe that one of the greatest freedoms that American citizens have is the right to criticize their government. As far as I can tell, CPSC staff also believes that and does not take such criticism personally.

11) When, and under what circumstances do you believe it is appropriate to pierce the corporate veil and hold a principal of a company personally liable for a product recall? Wouldn't you agree that this step is ordinarily only used when there is criminal conduct alleged? Yet the commission took this extraordinary step in the Buckeyballs case by adding Mr. Zucker individually, why?

This is not an area of law that I have researched thoroughly. According to various authorities, the law varies from state to state and from jurisdiction to jurisdiction. Because I continue to research the issue, I cannot provide a definitive answer regarding

when such an action is warranted. I note that adding an individual like Mr. Zucker in an administrative case is rare.

12) Section 6(b) of the Consumer Product Safety Act requires the CPSC to “take reasonable steps to assure” that any disclosure of information relating to a consumer product safety incident is accurate and fair. You have not been shy about expressing your opinion about section 6(b). Congress, however, has had several opportunities—including passage of the Consumer Product Safety Improvement Act—to amend the statute, but chose to preserve the regulatory authority and protections of section 6b.

Under your leadership, the Commission recently proposed an interpretative rule that would, among other things, significantly narrow the information subject to section 6(b) protections, exempt information that is “publicly available,” permits commission staff to *not* notify firms when it releases information “substantially the same as” information previously disclosed and especially troubling, eliminates protections from disclosure of information subject to attorney-client privilege.

What is your definition of “publicly available” because, based on the proposed rule, information posted on a blog would be “publicly available?” How will the Commission substantiate its reliability and factual accuracy before inclusion in communications or investigations of the CPSC? If information about an investigation, whether or not it is accurate, somehow is posted on the Internet, will that information then be exempt from section 6(b)?

As a starting point, I note that the proposed revisions to section 6(b) of the CPSA are still under review, so I am keeping an open mind regarding the comments filed in response to the Commission’s Federal Register Notice of Proposed Rulemaking.

It is no secret that I have a general dislike for some of the provisions of 6(b), especially when they impose substantial costs in time and money on the Commission’s Freedom of Information Act staff. I see no useful purpose in compelling the Commission to follow these cumbersome procedures – which apply only to CPSC and no other health and safety agency – when we are acting as a repository of information in similar fashion to a public library. Further, in some instances, safety information delayed is consumer safety denied. However, it is my duty to uphold all of CPSC’s statutes as written and, if re-confirmed, I pledge to continue do so.

With respect to the language regarding “publicly available” information in the NPR, in my judgment, this is clarifying what has generally been the practice of the Commission over the years more than anything new. As noted in the Commission’s Notice of Proposed Rulemaking, 79 Fed. Reg. 10712, 10714 (February 26, 2014), neither the statute nor the CPSA’s legislative history suggest that information that is readily available to the public is, or should be, subject to section 6(b). I believe that the NPR gives a good description regarding what “publicly available” information is, namely, information that has been disseminated in a manner intended to reach the public in

general, such as news reports; articles in academic and scientific journals; press releases distributed through news of wire services; or information that is available on the Internet.

I cannot speak generally regarding information posted on the Internet about a company under investigation because the statute treats such information in different ways depending on its status. Information submitted to the Commission pursuant to section 15(b) reports that might trigger an investigation must be treated as confidential by the agency unless the Commission has reasonable cause to believe a product is in violation of a safety rule or other provision of the law, or the product is the subject of a legal proceeding or the manufacturer has consented to its release. Nothing in the proposed modification to the agency's 6(b) rule will change that.

13) What problem is the Commission looking to fix with the proposed rule on information disclosures under section 6(b)? What kind of data was used by the Commission in determining that a change was needed?

The proposed rule is intended to update the Commission's 6(b) rule, which has not been revised since its promulgation in 1983 – a time when the Internet did not exist. The proposed rule is intended to modernize and streamline the Commission's processing of information disclosure under section 6(b). Among the pieces of information that the Commission relied on in proposing the changes were its assessments of the ongoing 6(b) costs and time delays in processing FOIA requests, which total in the hundreds of thousands of dollars and in days, sometimes months, in releasing information to the public.

14) Congress recognizes the importance of ensuring the accuracy and fairness of information disclosed by the Commission. What responsibility does the Commission have to prevent release of unreasonable and unsubstantiated information that could cause harm to businesses or brands as well as ill-serve the public we seek to protect?

The Commission has the same responsibility that any federal health and safety agency has to ensure accuracy and fairness of information that it discloses. It is a critical responsibility that the CPSC takes very serious. Why the extra restrictions in 6(b) that extend to no other health and safety agency need to apply to a resource-limited agency like CPSC remains unclear to me. However, it is my duty to uphold all of CPSC's statutes as written and, if re-confirmed, I pledge to continue do so.

15) Mr. Adler, will you commit to me that, if reconfirmed, you will follow not only the letter of the law when it comes to disclosure laws applicable to the Commission, but also the spirit of these rules, which are designed to prevent inaccurate, misleading and incomplete information that could hurt both consumers and manufacturers?

Yes.

16) The CPSC has, in recent years, been increasingly looking to retailers and manufacturers to undertake voluntary product safety recalls and other corrective

actions, as well as holding them accountable for failure to report and other penalty investigations. However, there has been more than a 20 percent decline in voluntary recalls between 2010 and 2013, and it appears this decline will continue through the current year. What do you think of this recent trend, and do you think it is something that should be publicly explored by the Commission? If reconfirmed, will you in fact explore this issue?

I read no particular message in the decline in voluntary recalls because it could be the result of any number of factors, including safer products in the marketplace, more targeted CPSC actions against repeat offenders, CPSC's increased work with Customs and Border Protection at our nation's ports, or a more diffuse marketplace because of the Internet. If re-confirmed, I will look into the issue, and work on this issue with my fellow Commissioners, particularly the Chairman, who is the individual responsible for the administrative and management direction of the agency.