

**U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY &
COMMERCE
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, & TRADE
MAY 19, 2015**

**RESPONSES OF COMMISSIONER JOSEPH P. MOHOROVIC TO
QUESTIONS FOR THE RECORD**

CHAIRMAN MICHAEL C. BURGESS, M.D.

1. **The Commission recently voted to seriously undertake “Retrospective Review” of its rules and regulations to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies. I know you are a strong proponent of this activity and can you explain why you believe this should be a priority for the agency?**

I am a strong proponent of retrospective review because of its ability to improve both the quality and relevance of our regulations and our relationships with our stakeholders. The CPSC has been around for over 40 years, and some of our rules – inherited from FDA, FTC, and others – have been on the books even longer. Over that time, it is inevitable that some of our 900 pages in the Code of Federal Regulations have become obsolete in some way.

For example, most of our fireworks regulations predate both the agency and the development of methods to properly test things like explosive charge. As a result, in 2015, we are still using a test method that involves a CPSC staff member standing in a field, lighting a firework, and determining whether or not the resulting sound is loud enough to have been intentional. This test may have been the best available 45 years ago when it was developed, but we can do better today. This test and the universe of our fireworks regulations are currently under review by our staff, and we hope to have a revision within FY 2016, but, in the meantime, both effective regulation and the agency’s credibility suffer from having this antiquated, subjective test and the archaic rules that surround it still on our books.

Retrospective review has been recognized as a key component of the development of a regulatory state that achieves its public good aims with as little economic burden as possible. A government-wide retrospective review program in the United Kingdom saved more than £2 billion (over \$3 billion) in economic costs across four years and dramatically improved business’ perception of the British regulatory state. Right now, the American regulatory burden would be the 10th largest economy in the world, and CPSC certainly contributes to that. We owe it to American consumers – who ultimately pick up the tab for that burden – to ensure our costs come with safety benefits.

I am grateful to Chairman Kaye for his leadership in re-visiting this issue and helping to develop a meaningful retrospective review plan. I am optimistic that we will better fulfill our obligation in the coming years.

HON. PETE OLSON

1. **Commissioner Mohorovic, during the Decisional Meeting to publish the NPR on section 108 of the CPSIA in the Federal Register you raised concerns about the potential deviation from the CPSC’s regulatory standards in favor of the European**

precautionary approach for regulatory action. Do you believe the CPSC’s rulemaking on phthalates reflects the application of a precautionary approach? Can you share your concerns with the committee?

I do believe the spirit of the Precautionary Principle is animating some of the Commission’s choices, particularly in our CPSIA Section 108 phthalate rulemaking.

While it has been in use, in one form or another, in many countries for decades, perhaps the clearest example of the Principle – and the most relevant to the phthalate discussion – is in the European Union’s Regulation on the Registration, Evaluation, Authorisation, and Restriction of Chemicals, commonly known as REACH. Among other provisions, REACH requires pre-market registration and approval of new chemicals.

While the Precautionary Principle may sound like a formalization of the familiar aphorism that we should look before we leap, in practice it stifles choice and constrains innovation. It effectively increases the costs of creating something new, making creation a more difficult decision to justify. Contrary to its laudable public health and safety purpose, this anti-innovation tendency can in fact harm the public, discouraging companies from developing new technologies and solutions that could yield a cleaner environment or safer products. In fact, one review in the UK described stifling innovation as the Precautionary Principle’s “greatest achievement to date.”²⁰

2. Wouldn’t a more “precautionary approach” mean that we would and should continue to use a chemical for which there is no evidence of harm in its 50 years of use in products and which in itself has been shown to be safe in products, unless and until the alternatives can be proven to be safer?

While our information disclosure statute prevents me from addressing any particular chemical or brand, I do agree that, in general, the burgeoning CPSC version of the Precautionary Principle does differ from the traditional version and its preference for the status quo. In the more familiar Principle, the proponent of any deviation from the existing state of the relevant environment – whatever that state is – bears the burden of proving that it does not create additional risk of harm. Proponents of the CPSC variant seem to redefine status quo to mean a pre-chemical status quo. This improperly assumes that all chemicals are hazardous until proven benign, even those that have been in safe use for decades. CPSC is a data-driven agency, and we should rely on data to shape our policy choices, not unsupported fear.

²⁰ Joyce Tait & Joanna Chataway, Pros and Cons of the Precautionary Principle (PP): European Experience with the regulation of GM crops, 2 (2010), available at <http://www.innogen.ac.uk/downloads/AGLS-09-Pros-and-cons-of-Precautionary-Principle.pdf>.