

CPSC Is Shifting Toward Voluntary Standards

By **Sheila Millar and Boaz Green** (February 6, 2019, 3:39 PM EST)

2018 was a year of subtle changes in the U.S. Consumer Product Safety Commission's direction and operations. With Ann Marie Buerkle serving as acting chair, the CPSC was able to avoid cuts to its budget, and its operating plans did not change dramatically from previous years.

However, the agency's tone and regulatory priorities appear to be shifting to show a preference for voluntary standards and collaboration over mandatory rule-making and exacting ever-higher civil penalties. We expect these trends will continue, especially with the newly established Republican majority on the commission.

CPSC Leadership

2018 saw significant changes to the composition of the Consumer Product Safety Commission. The confirmation of Republican commissioners Dana Baiocco (after a prolonged process) and Peter Feldman (after a relatively quick process) resulted in a shift of control at the CPSC, with a 3-2 Republican majority of commissioners for first time since 2006.

Acting chair Ann Marie Buerkle remains unconfirmed as both permanent chair and commissioner, and her tenure, already in a holdover year, comes to an end in October 2019, but the White House has renominated her for those positions. The business community has consistently expressed strong support for her nomination.

Regardless of party affiliation, all commissioners maintain a strong commitment to advancing the CPSC's core mission of promoting consumer product safety, although they differ in how to achieve that goal. The arrival of the Republican majority at the CPSC in October seems to signal a greater willingness to work collaboratively with industry to advance product safety in novel ways.

An example is the CPSC's settlement of litigation seeking to force Britax Child Safety Inc., a maker of jogging strollers, to conduct a recall. That settlement, announced in November, resulted in an innovative public information campaign, combined with consumer incentives. It was not characterized as a "recall," generating dissents from Democratic commissioners Robert Adler and Elliot Kaye, but this practical approach is welcome news for businesses.



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Recalls and Letters of Advice

There were approximately 258 voluntary recalls announced in 2018, down from 381 in 2017, and a few trends are notable. There was an increase in recalls of products that fail to comply with the requirements of the Poison Prevention Packaging Act, or PPPA. We also saw multiple recalls of off-road vehicles, following reports of fire hazards and injuries (including one death).

Additionally, the CPSC appears to be increasing its focus on violations of technical paperwork requirements, such as the absence of tracking labels or certificates of compliance. Through November 2018, the CPSC issued a record number of letters of advice, or LOAs, for violations of these requirements, including over 345 LOAs for certificate of compliance violations and more than 600 LOAs for tracking label violations.

This puts the commission on track to hand out more such LOAs than in any year since at least 2012, when records regarding LOAs first became available. The CPSC's enhanced focus on enforcing technical paperwork requirements may stem from its belief that products that lack required certificates of compliance or tracking labels may be more likely to fail other safety requirements as well.

Child-Resistant Closures/PPPA Recalls

The PPPA requires child-resistant closures for packaging of certain household products; the closures must be significantly difficult for children under five years of age to open, but easy for adults to open. The CPSC stepped up its enforcement of violations of the PPPA in 2018.

Since 1992, the CPSC has conducted 30 recalls for PPPA violations. Eight of these recalls have occurred since November 2017, and six were of products that contained lidocaine with concentrations of 4-5 percent. The increase in such recalls suggests that the CPSC's Office of Compliance and Field Operations has been conducting a targeted enforcement effort of PPPA requirements, focusing, at least initially, on products containing lidocaine.

The enforcement focus on PPPA violations could change, however, to focus on other product categories. In August, the CPSC issued a new guidance letter to the e-cigarette industry regarding child-resistant closure requirements under the Child Nicotine Poison Prevention Act of 2015, which may signal increased enforcement targeting e-liquids.

Off-Road Vehicles

Reports of injuries and deaths from fire, burn, crash and rollover hazards continue to plague off-road vehicles, such as recreational off-highway vehicles or ROVs, all-terrain vehicles, utility vehicles, golf carts and off-road motorcycles.

The CPSC announced 25 recalls for off-road vehicles in 2018 alone, and an additional six recalls of ride-on mowers and compact tractors. Large civil monetary penalties levied against Kawasaki in 2017 and Polaris in 2018 over late reporting of ROV hazards illustrate the commission's deep concern about hazards in this category — and the importance of prompt reporting.

Civil Penalties and Litigation

As noted above, the CPSC filed, and subsequently settled, administrative litigation to force Britax to

recall certain models of jogging strollers. It also announced three civil penalty settlements in 2018, down from six in 2016 and 2017.

Britax

The CPSC's enforcement action and subsequent settlement with Britax was perhaps the most noteworthy enforcement case in 2018. In February 2018, the commission initiated an administrative lawsuit seeking to force Britax to recall B.O.B. jogging strollers, due to alleged hazards associated with potential front wheel detachments.

The detachments apparently resulted from consumers incorrectly using a quick-release feature that allowed them to detach and reattach the front wheel quickly. The CPSC contended that the use of the quick release function — which could result in the wheel coming off unexpectedly during use — amounted to a design defect, which Britax disputed vigorously.

Britax and CPSC reached an innovative settlement agreement that stopped short of a recall. Britax agreed to develop and launch an information campaign that includes an instructional video demonstrating how to safely and correctly operate the quick-release on the front wheel of the strollers. Consumers will also be able to receive alternative front wheel attachments or discounts on new strollers.

The settlement offered a creative solution to the problem of consumer misuse of the quick-release feature. It allowed the company to avoid the costs and complications associated with characterizing its response to a perceived safety concern as a "recall," while continuing to allow consumers to operate the stroller safely and enjoy the utility of the quick release if they choose to.

Although the Britax settlement was not without its critics — Commissioners Kaye and Adler **objected** to the majority's agreement to avoid calling the corrective action a "recall" — the agreement signals a welcome change in policy from reflexively characterizing any corrective action that advances safety as a recall. The CPSC has in the past insisted on labeling company actions as "recalls" even when doing so stretched common sense.

For example, in 2013, the CPSC and Fisher Price announced a "Recall to Inspect" of Rock 'N Play inclined sleepers that could develop mold if not cleaned properly. Calling a recommendation that consumers inspect the sleeper and contact Fisher Price for cleaning instructions if needed a "recall" devalues the term "recall."

EKO and Costco

EKO and Costco settled with the CPSC for \$1 million and \$3.85 million, respectively, over charges that the companies knowingly failed to report a potential laceration hazard posed by EKO trash cans. The Sensible Eco Living Trash Cans, sold exclusively through Costco, had a black plastic protective collar on the back of the receptacle that was capable of detaching, exposing a sharp metal edge that could injure users.

While EKO received reports of lacerations including several serious injuries, and in fact changed the trash can's design to address the laceration hazard, both EKO and Costco allegedly failed to report the defect to the CPSC as required under the CSPA. The trash cans were eventually **recalled** in 2015.

Commissioners Adler and Kaye **dissented** from the EKO settlement, stating that the \$1 million civil

penalty levied against EKO was too low, given that the retailer agreed to pay a \$3.85 million civil penalty for its “failure to report the defect associated with these very products.” They suggested that the civil penalty on EKO should have been \$4.5 million, with all but \$1 million of the penalty suspended due to EKO’s small size.

While the Costco settlement was approved before Commissioner Peter Feldman was confirmed, the CPSC had a Republican majority when it voted on the EKO settlement.

Polaris

In April, Polaris Industries, the market leader in recreational off-road vehicles, agreed to pay a \$27.25 million civil penalty for allegedly failing to timely notify the CPSC that its RZR and Ranger ROVs “contained defects that could create a substantial product hazard or that the ROVs created an unreasonable risk of serious injury or death.” Polaris recalled 2014-2018 model year RZR 900 and 1000 models, due to fire hazards that caused burn injuries and one death of drivers and passengers.

The CPSC alleged that Polaris had received numerous reports of fires, injuries and property damage before the company reported the defects to the commission in 2016. In addition, Polaris allegedly failed to report a second defect in its 2014-2015 Ranger XP 900 and Crew 900 ROVS heat shields which detached, causing fire hazards.

In a creative and unusual step, the CPSC included a “global settlement” provision that included a release of potential claims relating to hazards or defects that Polaris reported to the CPSC as of June 29, 2017.

Looking Forward on Enforcement and Civil Penalties

Acting chair Buerkle has been an **outspoken critic** of a reflexive push for higher civil penalties. The CPSC settled three matters in 2018, compared to six settlements in each of the previous two years. The most recent settlement against EKO, for \$1 million, is also considerably lower than the average settlements in 2015-2017. We expect that the Republican majority will support stiff penalties where merited, but will also be open to more novel options to settle cases 2019, as it did in the Britax matter.

It will also be interesting to see whether the commission issues a new opinion in the Zen Magnets recall litigation. In July, a Federal District Court overturned the CPSC’s decision to order Zen Magnets to recall its high-powered magnet sets. The commission’s **final decision and order** hinged on reasonably foreseeable consumer misuse as the basis for its finding of a design defect that created a substantial product hazard. Buerkle **dissented in part**, arguing that warnings could cure the potential defect.[1]

The court rejected Zen Magnets’ arguments that the final decision and order was arbitrary and capricious on the merits, but it found Zen Magnets’ due process rights were violated, because previous statements by Commissioner Adler suggested that he had predecided central issues in the case and should have recused himself.

The court remanded the case to the commission, with the instruction that Adler recuse himself. If the commission issues a new decision in the matter, with three Republicans and one Democrat, its reasoning and conclusions may be very different from the commission’s previous decision.

Rule-Makings and Voluntary Standards

The CPSC's mandatory safety standard rule-making activity in 2018 was limited to rule-making under Section 104 of the CPSIA for durable children's products. The commission unanimously finalized rules for baby changing products, high chairs and booster seats (excluding car seats). All standards incorporated the relevant ASTM voluntary standards with no changes.

When the proposed standard for baby changing products came before the commission in September 2016, it included several revisions to the proposed ASTM standard, which had not been finalized. During the decisional meeting, former Commissioner Joseph Mohorovic, with then-Commissioner Buerkle's support, moved to delay the vote by six months, to allow the ASTM subcommittee to finalize the voluntary standard.

However, the commission did not adopt the motion advanced by the two Republican commissioners, and, in a 3-2 party-line vote, approved the publication of the proposed rule. By the time the commission voted on the final rule, however, the ASTM standard and the proposed final rule had come into alignment and Buerkle voted in its favor.

The reduction in mandatory standards activity, which we expect will continue in 2019, is consistent with Buerkle's stated preference for voluntary consensus standards over mandatory standards, where possible, and with statutory directives that the commission defer to an adequate voluntary standard reflected in Section 7(b) of the Consumer Product Safety Act, 15 U.S.C. Section 2056(b).

In a recent article published in Law360, Adler discussed the ever-changing balance between mandatory and voluntary standards, and outlined a number of ways he believes voluntary standards, and the process for developing them, could be improved in the name of better safety. While Adler has been championing these ideas for many years, the timing of the article may indicate his attempt to find a bipartisan compromise approach — favoring voluntary standards, but pushing to make them more rigorous.

Expected Rule-Making Activity in 2019

Under the 2019 Fiscal Year Operating Plan, the CPSC is not expected to develop new safety standards other than standards for durable children's products under Section 104 of the CPSIA. The commission is also planning to finalize some procedural rules and propose new burden-reduction initiatives.

We expect that the current commission will consider terminating several rule-making activities that generated strong opposition from business stakeholders on legal and policy grounds. These include:

- The proposed revisions to 16 CFR Section 1101, "Information Disclosure Under Section 6(b) of the Consumer Product Safety Act."
- The proposed revisions to the voluntary recall rule, 16 CFR Section 1115.20
- The proposed mandatory safety standard for ROVs. This rule was up for termination in January 2017 as a result of changes to the voluntary standard for ROVs, but the Democratic majority voted against termination.

The updates to the UL and ANSI/PGMA voluntary standards for portable generators, which now include a requirement for a carbon monoxide detection and shutoff feature, complicate the CPSC's ability to move forward with rule-making for portable generators. While the commission's statutory framework

requires it to give deference to an adequate voluntary standard, Senator Richard Blumenthal, D-Conn., who is the ranking member on the Consumer Protection, Product Safety, Insurance, and Data Security Subcommittee on the Senate's Commerce, Science and Transportation Committee, has expressed strong support for a rule.

The CPSC's proposed revisions to the fireworks safety standards died after a proposed final rule was presented to the commission and the scheduled commission vote was cancelled after concerns were raised about the merits. While the CPSC is not likely to finalize the rule, it seems unlikely that the commission will dedicate staff resources to prepare a formal vote on terminating rule-making in the near future.

Another controversial rule-making activity, which was strongly opposed by Republican commissioners and the business community, is the proposed ban on certain organohalogen flame retardants, or OFRs, in four classes of consumer products, in response to a petition by a coalition of consumer advocacy and environmental organizations. CPSC staff proposed denying the petition on grounds that data suggesting that OFRs be treated as a single class was lacking.

However, the former Democratic commission majority, in an unusual move, overruled staff, initiated a rule-making, recommended creating a chronic hazard advisory panel, or CHAP, and issued "nonbinding guidance" on OFRs. The operating plan for next year has already funded work by the National Academy of Sciences to create a scoping and feasibility study for the creation of an OFR CHAP, which is the first step in the rule-making process. It remains to be seen whether the commission will fund a CHAP in the next operating plan, or act to rescind the previous guidance.

Collaborations and Outreach

Industry

In November, the CPSC announced expanded collaboration with the Retail Industry Leaders Association, Safe Kids Worldwide and The Toy Association to promote toy safety and provide consumer guidance during the holidays. Such joint collaborative information campaigns have not been common over the previous few years, but more such initiatives could potentially develop under Buerkle's leadership.

Connected Products

In May, the CPSC held its first public forum on connected products, "The Internet of Things and Consumer Product Hazards." The hearing focused on unique challenges and considerations that connected products pose for product safety. The event brought together stakeholders from industry, academia, government agencies and the public to discuss topics such as voluntary standards, risk-based approaches, consensus-building, safety by design and transparency.

We expect the CPSC will continue focusing on connected products, working with voluntary standards organizations, and likely with other federal agencies to align on jurisdictional questions and principal responsibilities associated with the question of connected device security vulnerabilities, particularly distinguishing between instances where vulnerabilities or breaches affect personal data versus safe operation of a physical connected device.

Recall Effectiveness

In February 2018, CPSC staff issued its report on the July 2017 Recall Effectiveness Workshop. The agency subsequently issued a request for information, seeking stakeholder input on direct and targeted notice and how they may contribute to higher recall effectiveness. The agency's operating plan calls for additional focus on improving recall effectiveness, and we may see further efforts to engage with stakeholders on this issue.

Conclusion

2019 will be the first full year of the CPSC under Republican leadership in over a decade. The leadership change will likely mean a renewed focus on voluntary standards, collaboration with stakeholders and consumer education. It may also result in a broader dialogue of novel ways to address potential product safety questions and how to streamline the process.

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[1] The commission's reasoning in the Zen Magnets decision was the basis for its reasoning in initiating the recall lawsuit against Britax.