



CPSC Issues and Trends: An Update on Current Developments in Product Safety

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Agenda

- CPSC Overview and Update
 - CPSC Jurisdiction
 - CPSA Section 15(b) Requirements
 - Compliance Tips
 - Trends in Enforcement
 - New Laws and AI
 - Adjacent Issues: PFAS, Warranty & Right-to-Repair, Claims, MoCRA



Consumer Product Safety Commission Overview

Established in 1973, CPSC is an independent executive branch commission.

- Up to 5 commissioners; no more than three may be affiliated with the same political party.
- Each commissioner is appointed by the president and confirmed by the Senate for staggered set terms of 7 years.
 - The chairman influences the CPSC agenda, operating budget allocation, and direction of certain policies.
 - Maybe chosen from the commissioners or be a new appointment.

Current Commission has four commissioners total, including the chairman.

- Chair Alexander Hoehn-Saric (D)
- Commissioner Mary Boyle (D)
- Commissioner Richard Trumka (D)
- Commissioner Peter Feldman (R)
- One seat open (R)



What is a Consumer Product?

- According to the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, “consumer product” is defined as:
 - any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise.
- Excludes:
 - Motor vehicles and motor vehicle equipment (regulated by NHTSA);
 - Boats (regulated by Coast Guard);
 - Aircraft (regulated by FAA);
 - Pesticides (regulated by EPA) ;
 - Tobacco and firearms (regulated by TTAB);
 - Food, drugs, cosmetics and medical devices (regulated by FDA); and
 - “Any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer.”

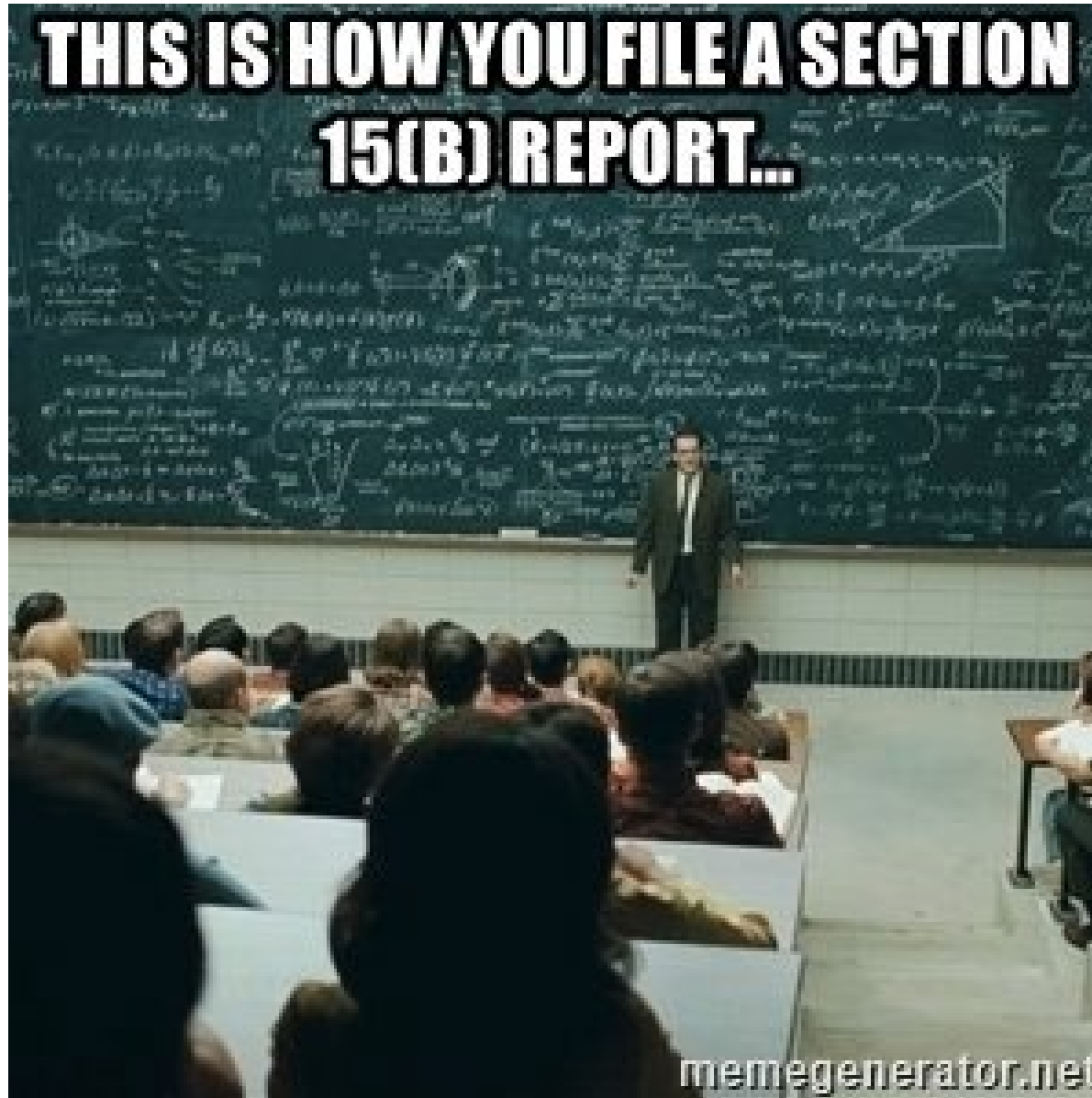
Consumer Product Safety Improvement Act (CPSIA)

- In 2008, Congress passed the CPSIA (updating 1972 CPSA) with bipartisan support.
- The Act is an umbrella statute: it defines CPSC's basic authority and authorizes the Agency to develop standards and bans.
 - Directed CPSC to promulgate mandatory standards for children's durable products and toys and require product registration cards.
 - Required third-party testing and certification for certain chemicals in certain products.
 - Directed the CPSC to create a public database to report consumer incidents – www.saferproducts.gov.
 - Increased the civil monetary penalty amounts to \$15 million.
 - Provides CPSC with the authority to pursue recalls and to ban products under certain circumstances.
 - Requires mandatory reporting of products that may present a risk of injury or that may violate a mandatory standard.

Relevant Statutes

- Consumer Product Safety Act (CPSA)
- Consumer Product Safety Improvement Act (CPSIA)
- Poison Prevention Packaging Act (PPPA)
- Federal Hazardous Substances Act (FHSA)
- Children's Gasoline Burn Prevention Act (CGCPA)
- Flammable Fabrics Act (FFA)
- Child Safety Protection Act (CSPA)
- Labeling of Hazardous Art Materials Act (LHAMA)
- Refrigerator Safety Act (RSA)
- Virginia Graeme Baker Pool and Spa Safety Act (VGB Act)
- Drywall Safety Act (DSA)
- Child Nicotine Poisoning Prevention Act (CNPPA)
- Safe Sleep for Babies Act
- Reese's Law
- Portable Fuel Container Act
- Sturdy Act

**THIS IS HOW YOU FILE A SECTION
15(B) REPORT...**



Section 15(b) – Mandatory Reporting to CPSC

Section 15(b) of the CPSA requires reporting upon receipt of information that “reasonably supports the conclusion” that any product over which CPSC has jurisdiction fails to comply with “any ... rule, regulation, standard, or ban” under any Act enforced by the Commission:

- A defective product that could create a substantial risk of injury to consumers;
- A product that creates an unreasonable risk of serious injury or death; and
- Certain specific triggers/statutory violations: death from choking on toys (violation of small parts standard), presence of hazardous substances or poisons, etc.

Who must make a Section 15(b) report to the CPSC?

- Manufacturers, importers, distributors, and retailers of consumer products have a legal obligation to report.

Timing: “Immediately,” i.e., within 24 hours of obtaining “reportable information.”

- Allowed up to 10 days to investigate.
- Additional 5 days to percolate through corporate/executive decision making.
- Failure to report in a timely manner may lead to a claim by the CPSC for civil monetary penalties and increased compliance requirements.

Is there a Hazard or Defect?

Is there a “Substantial Product Hazard” or “Unreasonable Risk of Injury or Death” that requires reporting?

- A failure to comply with an applicable consumer product safety rule under the CSPA or a similar rule, regulation, standard, or ban under any other Act enforced by the CPSC that creates a substantial risk of injury to the public, or
- A product defect that creates a substantial risk of injury or death to the public.
- Commission will consider the following factors:
 - risk of injury;
 - pattern of defect;
 - number of defective products distributed in commerce;
 - severity of the risk; or
 - other considerations, including reasonably foreseeable use and misuse of a product.
- Presence of any one factor alone can result in a finding that a product defect (or noncompliance) that creates a defect substantial product hazard, e.g., just one injury (or risk of severe injury) or even zero injuries may be enough if it is severe enough.
- Product can be defective with respect to its design, manufacture, or warnings (just as with products liability law)—multifactor analysis.

Types of Product Recalls

- The CPSC issues three types of recalls: Fast Track, Voluntary, and Mandatory:
 - Fast Track: Company-initiated voluntary recalls where no determination of substantial product hazard is made.
 - Voluntary: Company or CPSC-initiated voluntary recall which may include a preliminary determination (PD) that a substantial product hazard exists.
 - Mandatory: Cases in which the CPSC sues to force a company to conduct a recall; must include a preliminary determination of a substantial product hazard.
- Not every report leads to a recall. Except when Fast Track Recall is requested, Commission will evaluate nature of the hazard and make a determination:
 - Class A Hazard: Exists when a risk of death or grievous injury or illness is likely or very likely, or serious injury or illness is very likely.
 - Class B Hazard: Exists when a risk of death or grievous injury or illness is not likely to occur, but is possible, or when serious injury or illness is likely, or moderate injury or illness is very likely.
 - Class C Hazard: Exists when a risk of serious injury or illness is not likely, but is possible, or when moderate injury or illness is not necessarily likely but is possible.

What is the Remedy?

- What is the remedy?
 - Replacement
 - Repair
 - Refund
- CPSC is focused on trying to make recalls as effective as possible.
 - Recall Effectiveness Workshop:
 - Leveraging technology
 - Directly contacting customers
 - Creative ideas to make recalls easier
- Consider:
 - What is the best way to reach consumers who have the product?
 - Email—do you have all email addresses?
 - Commission will require internet posting; there is increasing insistence on social media as well
 - Other customer touchpoints
 - What remedy will ensure the highest level of product returns, so that the product is out of consumers' hands?

CPSC Compliance Tips



What does the CPSC say about compliance policies and programs, generally?

[The CPSC Recall Handbook](#) - 2012

- P.26: “Companies whose products come under the jurisdiction of the CPSC should consider developing an organizational policy and plan of action if a product recall or similar action becomes necessary, whether it involves the CPSC or another government agency. This policy and any related plans should focus on the early detection of product safety problems and prompt response.”

[The CPSC Regulated Products Handbook](#) - 2013

- P.25: “Companies whose products come under the jurisdiction of the CPSC should develop an organizational policy and plan of action to identify violative products during production and before a product recall or similar action becomes necessary. This policy and any related plans should focus on the early detection of product safety problems and execution of a prompt response.”

[The CPSC Handbook For Manufacturing Safer Consumer Products](#) - 2006

- P.17: “PRODUCT SAFETY POLICY: The commitment of the manufacturer is the first executive step to be taken in developing an industrial consumer product safety system. A clear, strong statement from senior management citing statutory and voluntary reasons for this commitment is needed. The policy should be explicit with respect to the primacy of product safety during design, production and distribution. This policy should also make clear that it applies not only to the internal operations but also to suppliers, including suppliers of products manufactured outside the U.S. Ordinarily such a statement is publicized widely within the organization as a platform for subsequent planning and action. It may also be widely publicized outside the organization.”

[Guidelines for Retailers and Reverse Logistics Providers](#) – 2013

- “It is your responsibility to monitor CPSC recalls and ensure that your business complies with the law.”

The #1 Reason to Have a Compliance Program

[16 C.F.R. § 1119.4\(b\)\(1\) Factors considered in determining civil penalties.](#) – 2010 (interpretative guidance)

Safety/compliance program and/or system relating to a violation. **The Commission may consider, when a safety/compliance program and/or system as established is relevant to a violation, whether a person had at the time of the violation a reasonable and effective program or system for collecting and analyzing information related to safety issues.** Examples of such information would include incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns. The Commission may also consider whether a person conducted adequate and relevant premarket and production testing of the product at issue; had a program in place for continued compliance with all relevant mandatory and voluntary safety standards; and other factors as the Commission deems appropriate. The burden to present clear, reliable, relevant, and sufficient evidence of such program, system, or testing rests on the person seeking consideration of this factor.

Goals of a CPSC Compliance Program

Design, implement, maintain, and enforce a system of internal controls and procedures to ensure that, with respect to all consumer products imported, manufactured, distributed or sold by the firm:

- Information required to be disclosed by firm to the CPSC is recorded, processed, and **reported** in accordance with applicable law;
- All reporting made to the CPSC is **timely**, truthful, complete, accurate and in accordance with applicable law; and
- Prompt disclosure is made to firm's management of any significant deficiencies or **material weaknesses in the design or operation of such internal controls** that are reasonably likely to affect adversely, in any material respect, the firm's ability to record, process, and report to the CPSC in accordance with applicable law.

Top 12 CPSC Compliance Tips



Compliance Tips

1. **Assign oversight** of the company's CPSC compliance and accountability to a senior management position such as regulatory compliance manager or director of compliance.
2. Maintain **written standards, policies, and procedures** designed to ensure that relevant product safety information that may relate to or impact CPSC compliance (including information obtained by quality control personnel) is conveyed effectively to personnel responsible for CPSC compliance, including reporting to the CPSC.
3. **Communicate CPSC compliance policies and procedures** to all applicable employees in risk management, legal, regulatory, marketing, product design, information technology, and compliance related roles, through **regular training programs**.
4. Provide a mechanism, such as an **anonymous hotline or online portal**, for confidential employee reporting of CPSC compliance-related questions or concerns to the chief compliance officer, regulatory compliance manager, or other officer.
5. Implement a thorough **Records Retention and Maintenance** system for product-safety related records, such as: records of product-related complaints, warranty returns, insurance claims, and lawsuits; production records; distribution records; quality control records; and product registration cards. Consider including retention cycles of at least five years.
 - A minimum of 5 years for most records or the “expected life” of the product.
 - Data from product registration cards for durable infant products must be retained for 6 years.
6. **Require proper testing and certifications** from all suppliers for all products and ensure that company compliance officials are aware of updated mandatory and voluntary standards.

Compliance Tips (part deux)

7. Regularly **track product safety information and incidents**, including product return rates, call center data, and ratings by consumers on various websites, and evaluate the information to see if it reflects on product quality and safety issues.
 - Leverage technology and analytics if available.
8. Institute **regular reviews** of all of the above-referenced product information and incident data so that appropriate information is regularly conveyed to senior level company officials who are responsible for CPSC compliance and reporting in a systematic and organized fashion.
9. Assign a **recall coordinator** who has full authority to take the steps necessary (including reporting to the CPSC) to initiate and implement all recalls, with the approval and support of the firm's chief executive officer.
10. Maintain a “**product hold process**” (or its equivalent) through which the sale of products can be placed on hold for reasons of design, manufacture, performance, or safety.
 - Leverage POS technology.
11. Plan for a complete “**Reverse Logistics**” program to ensure all recalled products are identified, isolated, and either destroyed or returned to the manufacturer.
 - Also, maintain a program for the appropriate **disposition of recalled goods**.
12. Design and implement a product **post-recall monitoring** system before the start of a recall, including collecting and maintaining information about product returns and recall complaints.

The Big Story: Penalty Cases and Settlements

FY23 (so far)

Peloton Agrees to Pay \$19 Million Civil Penalty for Failure to Immediately Report Tread+ Treadmill Entrapment Hazards and for Distributing Recalled Treadmills

FY22

Core Agrees to Pay \$6.5 Million Civil Penalty for Failure to Report Serious Injuries Involving its Exercise Equipment (Jan. 2022)

Vornado Agrees to Pay \$7.5 Million Civil Penalty for Failure to Immediately Report Space Heaters Posing a Fire Hazard (July 2022)

Segway Powersports Assessed \$5 Million Civil Penalty for Unlawfully Importing ATVs (Aug. 2022)

TJX Agrees to Pay \$13 Million Civil Penalty for Selling, Offering for Sale and Distributing Recalled Products (Aug. 2022)

Clawfoot Supply Agrees to Pay \$6 Million Civil Penalty for Failure to Immediately Report Shower Seats Posing Fall and Laceration Hazards (Sept. 2022)

The Big Story: Penalty Cases and Settlements (cont'd)

FY21

Walter Kiddie Agrees to \$12 Million Civil Penalty, Compliance Program for Failure to Report Defective Fire Extinguishers (Jan. 2021)

Cybex Agrees to \$7.95 Million Civil Penalty, Compliance Program for Failure to Report Defective Exercise Equipment (Feb. 2021)

Gree Appliance Companies Charged with Failure to Report Dangerous Dehumidifiers and Agree to **\$91 Million Resolution**

- **Gree U.S. Subsidiary Agrees to Plead Guilty to Felony Charge**
- **Two Corporate Executives Indicted in First-Ever Criminal Prosecution** for Failure to Report Under Consumer Product Safety Act (**they face up to 5 years in prison each**)

FY19

Costco Agrees to \$3.85 Million Civil Penalty, Compliance Program for Failure to Report Defective Trash Cans (Oct. 2018)

EKO Agrees to \$1 Million Civil Penalty, Compliance Program for Failure to Report Defective Trash Cans (Nov. 2018)

Unilateral Press Releases

- This is the first thing that happens if you can't agree on a recall with CPSC: Press release warning consumers not to use the product, characterizing the product as dangerous, and informing the world that the company has **refused** to conduct a recall or to agree to an "acceptable" recall
 - Company gets opportunity to comment if it's a defect issue, but not if it's a mandatory standard issue; 6(b) doesn't apply to "information about a product which the Commission has reasonable cause to believe is in violation of any consumer product safety rule..."
- Recent unilateral press releases
 - Walmart marketplace seller (bike helmets), 3/9/2023
 - Butterfly Express (essential oils), 12/22/22
 - Otteroo (infant flotation rings), 11/22/22
 - Future Motion (self-balancing electric skateboard), 11/16/22
 - Go-Bowen (youth ATVs), 9/28/22
 - Mobility Transfer Systems (adult portable bed rails), 6/2/22
 - Safety International (baby evacuation bag), 5/20/22
 - Leacho (infant loungers), 1/20/22
 - Waupaca Elevator Company (residential elevators), 1/11/22

Administrative Enforcement Actions

- This is the second thing that happens if you can't agree on a recall with CPSC
- Getting to this point is very risky
 - First you have to win before the ALJ
 - But the Commissioners can overrule the ALJ (e.g., Zen Magnets)
 - So then, you have to sue in district court
 - But if you win in district court, CPSC will appeal
 - So much bad press, legal fees along the way
- Recent administrative enforcement actions
 - Leachco (infant loungers), initiated 2/22
 - Amazon (CO detectors, children's sleepwear, and hair dryers), initiated 7/21
 - thyssenkrupp (residential elevators), initiated 7/21, settled 9/22
 - Britax (jogging strollers), initiated 2/18, settled 7/19

Damaging Commissioner Statements

- So you've worked cooperatively with CPSC and agreed on a recall. What now?
 - The Commissioners can still issue scathing remarks about your company

- Statement of Commissioner Peter A. Feldman on Corrective Action Plan with Epoch Everlasting Play, LLC (3/9/23):

“Today, [CPSC] announced a corrective action plan regarding Epoch Everlasting Play, LLC’s (EEP’s) Calico Critters brand toys. Because these toys have resulted in two known fatalities and one near miss, I have **for years** called on the Commission to act. Today’s recall should be only a first step. I will **continue to urge Commission staff to review similar Calico Critters toys and accessories** to ensure safety.

With today’s announcement, I believe CPSC **should also determine whether EEP has complied with its reporting obligations to the Commission.** Firms that knowingly violate CPSC reporting requirements are subject to civil and, in certain instances, **criminal penalties.**

As I have stated on several occasions, **I believe this recall should have happened sooner.** For too long, CPSC dragged its feet on robust enforcement with respect to the recalled products and the choking hazard they present, unnecessarily placing lives at risk. I hope today’s action offers some solace to the families who lost children to these products.”

- This is a gift to the plaintiff’s bar

New Laws

Reese's Law

- Directs CPSC to develop performance standard for battery compartments of consumer products that contain button cell or coin batteries
- Directs CPSC to create warning label requirements for button cell and coin batteries and consumer products that contain them
- Requires child-resistant packaging for button cell and coin batteries

STURDY Act

- Requires CPSC to establish a mandatory consumer product safety rule for free-standing furniture items
- Rigorous testing
- Warning requirements

Safe Sleep for Babies

- Bans crib bumpers and inclined infant sleepers

Artificial Intelligence and Machine Learning

CPSC is focused on how AI/ML may impact long term safety of products that may operate differently over time. ***AI/ML may present a safety risk but may also enable identification and mitigation of potential hazards before they manifest.***

- May 2021 Report:
 - Highlights recent staff activity, including hiring staff technologist and establishing AI/ML Working Group.
 - Proposes framework for evaluating potential safety impact of AI and ML in products:
 - Screen products for “components” of AI (e.g., data, algorithms, computations and connections) and ML (e.g., assessing/monitoring outputs, analyzing/modeling changes, adapting behavior over time) capabilities.
 - Assess functions and features of AI/ML capabilities.
 - Understand how AI/ML capabilities may impact consumers.
 - Ascertain if and how AI/ML capabilities may transform product and its use over time.
- August 2022 Report:
 - Builds on 2021 report by describing in greater detail a proposed process to evaluate AI/ML technologies in consumer products to determine if they pose a potential hazard: (1) screen for AI/ML components; (2) assess the contribution they make to the product; (3) analyze if they contribute to known hazards; and (4) monitor/measure their transformations.

Adjacent Issues

- State PFAS laws
- Claims/Labeling
- Warranty and Right-to-repair
 - FTC enforcement
 - Class actions

Adjacent Issues (cont'd)

- Modernization of Cosmetics Regulation Act (MoCRA)
 - Effective December 29, 2023
 - Any facility (even foreign facilities) that manufactures or processes cosmetics intended for sale in the U.S. must register with FDA
 - Manufacturers/packers/distributors must submit product, ingredient, and other information to FDA
 - Recordkeeping and adverse event reporting requirements
 - New labeling requirements

Wrap Up

- CPSC compliance is more important than ever. The threat of civil penalties and even criminal penalties is real
- CPSC's priorities:
 - Pursue vigorous enforcement
 - Proactive approach to identifying AI/ML hazards
 - Adding staff, including to import surveillance
 - Enhance communication efforts alerting consumers to hazards and recalls



Questions?

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