

Shift In CPSC Leadership Means More Changes To Come

By Erin Bosman, Julie Park and Dean Atyia

Law360, New York (July 25, 2017, 11:21 AM EDT) -- At the midpoint of 2017, we look back on the U.S. Consumer Product Safety Commission's activity under the new administration, including how recalls and penalties stack up against previous years, new focal points for safety initiatives and enforcement and an interesting development from the White House that could affect the CPSC's regulatory approach in the future.

The most significant developments we expect in the coming months are a reversal in the trend of enforcement and steep penalties. Consumer products providers are increasingly willing to voluntarily recall products rather than wait for the CPSC to initiate an investigation. It would not be surprising if this pattern of self-regulation resulted in more cooperation between the CPSC and consumer products providers and, ultimately, an overall reduction in civil penalties.

Additionally, a major shift in the leadership of the CPSC is expected to occur in October of this year. Commissioner Marietta S. Robinson was appointed by President Obama in June of 2013. Her term expires on October 27 of this year.

President Trump will likely appoint a Republican to replace Commissioner Robinson, which would swing CPSC leadership to a 3-2 Republican majority. Given President Trump's emphasis on deregulation, a Republican-dominated Commission would likely further contribute to a reduction in enforcement and civil penalties.

By the Numbers

In the first half of 2017, the CPSC has issued three civil penalties in the amounts of \$5.8 million, \$4.65 million, and \$5.2 million. At midyear, this total of \$15.65 million puts 2017 on course for a cumulative penalty figure lower than the \$37.3 million total that the CPSC levied in 2016. But at this pace, 2017 would still end with significantly more penalties than 2015's \$21.4 million total, which would comport with the CPSC's trend of increased civil penalties over the past few years.

Voluntary recalls also continue to increase, although the average number of products per recall has



Erin Bosman



Julie Park



Dean Atyia

declined. 2016 saw 329 product recalls that ultimately resulted in approximately 247,408,633 units recalled. This was over eight times the number of units recalled in 2015 as a result of 290 product recalls.

As of mid-June, there have been approximately 138 recalls in 2017 that account for approximately 12,107,139 affected units. While the number of recalls in 2017 is proportionally comparable to those over the past two years, the number of affected units is markedly lower.

The lower number of units recalled in 2017 is due in part to Samsung Electronics Co.'s Galaxy Note 7 recall, which encompassed approximately 2 million units as of October last year.[1] However, it may also be the result of the increased ability for companies to narrow a recall's scope by lot numbers or date ranges, or an increased willingness by the industry to conduct voluntary recalls for smaller issues. Regardless of the underlying cause, the decreased number of total affected units is an improvement for consumers and industry alike.

President Trump Seeks Deregulation, CPSC Role Still Unclear

In February of this year, Republican Ann Marie Buerkle was named acting CPSC Chairman, replacing former Chairman and Democrat Elliot Kaye. Kaye, known for his platform of increased CPSC enforcement and higher civil penalties, stepped down to occupy one of the four remaining positions for CPSC commissioners.

Just before Chairman Buerkle was appointed and in an effort to spurn business growth, President Trump directed all federal agencies to eliminate two rules for every new rule proposed in an executive order dated Jan. 30, 2017.[2] According to the President, regulations are stifling domestic businesses and up to 70 percent of existing regulations can be eliminated.[3]

Chairman Buerkle and Commissioner Kaye are at odds when it comes to the CPSC's response to the President's edict. Commissioner Kaye has taken the position that the President's executive order does not apply to independent agencies. Furthermore, Kaye represents that although the CPSC has attempted to follow the spirit of presidential orders in the past, it will only do so to the extent the orders comport with sound public policy and the agency's public health and safety mission. In Kaye's own words, Trump's executive order "clearly fails" these requirements.[4]

In contrast, Chairman Buerkle advocates compliance with the spirit of the President's executive order, stating that "seeking to reduce regulatory burdens is responsible governance,"[5] but she does acknowledge that his regulatory executive orders are not definitively applicable to independent agencies like the CPSC.

It seems that Chairman Buerkle's inclination to implement the President's deregulatory agenda has spurred action from the CPSC. Earlier this month, the CPSC issued a request for information, seeking "suggestions for ways the Commission could potentially reduce burdens and costs of its existing rules, regulations, or practices without harming consumers." [6] Written comments must be submitted to the CPSC by Sept. 20, 2017.

It is unclear what action, if any, the CPSC will formally take to reduce the burden of the existing enforcement regime, but it is possible that the agency will eliminate or alter existing rules. Such action seems to be another effort to reverse the increased enforcement trend initiated during Commissioner Kaye's tenure as Chairman.

Looking Forward

It is difficult to predict how 2017's emerging developments and trends will play out into the future, but the numbers seem to indicate that the CPSC started out on track for another year of penalties and recalls comparable to those in 2016, following its trend of increased enforcement.

However, with the appointment of Chairman Buerkle, her reaction to President Trump's deregulation order and the potential appointment of another Republican commissioner, we believe we are likely to see a reversal of the trend. As usual, we will continue to monitor developments in this area and provide regular updates.

Erin M. Bosman and Julie Y. Park are partners, and Dean Seif Atyia is an associate, at Morrison & Foerster LLP in San Diego.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.cpsc.gov/Recalls/2017/Samsung-Expands-Recall-of-Galaxy-Note7-Smartphones-Based-on-Additional-Incidents-with-Replacement-Phones>.

[2] <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>.

[3] <http://thehill.com/regulation/337953-consumer-safety-commission-looks-to-reduce-regulatory-burdens..>

[4] Id.

[5] Id.

[6] 82 FR 27636 (2017-12434): <https://www.federalregister.gov/documents/2017/06/16/2017-12434/request-for-information-on-potentially-reducing-regulatory-burdens-without-harming-consumers>.