

Expect More CPSC Litigation, Regulation, Penalties In 2023

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The U.S. Consumer Product Safety Commission will take a hard and fast approach to product safety in fiscal year 2023, according to its recently passed operating plan — with enforcement being at the top of its priority list.

Companies can prepare for this enforcement focus, and other CPSC objectives laid out in the plan, by ensuring internal compliance programs are comprehensive and comprehensively implemented, confirming standard operating procedures are current and closely followed, and proactively engaging with voluntary standards organizations and the CPSC to reach consensus on workable solutions.

The CPSC will levy swift and strong civil penalties for product safety infractions — but, under this plan, it will also evaluate 100% of those cases for potential referral to the U.S. Department of Justice for criminal prosecution of corporate offenders, to meaningfully deter future misconduct.

The CPSC will publicize import seizures to flex its power at the ports, and — funds permitting — increase staffing in the commission's Office of Compliance and Enforcement and Office of the General Counsel.

These priorities signal that the current commission, which will likely hold office beyond the current administration, will continue to increase the speed of its actions and the consequences for facilitating risky consumer products into commerce, and for failing to timely file Section 15(b) reports — the legal requirement of manufacturers, sellers, distributors and importers to provide prompt notice to the commission when they learn of any information that "reasonably supports the conclusion" that a product contains a defect that could create a substantial product hazard or unreasonable risk of serious injury or death.

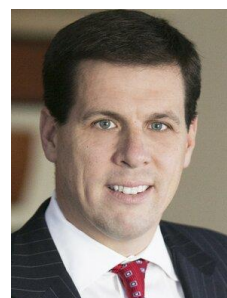
Beyond enforcement, there are other substantive issues that the CPSC plans to tackle in 2023, including the evaluation of chronic hazards associated with per- and polyfluoroalkyl substances in textiles and children's products. The focus on PFAS is part of a larger initiative to enhance the commission's efforts to track international standards on all chemicals that affect consumer products.



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Air quality hazards associated with gas stove emissions will also be on the CPSC's to-do list. The commission will be looking at whether there are workable solutions to gas appliance emissions, as opposed to a potential ban of those appliances.

Safety equity will be enhanced by the CPSC's commitment to integrate data and analyses of product risks having disparate impacts on age and gender. The commission will also study whether certain products or product classes more adversely affect underserved communities. Expect secondary markets, resellers and e-platforms to be among the targets in those research reports.

Other CPSC objectives for 2023 include the following:

- The CPSC will employ more continuity in its port inspections and operational activities, setting stronger metrics for improving its targeting to stop hazardous products from reaching consumers.
- The beta pilot test of the commission's new e-filing program will happen in 2023, which should enable importers of regulated consumer products to electronically file certain data with U.S. Customs and Border Protection for importation purposes. The results will inform rulemaking.
- Infant safety will remain important, with more anticipated rulemakings for sleep products and infant rockers. Expect more discussion on whether the existing pillow ban should be expanded to include nursing and other infant pillows.
- The commission intends to issue guidance and enforcement on Reese's Law, which requires manufacturers to meet certain packaging requirements for certain batteries under the Poison Prevention Packaging Act by mid-February. A warning label is now required on packaging and in any literature or user manual that accompanies a consumer product containing button cell and coin batteries that warns of the risk of injury from ingestion by children six and younger during "reasonably foreseeable use or misuse conditions."
- The commission will strengthen protection of its data and networks. It will continue to monitor whether data privacy legislation negatively affects recall effectiveness.
- CPSC communications and safety messaging will expand into more communities. This will include rulemaking aimed at improving the commission's ability to share product hazard information more readily with the public. Unilateral press releases will be used liberally.

The 2023 operating plan is consistent with the goals advanced by the CPSC in 2022. Last year, the CPSC was arguably the most active it had ever been, operating at historical levels with regard to regulatory actions. The CPSC passed 12 mandatory standards, proposed 23 final rule packages, banned inclined and other infant sleep products, generated congressional action in the enactment of the Safe Sleep for Babies Act, and Reese's Law.

The commission levied four civil penalties in 2022 totaling \$32 million. It initiated litigation against multiple firms that failed to timely file Section 15b reports and refuse to settle. And in August 2022, it received affirmation from the U.S. Court of Appeals for the District of Columbia Circuit, in *Finnbin LLC v. CPSC*, for its rulemaking authority and expertise arising out of a challenge to its sleep products rule.

The CPSC conducted more than 60,000 product screenings at various ports of entry, and removed nearly

19 million noncompliant or unsafe items from commerce. Expect the commission to continue its interdicting activities at ports of entry.

How Companies Can Prepare

Considering the CPSC's plan as a whole, there are a few key points that should not be overlooked.

First, the commission is signaling that it intends to use all available means to send a message to would-be bad actors in the safety world. That is exactly why, in addition to imposing monetary fines, it plans to review all cases to see whether violations are intentional or egregious.

Plans to refer more cases to the DOJ for criminal prosecution shows that the commission has little tolerance for violators, and will be less likely to wait and see what might be worked out with offenders. In light of this focus, firms should review internal compliance programs to ensure they are comprehensive, fully understood and consistently implemented.

Internal groups, such as quality assurance or safety committees, responsible for assessing product safety and satisfying government reporting obligations should review standard operating procedures to confirm that they are up-to-date and appropriately followed.

Relatedly, entities exploring mergers or acquisitions of consumer product companies should carefully conduct due diligence of applicable compliance processes, safety records and product quality to avoid assuming liabilities like CPSC investigations, penalties and recalls, post-closing. Acquisition of product lines that may be subject to new and more restrictive standards should also be considered, to determine economic feasibility.

Second, the commission has signaled its intent to look at more complex and timely issues that have perhaps been dormant.

For example, the CPSC has looked at carbon monoxide sensors and gas appliance emissions before. Here, however, the CPSC seems to foreshadow the possibility of far-reaching regulatory action in this area.

If this applies to your company, it might be beneficial to engage with voluntary standards organizations and the CPSC to reach consensus on workable solutions, as opposed to waiting for a potential ban on the way appliances are currently manufactured and sold.

Third, safety equity is long overdue, and the CPSC is committed to looking more closely at product risks and hazard patterns that are adversely skewed toward certain communities, ages or genders.

The CPSC expressly plans to increase and more narrowly tailor some of its safety messaging, so that those consumers and families who might be at an increased risk for injury from a particular hazard have access to important safety information.

Funding remains one of the commission's largest obstacles to achieving its robust agenda. But make no mistake: The CPSC, now celebrating its 50th anniversary, is not the same old CPSC. It is much more sophisticated, and focused on a full range of issues and goals.

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