



NUMBER: 0318.2¹

SUBJECT: Delegation of Authority to Assert Deliberative Process Privilege in Specific Administrative Litigation Matter (Leachco)

DIRECTIVE OWNER: Office of General Counsel (OGC)

EFFECTIVE DATE: April 4, 2022

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1. **PURPOSE.** To memorialize the delegation of authority, from the Chair to the Deputy Executive Director for Operations, to assert the deliberative process privilege as appropriate and consistent with existing Commission practice and applicable law for specific administrative litigation matters.
 2. **SCOPE.** This delegation applies to the following adjudicative proceeding:
 - a. *In the Matter of Leachco, Inc.* (CPSC 22-1)
 3. **AUTHORITIES.**
 - a. Section 4(f)(1) of the Consumer Product Safety Act (CPSA) as amended (15 U.S.C. § 2053(f)(1)).
 - b. Sections 15(c), (d), and (f) of the CPSA (15 U.S.C. §§ 2064(c), (d), (f)).
 - c. 5 U.S.C. § 554 of the Administrative Procedure Act (APA).
 - d. 16 CFR Part 1025, Rules of Practice for Adjudicative Proceedings.

Sections 15(c), (d), and (f) of the CPSA authorize adjudicative proceedings. Part 1025 of 16 C.F.R. governs the procedures in adjudicative proceedings. Section 1025.31(c)(2) provides that discovery may be limited or denied “to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable Act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.” The Supreme Court has stated that a formal claim of privilege must be “lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” United States v. Reynolds, 345 U.S. 1, 7–8 (1953) (citations omitted). The department head’s role in asserting privilege may be delegated, however. See, e.g., *Landry v. F.D.I.C.*, 204 F.3d 1125 (D.C. Cir. 2000), finding that any delegation should be to a person “of sufficient rank to achieve the necessary deliberateness in assertion of the deliberative process.” *Id.* at

¹ Formerly Directive D202.10.1. Administratively renumbered by the Commission Secretary in accordance with Directive 0100 (September 21, 2022) on January 23, 2023.



1136. Section 4(f)(1) of the CPSA establishes that the Chairman is the principal executive officer of the Commission and that he or she exercises all of the executive and administrative functions of the Commission, including the distribution of business among Commission personnel and administrative units.

- 4. **EXPIRATION DATE.** This delegation expires upon occurrence of either of the following: the Commission’s acceptance of an offer of settlement and issuance of an appropriate order pursuant to 16 C.F.R. § 1025.26, or the conclusion of litigation, *i.e.*, issuance of a Final Decision and Order and the time for appeal to the Commission or to a federal court has expired for each party.

- 5. **DELEGATION OF AUTHORITY:** Pursuant to the authorities identified above, the Chair hereby delegates to the Deputy Executive Director for Operations authority to assert the deliberative process privilege as the basis for withholding documents or testimony that arise in connection with *In the Matter of Leachco, Inc.* (CPSC 22-1). This authority may be re-delegated to the Assistant Executive Director for Compliance and Field Operations. This delegation does not authorize waiver of any privilege that could be asserted by an individual Commissioner absent approval of the General Counsel in consultation with the relevant Commissioner or Commissioners.

**Alexander
Hoehn-Saric**

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Alexander Hoehn-Saric
Chair

Date