



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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ACTING CHAIRMAN ROBERT ADLER

**DISSENTING OPINION OF CPSC ACTING CHAIRMAN ROBERT ADLER ON COMMISSION VOTE
TO IMPLEMENT ROUGHLY 50 AMENDMENTS TO FY 2022 OPERATING PLAN
WITHOUT NOTICE OR AN OPPORTUNITY FOR DELIBERATION OR DISCUSSION**

October 5, 2021

On September 24, 2021, my two CPSC colleagues, Peter Feldman and Dana Baiocco, submitted a last-minute ballot vote on the staff's proposed FY 2022 Operating Plan that added roughly 50 amendments to the Op Plan. This vote occurred with no advance notice to me or anyone else on agency staff. As I shall discuss, these amendments, with virtually no rationale, would, among other things, stop work on certain mandatory standards, dramatically alter the management structure of the agency, impose new and often unclear work requirements on agency staff, mandate automatic implementation of Inspector General recommendations irrespective of their merit, and inject Commissioners into personnel matters and other areas of authority statutorily reserved for the agency's Chairman.

To put this vote into context, although the Commission is authorized to seat five Commissioners, as a result of the recent resignation of Commissioner Elliot Kaye, there are now only three sitting Commissioners. This has given my two colleagues a temporary majority that they would otherwise not have. Three new nominees to the Commission have gone through their confirmation hearings before the Senate Committee on Commerce, Science, and Transportation and await full Senate confirmation. In the meantime, my colleagues have seized the moment to try to run the agency.

Due Process Abuse: Government By Ambush

Aside from the lack of courtesy or fair play, my colleagues' failure to provide any advance notice to me regarding the Op Plan vote violated both Commission procedural rules and my due process right to notice and an opportunity to participate in Commission decision making. Accordingly, I sought a ruling from the CPSC Office of General Counsel on the legality of my colleagues' vote. Upon consideration, they determined that Commission procedural rules were violated and that the vote should be declared null and void.

In response, and further compounding their disregard of Commission rules and due process, my colleagues – again without consulting me or following proper agency rules – posted an email declaring that they overruled the GC's opinion. I surmise that my colleagues realized that the email had no legal

effect because they then suddenly demanded that the Commission place the GC's opinion on the agency's agenda, which the Agenda Planning Committee did.

In addition to my colleagues' proposal, I submitted a request to the Agenda Planning Committee to vote on the Operating Plan in a full, open, public decisional meeting. To no one's surprise, my colleagues have ignored this request, overruled the General Counsel's opinion, and insisted their amendments be implemented without deliberation, debate, or discussion. To say the least, their action constitutes an abuse of agency procedures.

The Feldman/Baiocco Operating Plan Amendments: Overreaching, Unclear, and Improper

The Commission's Operating Plan provides the basic structure for Commission action during each fiscal year. It is one of the most important votes that the Commission can take. Alas, as noted, my colleagues dropped a massive set of amendments at the last moment without advising me or staff of their concerns. As far as I can tell, most of these amendments address issues never raised with me or with staff. Aside from the fact that a number of them provide little clarity or guidance, many of them would reduce consumer safety and restructure the agency in convoluted ways. Because my colleagues have provided so little guidance, members of the staff will undoubtedly struggle to adopt these changes with no particular idea how to do so.

What is so outrageous is my colleagues' refusal to debate, explain, or vote on their amendments in a public forum. That truly saddens me.

Moreover, a particularly troubling thread runs through many of my colleagues' amendments. Under section 4 of the Consumer Product Safety Act (and similar language in the statutes of most other multi-member agencies), the Chairman exercises "all of the executive and administrative functions" of the Commission subject to the "general policies" of the Commission. Provisions like these were added as necessary reforms to the administrative process many years ago to prevent all sitting Commissioners from controlling every aspect of every decision before the agency. Without these boundaries, agencies suffer from micromanagement and "paralysis by analysis." My colleagues have clearly ignored these limits and have plunged deeply into the authority reserved for the agency's Chairman. Given my intention to retire in less than a month, I have no personal stake in their meddling in administrative minutiae, but as one committed to having government operate in an orderly and efficient manner, I strongly object to this overreach into the agency's operations.

Without detailing all of the many objections I have to my colleagues' amendments, I offer the following serious concerns regarding the amendments.

Halt Mandatory Standards Development for Infant Pillows and CO Sensors for Gas Furnaces

Under these amendments, my colleagues significantly delay and curtail the development of mandatory rulemaking for Infant Nursing Pillow safety and Carbon Monoxide reduction in Gas Furnaces. They convert currently planned Notices of Proposed Rulemaking (NPR) into Data Analysis and Technical Review (DA/Tr), thereby halting rulemaking scheduled for FY 2022. This is not something that CPSC staff has requested nor has anyone shown any reason to halt these rulemaking packages. Where this amendment came from is a mystery to me, but this postponement of consumer safety is extremely improper.

Children's Products Defect Team Reorganized

Under this amendment, with no stated rationale, staff is required to draft and transmit to the Commission for consideration and approval a plan to reconstitute a children's product defect team within the Office of Compliance (OC). I do not object to the Commissioners requiring a plan for *consideration* by the Commission. I do object to having the Commissioners *approve* such a plan because, without in any way enhancing consumer safety, it undoes a carefully planned restructuring of Compliance recently approved by the Commission. Contrary to their attempt to create an impression that their amendment will increase the resources or effectiveness of the agency's work on Children's Products, it merely rearranges a carefully thought out reorganization of the office.

Funds Taken From Communications and Given to Compliance for Training

Under this amendment, over \$400,000 will be taken from the Office of Communications (OCM) and given to the Office of Compliance (OC) for training purposes. No rationale is given beyond providing additional resources to Compliance. Other than an exercise in virtue signaling, my colleagues offer no explanation or basis for transferring these funds for training. To the best of my knowledge, this amendment responds to no request from Compliance for such funds and represents no documented need beyond what Compliance has requested. Moreover, removing funds from the Office of Communications will directly affect its ability to communicate safety messages to the public, including Compliance matters.

Notwithstanding this cut to funding for Communications, my colleagues issued a statement in which they tout the adding of resources to OCM! They do this through what can only be described as budgetary sleight of hand. Instead of openly acknowledging their cuts to OCM, they seize on the fact that staff had recommended a significant and critical increase to OCM's funding and their \$400,000 cut will still permit a (much smaller) net increase in OCM's budget. Yet, contrary to their claim that this budget "increase" will help OCM improve its operations, their cut will significantly undermine its ability to do so.

Office of Communications (OCM) Updates Required Any Time a Commissioner Asks

Under this amendment, any Commissioner at any time may obtain updates supporting any safety claim made in the Office of Communications' press releases, social media posts, safety campaigns, and other external communications. Unfortunately, this benign looking amendment will permit any Commissioner, under the guise of OCM document safety claims, to impose "paralysis by analysis" by repeatedly demanding such documentation even for messages thoroughly vetted and widely used by CPSC and other agencies. What makes this amendment worse is that the reduced funding for OCM in my colleagues' amendments will make the Office of Communications' ability to function even more difficult given this potentially massive drain on their resources.

There is a broader point here. I particularly object to giving individual Commissioners, including even the Chairman, an unfettered right to demand briefings. That has never been the practice of CPSC or any other agency of which I am aware. The agency has long had a policy of responding to information requests by Commissioners by requiring that they not be onerous and can be met within a reasonable time period. No agency can operate efficiently without orderly management procedures, which this amendment ignores.

Automatic Implementation of Inspector General (OIG) Recommendations

This amendment requires within 180 days the automatic, mandatory implementation of all open OIG recommendations before the agency irrespective of the merits of the recommendations or concurrence of senior managers within the agency. This is one of the most troubling of their amendments. It expands the authority of the Inspector General beyond that of any IG in any other agency or department in the government. It removes any discretion or ability of the agency to consider factors such as budget constraints, staffing limitations, changed circumstances, or evolving technologies in addressing the IG's recommendations.

At any given moment, the CPSC typically has dozens of recommendations from the IG before it. These range from how the agency implements budget and information technology provisions to major recommendations about how the agency staff should be organized. Were this provision to be implemented, the agency would have to dramatically change its operations to address the flood of IG recommendations.

Setting Performance Metrics for Senior Staff to Implement OIG Recommendations

Further compounding the problems of requiring the automatic implementation of all open OIG recommendations, this amendment would require compliance with OIG recommendations to be a performance metric for Senior Executive Service employees and other senior management officials, including but not limited to the Executive Director and Deputy Executive Directors, the Director of the Office of Communications, the General Counsel, and other agency personnel as determined by the Executive Director. This is an unprecedented intrusion into the management authority of the Chairman. The Chairman is the only person who should be establishing performance metrics for senior staff. Again, this is micromanagement to the nth degree.

Use of Paid Influencers in CPSC Public Relations Campaigns

This amendment prohibits the Commission from using compensated outside influencers and spokespeople in agency campaigns unless certain highly-detailed requirements are met. Particularly objectionable is the requirement that any use of such influencers requires Commission approval of them one-by-one. I believe that such a mandate constitutes extreme micromanagement and an improper intrusion into the operations of one of the agency's most important offices. It undermines the Chairman's ability to exercise all of the executive and administrative functions of the Commission, especially his or her authority to distribute business among agency staff and to decide the use and expenditure of funds.

Influencers—like other professionals employed by the government—should enjoy a hiring process free from bias or political undertone. The intrusion of the Commission into this hiring process allows for the taint of bias—whether conscious or implicit—to undermine our important work of reaching diverse audiences.

TikTok Prohibition

This amendment, without any stated rationale, bars any agency employee or contractor of CPSC from downloading and using the TikTok app – which, I am told, no one currently uses for any agency purpose. Again, I believe that such micromanagement improperly intrudes into the executive and administrative

authority of the Chairman. Why my colleagues singled out TikTok from the many other apps that can be abused remains a mystery.

Reports Required Under the Operating Plan Submitted to the Executive Director Must Be Simultaneously Submitted to Every CPSC Commissioner

This amendment directs that every report required in the Operating Plan designated for submission to the Executive Director be submitted simultaneously to every Commissioner. Under existing procedures at every regulatory agency of which I'm aware, the Executive Director reports exclusively to the agency's Chairman and staff reports directly to the Executive Director. Requiring staff to share their reports immediately with the Commissioners before the Executive Director has had a chance to review them injects the Commissioners prematurely into the process of policy development. It also undermines the ability of staff to discuss their reports freely and candidly with the Executive Director, and to ensure that the reports contain the necessary information for agency consideration.

Additional Performance Metrics for Office of General Counsel and the Office of Legislative Affairs

This amendment requires staff – completely excluding the Chairman! – to submit for Commission approval key performance measure proposals for the Office of General Counsel (OGC) and the Office of Legislative Affairs (OLA), including the Freedom of Information Office (FOIA). I cannot think of a greater usurpation of the Chairman's authority than the Commissioners sidestepping the Chairman and directly assigning work to CPSC staff who are supposed to report to the Chairman. The Chairman is the only person who should establish performance metrics for senior staff. I find it hard to imagine a more blatant attempt to take over management of the agency than this amendment.

Conclusion

Unfortunately, my colleagues have seized the moment when the Commission is at minimal staffing to impose an array of poorly-drafted, hastily-drawn management mandates. These amendments will have huge safety, resource, and policy consequences. This is particularly distressing given that we are on the verge of welcoming three new Commissioners. Were the Commission fully staffed, my colleagues would not be able to take such improper action. I deeply regret their power grab.