



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING

October 19, 2016

Chairman Elliot F. Kaye convened the October 19, 2016, 9:30 a.m., meeting of the U.S. Consumer Product Safety Commission in open session. Commissioners Robert S. Adler, Marietta S. Robinson, Ann Marie Buerkle and Joe P. Mohorovic were in attendance. Ann Marie Buerkle participated by telephone.

Decisional Matter: Fiscal Year 2017 ("FY 2017") Operating Plan (Briefing package dated September 15, 2016)

After introducing the matter and making an opening statement, Chairman Kaye called for any opening statements or questions. Present to respond to any questions were Patricia Adkins, Executive Director; DeWane Ray, Deputy Executive Director for Safety Operations; George Borlase, Assistant Executive Director for Hazard Identification and Reduction; and Jay Hoffman, Director, Office of Financial Management. The Commissioners declined to make any statements or ask questions at this point.

Chairman Kaye moved that the FY 2017 Operating Plan be amended to include crib bumpers as a project. The amendment included changes to several parts of the plan. Commissioner Adler seconded the motion. Chairman Kaye explained the purpose of the amendment and the Commission discussed the amendments. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (3-2) to adopt Chairman Kaye's motion and amendment. Chairman Kaye, Commissioner Adler and Commissioner Robinson voted to adopt the amendment. Commissioner Buerkle and Commissioner Mohorovic voted to not adopt the amendment. (The adopted amendment is attached.)

Chairman Kaye moved that the FY 2017 Operation Plan be amended in certain portions that pertain to all-terrain vehicles. Commissioner Adler seconded the motion. Chairman Kaye explained the purpose of the amendment and the Commission discussed the amendment. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted unanimously (5-0) to adopt Chairman Kaye's motion and amendment. (The adopted amendment is attached.)

Chairman Kaye moved that the FY 2017 Operation Plan be amended to include language to include a project involving high energy batteries. Commissioner Robinson seconded the motion. Chairman Kaye explained the purpose of the amendment and the Commission discussed the amendment. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted unanimously (5-0) to adopt Chairman Kaye's motion and amendment. (The adopted amendment is attached.)

Chairman Kaye moved that the FY 2017 Operation Plan be amended to include language to include a project involving top-loading washing machines. Commissioner Robinson seconded the motion. Chairman Kaye explained the purpose of the amendment and the Commission discussed the amendment. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted unanimously (5-0) to adopt Chairman Kaye's motion and amendment. (The adopted amendment is attached.)

Chairman Kaye moved that the FY 2017 Operating Plan be amended to change the language at certain parts pertaining to upholstered furniture flammability. Commissioner Adler seconded the motion. Chairman Kaye explained the purpose of the amendment and the Commission discussed the amendment. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (4-1) to adopt Chairman Kaye's motion and amendment. Chairman Kaye, Commissioner Adler and Commissioner Robinson and Commissioner Mohorovic voted to adopt the amendment. Commissioner Buerkle voted to not adopt the amendment. (The adopted amendment is attached.)

Chairman Kaye called for any other motions for amendments. Commissioner Adler moved that the FY 2017 Operating Plan be amended to add language to establish a program that would provide support to consumers for technical and other input in the development of voluntary standards in proceedings in which the Commission participates. Commissioner Robinson seconded the motion. Commissioner Adler explained the purpose of the amendment and the Commission discussed the amendment. After the discussion, Chairman Kaye suggested specific changes be made to the amendment. Commissioner Adler withdrew the amendment as written. Chairman Kaye paused the meeting for 15 minutes to allow the Commissioners to revise the amendment.

After the break, Commissioner Adler moved that the FY 2017 Operating Plan be amended to establish a program to support consumer input in voluntary standards proceedings with the revised amendment. Commissioner Robinson seconded the motion. Commissioner Adler explained the purpose of the amendment and the Commission discussed the amendment. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted unanimously (5-0) to adopt Commissioner Adler's motion and amendment. (The adopted amendment is attached.)

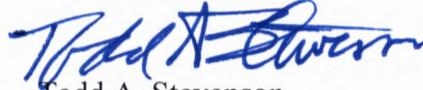
Chairman Kaye called for any other motions for amendments. Commissioner Robinson moved that the FY 2017 Operating Plan be amended to add to the Voluntary Standards Table new projects for "Non-Integral Firearm Locking Devices" and "Youth-Resistant Firearm Security Containers." Commissioner Adler seconded the motion. Commissioner Robinson explained the need for and purpose of the amendment and the Commission discussed the amendment. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (3-2) to adopt Commissioner Robinson motion and amendment. Chairman Kaye, Commissioner Adler and Commissioner Robinson voted to adopt the amendment. Commissioner Buerkle and Commissioner Mohorovic voted to not adopt the amendment. (The adopted amendment is attached.)

Chairman Kaye called for any other motions for amendments. Hearing no motions, Chairman Kaye moved to approve the underlying FY 2017 Operating Plan as amended. Commissioner Adler seconded the motion. Chairman Kaye called for any statements. Hearing none, Chairman Kaye called for a vote on the matter. The Commission voted (3-2) to approve and adopt the FY 2017 Operating Plan as amended. Chairman Kaye, Commissioner Adler and Commissioner Robinson voted to adopt the amended plan. Commissioner Buerkle and Commissioner Mohorovic voted to not adopt the amended plan.

Chairman Kaye called for any closing statements. The Commissioners each made closing statements. There being no other business, Chairman Kaye adjourned the meeting at 12:55 p.m.

Commissioner Buerkle issued the attached statement regarding the issue.

For the Commission:

A handwritten signature in blue ink, appearing to read "Todd A. Stevenson".

Todd A. Stevenson
Secretary

Attachments: Adopted Amendments
Statement of Commissioner Buerkle

Chairman Kaye Fiscal Year 2017 Operating Plan Amendments

1. Chairman Kaye Amendment on Crib Bumpers

The Commission directs staff to amend the Fiscal Year 2017 Operating Plan as follows:

On page 9, add "Consumer Registration Requirement for Crib Bumpers" to the "Mandatory Standards Summary Table" under the section "CPSIA, as amended by Pub. L. No. 112-28, and including Section 104, the Danny Keysar Child Product Safety Notification Act," with a status of "DA/TR" in the "FY 2017 Op Plan" column.

On page 9, add "Crib Bumpers" to the "Mandatory Standards Summary Table" under the section "CPSIA, as amended by Pub. L. No. 112-28, and including Section 104, the Danny Keysar Child Product Safety Notification Act," with a status of "DA/TR" in the "FY 2017 Op Plan" column.

On page 9, delete "Crib Bumpers" from the "Mandatory Standards Summary Table" under the section "Other Ongoing or Potential Rulemaking-Related Activities."

On page 15, under section "22727 – Children's/Nursery Product Hazards: Rulemaking Activities," delete the following language:

This project covers rulemaking activities related to these products: booster seats, children's folding chairs and stools, high chairs, changing tables, gates and other enclosures, infant bath tubs, infant bouncer seats, infant inclined sleep products, infant slings, and stationary activity centers.

This project also includes DA/TR work on crib bumpers and activities related to age determination guidelines."

On page 15, under section "22727 – Children's/Nursery Product Hazards: Rulemaking Activities," replace the deleted language with the following language:

This project covers rulemaking activities related to these products: booster seats, children's folding chairs and stools, high chairs, changing tables, gates and other enclosures, infant bath tubs, infant bouncer seats, infant inclined sleep products, infant slings, stationary activity centers, and crib bumpers.

The Commission has directed staff to initiate a rulemaking under section 104 of the CPSIA to promulgate a mandatory consumer product safety standard that will address the risk of injury associated with the use of padded crib bumpers. This project shall produce:

- An NPR package in FY 2018 that proposes to include crib bumpers as "durable infant or toddler products" requiring consumer registration under section 104(d) of the CPSIA; and
- An NPR package in FY 2018 that proposes a mandatory consumer product safety standard for crib bumpers under section 104 of the CPSIA that is more stringent than

the current ASTM voluntary standard and will further reduce the risk of injury associated with this product. This package shall address all or as many as possible of the following hazard patterns associated with padded crib bumpers: (1) suffocation; (2) wedging and entrapment; (3) falls; (4) use patterns such as installation difficulties, using crib bumpers for children past the recommended age and using crib bumpers outside of a crib; and (5) mixed messaging about padded objects in cribs. In developing a proposed standard, staff shall, at a minimum: (1) develop a performance requirement and test method to show that a crib bumper is firm enough not to conform to the face of an infant, based on known anthropometric parameters; (2) develop a performance requirement and test method based on known infant inhalation and exhalation requirements and anthropometric parameters to demonstrate that a crib bumper matches or exceeds the airflow characteristics of mesh or mesh-like materials, taking into account the safety of infants with compromised breathing; and (3) compose warnings and instructions on the product that explain all of the types of cribs on which the product can and cannot be installed, clear advice about how to install the product and at what age of the child to stop using the product.

This project also includes activities related to age determination guidelines.

2. Chairman Kaye Amendment on ATVs

The Commission directs staff to amend the Fiscal Year 2017 Operating Plan as follows:

On Page 9, add "ATVs - Other" to the "Mandatory Standards Summary Table" under the section "CPSIA, as amended by Pub. L. No. 112-28, and including Section 104, the Danny Keysar Child Product Safety Notification Act," with a status of "FR" in the "FY 2017 Request" column and a status of "DA/TR" in the "FY 2017 Op Plan" column.

3. Chairman Kaye Amendment on High Energy Density Batteries

The Commission directs staff to amend the Fiscal Year 2017 Operating Plan as follows:

On page 14, under section "21518 – Electrical Hazards: Voluntary Standards and Codes," add the following language to the end of the section:

- The Commission also has directed staff to perform additional work to address the emerging and ongoing hazards associated with high energy density batteries, including but not limited to enforcement, voluntary and mandatory standards work, import surveillance and compliance, and industry, interagency and intergovernmental cooperation. This project shall address the emerging and ongoing hazards associated with devices powered by high energy density batteries, including but not limited to lithium-ion, lithium polymer and lithium iron phosphate batteries, as well as system safety features that ensure high energy density batteries, battery packs, safety circuits, end products and chargers all work together to achieve safe operation for the intended application. This work will inform future budgets and operating plans.

4. Chairman Kaye Amendment on Top-Loading Washers

The Commission directs staff to amend the Fiscal Year 2017 Operating Plan as follows:

On page 7, add "83. Washing Machines, Top Loading" to the "Voluntary Standards Summary Table" under the section "Other Planned Voluntary Standards Activities," with a bullet point in the "FY 2017 Op Plan" column.

5. Chairman Kaye Amendment on Upholstered Furniture Flammability

The Commission directs staff to amend the Fiscal Year 2017 Operating Plan as follows:

On page 9, change the "Mandatory Standards Summary Table" for "Upholstered Furniture" from a status of "BP" to a status of "DA/TR" in the "FY 2017 Op Plan" column.

On pages 13 and 14, under section "21498 – Upholstered Furniture Flammability Rulemaking," delete the sentence "In FY 2017, staff will develop a briefing package to the Commission to terminate rulemaking, and also continue to conduct research and to work with voluntary standards development organizations to develop performance standards to address the hazards associated with upholstered furniture fires."

On pages 13 and 14, under section "21498 – Upholstered Furniture Flammability Rulemaking," replace the deleted sentence with the following language:

In FY 2017, staff will work with California Bureau of Electronic and Appliance Repair, Home Furnishings and Thermal Insulation (BEARHFTI) staff, as well as in the voluntary standard developments organizations, to improve upon and further refine the technical aspects of 117-2013. While pursuing fire safety through voluntary standards efforts, staff shall support development of a voluntary standard that can be achieved without exposure to toxic chemicals either from the furniture itself or through combustion of the furniture.

ADLER AMENDMENT ON VOLUNTARY STANDARDS CONSUMER PARTICIPATION

Amend FY 2017 Operating Plan to establish a program that would provide support to consumers for technical and other valuable input in the development of voluntary standards in proceedings that the Commission has decided to participate in. Insert the following language in the appropriate place in the FY 2017 Operating Plan Details for Hazard Identification (pp. 12-17):

- ***Program to Support Consumer Input in Voluntary Standards Proceedings:***

The Commission has directed staff, consistent with 16 CFR § 1031.7(11) and any other applicable authorities, to develop a protocol subject to Commission approval, prior to the Commission consideration of the 2017 Mid-Year Review, for allocating appropriate resources to consumers and consumer organizations so that they may provide technical and other valuable input to the development of certain voluntary standards identified by the Commission for agency participation. The protocol shall describe circumstances in which resources shall be allocated, at the discretion of CPSC staff, in accordance with procedures and protocols established by staff, to consumers or consumer organizations involved in the development of those voluntary standards identified by the Commission for agency participation, provided the CPSC Voluntary Standard Coordinator certifies that the standards development organization meets the criteria for CPSC participation in accordance with 16 CFR §1031.5.

COMR FY17 OP Amendment

Add to **Voluntary Standards Table** on pages 6-7 the following:

Product		FY 2017 Request	FY17 Op Plan
Other Planned Voluntary Standards			
---	Non-Integral Firearm Locking Devices		•
---	Youth-Resistant Firearm Security Containers		•

EXFM is also directed to make all conforming changes throughout the FY17 OP to reflect this amendment.

Note:

This works will require 1 staff month (FTE). EXHR reported that 1 staff month (FTE) is available to be used from the project code **13331 – Petitions, OLA Support, and other Unplanned Hazard Work** (currently allocated 34.3 staff months).

Statement of Commissioner Buerkle on the Fiscal Year 2017 Operating Plan

I want to begin by expressing my gratitude to the staff for all of their efforts in putting together the FY2017 Operating Plan, particularly Patricia Adkins, DeWane Ray, George Borlase, Jay Hoffman, James Baker, and the Office of Financial Management. I recognize how trying it is to produce an operating plan without the certainty of a full appropriation from Congress. I appreciate staff's efforts and the timeliness of this document despite that challenge.

I also want to thank John McGoogan and Kim Dulic for facilitating my participation in the decisional meeting on this topic via phone, and thank you to my colleagues and the entire staff for understanding my need to partake remotely due to a personal family matter. I so appreciate all of the kind words and thoughts shared with me by so many here at the CPSC.

Although the Operating Plan was provided to us in a timely way, I was unable to support it for a number of reasons. To begin with, the plan contemplates final rules for the highly controversial Voluntary Recall Notices and 6(b) proposals.

I am puzzled as to what will happen next with these proposals. A few weeks ago, at our public meeting on the Fall Regulatory Agenda, Commissioner Adler indicated that he would offer compromise proposals on both subjects. While I always remain open to new ideas, it is unclear how such compromises would be acted on. Would we abandon "regular order" and ignore the substantial comments from outside stakeholders? The Operating Plan reflects that staff will transmit final rule packages to the Commission in the current Fiscal Year. Yet staff from all responsible offices have informed me in meetings that they have no resources allocated to either project. If this is the case, why do we continue to let these proposals linger in the operating plan to draw ire from the regulated community and Congress, when we have no intention of completing them?

These proposed rules should be terminated. At this stage, they really are unsalvageable. Any attempt to move forward now would put the staff in an extremely uncomfortable position of responding to harsh comments on ideas that did not originate with the staff.

I have strongly opposed these proposals since their inception. But even apart from the content of the proposals, there are additional compelling reasons not to move forward with them at this time. Last February, the Chairman announced that CPSC would hold a public workshop on recall effectiveness. The exchanges of information during such a workshop would be relevant to any rule on voluntary recall notices. Similarly, I understand that the Office of General Counsel will be updating our Freedom of Information Act (FOIA) rules later this year. It appears possible that those revisions will address, and possibly moot, some of the initiatives in the 6(b) proposal. Thus it would seem to make sense to hold off on 6(b) until we see the FOIA package. During the preparatory meetings for this Hearing, I offered amendments that would have removed any expectation of a final rule on these subjects in the current fiscal year. Unfortunately, the majority members of the Commission refused to support any such measure.

These issues have become an embarrassing mess, a black eye to the agency, through no fault of the staff. In previous years, the Chairman emphasized that he did not regard these as priority issues and would not move them unless all other safety work was finished. Now I sense a different attitude on his part and a determination on the part of other Commissioners to move

these rules forward somehow, somehow. Given the lack of clarity and transparency in the process, this ends up feeling more like election year, “midnight” rulemaking than good-faith compromise.

Also of great concern to me is the operating plan’s provision for an Advance Notice of Proposed Rulemaking (ANPR) on furniture tipover, which was not forecast in our FY 2017 Budget Request. Quite simply, this ANPR is premature and inappropriate. The staff recently sent us a briefing package on this subject, but it does not support moving forward with rulemaking. The existing voluntary standard is barely two years old, and there is no evidence whatsoever that the standard is inadequate. I have asked the staff explicitly whether they are aware of any deaths or injuries resulting from tipover of dressers or other clothing storage units that comply with the 2014 standard and the answer is No. It is inappropriate to press for improvements to the voluntary standard at this point. Instead, we would be better off helping manufacturers to improve their designs and meet the current voluntary standard, rather than move the goal posts again so soon.

On Portable Generators, the Operating Plan contemplates a final rule in the current fiscal year. This is another area where we should hold off on rulemaking.

Our staff has been working for years on ways to limit carbon monoxide (CO) emissions from portable generators. I appreciate their intensive work and engagement in this area. Their efforts have spurred a tremendous amount of activity in the private sector. Only recently, there has been a breakthrough, with the industry promising to open the voluntary standard and address the CO hazard.

Some argue that the industry won’t move forward until we actually propose a mandatory standard. That argument is contradicted by the industry’s recent activities and voluntary standard commitment. Moreover, proposing a standard requires the industry to misdirect their resources. Instead of focusing solely on the voluntary standard, they must work to address the staff’s proposal. Our experience with the proposed standard for Recreational Off-Highway Vehicles (ROVs) is instructive. The industry came up with innovative solutions to the safety challenges, but they might have done so more quickly if they were not obliged to focus on our rulemaking proposal.

In the case of Portable Generators, there are additional reasons to support voluntary standards in preference to mandatory regulations. There are serious questions about our legal authority to regulate carbon monoxide emissions from generators. While I will explain these concerns in greater depth elsewhere-, I will say that pursuing our intended performance requirements in the voluntary standards arena would avoid some thorny legal issues and thus is doubly sensible.

Speaking of ROVs, the operating plan seems to contemplate two different submissions to the Commission—one to evaluate the pertinent voluntary standards and a second to terminate rulemaking. I would encourage the staff to save some of their own time and resources by combining their review of the voluntary standards with a recommendation to terminate rulemaking, if they consider that outcome appropriate.

My colleague, Mr. Adler, proposed an amendment on Voluntary Standards Consumer Participation. In its original form it was totally unacceptable to me. It was an extremely open

ended, vague proposal that would have allowed the staff to begin funding consumer participation without Commission approval of the basic eligibility requirements or even of the total amount of money they could disburse. This would have amounted to a blank check for staff and an abdication of our own fiscal responsibility. I am therefore pleased that the proposal was amended to require the development of an eligibility protocol that will be subject to Commission review before any of our appropriated funds are distributed for this purpose. Frankly, I remain very doubtful that any of our precious resources should be diverted to this type of use, but I am willing to consider the proposal again when the basic requirements have been fleshed out in the protocol.

The Chairman proposed an amendment concerning furniture flammability, which was approved by a 4-1 vote (over my objection). The Commission staff has labored for years to try to develop regulations in this area. In the 2016 Operating Plan, approved last February, I sponsored an amendment asking for a report on California standard TB 117-13 and a comparison to our own rulemaking proposal. The staff produced a very significant report with remarkable conclusions, including a recommendation to terminate rulemaking in this area. I think we should seek public comment on that document before we settle on our next steps. The Chairman's amendment was a step in the right direction, but does not go far enough to assert the Commission's prerogative. We are at something of a crossroads on this important topic, and we should require the staff to consider comments on their report and then to lay out a proposal as to the best way forward. Until the Commission has an opportunity to approve their objectives and their course, I think it would be a mistake for the staff to be advancing policy positions in the voluntary standards arena. I am particularly concerned about the current NFPA proceedings, which have been criticized from almost every quarter.

Just as concerning as what is in the operating plan is what is not in it. There are no resources dedicated to the workshops on recall effectiveness or section 15(b) reporting. While I appreciate these are being run out of the Chairman's office, it is naïve to think that staff work will not be required at some point along the way. These are important topics that deserve serious attention, not just "check the box" lip service.

Once again, there is no funding for an information and education (I & E) campaign for window coverings. I know this is not a popular option for staff and some of my fellow Commissioners. The Chairman in particular has made it plain that he thinks education campaigns are ineffective, with a few project exceptions. Yet we don't hesitate to insist that industry fund I&E campaigns.

I am confident that a robust and sustained I&E campaign regarding window coverings would advance a critical safety message on the importance of using cordless products wherever children are present. It could greatly expand awareness of the risk by parents and caregivers and keep children safe. If nothing else, it would be added value to all of the other agency activity on window coverings.

Many key senior staff positions remaining vacant is also troubling. We are putting forward a plan that expands certain initiatives and takes on new ones while numerous directorates have no permanent leadership. This has been a troubling long-term void and it is my hope that we can find outstanding candidates to fill these positions at last.

In closing, while there were changes that if adopted would have made the operating plan more acceptable to me, my fellow Commissioners made clear that they would not accept the necessary changes and thus offering them would have been an exercise in futility. Several of the amendments to the plan raise further concerns, including crib bumpers being treated as a “durable nursery product.” In the end, the operating plan is much more reflective of the majority’s values and therefore is not one I can support as it takes this agency down a path that I do not believe is the appropriate role of government.

The role of this agency is to protect consumers from unreasonable risk. It is not to use threats of rulemaking and compliance investigations to bully industry into doing what we want. Our policy decisions and agency actions should address actual risks and be driven by sound science and data.

The American people do not appreciate their government leaders basing policy decisions on emotional considerations or rhetoric. We must use the best science to assess information and to make rational and data-driven recommendations on how best to keep consumers safe. The American people should not be patronized by their government or treated as incapable of making good decisions for themselves and their families. It is our job to provide the most current and accurate information possible so in turn they can make informed decisions.