



**DRI PRODUCT LIABILITY  
CONFERENCE**  
NEW ORLEANS, LA  
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# Overview

- My “unvarnished insight into the CPSC’s current activities and priorities”:
- Many of CPSC’s current activities and priorities are unnecessarily combative with regulated industry, making us less effective in pursuing our core safety mission
- There are good opportunities for CPSC to reestablish its relationships with its stakeholders and better leverage cooperative approaches to better protect consumers



# Adversarial Administrative State

- Aggressive Rulemaking

- EPA Power Plants



- Aggressive Penalties

- FCC demands \$100,000,000 from AT&T



- Aggressive Enforcement

- EPA: “For backfilling his own fields, Mr. Rapanos faced 63 months in prison [as] a small part of the immense expansion of federal regulation . . . that has occurred under the Clean Water Act – without any change in the governing statute.”
  - Rapanos v. United States, 547 U.S. 715, 721 (2006) (Scalia, J.).



# Adversarial Administrative State

- Attitude reflects leadership



- Tone is not likely to get any better this year, either
  - At CPSC, at least, it may get worse...more on that later



# Adversarial Administrative State

- “[The Obama administration has] put business on notice that it’s going for broke on regulations and executive orders in 2016, Congress and economic growth be damned”

Tom Donohue, US Chamber, Jan. 14, 2016





# Making it Personal: Yates Memo

“[Government] attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.”

Sally Quillian Yates, Deputy Attorney General, Sept. 9, 2015





# CPSC Walking the Same Path

- Some suggest companies only care about safety as much as they *have* to and will sacrifice safety for profit



“Saturday Night Live,” ©NBC (1976)

- Not only is this inaccurate, it is counter-productive to our safety mission



# Adversarial When Appropriate



- Sometimes, bad actors do emerge
- When they do, enforce swiftly and firmly

- 
- Until someone acts badly:
    - The law presumes them innocent
    - Consumers are safer if we work *with* each other, not against





# Collaboration Can Work

- U.S. Customs and Border Protection Advisory Committee on Commercial Operations (aka COAC)
- Est. 1987, members are from companies that work with CBP, coordinated by reps from Treasury and DHS.
- Result has been open dialogue between trade, CBP
  - CPSC has even plugged into this network, though could do more



**U.S. Customs and  
Border Protection**



# Big Toolbox

- CPSC has lots of legal tools, but two most familiar are Recalls and Rules





# Recalls & Rules

- Both built on premise that we first try to work with industry
- Recalls (15 USC 2064(d))
  - Commission can order that company address a substantial product hazard, but company can litigate order as far as Supreme Court
  - Much faster, more effective to reach voluntary recall agreement
- Consumer product safety standards (15 USC 2056(a))
  - Cannot issue mandatory rule if a voluntary standard adequately addresses risk, must meet stringent cost/benefit requirements
  - Much faster, more effective to engage voluntary standards bodies



# Straying from Foundational Principles

- Despite Congressional intent for us to cooperate with stakeholders, the Commission's tone is too frequently turning
  - Adversarial in penalties,
  - Adversarial in rulemaking, and
  - Sometimes into outright bullying.





# CPSC Penalty Basics

- For calculating penalties, CPSA Section 20 sets out factors tied to “nature, circumstances, extent, & gravity of violation” (15 U.S.C. 2069)
  - Nature of defect
  - Severity of risk of injury
  - Occurrence or absence of injury
  - Number of products distributed
  - Size of business
  - Other factors as appropriate
- We make penalty demands, but, to collect, we need to either reach a settlement or go to court



# Penalty Ramp-Up

- CPSIA increased max penalties roughly 10-fold
- Most see this as signal to increase penalties, and penalties have gone up.
- In FY 2015
  - Avg. penalty up 50%
  - Total went from \$7.5M to \$20.9M
- I agree Congress' direction was to impose higher penalties, but that's not the end of the story. *How* matters.





Always remember...

***“With Great Power  
Comes Great  
Responsibility”***

Spider-Man



# CPSC Penalty Uncertainty

- Industry, “CPSC Bar” have long commented on lack of transparency & predictability in CPSC penalties.
- Stakes have been raised. So has uncertainty.
- We’ve said we want higher penalties, but haven’t said how we translate old precedents into new numbers
  - Simple multiplication? Proportionality?
- Vast majority of our penalties are for failure to report timely – an inherently subjective, real-time determination where factors are even fuzzier





# CPSC Penalty Uncertainty

- **Baja Settlement**
  - Kids' bikes catching on fire from leaky gas tank
  - At least one child severely burned
  - \$4.3 million settlement
- **Office Depot Settlement**
  - Chairs breaking, occupants falling on their hindparts
  - Handful of mostly minor injuries
  - \$3.4 million settlement
- **Johnson Health Settlement**
  - Power supply short circuit from moisture accumulation
  - No injuries, no property damage
  - \$3 million settlement





# CPSC Penalty Uncertainty

- CPSC's concept is to throw all the facts and factors into a cauldron and see what number boils up



- The picture is even murkier on the outside





# Too Much Predictability?

- Some believe if we give too much clarity and predictability, companies won't negotiate on their own merits, will demand penalties similar to what "the other guy" paid
- One end of spectrum: EPA has precise matrices to determine penalty ranges

Potential  
for  
Harm

Extent of Deviation from Requirement

	MAJOR	MODERATE	MINOR
MAJOR	\$27,500 to 22,000	\$21,999 to 16,500	\$16,499 to 12,100
MODERATE	\$12,099 to 8,800	\$8,799 to 5,500	\$5,499 to 3,300
MINOR	\$3,299 to 1,650	\$1,649 to 550	\$549 to 110



# One Thing is Clear: Must Do Better

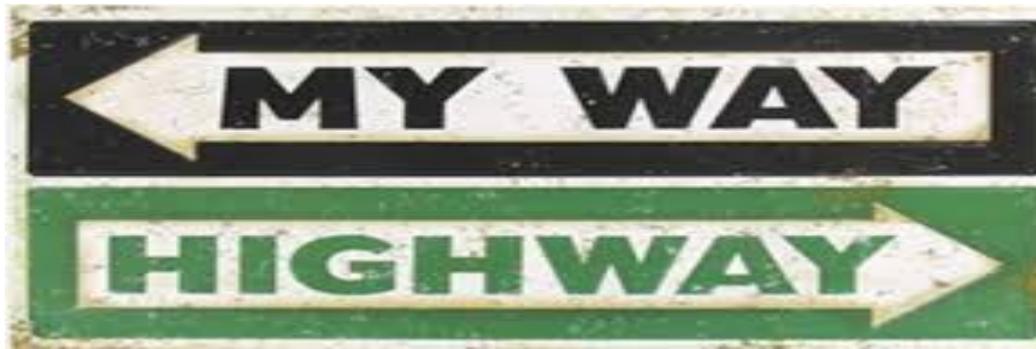
- Right balance may be hard to find, but we need to find it
- Must engage the community to see where problems are
  - Workshop?
  - Comments?
  - Public hearings?
- The longer we just ramp up numbers without explanation, the more likely companies will demand their day in court rather than settle. No one wins that way.





# Adversarial Rulemaking

- CPSC has taken a more aggressive posture in rules
- Two proposed rules have CPSC community on edge:
  - “Voluntary Remedial Actions” (Voluntary Recall Rule)
    - 78 Fed. Reg. 69,793 (Nov. 21, 2013)
  - “Information Disclosure Under Section 6(b) of the CPSA” (6b Rule)
    - 79 Fed. Reg. 10,712 (Feb. 26, 2014)





# Voluntary Recall Rule



- Changes would turn a collaborative negotiation focused on quickly getting a product off the shelves into a “take-it-or-leave-it,” cookie-cutter approach & would require more lawyers

- 
- Chairman Ann Brown: Voluntary Recall Rule would make award-winning Fast Track recall program “impossible”





# Current Information Disclosure Rule

- “[P]rior to its disclosure of any information . . . the Commission shall take reasonable steps to assure . . . that [such] information . . . is accurate, and that such disclosure is fair.”

15 U.S.C. 2055(b)(1)



“Once the government condemns a product as inherently dangerous and unfit, that denouncement may well be tantamount to an economic death knell.”

Relco, Inc. v. CPSC, 391 F.Supp. 841, 846 (S.D. Tex. 1975).





# Proposed Gossipmongering Rule

- Proposed rule would, among other changes, allow us to:
  - Repeat any public information without fact-checking it first
  - Cast companies as trying to keep consumers in the dark
  - Ignore attorney-client privilege
  
- Nutshell: New rule shifts agency posture from careful with the facts to casual





# Common Theme

- Both Voluntary Recall & 6b Rules change relationship between agency and stakeholders, put companies on the defensive even if they've done nothing wrong
- Continued existence of both proposals signals to industry the lens through which CPSC views them
- Pretending people aren't going to notice these rules hanging around is naïve.



# A Looming Threat?

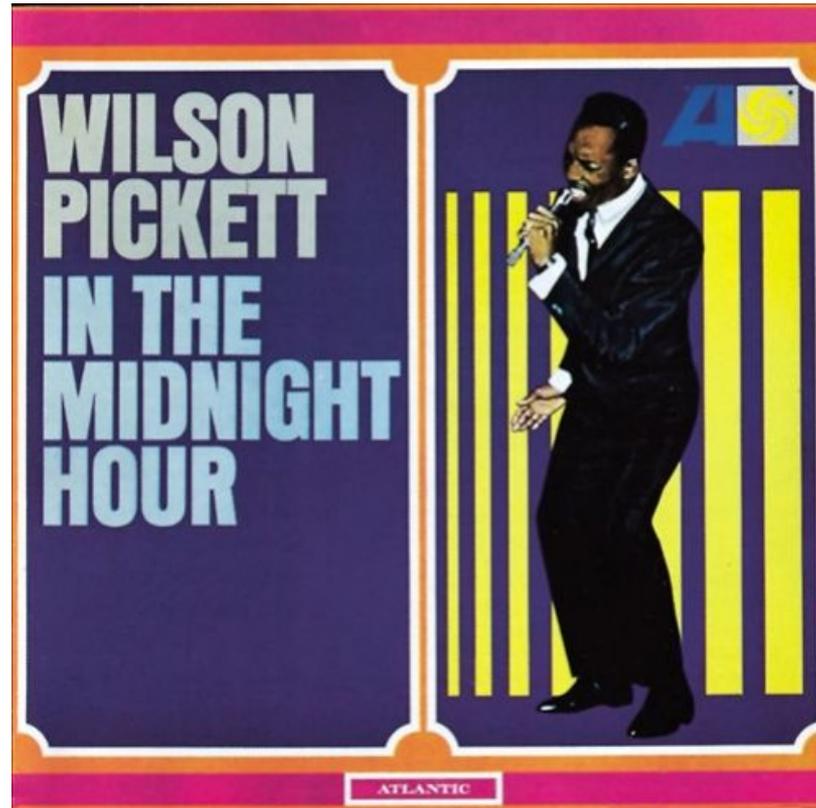
- Proposed rules are a cloud over community, **and**
- Majority has described rules as not priorities, **but**
- Majority has repeatedly voted to keep rules alive.



“Star Wars: Episode V – The Empire Strikes Back,” © Lucasfilm (1980)



# The (Midnight) Hour Approaches



- Midnight Regulation: Surge in issuance of rules just before a president's term expires



# Regulating Turns to Bullying

- In 2014, CPSC issued a mandatory safety standard for small, high-powered magnet sets.
- I voted for the rule because there was an unreasonable risk that needed to be addressed.
- Rule was appropriate.  
Some other actions weren't.





# Bucky Bullying, Part I

- In 2012, Commission filed administrative complaint against Maxfield & Oberton (“Buckyballs”) seeking recall
  - No allegations of any wrongdoing
- Later, *with no Commission vote*, CPSC counsel added CEO Craig Zucker in official capacity and personally
  - Responsible Corporate Officer Doctrine  
*U.S. v. Park* (1975) & *U.S. v. Dotterweich* (1943)
- Complaint sought as much as \$57 Million from Zucker to cover costs of recall
  - Again, no allegations of any wrongdoing
- CPSC eventually settled for \$375k





# Bucky Bullying, Part II

- *Before* filing complaint, CPSC pressured retailers to stop sale of over 2 million products
- CPSC became poster child for “agency threats”:
  - “The CPSC effectively ordered the company shut down absent any adjudicatory or regulatory process. It did not matter that the company sought a formal process because the CPSC had scared away its business partners and customers.”
    - Jerry Brito, “Agency Threats and the Rule of Law: An Offer You Can’t Refuse,” 37 Harv. J. L. & Pub. Pol’y 553 (2014).





# We Can Work it Out!

- CPSC & the broader administrative state need to reverse the trend toward adversarial relationships with their stakeholders.
- Doing so will require effort, but there is a viable way forward.
- We should heed the profound admonition of venerated deep-thinker Robert Matthew Van Winkle





# A.K.A. Vanilla Ice



“Ice Ice Baby,” © SBK Records (1990)



# How CPSC Can Collaborate & Listen

- Five opportunities for more effective, more protective policy that will also rehabilitate agency's culture:
  - Retailer Reporting
  - Trusted Trader
  - Greater Clarity in Rules
  - Greater Clarity in Enforcement
  - Retrospective Review





# 1. Retailer Reporting Program

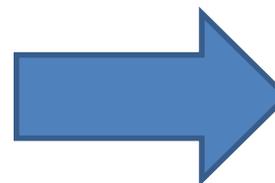
- Can't hit what you can't see, and CPSC has a blind spot for real-time identification of emerging hazards.
- Traditional data sources provide a good historical picture of *injuries*, but we know very little about which *products* caused those injuries, and even less about which ones are creating hazards now.
- What part of CPSC ecosystem is most in touch with consumers' real-time experiences? Retail.
- Retailer Reporting pilot stuck in limbo.





## 2. Trusted Trader

- Each year, 235,000 importers bring in 14 million shipments worth \$700 billion.
- Imported products make up about 4 of 5 recalls.



Want to find the needle?

Shrink the haystack!



# Win for Agency, Win for Trade

- Tough applicant examinations that give CPSC confidence that cargo will be safe before it's on the boat
- Facilitate legitimate flow of trade by speeding imports from good actors who volunteer for increased front-end scrutiny
- Looking to similar programs at fellow agencies





## 3. Greater Clarity in Regulations

- People need to know what they can't legally do
- Ex.: Per rules, children's clothing and accessories (such as buttons) are exempt from small parts rules. Per real world, if clothing has detachable small parts, we'll recall it.

### The Children's Place Recalls Boys' Varsity Jackets Due to Choking Hazard

Recall date: AUGUST 06, 2015

Recall number: 15-

Enlarge 

#### Recall Summary

Name of product:

Boys' varsity jackets

#### Hazard:

The metal snaps on the jackets could detach, posing a choking hazard to young children.

### Precious Cargo Recalls Infant One-Piece Garments Due to Choking Hazard

Recall date: AUGUST 06, 2015

Recall number: 15-208

Enlarge 



#### Recall Summary

Name of product:

Precious Cargo infant one-piece garments

Hazard:

The snaps on the one-piece garments can detach.

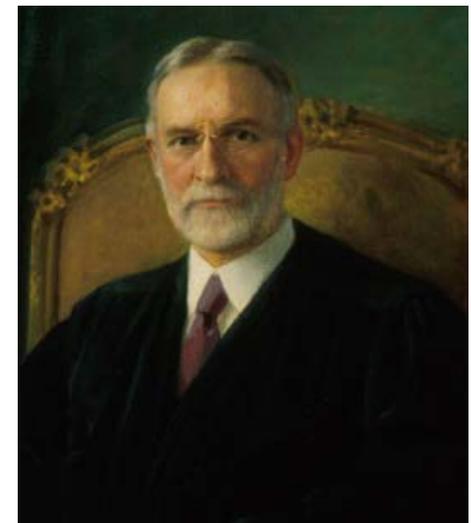
#### Hazard:

The snaps on the one-piece garments can detach, posing a choking hazard to young children.



## 4. Greater Clarity in Enforcement

- Where rules are inherently fact-specific judgment calls (i.e. when to report), we can still do more to help communicate our expectations
- Penalties, settlements should have clear discussion of facts and what conclusions CPSC draws from them
- “[A] statute . . . so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”
  - *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) (Sutherland, J.).





# 5. Need for Rule Review Across Gov't



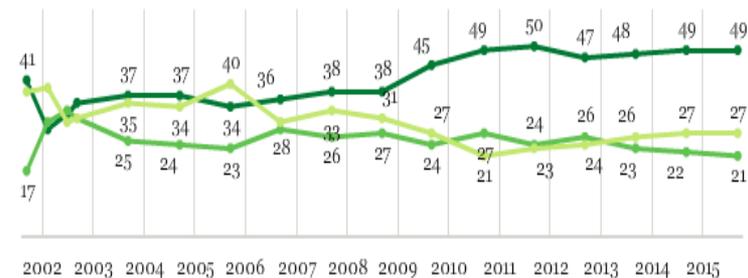
## • 2015 Gallup Governance Survey:

- 49 % of Americans feel there is too much regulation of business
- Only 21% feel there is too little

*Americans' Overall Perceptions on Government Regulation of Business*

In general, do you think there is too much, too little or about the right amount of government regulation of business and industry?

■ % Too much ■ % Too little ■ % Right amount





# Need for Rule Review at CPSC

- Our rules take up 898 pages in the CFR, and many of them pre-date the agency. Safe bet some are outdated.
- Commission unanimously agreed to develop rule review plan, incorporate review measures in new rules
- Commission needs to follow through:
  - Fund and conduct the reviews
  - Solicit and incorporate public feedback on rules, plan itself





## Wrap-Up

IT'S ~~NOT~~  
TOO LATE!

- With a few targeted changes, CPSC can become a model agency for working collaboratively with its stakeholders toward the common public health & safety objective
- Carrots where possible, sticks where necessary.



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