



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Elliot F. Kaye
 Commissioner Robert S. Adler
 Commissioner Marietta S. Robinson
 Commissioner Ann Marie Buerkle
 Commissioner Joseph P. Mohorovic

ITEM:

Federal Register Notice: CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation
(Briefing package dated November 4, 2016)

DECISION:

The Commission voted (3-2) to approve publication of the notice in the *Federal Register*, as drafted, that would inform the public of Litigation Guidance to provide recommendations for best practices to all parties in relevant litigation related to providing an exemption in protective orders and settlement agreements for reporting information to the CPSC.

Chairman Kaye, Commissioner Adler and Commissioner Robinson voted to approve publication of the notice, as drafted. Commissioner Buerkle and Commissioner Mohorovic voted to not approve publication of the notice.

Commissioner Buerkle and Commissioner Robinson submitted the attached statement regarding the matter.

For the Commission:

Todd A. Stevenson
Secretary

* Ballot vote due November 18, 2016
(Vote due date was set by Commission agreement.)

Attachment: Statement of Commissioner Buerkle
 Statement of Commissioner Robinson

Dissenting Statement of Commissioner Ann Marie Buerkle on the “Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation”

The Commission voted 3-2 to approve the “Guidance” relating to protective orders in private litigation. I generally welcome any additional safety information the agency can get, but I have serious concerns about how this Guidance will be portrayed to courts considering requests for protective orders. I am particularly concerned about our ability to protect any information that comes our way because of it.

Despite my concerns, I was prepared to approve publication of the Guidance as a proposal for public comment. Unfortunately, my colleagues on the other side of the aisle refused to accept that approach. Therefore, I could not vote for adoption of the Guidance.

Although the Commission declined to allow public comment on this Guidance, I am still interested in hearing any thoughts and reactions from our stakeholders. Please provide comments to me by e-mail at Commissioner_Buerkle@CPSC.gov.



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

**STATEMENT OF COMMISSIONER MARIETTA S. ROBINSON
ON CPSC LITIGATION GUIDANCE AND RECOMMENDED BEST PRACTICES FOR PROTECTIVE
ORDERS AND SETTLEMENT AGREEMENTS IN PRIVATE CIVIL LITIGATION**

The U.S. Consumer Product Safety Commission (“CPSC” or “Commission”) is a small and underfunded health and safety agency tasked with protecting the public from unreasonable risk of death or injury associated with thousands of types of consumer products. CPSC cannot properly do its essential job if it does not collect timely information relating to potential product hazards. To advance the CPSC’s mission, on November 18, 2016, the Commission, by a vote of 3-2, issued Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Litigation (“Litigation Guidance”). The Litigation Guidance aims to help prevent protective orders and confidentiality agreements entered in private litigation from barring the disclosure of critical product hazard-related information to the CPSC by any party. As explained in the Litigation Guidance, such confidentiality provisions have, in fact, prevented parties who do not have 15(b) reporting obligations under the Consumer Product Safety Act (CPSA) from providing information to the CPSC regarding potential consumer product hazards. As a result, the health and safety of American citizens may have been needlessly compromised.

As explained in the Litigation Guidance, the Federal Rules of Civil Procedure, case law, and state statutes, all support excluding or exempting reporting to CPSC from confidentiality provisions in protective orders, settlements, and similar agreements. The Litigation Guidance also provides suggested language for parties wishing to effectuate such exclusions or exemptions in the agreements they negotiate. The Litigation Guidance does not, however, change any person’s rights, duties, or obligations under any act or regulation administered by the CPSC. Rather, it simply provides parties engaged in private litigation the tools to ensure that the agreements into which they enter as part of their litigation do not needlessly compromise the health and safety of the American public by depriving the very agency tasked with protecting the public of the essential information it needs to do its job.

The Litigation Guidance was my initiative. I proposed it after hearing from private litigators representing consumers whose injuries or deaths were caused by a product. These litigators had been barred from disclosing critical information to the CPSC because of protective orders and settlement agreements entered in their cases. These litigators informed me of similar guidance previously issued by the National Highway Traffic Safety Administration, available here. While developing this Litigation Guidance, my staff and I worked hard to address any concerns raised by fellow Commissioners and staff.

One of the concerns raised was the decision to publish the Litigation Guidance without notice and comment. While I am generally a strong believer in the value of notice and comment,

it is not required, nor helpful, in this instance. First, as guidance, there is no requirement under the Administrative Procedures Act to seek comment. Second, the Litigation Guidance simply informs the public of the relevant legal authorities and provides the tools, which parties are free to ignore, to ensure that information discovered in private litigation, may, if appropriate, be disclosed to the CPSC. Issuing the Litigation Guidance without seeking comment, is entirely consistent with CPSC's previous practice, such as the publication of the CPSC's Public Health Authority Notification, informing hospitals and other health care organizations of CPSC's status as a "public health authority" under HIPAA (a Federal Register Notice that Commissioner Buerkle voted to approve). The Litigation Guidance is no different; it is a means of providing relevant members of the public information regarding the state of the law as it applies to disclosure of information to the CPSC. Finally, when notice and comment is neither required nor helpful, seeking comment simply ties up precious CPSC resources, and needlessly delays safety-enhancing action.

As Commissioner Buerkle notes in her statement regarding the Litigation Guidance, collecting safety information is important. However, Commissioner Buerkle's expressed concern about CPSC's ability to protect the confidentiality of such information is, simply, a canard. Under Section 6(b) of the CPSA, the CPSC is uniquely restricted in its ability to disclose information to the public regardless of its source. In fact, CPSC has even imposed on itself additional restrictions on information disclosure under its 1101 Regulation. Commissioner Buerkle has been a steadfast opponent of CPSC's attempts to modernize and streamline this regulation. Given the protections of both the statute and regulation, any protestations that information which CPSC may receive as a result of parties voluntarily adopting the recommendations in the Litigation Guidance ring especially hollow.

The Litigation Guidance has been issued. Parties and judges are free to read it, consider it, and decide whether to adopt its recommendations. Given the strong public interest involved, I hope that the Litigation Guidance will help protect the health and safety of the American public, by allowing CPSC to receive, and take action on, timely and relevant information regarding potential consumer product hazards.