

Consumer Product Safety Commission Advisory: Announcement of New Nominees To The Consumer Product Safety Commission: How This Might Affect Your Business Sooner Than You Think

5/7/2009

On May 5, 2009, President Obama announced his nomination of Inez Moore Tenenbaum to chair the Consumer Product Safety Commission and Robert S. Adler to be a commissioner. He also announced his intent to nominate a fifth (Republican) commissioner this summer. Since former CPSC Chairman, Harold Stratton, resigned in July 2006, the CPSC has been operating under the direction of only two commissioners, Nancy Nord (Acting Chair) and Thomas Moore. These two commissioners often are in sharp disagreement, hindering Commission decision-making. Over the past several months, members of Congress, and even Acting Chair Nord herself, have been calling for the President to nominate a new Chair.

Collectively, the new commissioners, if confirmed, could dramatically change the direction and focus of the agency and may, over time, impose significant new mandates and restrictions on companies that manufacture, import, and sell consumer products. How the new Commission interprets and enforces the recently enacted Consumer Product Safety Improvement Act (CPSIA) will also directly impact all such firms.

The Nominees

Inez Moore Tenenbaum

Current:

- Special counsel to the McNair Law Firm on matters of public school finance.
- Previously mentioned as a possible nominee for Secretary of Education and as a possible Gubernatorial candidate in South Carolina.

Prior Experience:

- Super-delegate in the 2008 Presidential election, endorsed President Obama.
- South Carolina's state Superintendent of Education (1998-2007).
- Candidate for U.S. Senate (lost to Jim DeMint) (2004).
- Attorney, Sinkler & Boyd (health, environmental, public interest law) (1986-1992).

- Established the South Carolina Center for Family Policy, a non-profit organization dedicated to reforming the state's juvenile justice system (1992).
- Director of research for the Medical, Military, Public & Municipal Affairs Committee, SC House of Representatives.
- BS and MA (education), University of Georgia. JD, University of South Carolina.

Robert S. Adler

Current:

- Professor at the University of North Carolina and the University of North Carolina Kenan-Flagler Business School.
 - Professor of ethics, negotiation, business law, and consumer protection.
 - Served as the Associate Dean of the MBA program and as Associate Dean for the Bachelor of Science in Business Administration program.

Prior Experience:

- Deputy Attorney General for Pennsylvania Justice Department (head of southwest regional office of the PA Bureau of Consumer Protection).
- Attorney-advisor to two previous CPSC Commissioners (1973-1984).
- Counsel on the Committee on Energy and Commerce (advised on CPSC matters).
- Elected six times to Board of Directors of Consumers Union.
- Served on Obama-Biden transition team (co-authored the CPSC agency review report).
- AB, University of Pennsylvania. JD, University of Michigan.

Probable Impact Of The Nominations

We expect that the newly constituted Commission, once it is in place, may result in the following:

- The new commissioners may take swift and public enforcement and regulatory action targeted at certain companies and industry sectors that have been viewed by some consumer advocates and media as "bad actors," particularly in areas where there has been significant public and congressional attention, *e.g.*, toys.
- A number of petitions and proposed regulations and bans that previously had been voted down by the Commission may be reviewed and voted on again, including, for example, the ban on youth ATVs and review of petitions to ban a number of heavy metals and other substances from children's and other consumer products.
- The Commission may also begin to examine the long-term health impacts of substances and products that it has heretofore not had the resources to examine, possibly in conjunction with other federal agencies and in coordination with consumer and environmental groups.
- The new Chair and the new Commission will need to address a host of lingering CPSIA enforcement issues. It can be expected that the Commission will begin acting quickly to:
 - grant exemptions from the ban on lead content (in excess of 600—soon to be 300—ppm);

- give practical guidance as to how to test for both lead paint and lead substrate (e.g., what a “component part” of a product is and whether testing is required on the finished product or just component parts);
 - provide more specific guidance on what is required under Section 103 of the CPSIA (regarding tracking labels for children’s products);
 - begin to substantively address the third-party testing and certification requirements of the CPSIA, possibly including specific testing protocols and procedures, and granting further relief from the general conformity certification requirement;
 - offer greater clarity as to which products the limit on certain phthalates applies, as well as acceptable methods to test that standard; and
 - commence utilization of the CPSIA Section 223 authority to deem certain products *per se* substantial product hazards.
- The new Commission may also be more inclined to act on information it receives from consumer advocate groups, including accepting those groups’ conclusions that a product or product category poses a significant hazard.
 - It might also be more prone to release to the public information it obtains about specific products (which is currently protected from immediate disclosure). The new Chair and Commission may also be more willing to publicly criticize companies, industry sectors, and even foreign governments that it perceives as not doing enough to ensure product safety.
 - There will also be changes to the influential senior staff at the agency. Political appointees will likely leave shortly after the new Chair arrives, but the career senior staff may remain. To the extent there are senior staff changes, there may be a significant impact on the enforcement and other priorities and outcomes of the agency.

Contact

Mintz Levin has assembled a team with extensive first-hand experience with CPSC administered laws and regulations. Chuck Samuels has represented clients in the product safety arena for nearly 30 years and was a leader in the industry group that worked on the CPSIA legislation. Quin Dodd, former Chief of Staff at CPSC, led the team that negotiated provisions of the CPSIA on behalf of the agency. We are presently advising trade associations, manufacturers, retailers, importers and testing labs on the new law and its implications to their business.

Please feel free to contact us if you have questions regarding product safety regulatory advice.

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