

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 participation 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 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 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 need to seek public comment on that document before we settle on our next steps. I think 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.