

## What To Expect As A Democrat Takes The Reins At The CPSC

By **Matthew Cohen** (October 3, 2019, 4:21 PM EDT)

It has long been said that politics makes strange bedfellows. On Sept. 13, Ann Marie Buerkle, the outgoing acting chairman of the U.S. Consumer Product Safety Commission and a staunch Republican, sided with Democratic commissioners Robert Adler and Elliot Kaye to elect Adler as the incoming vice-chairman of the commission.

The implications of that vote became clear this week, when Buerkle stepped down as acting chairman of the CPSC on Sept. 30, and Adler assumed the chair on Oct. 1.

This is a remarkable development in today's hyperpartisan political world. Such crossover votes are exceedingly rare — particularly where, as here, the outcome determined the interim leader of a federal agency. While consumer product safety should not be political, it very much is, like everything else.

So, a little less than one year after the Republicans gained a majority on the CPSC for the first time in 12 years, the commission is on the verge of returning to a 2-2 split along partisan lines, and being led by a Democrat — hardly an expected outcome during this administration.

For those readers not familiar with the CPSC, the agency is currently made up of five commissioners — Republicans Ann Marie Buerkle, Dana Baiocco and Peter Feldman, and Democrats Robert Adler and Elliot Kaye. Just a few months ago, on June 18, Buerkle withdrew her nomination to serve as a confirmed chairman of the commission, and to serve an additional seven-year term through October 2025.

Buerkle also announced on the same day that Sept. 30 would be her last day as acting chairman, and that she would depart the agency altogether on Oct. 27, the expiration date of her current term (which has included a holdover year).

Traditional, partisan thinking forecast that the majority of the commission (i.e., the three Republicans) would elect a fellow Republican on Sept. 13 to serve as vice-chairman, who for all intents and purposes would be the incoming acting chairman. But, extraordinarily, that is not what happened.

In a statement issued that same day to the Washington Post, Buerkle stated that “consumer protection is not political,” and that she believed the incoming acting chairman should be “the most experienced,



Matthew Cohen

most senior commissioner who has previously served in this role.” And that individual, according to Buerkle, was Adler.

A commissioner since 2009, and longtime staff member at the CPSC going back to its creation, Adler served as the acting chairman of the commission in late 2013 and early 2014 upon the departure of then-chairman Inez Tenenbaum. It is indisputable that now-acting chairman Adler is a steady hand.

As shocking as this development may be to some, it should hardly come as a complete surprise. Although Buerkle and Adler, admittedly, have diverging political and regulatory philosophies, they are known within the product safety community to have a long-standing and cordial working relationship grounded in mutual respect.

In fact, in the wake of Buerkle’s June 18 announcement that she would be withdrawing her nomination to serve as chairman and leaving the agency at the end of her term, Adler told the Washington Post that he considered Buerkle to be “a fundamentally decent, fair-minded person.” Adler added that “she and I disagreed strongly on many, many issues of regulatory philosophy and policy. But I think she was an excellent chair for this agency.”

On the other hand, Buerkle’s relationship with her fellow Republican commissioners, particularly Dana Baiocco, appeared strained at times, to say the least. There were clues along the way that the then-acting chairman might consider casting her vote for Adler upon her resignation of the chair.

For example, during the CPSC’s May 22 public meeting on the FY 2019-2020 Mid-Year Review, Baiocco and Buerkle engaged in lengthy, unusually tense and at times uncomfortable exchanges on the commission’s response to an unauthorized disclosure of information in April. No observer could have walked away from that meeting with the impression that the two had a particularly warm relationship. Such exchanges continued over the past few months in meetings and other public fora as well.

So what does this development mean for product safety stakeholders, including industry and consumer advocates, and those who practice law regularly before the commission?

In the short term, upon Buerkle’s departure from the CPSC altogether on Oct. 27, the commission will return to a 2-2 split along party lines. Presumably, some partisan gridlock on both procedural and substantive matters will occur. In the very near term, the commission will consider the agency’s FY 2020 operating plan. Should approval of the operating plan not occur before Oct. 27, the chance of a stalemate between Republicans Baiocco and Feldman on one side, and Democrats Adler and Kaye on the other, increases.

Similarly, in the past, the commission has, for example, divided along party lines on the approval of certain agreements to resolve civil penalties — such as the last announced civil penalty agreement in November 2018 involving EKO trash cans — and administrative litigation — such as the Britax case involving jogging strollers. Such divisions could reemerge on these types of matters presented to the commission, as well as others related to regulatory rulemaking.

That dynamic notwithstanding, the commission will continue to operate according to its current fiscal year’s operating plan, which has already been voted on and passed, and continue its work to keep consumers safe from unreasonable risk of injury or death from consumer products.

As to longer term implications, presumably, Adler's ascendancy to the chair of the agency will incentive the White House to nominate, and the Republican-controlled Senate to confirm, a third Republican commissioner to restore the Republican majority upon Buerkle's departure from the agency later this month. That commissioner could even be nominated as chairman, or the White House could decide to elevate Baiocco or Feldman. Time will tell how this unusual series of events plays out.

---

*Matthew Cohen is a counsel at Crowell & Moring LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*