

Advocate For An Agency: Ex-CPSC GC Cheryl Falvey

Law360, New York (March 31, 2017, 12:07 PM EDT) --*This article is the third in a series featuring the reflections of attorneys who have served as general counsels of federal agencies.*

In this installment, Cheryl Falvey, who served as general counsel of the U.S. Consumer Product Safety Commission from 2008 to 2012, describes the challenges of working at an agency with constrained rulemaking authority and a tight budget, discusses how a change in administrations led to shifting CPSC priorities, and explains how she worked with her staff to respond creatively to urgent problems that required coordination across multiple agencies and governments.



Cheryl Falvey



I have been asked for reflections on my tenure as the general counsel of the U.S. Consumer Product Safety Commission. The CPSC regulates a wide range of consumer products sold in the U.S. Yet, interestingly, the statutes the CPSC administers tightly curtail the commission's power to issue rules. In those statutes, Congress mandates a distinct preference for voluntary industry standards over mandatory rules and regulations.

Unless Congress mandates otherwise, before passing "go" on most rulemakings, the commission must make detailed analyses and findings concerning the adequacy of any existing, relevant voluntary standards, as well as costs and benefits and other regulatory alternatives. Given the hurdles to rulemaking built right into the statute, very few mandatory rules have been issued by the CPSC over the years, and those that have can prove challenging to revise.

What then does the general counsel do at a regulatory agency where the statutes constrain the agency's ability to issue regulations? For me, the answer was to implement a sweeping reauthorization bill – more on that later. But the other half of the job involved the CPSC's real regulatory power, which comes from its ability to recall products.

Manufacturers, distributors and retailers must inform the commission promptly about potentially dangerous products which then initiates an analysis at the CPSC of whether a defect exists and whether corrective action is necessary. A recall can be ordered by the CPSC when it finds that a product contains a

“defect” that creates a “substantial product hazard.” Most recalls are not ordered by the CPSC but initiated voluntarily to avoid a government finding of a defect.

The law imposes stiff civil penalties for failing to report hazardous products in a timely manner. Indeed, this power has caused several courts to note that the CPSC’s reporting requirement is among its most potent weapons. Describing the regulatory power behind the reporting requirement and recall process helps illuminate the influence the Office of General Counsel at the CPSC has on the regulated stakeholders.

As a career appointee from March of 2008 through September of 2012, I served as a direct report to both a Republican chairman, Nancy Nord, and a Democratic chairman, Inez Tenenbaum, and through the transition from the Bush administration to the Obama administration. At the time, the CPSC was implementing a sweeping reauthorization bill with new mandates and enforcement powers, the Consumer Product Safety Improvement Act (CPSIA).

The CPSIA was enacted in August of 2009 with significant bipartisan support. It imposed new regulations on manufacturers of children’s products. While the law began as an attempt to address the issue of lead paint on toys (mostly imported from China), the expansive definition of children’s product in the CPSIA swept in a variety of industry segments, including bicycles, all-terrain vehicles, apparel, shoes, personal care products, jewelry, durable infant products, books, school supplies, educational materials and science kits.

Compliance with the new regulations would be established through costly testing and certification requirements that favored large suppliers. Many small businesses discontinued the sale of children’s products given the cost of the third-party testing required to prove compliance. The implementation of the CPSIA, with its controversy and attendant political pressures (culminating in revisions to the law passed two years later), was my main priority while serving as the general counsel to the agency.

But my role as general counsel entailed significant additional responsibilities. I provided legal advice to the commission on its compliance with the Privacy Act and NIST cybersecurity requirements as it modernized its IT function and launched its consumer facing database, saferproducts.gov, also mandated by the CPSIA. I supervised four divisions within the legal function at the CPSC ranging from procurement and ethics to litigation and enforcement.

During my tenure, we delivered to the commission then-record civil penalty settlements for failure of manufacturers and retailers to make timely reports to the agency, particularly in the wake of the excessive amounts of lead paint being found on imported toys. As the Obama administration found their voice at the CPSC, we started using more of the enforcement tools in the CPSIA and partnering with other agencies to bring criminal actions against the most egregious repeat violators.

Importantly, the lawyers at the agency involved in the day to day compliance functions of the CPSC were brought under the general counsel’s supervision during my tenure. Nancy Nord spearheaded that change to bring the CPSC more in line with a corporate model, where the legal department served as counsel to all the various directorates, or divisions, of the commission.

As the Obama administration stepped up enforcement activity, however, that necessarily meant the general counsel had more influence over the decisions with regard to the issues of significant regulatory impact. The best example of that during my tenure was the general counsel’s role in the Chinese drywall investigation.

The CPSC found itself in the lead with regard to an inter-agency investigation into an environmental health

issue involving defective drywall manufactured in China, imported to the United States and used in residential construction between 2001 and 2009 in approximately 20 states. As the general counsel, I directed the legal aspects of the Chinese drywall investigation due, in part, to this change in the legal reporting structure at the agency.

The Chinese drywall investigation involved every division of the Office of General Counsel. We had lawyers handling the procurement of sophisticated laboratory equipment for drywall chamber testing and contracting with teams of experts both within and outside of government. Others in the enforcement division were determining whether there was evidence sufficient to prove a defect, and still others were meeting with plaintiffs' lawyers and state AGs who were demanding the results of the CPSC's investigation to build their own cases.

The coordination of the investigation with the Chinese government also brought in the need to navigate cybersecurity and information disclosure concerns. As part of the investigation, our lawyers worked with technical experts at the CPSC analyzing indoor air emissions, calculating inhalation risks to the individuals in the home, and studying whether those emissions might corrode significant fixtures in the home, such as the gas lines. Without question that experience enabled me to see the CPSC at its best – world renowned experts across a myriad of disciplines all working together to solve a technical challenge.

The agency managed that crisis by adopting a transparent disclosure policy. In an unprecedented move, the CPSC decided to release the results of its testing at various stages and before all of the analytical interpretation was complete. These interim technical reports were shared with Congress and the press and then posted on a joint inter-agency task force website dedicated to the investigation.

Staff routinely appeared on the Hill to answer questions regarding the status of the investigation, including me, as general counsel, with no invocation of attorney client privilege. As lawyers, our initial instincts are often to preserve privilege and avoid disclosure. It was tough to manage an investigation where we were building consensus on the results of our testing with one another and other agencies, such as EPA and the CDC, under the constant scrutiny of the public eye.

It taught me, however, that despite how changeable and even chaotic an investigation may appear as it unfolds, providing answers to stakeholders with an interest in the outcome of the investigation is important when the public safety may be at risk. After all, those stakeholders are taxpayers, and if information can be shared with the appropriate caveats and without causing undue prejudice, it deserves to be released to the public the agency serves.

Lessons Learned

The Chinese drywall experience will always serve as a reminder to me of the pressure that Congress can bring to bear on an agency on behalf of its constituents and how a crisis can divert critical agency resources away from achieving other important agency goals. The lesson learned: when enduring congressional pressure to act, make sure to ask for the necessary funds and track and document the cost of responding to all that pressure.

There are plenty of lessons in the CPSIA experience about the unintended consequences of regulation by congressional fiat. Industries swept into the breadth of Congress's definition of children's product — youth ATVs, bicycles and even books — learned that the hard way. One observation that may not be as apparent is how the tight timelines in the CPSIA impacted the staff at the agency.

The statute dictated a series of back to back rulemakings, beginning within months of enactment, and including, among other things, two durable infant product rules every six months for many years into the future. Despite sweeping changes in the law, the timelines allowed very little time for training the agency staff on the meaning of those new provisions. Learning the new law was added to plates that were already full in a resource-strapped agency. With critical provisions in the law changing days before passage, there was little time for advance preparation and planning.

The other significant lesson from the CPSIA experience was just how difficult it is to mandate that an existing industry voluntary standard become law. Congress certainly has the power to do so, but whether the voluntary standard has been sufficiently developed, both in terms of its substance and underlying testing procedures, to be enforceable is an entirely different question.

Whether testing pool drains to protect against hair entrapment, durable infant products for leaching chemicals, or furniture for durability and stability, without fully developed test protocols and round-robin testing at numerous laboratories, there can be serious questions regarding the enforcement of those standards.

It simply doesn't make sense to give a voluntary standard the force of law without ensuring that everyone knows how to test for compliance. All too often companies that thought they had brought their products and management systems into compliance were second-guessed after having spent significant sums to meet the new mandates.

Challenges for the Future

The single biggest challenge for the CPSC in the future is striking the right balance on risk based hazard assessment. That is true whether that risk assessment is made by formal APA rulemaking or encompassed in the day-to-day compliance activities of its enforcement staff. The real regulatory burdens from the CPSC often come not from official rulemaking, with its due process protections and cost benefit analysis, but from day-to-day compliance decisions on what is a defect that creates a substantial product hazard. That process is utterly opaque.

Sometimes trends can be gleaned from studying recalls. In rare circumstances, whether a product defect presents a substantial product hazard will be announced by a letter to industry issued by the director of compliance with no due process. The Chinese drywall example proves that more transparency can be achieved, serving the interests of public safety while remaining consistent with appropriate safeguards on manufacturer-specific information disclosure and the due process protections built into the CPSA.

All eyes are currently focused on the impact of President Trump's executive order requiring the repeal of two regulations for every one promulgated. With the Democrats still firmly in the majority at the CPSC, it seems improbable that it will have any impact. The CPSC, as an independent agency, could easily take the position that the EO simply does not apply to them. The White House agrees.

But the reality is that very few rules have been issued by the CPSC over the entire life of the agency. As discussed above, that is because its enabling statute favors voluntary industry standards over mandatory rules. Indeed, many of the CPSC rules affecting product performance have been mandated by Congress and could not be repealed by the agency absent an act of Congress. Still others may require some APA process before they can be legally repealed or changed.

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