

ALERT

What Will CPSC Do Next About Battery Powered Products?

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Last week, the Consumer Product Safety Commission (CPSC) unanimously directed its staff to undertake an investigation of what Chairman Kaye called the safety issues associated with the use of "high energy density batteries," including lithium ion. This investigation has significant implications for manufacturers, distributors, and retailers of both lithium ion batteries and the products powered by those batteries.

This action was spurred in no small part by the ongoing publicity surrounding the recall of Samsung's Galaxy Note 7 mobile phone. But the agency has a long history of dealing with defective lithium ion batteries. Among other things, CPSC led the intra-government investigation and recall of hoverboard self-balancing scooters in the 2015 holiday season.

Typically, in situations like this, CPSC staff conducts some form of review and drafts a report that summarizes the issues, outlines potential CPSC responses, and recommends some of them. CPSC's active involvement in lithium ion battery and related product recalls in recent years has created at the agency a relatively deep pool of in-house expertise on failure modes and related issues. But CPSC staff likely will still seek support and input from the public. And there is little doubt that third party certification organizations will actively promote CPSC endorsement of their standards as a solution.

The next steps recommended by the staff could lead to the imposition of labeling and other regulatory requirements (e.g., testing) on some or all battery-powered consumer products and/or their packaging—including products that do not currently bear mandatory warning labeling, like mobile phones.

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If CPSC concludes that if additional regulation of lithium ion products is warranted, the agency is likely to choose one or more of four means of imposing new regulatory requirements: (i) formal adoption as rules of enforceable regulatory standards; (ii) formal identification in rules of product characteristics that it deems create substantial product hazards; (iii) informal issuance of guidance stating the agency's position on the appropriateness of certain voluntary standards; or (iv) clarification of its view as to whether the existing regulatory framework of the Federal Hazardous Substances Act (FHSA) applies to certain products.

First, the agency could establish a "consumer product safety rule" adopting a formal standard for lithium ion products under Section 7(a) of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2056(a). This type of rule sets forth minimum requirements that a product must meet in order to be deemed not to pose a "substantial product hazard." As part of those requirements, CPSC has frequently mandated compliance with a specific industry standard or standards (e.g., UL, ANSI, IEC), but it also can create wholly new regulatory elements.

Under Section 14(a) of the CPSA, 15 U.S.C. § 2063(a), any product for which an applicable consumer product safety rule exists must be certified and tested to meet that rule's requirements. If the rule incorporates by reference an otherwise "voluntary" industry standard, compliance with that standard is no longer voluntary.

Second, the agency might make a determination by rulemaking under Section 15(j) that certain product characteristics, or the lack thereof, (such as compliance with a voluntary standard or failure to include some safety components) pose a "substantial product hazard." If CPSC does so, a noncompliant product would almost certainly be found by a court to be unsafe for consumers, and therefore illegal to distribute or sell.

In theory, a Section 15(j) rule differs from a consumer product safety rule in that, among other things, a Section 15(j) rule does not expressly require testing and certification against the voluntary standard referenced. In practice, however, for prudent companies there is little practical difference between the two types of rules. A Section 15(j) rule is, like a consumer product safety rule, enforceable by CPSC even without a product failure. And it sets a standard likely to be relied upon by courts hearing personal injury or product liability claims tort cases.

From CPSC's perspective, the primary real-world difference between a Section 7 and a Section 15(j) rule is that CPSC has proven able to promulgate Section 15(j) rules far more quickly than a Section 7 rule.

But there is a third approach that enables CPSC to move even more quickly: the agency can simply use its "bully pulpit" authority to promote compliance with a voluntary standard.

CPSC has taken this third approach in the past by issuing and publicizing a statement or guidance saying that it believes a particular "voluntary" standard represents the minimum needed to *not* pose a substantial product hazard. While this sort of "guidance" is not alone directly enforceable by CPSC, even this sort of informal publication must be taken seriously by prudent companies. For example, CPSC recently used this method to urge the adoption of a new UL standard for hoverboard scooters containing lithium ion batteries. In that case, CPSC sent an open letter to retailers stating that CPSC believed that no hoverboard was safe unless it complied with a UL standard. This letter effectively resulted in a ban on the products, without any rulemaking proceeding.

As part of the regulations or guidance discussed above or independently, CPSC also might mandate (in the course of rules) or strongly encourage (in the case of guidance) product-specific labeling warning consumers. But, perhaps more concerning, independently of the CPSA, CPSC might opine that lithium ion batteries and/or products containing lithium ion batteries to be subject to the labeling requirements of the FHSA, 15 U.S.C. § 1261, *et seq.* If a product is subject to FHSA, the resulting labeling requirements are relatively straightforward. Manufacturers must put extensive text on the exterior of their products *and* on retail packaging. CPSC generally does not allow for the text to be presented only on packaging or in user manuals. And, significantly, these requirements attach once the product is deemed to be subject to FHSA, such as presenting a fire risk.

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Wiley Rein lawyers have considerable experience in dealing with CPSC and are world leaders in addressing regulatory issues associated with all types of batteries and battery powered products. For more information, please contact David Weinberg, Chair of Wiley Rein's Environment & Safety Practice (dweinberg@wiley.law, 202.719.7102).