



# Consumer Product Safety and Warranties

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**Melissa Landau Steinman**

Partner | [mlsteinman@Venable.com](mailto:mlsteinman@Venable.com) | 202.344.4972

**VENABLE** LLP

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# Agenda

- CPSC Overview and Update
  - CPSC Jurisdiction, CPSA Section 15(b) Requirements & Recall data
  - Compliance Tips
  - Trends in Enforcement/Recent Civil Monetary Penalty Settlements
  - New Laws and Legislation
- Warranties
  - Magnuson-Moss Act Framework
  - State Laws
  - Recent Litigation
  - Right to Repair



# Consumer Product Safety Commission Overview

Established in 1973, CPSC is an independent executive branch commission.

- Up to 5 commissioners; no more than three may be affiliated with the same political party.
- Each commissioner is appointed by the president and confirmed by the Senate for staggered set terms of 7 years.
  - The chairman influences CPSC agenda, operating budget allocation, and direction of certain policies.
  - May be chosen from the commissioners or be a new appointment.

Current Commission has three commissioners total, including the chairman.

- Acting Chairman Adler (D) (finished term, temporary holdover)
- Commissioner Dana Baiocco (R)
- Commissioner Peter Feldman (R)
- Three seats open – President Biden has announced nominations for all three:
  - Alexander Hoehn-Saric (D)- will become chair.
  - Mary Boyle (D)
  - Richard Trumka, Jr. (D)



# What is a Consumer Product?

- According to Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, “consumer product” is defined as:
  - any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise.
- Excludes:
  - Motor vehicles and motor vehicle equipment (regulated by NHTSA);
  - Boats (regulated by Coast Guard);
  - Aircraft (regulated by FAA);
  - Pesticides (regulated by EPA) ;
  - Tobacco and firearms (regulated by TTAB);
  - Food, drugs, cosmetics and medical devices (regulated by FDA); and
  - “Any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer.”

# Consumer Product Safety Improvement Act (CPSIA)

- In 2008, Congress passed the CPSIA (updating 1972 CPSA) with bipartisan support.
- The Act is an umbrella statute: it defines CPSC's basic authority and authorizes the Agency to develop standards and bans.
  - Directed CPSC to promulgate mandatory standards for children's durable products and toys and require product registration cards.
  - Required third-party testing and certification for certain chemicals in certain products.
  - Directed the CPSC to create a public database to report consumer incidents – [www.saferproducts.gov](http://www.saferproducts.gov).
  - Increased the civil monetary penalty amounts to \$15 million.
  - Provides CPSC with the authority to pursue recalls and to ban products under certain circumstances.
  - Requires mandatory reporting of products that may present a risk of injury or that may violate a mandatory standard.

# Relevant Statutes

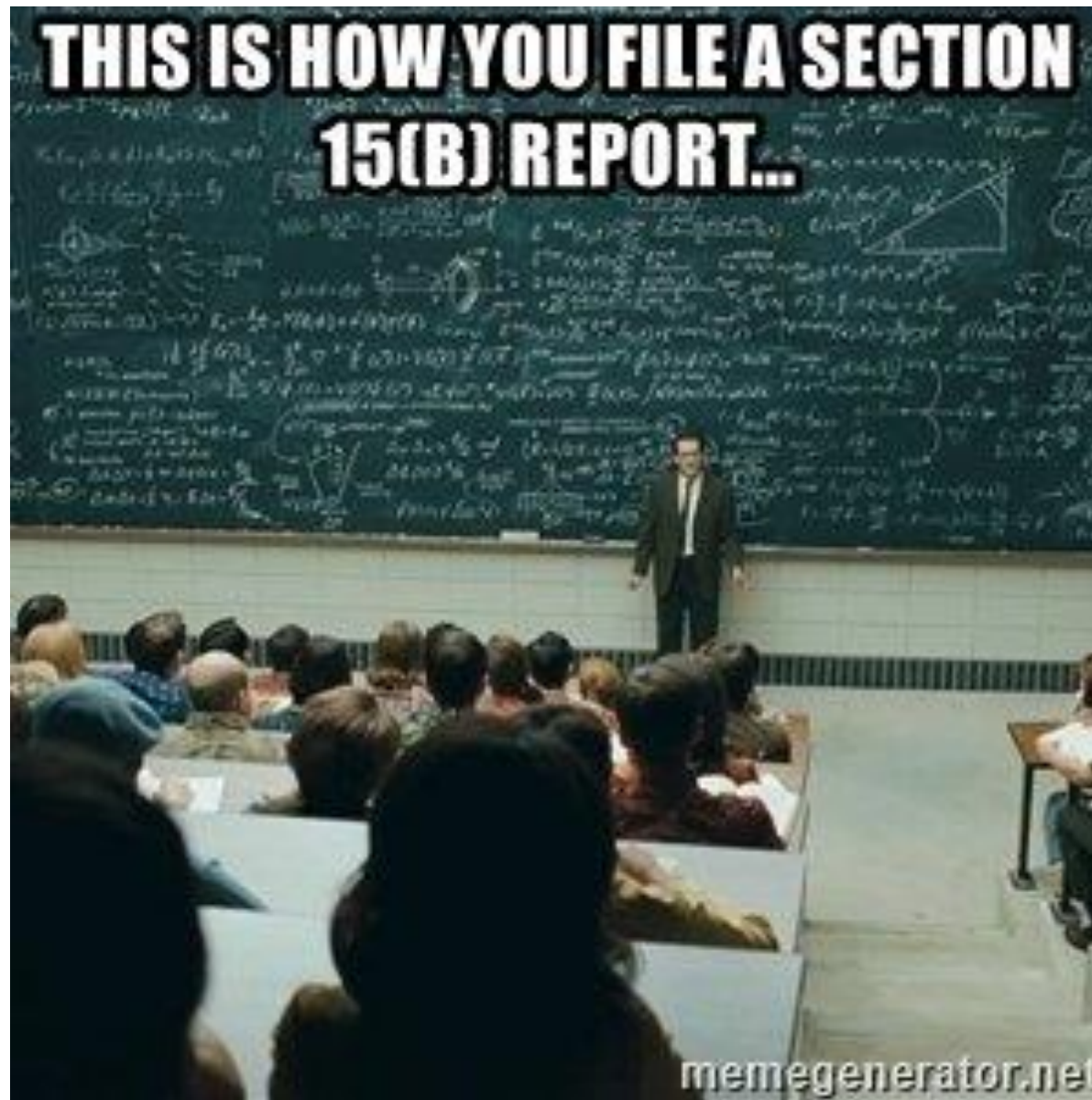
Consumer Product Safety Act (CPSA)

Poison Prevention Packaging Act (PPPA)

- PPPA requires a number of household substances to be packaged in child-resistant packaging.

Federal Hazardous Substances Act (FHSA)

- FHSA requires certain hazardous household products to have warning labels. It also gives CPSC the authority to regulate or ban a hazardous substance, and toys or other articles intended for use by children, under certain circumstances to protect the public.
  - Electrically operated toys, cribs, rattles, pacifiers, bicycles, and children's bunk beds.
- Children's Gasoline Burn Prevention Act (CGCPA)
- Flammable Fabrics Act (FFA)
- Child Safety Protection Act (CSPA)
- Labeling of Hazardous Art Materials Act (LHAMA)
- Refrigerator Safety Act (RSA)
- Virginia Graeme Baker Pool and Spa Safety Act (VGB Act)
- Drywall Safety Act of 2012 (DSA)
- Child Nicotine Poisoning Prevention Act of 2015 (CNPPA)





# Section 15(b) – Mandatory Reporting to CPSC

*Section 15(b) of the CPSA requires reporting upon receipt of information that “reasonably supports the conclusion” that any product over which CPSC has jurisdiction fails to comply with “any ... rule, regulation, standard, or ban” under any Act enforced by the Commission:*

- A defective product that could create a substantial risk of injury to consumers;
- A product that creates an unreasonable risk of serious injury or death; and
- Certain specific triggers/statutory violations: death from choking on toys (violation of small parts standard), presence of hazardous substances or poisons, etc.

*Who must make a Section 15(b) report to the CPSC?*

- Manufacturers, importers, distributors, and retailers of consumer products have a legal obligation to report.

*Timing:* “Immediately,” i.e., within 24 hours of obtaining “reportable information.”

- Allowed up to 10 days to investigate.
- Additional 5 days to percolate through corporate/executive decision making.
- Failure to report in a timely manner may lead to a claim by the CPSC for civil monetary penalties and increased compliance requirements.

# Is there a Hazard or Defect?

Is there a “Substantial Product Hazard” or “Unreasonable Risk of Injury or Death” that requires reporting?

- A failure to comply with an applicable consumer product safety rule under the CSPA or a similar rule, regulation, standard, or ban under any other Act enforced by the CPSC that creates a substantial risk of injury to the public, or
- A product defect which creates a substantial risk of injury or death to the public.
- Commission will consider the following factors:
  - risk of injury;
  - pattern of defect;
  - number of defective products distributed in commerce;
  - severity of the risk; or
  - other considerations, including reasonably foreseeable use and misuse of a product.
- Presence of any one factor alone can result in a finding that a product defect (or noncompliance) that creates a defect substantial product hazard, *e.g.*, just one injury (or risk of severe injury) or even zero injuries may be enough if it is severe enough.
- Product can be defective with respect to its design, manufacture, or warnings (just as with products liability law)—multifactored analysis.



# Types of Product Recalls

- The CPSC issues three types of recalls: Fast Track, Voluntary, and Mandatory:
  - Fast Track: Company-initiated voluntary recalls where no determination of substantial product hazard is made.
  - Voluntary: Company or CPSC-initiated voluntary recall which may include a preliminary determination (PD) that a substantial product hazard exists.
  - Mandatory: Cases in which the CPSC sues to force a company to conduct a recall; must include a preliminary determination of a substantial product hazard.
- Not every report leads to a recall. Except when Fast Track Recall is requested, Commission will evaluate nature of hazard and make a determination:
  - Class A Hazard: Exists when a risk of death or grievous injury or illness is likely or very likely, or serious injury or illness is very likely.
  - Class B Hazard: Exists when a risk of death or grievous injury or illness is not likely to occur, but is possible, or when serious injury or illness is likely, or moderate injury or illness is very likely.
  - Class C Hazard: Exists when a risk of serious injury or illness is not likely, but is possible, or when moderate injury or illness is not necessarily likely, but is possible.

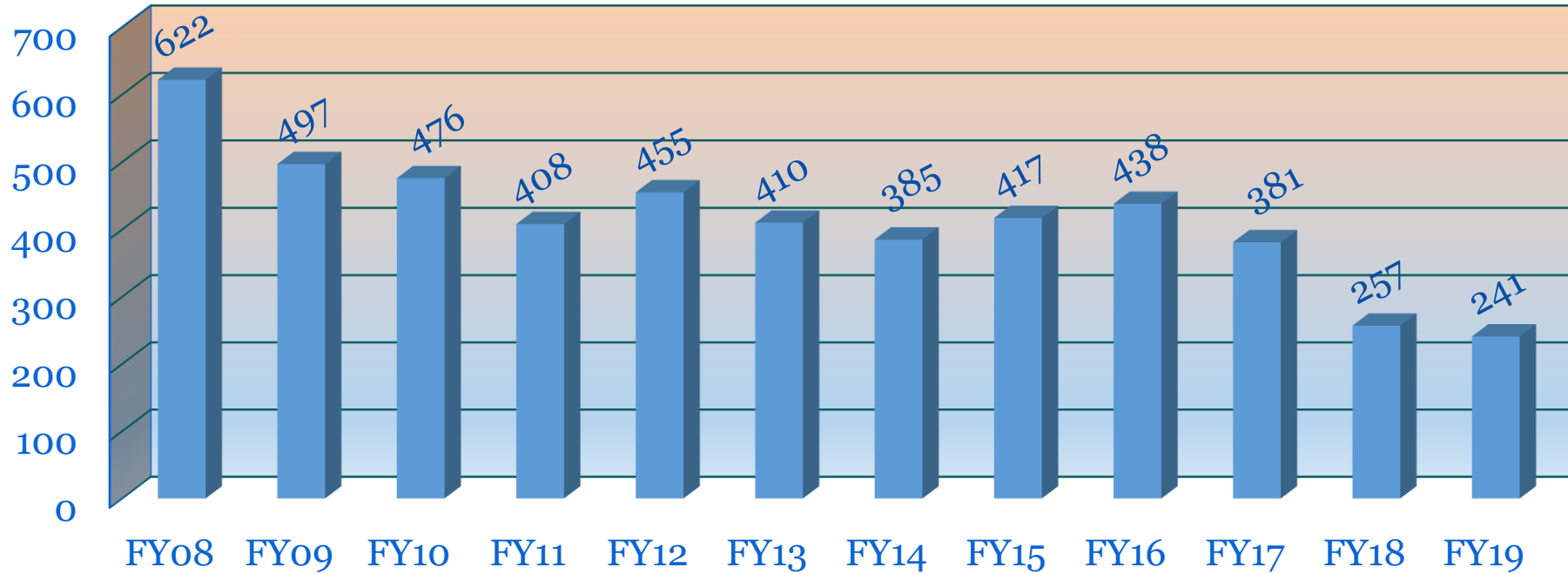
# What is the Remedy?

- What is the remedy?
  - Replacement
  - Repair
  - Refund
- CPSC focused on trying to make recalls as effective as possible.
  - Recall Effectiveness Workshop:
    - Leveraging technology
    - Directly contacting customers
    - Creative ideas to make recalls easier
- Consider:
  - What is the best way to reach consumers who have product?
  - Email—do you have all email addresses
  - Commission will require internet posting; increasing insistence on social media is well
  - Other customer touchpoints
  - What remedy will ensure the highest level of product returns so they are out of consumers' hands?

# Show me the data!



# Recalls by Fiscal Year – CPSC Data



**240 recalls in FY 2020**

## Section 15(b) Reporting and Recalls – CPSC data

- Only **56%** of all Section 15(b) reports end up being a recall, AND
- If you remove Fast Track cases, only **28%** of Section 15(b) reports end up being a recall.
- This is even further reduced to **17%** when the Corrective Action does not include a public Press Release or Recall announcement.

# CPSC Compliance Tips





# What does the CPSC say about compliance policies and programs, generally?

## [The CPSC Recall Handbook](#) - 2012

- P.26: “Companies whose products come under the jurisdiction of the CPSC should consider developing an organizational policy and plan of action if a product recall or similar action becomes necessary, whether it involves the CPSC or another government agency. This policy and any related plans should focus on the early detection of product safety problems and prompt response.”

## [The CPSC Regulated Products Handbook](#) - 2013

- P.25: “Companies whose products come under the jurisdiction of the CPSC should develop an organizational policy and plan of action to identify violative products during production and before a product recall or similar action becomes necessary. This policy and any related plans should focus on the early detection of product safety problems and execution of a prompt response.”

## [The CPSC Handbook For Manufacturing Safer Consumer Products](#) - 2006

- P.17: “PRODUCT SAFETY POLICY: The commitment of the manufacturer is the first executive step to be taken in developing an industrial consumer product safety system. A clear, strong statement from senior management citing statutory and voluntary reasons for this commitment is needed. The policy should be explicit with respect to the primacy of product safety during design, production and distribution. This policy should also make clear that it applies not only to the internal operations but also to suppliers, including suppliers of products manufactured outside the U.S. Ordinarily such a statement is publicized widely within the organization as a platform for subsequent planning and action. It may also be widely publicized outside the organization.”

## [Guidelines for Retailers and Reverse Logistics Providers](#) – 2013

- “It is your responsibility to monitor CPSC recalls and ensure that your business complies with the law.”

# The #1 Reason to Have a Compliance Program

[16 C.F.R. § 1119.4\(b\)\(1\) Factors considered in determining civil penalties.](#) – 2010 (interpretative guidance)

Safety/compliance program and/or system relating to a violation. **The Commission may consider, when a safety/compliance program and/or system as established is relevant to a violation, whether a person had at the time of the violation a reasonable and effective program or system for collecting and analyzing information related to safety issues.** Examples of such information would include incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns. The Commission may also consider whether a person conducted adequate and relevant premarket and production testing of the product at issue; had a program in place for continued compliance with all relevant mandatory and voluntary safety standards; and other factors as the Commission deems appropriate. The burden to present clear, reliable, relevant, and sufficient evidence of such program, system, or testing rests on the person seeking consideration of this factor.

# Goals of a CPSC Compliance Program

Design, implement, maintain, and enforce a system of internal controls and procedures to ensure that, with respect to all consumer products imported, manufactured, distributed or sold by the firm:

- Information required to be disclosed by firm to the CPSC is recorded, processed, and **reported** in accordance with applicable law;
- All reporting made to the CPSC is **timely**, truthful, complete, accurate and in accordance with applicable law; and
- Prompt disclosure is made to firm's management of any significant deficiencies or **material weaknesses in the design or operation of such internal controls** that are reasonably likely to affect adversely, in any material respect, the firm's ability to record, process, and report to the CPSC in accordance with applicable law.

# Top 12 CPSC Compliance Tips



# Compliance Tips

1. **Assign oversight** of the company's CPSC compliance and accountability to a senior management position such as regulatory compliance manager or director of compliance.
2. Maintain **written standards, policies, and procedures** designed to ensure that relevant product safety information that may relate to or impact CPSC compliance (including information obtained by quality control personnel) is conveyed effectively to personnel responsible for CPSC compliance, including reporting to the CPSC.
3. **Communicate CPSC compliance policies and procedures** to all applicable employees in risk management, legal, regulatory, marketing, product design, information technology, and compliance related roles, through **regular training programs**.
4. Provide a mechanism, such as an **anonymous hotline or online portal**, for confidential employee reporting of CPSC compliance-related questions or concerns to the chief compliance officer, regulatory compliance manager, or other officer.
5. Implement a thorough **Records Retention and Maintenance** system for product-safety related records, such as: records of product-related complaints, warranty returns, insurance claims, and lawsuits; production records; distribution records; quality control records; and product registration cards. Consider including retention cycles of at least five years.
  - A minimum of 5 years for most records or the “expected life” of the product.
  - Data from product registration cards for durable infant products must be retained for 6 years.
6. **Require proper testing and certifications** from all suppliers for all products and ensure that company compliance officials are aware of updated mandatory and voluntary standards.

# Compliance Tips (part deux)

7. Regularly **track product safety information and incidents**, including product return rates, call center data, and ratings by consumers on various websites, and evaluate the information to see if it reflects on product quality and safety issues.
  - Leverage technology and analytics if available.
8. Institute **regular reviews** of all of the above-referenced product information and incident data so that appropriate information is regularly conveyed to senior level company officials who are responsible for CPSC compliance and reporting in a systematic and organized fashion.
9. Assign a **recall coordinator** who has full authority to take the steps necessary (including reporting to the CPSC) to initiate and implement all recalls, with the approval and support of the firm's chief executive officer.
10. Maintain a “**product hold process**” (or its equivalent) through which the sale of products can be placed on hold for reasons of design, manufacture, performance, or safety.
  - Leverage POS technology.
11. Plan for a complete “**Reverse Logistics**” program to ensure all recalled products are identified, isolated, and either destroyed or returned to the manufacturer.
  - Also, maintain a program for the appropriate **disposition of recalled goods**.
12. Design and implement a product **post-recall monitoring** system before the start of a recall, including collecting and maintaining information about product returns and recall complaints.

# Recent Trends in CPSC Enforcement

The number of consumer product recalls fell to its lowest level in 16 years in 2019 (241 recalls), and dropped again to 240 recalls in 2020.

- The number of recalls last year may have been higher but for COVID-19.
- Peloton Tread+ recall in May 2021.
- One of the highest-profile recalls of the last two years (Tread was also recalled, but for an unrelated issue).
- Worth watching: CPSC’s administrative action against Amazon—marketplace liability is a “hot” issue in both the courts and at CPSC.



# The Big Story: Civil Monetary Penalty Cases and Settlements

## FY21 so far

**Walter Kiddie** Agrees to \$12 Million Civil Penalty, Compliance Program for Failure to Report Defective Fire Extinguishers (Jan. 2021)

**Cybex** Agrees to \$7.95 Million Civil Penalty, Compliance Program for Failure to Report Defective Exercise Equipment (Feb. 2021)

## FY19

**Costco** Agrees to \$3.85 Million Civil Penalty, Compliance Program for Failure to Report Defective Trash Cans (Oct. 2018)

**EKO** Agrees to \$1 Million Civil Penalty, Compliance Program for Failure to Report Defective Trash Cans (Nov. 2018)

## FY18

**Polaris** Agrees to Pay \$27.25 Million Civil Penalty for Failure to Report Defective Recreational Off-Road Vehicles (Apr. 2018)



# Other Developments

**Artificial Intelligence and Machine Learning**—CPSC is focused on how AI/ML may impact long term safety of products that may operate differently over time. ***AI/ML may present a safety risk, but may also enable identification and mitigation of potential hazards before they manifest.***

- March 2021—Virtual forum on AI and ML; discussions with stakeholders.
- May 2021—Publication of Report:
  - Highlighting recent staff activity, including hiring Staff Technologist and establishing AI/ML Working Group.
  - Proposing framework for evaluating potential safety impact of AI and ML in products:
    - Screen products for “components” of AI (e.g., data, algorithms, computations and connections) and ML (e.g., assessing/monitoring outputs, analyzing/modeling changes, adapting behavior over time) capabilities.
    - Assess functions and features of AI/ML capabilities.
    - Understand how AI/ML capabilities may impact consumers.
    - Ascertain if and how AI/ML capabilities may transform product and its use over time.
  - Makes recommendations to continue discussions, engage in voluntary standard-setting, make product testing recommendations.

# New Laws

## New Nationwide Upholstered Furniture Standard

- Signed into law December 27, 2020 as part of Consolidated Appropriations Act of 2020.
- Adopts California Technical Bulletin 117-2013:
  - Requires specific tests for smoldering resistance of materials used in upholstered furniture (mandatory since 2015).
  - Upholstered furniture = “general-use and children’s seating furniture” that is intended for indoor use, constructed with an upholstered seat, back, or arm, and has a cushion or pillow that can be used as a support for the body, limbs, or feet of an individual.
  - Standard also includes label font size, format, placement requirements.
  - Eff. June 25, 2021, applicable to items manufactured, imported, reupholstered as of that date.
- Online Q&A published 5/19/2021
  - Labeling requirement begins June 25, **2022** and only applies to items manufactured, imported, reupholstered as of that date.
  - Clarifies that all exemptions in CA flammability standard are incorporated in federal standard, including various baby furniture, and “[a]ny article which is smooth surfaced and contains no more than one-half (1/2) inch of filling material, provided that such article does not have a horizontal surface meeting a vertical surface.”

# New Legislation

- **HR 3724: Total Recall Act** (Rep. Meng (D-NY)):
  - Proposes that firms engaged in a recall should be required to post recall notices on their websites and all social accounts and spend a defined amount of money on publicizing it:
    - Mandatory recall: 25% of what the firm spent on marketing the product.
    - Voluntary recall: 25% of the product's original marketing budget as well as 100% of the product's social media marketing budget.
  - Bill would also mandate that the CPSC must provide an annual report to Congress on participation rates for each recall.
- **S 1355: Sunshine in Product Safety Act** (Sen. Blumenthal (D.-CT) and Reps. Schakowsky (D-IL) and Rush (D-IL))—would repeal Section 6(b) due process safeguards provided to companies in the CPSA.
  - Section 6(b) requires CPSC to engage in certain procedural steps before publicly disclosing information from which the identity of a manufacturer of a product can be readily ascertained, including taking reasonable steps to ensure that the information to be disclosed publicly is fair, accurate, and reasonably related to effectuating the purpose of the product safety laws.
  - CPSC notifies the manufacturer of the potential disclosure and provides it with the opportunity to comment, generally 15 days' time.

# Warranties



# Federal Consumer Product Warranty Law: Magnuson-Moss Warranty Act

## The Magnuson-Moss Warranty Act (“MMA”):

- Applies to consumer products or combination sales of products and services.
- Enables comparison shopping.
- Specific requirements that warrantors must meet.
- Do not have to provide a written warranty, but if you do, it must meet these requirements.

## Three parts:

- *Rule on Disclosure of Written Consumer Product Warranty Terms and Conditions* (the Disclosure Rule)
  - Written consumer product warranties must be titled as either "full" or "limited."
  - Warranty must include certain specified information about the coverage of the warranty in a single, clear, and easy-to-read document.
- *Rule on Pre-Sale Availability of Written Warranty Terms* (the Pre-Sale Availability Rule)
  - Warrantors *and* seller must ensure that warranties are available where warranted consumer products are sold.
  - Note required for products that retail for \$15 or less.
- *Rule on Informal Dispute Settlement Procedures* (the Dispute Resolution Rule)

# Magnuson Moss Warranty Act (cont.)

## Dispute Resolution under MMA

- MMA makes it easier for consumers to take company to court.
- Encourages warrantors to use informal dispute resolution under Dispute Resolution Rule, which includes specific requirements for ADR (*e.g.*, funding, procedures, etc.)—but not required to use if you do not require consumers to use it before suing.

## Magnuson-Moss PROHIBITS:

- Disclaiming or modifying implied warranties, although you can limit them to the duration of your express warranty—and if you are a seller and do not offer a written warranty (but offer a manufacturer’s warranty), you can disclaim your implied warranties in most states.
- Tie-in sales provisions –cannot require use of a specific item or service to keep warranty coverage unless they are free of charge, or the warrantor receives a waiver from the FTC (*see* Right to Repair discussion).
- Deceptive warranty terms.
  - Note that while “satisfaction guaranteed” and “lifetime guarantee” are not warranties, they may be deceptive advertising.

## Scope--Magnuson-Moss does NOT:

- Apply to oral warranties.
- Apply to warranties for services.
- Apply to products sold for resale or commercial purposes.

# State Warranty Laws

All 50 states have some type of warranty laws, but nature and scope vary:

- Lemon Laws
- Implied warranties (many states restrict or prohibit ability to disclaim).
- Laws that apply to specific types of product (e.g., new or used cars, RVs, boats, mobile homes) providing additional protections to purchasers of those products.
- Extended warranties/service contracts.

California's ***Song-Beverly Consumer Warranty Act***, Cal. Civ. Code §§ 1792 *et seq.* is particularly extensive:

- The Song-Beverly Act provides, among other things, that consumer goods sold at retail in California are automatically accompanied by certain implied warranties, and limits the ability to disclaim these warranties.
- Song-Beverly also requires manufacturers that cover products with express warranties to maintain a sufficient in-state service and repair presence (either themselves or through authorized independent facilities).
- If the manufacturer or its agents fail to repair the defective product within a reasonable number of attempts, the manufacturer should either buyback the product or replace it.
- Applies to any consumer goods, except for clothing and consumables.
- Has a cost-shifting provision.



# Warranty Litigation

- **FTC settlements/warning letters:** In 2018, The FTC settled with a car manufacturer and sent warning letters to six major companies that market and sell automobiles, cellular devices, and video gaming systems regarding tying or potential tying conduct in violation of MMA. The car manufacturer conditioned car owners' warranty coverage on use of its parts and service. Similarly, the letters warned that FTC staff had concerns about the companies' statements that consumers must use specified parts or service providers to keep their warranties intact. Each company used different language, but questionable provisions included:
  - This warranty shall not apply if this product . . . is used with products not sold or licensed by [company name].
  - This warranty does not apply if this product . . . has had the warranty seal on the [product] altered, defaced, or removed.FTC staff requested that each company review its promotional and warranty materials to ensure they did not state or imply that warranty coverage was conditioned on the use of specific parts of services and revise its practices to comply with the law.
- ***Garcia v. Corelle Brands, LLC***, No. CGC-21-589808 (Cal. Super. Ct. Apr. 7, 2021)(settled) -- class action suit that alleges, among other things, that Corelle Brands violated Song-Beverly by failing to include statements that the warranty card is for product registration and that a consumer's failure to complete and return the warranty card will not diminish the consumer's warranty rights.
  - Violates Section 1793.1(a) of Song-Beverly Act, which specifically requires such statements when a warranty card is used. MMA rules (16 C.F.R. § 700.7) also say that warranty coverage cannot be conditioned on return of a warranty card.
  - Series of similar class actions filed in California.
- ***In Re MacBook Keyboard Litigation***, No. 5:18-cv-02813-EJD (N.D. Cal. Mar. 8, 2021) –class action suit alleging, among other things, that Apple violated its implied warranty under Song-Beverly w/r/t the “butterfly keyboard” on its MacBook, which allegedly often fails. Class recently certified.



# Right to Repair



- Right to repair= right to self-repair or use third party to repair products (without voiding warranty). Grassroots, cross-industry, international movement supporting right-to-repair reached peak in 2021.
- May 2021-FTC Report to Congress regarding Right to Repair Restrictions concluding that original equipment manufacturers (OEMs) may impose repair restrictions in a potentially anticompetitive manner, including:
  - Product designs that complicate or prevent repair;
  - Unavailability of parts and repair information;
  - Designs that make independent repairs less safe;
  - Policies or statements that steer consumers to manufacturer repair networks;
  - Application of patent rights and enforcement of trademarks;
  - Disparagement of non-OEM parts and independent repair;
  - Software locks and firmware updates; or
  - End User License Agreements.
- Repair restrictions may violate federal and state warranty laws as well as antitrust laws.
- In July, President Biden issued an executive order which, among other things, requested that the FTC address "unfair anticompetitive restrictions on third-party repair or self-repair of items."
- FTC voted unanimously on 7/21/21 to ramp up law enforcement against repair restrictions
- Legislation is making its way through at least 25 state legislatures.

# “Right to Repair” Is Gaining Steam

- France created a “repairability index” and required manufacturers to give their products a score based on a range of criteria, as part of an anti-waste bill passed last year.
- The EU and UK enacted rules this year that require manufacturers of electrical appliances to make spare parts available to consumers and third-party companies. The EU is set to expand those rules to cover other electrical devices.
- Recent defect class actions (including suits against Microsoft and Sony for video game controller issues) have included allegations relating to consumers’ inability to repair.



# Questions?

**Melissa Landau Steinman**

Partner

202.344.4972

[mlsteinman@Venable.com](mailto:mlsteinman@Venable.com)





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