



COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION

OFFICE OF OVERSIGHT AND INVESTIGATIONS
MINORITY STAFF

**Failed Recalls:
The U.S. Consumer Product Safety
Commission Must Take New Steps to
Improve Recall Effectiveness**

STAFF REPORT FOR RANKING MEMBER
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**Failed Recalls:
The U.S. Consumer Product Safety Commission Must Take New Steps to Improve Recall Effectiveness**

EXECUTIVE SUMMARY

A series of high-profile failures to effectively recall dangerous products has called into question the ability of the U.S. Consumer Product Safety Commission (CPSC) to adequately protect American consumers from unsafe and defective products. An extensive review by U.S. Senate Committee on Commerce, Science, and Transportation Minority staff shows that these failures have not occurred due to staffing shortages or lack of legal authority. Instead, they are the result of a pattern of inappropriate deference to industry that has characterized CPSC leadership in recent years.

For example, in the case of the BOB jogging stroller, where approximately 200 reports were made of wheel detachment resulting in approximately 100 injuries to children and adults, CPSC leadership at the time ignored staff warnings urging an immediate recall of the product and terminated a lawsuit against Britax, the company that manufactures the stroller, for an immediate recall. A similar situation developed with regard to the Rock ‘n Play infant inclined sleeper, where the Commission had learned that more than 30 infants had died and yet failed to quickly act.

Following media reports that highlighted serious defects with both products and public outcry, the CPSC finally made public information about injuries and deaths associated with these products, and announced remedial actions. In both cases, the remedial actions were publicly billed as comprehensive “recalls” by the companies.

An examination of documents associated with both products by Senate Commerce Committee staff shows, however, that the “recalls” agreed to be the Commission function less as true remedies for consumers, and more as incentive programs to bring more business to the companies involved in the recalls.¹ Instead of offering refunds for many consumers with defective BOB strollers, the CPSC instead settled for allowing the company to offer coupons towards the purchase of additional products. Similarly, in the case of the Rock ‘n Play infant sleeper many consumers will never get a refund. Instead, they will be offered a voucher for additional Fisher-Price products. Finally, in the case of residential elevators with known hazards, then-Acting Chairman Ann Marie Buerkle did not nothing other than issue a “safety warning” that shifted blame for defects from the manufacturers to families and state regulators.

¹ This investigation was initiated by an April 8, 2019, letter from Senate Commerce Committee Ranking Member Maria Cantwell to then-CPSC Acting Chairman Ann Marie Buerkle requesting information related to the Commission’s handling of the BOB jogging stroller defect investigation, as well as other product defect investigations. This initial request was then supplemented by a June 27, 2019, letter from Ranking Member Cantwell to Acting Chairman Buerkle requesting information on the Commission’s handling of deaths and injuries caused by defective residential elevators. Copies of these letters are attached as Exhibit A. In response, the Commission produced thousands of pages of documents to Committee Minority staff. In addition, Committee Minority staff also reviewed numerous other open source documents, as well as regulatory information from other consumer product safety regulators around the world.

These settlements are at odds with traditional recall agreements negotiated by the CPSC, and they are at odds with the statutory mission of the Commission. Rather than providing consumers with a specific remedy that repairs all impacted products or a refund to remove the dangerous products from homes, these recalls perversely serve as marketing tools to allow the recalling company to sell additional products to consumers. Far from serving as a deterrent, the new CPSC approach focuses on limiting legal liability, minimizing recall costs, and providing consumers with a largely useless “remedy” option.

In this report we closely examine Commission actions involving the BOB jogging stroller, the Fisher-Price Rock ‘n Play inclined infant sleeper, and residential elevator safety that illustrate a failure by past CPSC leadership to adequately protect consumers from the dangers of these product hazards. The report also includes recommendations to ensure that these Commission failures are corrected and not repeated by new leadership at the CPSC.²

THE BOB STROLLER

I. Background

The first BOB jogging stroller was introduced by BOB Gear in the late 1990s, and was billed as the first “Sport Utility Stroller.”³ BOB Gear was later acquired by Britax Child Safety, Inc. (Britax) in 2011.⁴ Among other features, according to Britax, the stroller came with a “patented suspension system, tough polymer wheels, easy-fold frame, a reclining, padded seat and several other features no one else had ever put on a stroller before.”⁵ In 2005, BOB introduced the “BOB Revolution,” which, according to Britax, was the first stroller that had a “swiveling front wheel.”⁶ As described by Britax, the “rotating front wheel made turning tight corners, walking narrow aisles and navigating crowded sidewalks a sheer breeze.”⁷ In addition, the front wheel came with a “locking mechanism” that could “lock forward for uneven terrain or faster speeds.”⁸ These and other descriptions gave consumers a false sense of confidence that the stroller was safe for use. In fact, the stroller suffered from dangerous defects that the company failed to disclose to the public.

II. 2014 BOB Jogging Stroller Recall for Partial Fingertip Amputations

On January 30, 2014, the CPSC, in conjunction with the Canadian product safety regulator, Health Canada, announced the recall of approximately 225,000 BOB jogging strollers

² On June 18, 2019, Acting Chairman Buerkle announced her intention to withdraw her nominations to serve as Chairman of the CPSC and for another 7-year term, and stated that she would leave the Commission on or about October 27, 2019. See U.S. Consumer Product Safety Commission, *Statement: Acting Chairman Ann Marie Buerkle Announces Withdrawal of her Nominations*, June 18, 2019, available at <https://www.cpsc.gov/about-cpsc/chairman/ann-marie-buerkle/statements/statement-acting-chairman-ann-marie-buerkle>.

³ BOB Gear Website: About, available at <http://www.bobgear.com/about> (accessed May 14, 2019).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

for partial fingertip amputations.⁹ According to the CPSC announcement of the recall, Britax had received “eight incident reports,” including “one partial fingertip amputation, one broken finger and severe finger lacerations” for certain BOB jogging strollers sold between May 2011 and June 2013.¹⁰ As a remedy, consumers were directed to “stop using the recalled stroller immediately and contact Britax to receive a free repair kit.”¹¹

III. 2017 BOB Jogging Stroller Recall for Fall Hazards

On February 16, 2017, the CPSC, in conjunction with Health Canada and the Mexican product safety regulator, Profeco, announced the recall of approximately 710,000 BOB jogging strollers sold in the United States, Canada, and Mexico.¹² According to the joint release, Britax “has received 33 reports of car seats unexpectedly disconnecting from the strollers and falling to the ground, resulting in 26 reports of injuries to children, including scratches, bruises, cuts and bumps to the head” due to defective “mounts that attach the car seat carrier to the stroller frame.”¹³

Senate Commerce Committee Minority staff reviewed the February 15, 2017, corrective action plan (CAP) created by the CPSC and sent to Britax for the recall, and found that it contained an extensive list of requirements, including a “stop sale” of recalled units on February 16, 2017, press releases, recall notices sent to consumers, and a free recall kit. The CAP also required “monthly progress reports” on the effectiveness of the recall to the Commission.

Britax provided 25 progress reports to CPSC Compliance staff following the CAP.¹⁴ However, not long after then-Acting Chairman Buerkle took over and the Republican CPSC commissioners secured the Commission majority, Britax advocated for an end to the monthly reporting requirements.¹⁵ In an April 12, 2019, email to Commission staff, Britax’s Director of Compliance stated that: “Britax requested on January 4, 2019 along with the December 2018 progress report that Commission monitoring of B-Agile recall RP160279 be ended. I am submitting this 25th progress report as no response has been received. Britax appreciates your consideration on this matter.”¹⁶ That same day, Commission staff granted that request.¹⁷ The final report submitted to the Commission, dated April 2, 2019, states that of the 675,856 strollers

⁹ U.S. Consumer Product Safety Commission, “Strollers Recalled by Britax Due to Partial Fingertip Amputation Hazard,” January 30, 2014, available at <https://www.cpsc.gov/Recalls/2014/Strollers-Recalled-by-Britax>.

¹⁰ *Id.*

¹¹ *Id.*

¹² U.S. Consumer Product Safety Commission, “Britax Recalls Strollers Due to Fall Hazard,” February 16, 2017, available at <https://www.cpsc.gov/Recalls/2017/Britax-Recalls-Strollers>.

¹³ *Id.*

¹⁴ Email from Julia Lentini, Director of Compliance, Britax USA to Christopher Nguyen, CPSC Compliance Officer, April 2, 2019, attached as Exhibit B.

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ *See* Email from Christopher Nguyen, CPSC Compliance Officer to Julia Lentini, Director of Compliance, Britax USA, April 2, 2019, attached as Exhibit C.

sold in the United States with the defective mounting mechanism, 134,321 had been corrected – a recall completion rate of approximately 20 percent.¹⁸

IV. The 2019 “Information Campaign” for BOB Jogging Stroller Wheel Detachments

1. The Commission Staff Investigation, Request for Recall, and Commission Administrative Lawsuit

As part of this investigation, Senate Commerce Committee staff also sought information from the CPSC on incidents involving front wheel detachments from various models of BOB jogging strollers. A report provided by the Commission details at least 244 consumer incident reports involving BOB stroller front wheel detachments that occurred between December 1, 2011 and April 15, 2019.¹⁹ The internal CPSC incident report also notes that a number of the front wheel detachment incidents were reported to Britax as early as 2012, but the majority of these reports were not forwarded to the Commission until approximately July 11, 2016.²⁰ This delay raises serious questions about whether Britax complied with its obligation, under Section 15 of the Consumer Product Safety Act (CPSA), to report product defects that could result in injury in a timely manner. To date, Britax has not been fined by the CSPC for a failure to properly report these incidents.

In September 2017, Commission staff created a PowerPoint presentation on the BOB stroller noting that 187 “front wheel detachment incidents” had been reported to date, and that 50 children and 47 adults had suffered injuries.²¹ The injuries to children included “1 concussion, 1 blood in ear canal, 4 stiches on head/face, 2 dental injuries, 1 finger fracture; and 1 hand laceration requiring stitches.”²² Commission staff also stated that the defect could cause “serious and potentially life-threatening head impact injuries, such as concussions, skull fractures, and traumatic brain injuries from internal brain bleed, bruise, or edema.”²³ The final page with “Recommendations for Next Steps” stated: “Maintain and reiterate staff’s position for Firm to recall these products.”²⁴

On January 9, 2018, Commission staff held a “Closed Commission Briefing” that provided further detail on the hazard posed by the BOB strollers and injuries.²⁵ In the presentation, staff found that “the front wheel can appear to be properly secured when it is not.”²⁶

¹⁸ CPSC Monthly Progress Report for Corrective Action Plans, Case RP160279, Britax Child Safety, Reporting Dates: 3/1/19 to 3/31/19, attached as Exhibit D.

¹⁹ U.S. Consumer Product Safety Commission, All Reported Incidents on BOB Jogging Strollers, Date of Incident: Dec. 1, 2011 – Apr. 15, 2019, attached as Exhibit E.

²⁰ *Id.*

²¹ U.S. Consumer Product Safety Commission, Britax BOB Jogging Strollers, CPSC File No. RP160404, Sept. 2017 (pertinent portions attached as Exhibit F).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ U.S. Consumer Product Safety Commission, Britax BOB Jogging Strollers, Closed Commission Briefing, January 9, 2018 (pertinent portions attached as Exhibit G).

²⁶ *Id.* at 4.

The presentation also concluded that the “front dropout fork contains a secondary retention system; however, it does not prevent wheel detachment if the quick release is not properly secured.”²⁷

In order to resolve the case, Britax offered a “New You Tube ‘How To’ video incorporating CPSC suggestions.”²⁸ The company also stated that it would “Consider CPSC suggestions for improvements to its written instructions and/or labels,” and that “If CPSC issued a ‘safety alert’ to address the importance of proper quick release use on its strollers, Britax would consider providing a link to this notice on its BOB gear website.”²⁹ In the presentation, however, it appears that CPSC staff took a dim view of this approach. Specifically, staff noted that an information campaign regarding use of the front wheel quick release, in lieu of a recall, would likely be ineffective because: “Consumers are unlikely to read the manual or watch the video because the quick release does not appear to be complex.”³⁰ In addition, staff noted that: “A reasonable consumer can follow BOB instructions, but use too little force.”³¹

Following this briefing from staff, the Commission’s then-Democratic majority voted on February 16, 2018, to file an administrative complaint against Britax alleging that certain models of the BOB jogging stroller “contain defects in their design which present a substantial product safety hazard.”³² The notice for the administrative lawsuit noted that the defects caused a number of serious injuries to adults and children, and that Britax “declined to recall or repair the strollers that pose a substantial risk of injury to children and adults.”³³ Accordingly, the Commission’s administrative lawsuit sought a “finding that the strollers present a substantial product hazard [and] an order that Britax provide the remedies outlines in the complaint to stop further incidents and injuries to the public.”³⁴

2. The Commission Membership Changes

Relief was in sight for Britax, however, to the detriment of consumers and children. On June 1, 2018, Republican Commissioner Dana Baiocco was sworn in as a Commissioner on the CPSC, replacing Democratic Commissioner Marietta Robinson.³⁵ Although the briefings from Commission Compliance staff and the February 16, 2018, administrative lawsuit filing clearly indicated a substantial risk of serious injury or even death from the continued use of the BOB jogging strollers, as discussed below, CPSC staff apparently were directed by the Office of the Chairman to settle the case without a recall.

²⁷ *Id.*

²⁸ *Id.* at 27.

²⁹ *Id.*

³⁰ *Id.* at 22.

³¹ *Id.*

³² U.S. Consumer Product Safety Commission, Release, CPSC Sues Britax Over Hazardous Jogging Strollers; Action Prompted by Ongoing Harm to Children and Adults from Stroller Wheel Detachment, Feb. 18, 2018, available at <https://www.cpsc.gov/Newsroom/News-Releases/2018/CPSC-Sues-Britax-Over-Hazardous-Jogging-Strollers>

³³ *Id.*

³⁴ *Id.*

³⁵ <https://www.cpsc.gov/About-CPSC/Commissioners>

Committee staff obtained a signed Consent Agreement between Commission staff and Britax dated August 27, 2018 (“August Agreement”), and marked “In Camera Filing – FOUO.”³⁶ In this agreement, it appears that CPSC Office of General Counsel staff largely agreed to Britax’s proposal for an “Information Campaign,” rather than a recall.³⁷ Consumers owning BOB strollers manufactured “between January 1, 2011, through September 30, 2015” who watched a video about the BOB stroller “quick release mechanism” and continued to have concerns about the mechanism could request either a new quick release mechanism that “only rotates 90 degrees,” a new “thru-bolt” for the jogger’s front axle, or a “20% discount off the Manufacturer’s Suggested Retail Price (“MSRP”) of any new BOB gear stroller.”³⁸ Owners who did not express concerns about the quick release or had strollers purchased before January 1, 2011, would only be able to receive the 20% percent discount rather than a corrective remedy.³⁹

The August 27, 2018, agreement also contained a provision stating that “the Consent Agreement shall be null and void” if the Commission rejects or does not accept the agreement.⁴⁰ Although Commission records are not clear, the Commission did not accept the agreement, and instead deadlocked on a 2-2 vote on the proposed agreement.

3. The New CPSC Majority Caves to Britax

On October 5, 2018, Peter Feldman was seated as the third Republican Commissioner on the CPSC.⁴¹ Following this, the Commission negotiated another version of the “Information Campaign” agreement with Britax. On November 9, 2018, the Commission approved the “Revised Proposed Settlement” with Britax on a 3-2 vote with the three Republican Commissioners approving the agreement (“November Agreement”).⁴²

The November Agreement expanded the period where an actual remedy was provided (either the modified quick release or the modified thru-bolt) to those purchased “between January 1, 2009, and September 30, 2015,” which was a slight improvement.⁴³ On the other hand, the November Agreement contained new limitations on how long Britax would provide a remedy to impacted consumers and run the “Information Campaign.”⁴⁴

The August Agreement provided that Britax “shall maintain a dedicated website portal and customer service number to facilitate the distribution of the parts, accessories, and other incentives” detailed in the agreement.⁴⁵ The November Agreement, on the other hand,

³⁶ *In the Matter of Britax Child Safety, Inc.*, CPSC Docket No. 18-1, *Consent Agreement, In Camera* (signed Aug. 27, 2018), attached as Exhibit H (hereinafter “August Agreement”).

³⁷ *Id.*, at 3.

³⁸ *Id.*, at 5-7.

³⁹ *Id.*

⁴⁰ *Id.* at 8, para. 16.

⁴¹ <https://www.cpsc.gov/About-CPSC/commissioner/peter-a-feldman>

⁴² Vote Regarding Revised Proposed Settlement of In the Matter of Britax Child Safety, Inc., CPSC Docket No. 18-1, available at https://www.cpsc.gov/s3fs-public/RCAVoteRegardingRevisedProposedSettlement-Britax-CPSCDocketNo%2018-1_%20110918.pdf?830zLEHvUC4PwD_UAfvZKiadatBNRyR (hereinafter “November Agreement”).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ August Agreement at 7.

specifically limits this website to “the first 12 months of the Information Campaign.”⁴⁶ After that time, Britax is merely required to “maintain a version of the Instructional Video containing information demonstrating and describing how to safely, correctly, and consistently operate the Quick Release on the Strollers, on the BOBGear.com website (“Revised Instructional Video”) for an additional 12-month period at a location that is easily accessible to consumers.”⁴⁷ By doing this, the Commission Majority effectively let Britax end the only true consumer remedy after 12 months, and then default to an instructional video that staff had already rejected as ineffective after that.

The November Agreement also allowed Britax to evade Commission recall reporting requirements. The August Agreement provided that Britax “shall provide to the Commission staff information on a quarterly basis identifying the number of consumers who have viewed the campaign and requested any of the incentives” provided by the agreement.⁴⁸ Parallel provisions in the November Agreement, however, changed this to: “For the first 12 months of the Information Campaign, Respondent shall provide to the Commission staff information on a quarterly basis identifying the number of consumers who have viewed the Information Campaign” or requested any of the incentives.⁴⁹

As noted earlier, the consumer response rate for the 2017 Britax fall hazard recall was a dismal 20 percent after more than 2 years. With this “Information Campaign,” it is likely that the Commission will never know what the effective consumer take rate is because the reporting requirement will be terminated before meaningful data is obtained and analyzed.

THE FISHER-PRICE ROCK ‘N PLAY SLEEPER

I. The Commission’s Failure to Inform the Public of Deaths Associated with the Rock ‘n Play Sleeper

On April 11, 2019, Consumer Reports released a study associating at least 32 infant deaths with use of Fisher-Price’s inclined infant sleeper product.⁵⁰ Although these reports had apparently been piling up at the CPSC for several years, it appears that the Commission refused to take action to alert the public until the information was released by *Consumer Reports*.⁵¹

⁴⁶ November Agreement at 7.

⁴⁷ *Id.* at 8.

⁴⁸ August Agreement, at 8.

⁴⁹ November Agreement, at 8.

⁵⁰ Rachel Rabkin Peachman, Fisher-Price Rock ‘n’ Play Sleeper Should be Recalled, Consumer Reports Says, CONSUMER REPORTS, May 8, 2018, available at <https://www.consumerreports.org/recalls/fisher-price-rock-n-play-sleeper-should-be-recalled-consumer-reports-says/>.

⁵¹ *See id.* The *Consumer Reports* investigation notes that while some Rock ‘n Play incident reports had been received by the CPSC as early as 2011, a pattern of possible defect that could result in serious injury or death became more apparent in 2017.

II. The Commission Deliberately Mischaracterizes the Recall Remedy for the Rock ‘n Play as a “Refund” for All Consumers

On April 12, 2019, the Commission announced that “Fisher-Price Recalls Rock ‘n Play Sleepers Due to Reports of Deaths.”⁵² The notice states that approximately “4.7 million units” were being recalled, and that the consumer remedy is a “refund.” Senate Commerce Committee Minority staff investigated this remedy claim, however, and found that it is misleading and materially inaccurate.

Selection of the recall link provided in the CPSC recall announcement takes a consumer to the main Fisher-Price recall page.⁵³ From that page, to find the relevant information, a consumer must: navigate to another page listing all Fisher-Price recalls,⁵⁴ then navigate to a third page with a general announcement about the Rock ‘n Play recall,⁵⁵ and finally, click on a fourth link that displays the actual terms of the U.S. Rock ‘n Play recall.⁵⁶ This page indicates that a consumer’s “recall resolution” is based on when they bought the product. For consumers who purchased a Rock ‘n Play sleeper on or after October 12, 2018, a full cash refund is offered if an original receipt is provided.⁵⁷ For Rock ‘n Play sleepers purchased before October 12, 2018, consumers “will receive a voucher for a Fisher-Price product to be selected from a list of products to be provided by Fisher-Price.”⁵⁸

For U.S. consumers, therefore, whether they receive a refund to replace the Rock ‘n Play or a product voucher is based purely on when they purchased the product. Thankfully, other countries have taken a different, and far more consumer-protective, approach. The Australian product safety regulator, for example, has required a full refund for all Rock ‘n Play sleepers covered by the recall notice.⁵⁹ The New Zealand product safety regulator similarly provided a full refund.⁶⁰ Other countries have gone even further. Canada, for example, has prohibited the marketing of inclined infant sleepers, such as the Rock ‘n Play, since 2011.⁶¹ The CPSC recently released a staff proposal to promulgate a standard for infant inclined sleep products that would, effectively, prohibit products like the Rock ‘n Play.⁶² But this would still leave many of these products in U.S. households, and leave consumers without a true remedy.⁶³

RESIDENTIAL ELEVATOR HAZARDS

⁵² <https://www.cpsc.gov/Recalls/2019/fisher-price-recalls-rock-n-play-sleepers-due-to-reports-of-deaths>

⁵³ <https://service.mattel.com/us/home.aspx>

⁵⁴ *Id.*

⁵⁵ https://service.mattel.com/us/recall/default.asp?recall_id=52466

⁵⁶ https://service.mattel.com/us/recall/BJD57_ivr.asp

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ <https://www.productsafety.gov.au/recall/mattel-pty-ltd-fisher-price-rock-n-play-sleeper>

⁶⁰ <https://www.recalls.govt.nz/recall/fisher-price-rocknplay-sleeper>

⁶¹ <https://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2019/69912r-eng.php>

⁶² U.S. Consumer Product Safety Commission, Draft Supplemental Notice of Proposed Rulemaking for Infant Sleep Products, Oct. 16, 2019, available at https://www.cpsc.gov/s3fs-public/SupplementalNoticeofProposedRulemakingforInfantSleepProducts_10_16_2019.pdf.

⁶³ See *All Inclined Sleepers Put Infants at Risk and Must be Recalled*, CONSUMER REPORTS, Oct. 23, 2019, available at https://advocacy.consumerreports.org/press_release/consumer-reports-all-inclined-sleepers-put-infants-at-serious-risk-and-must-be-recalled/.

For many years, safety advocates have called attention to the known hazard posed by many residential elevators.⁶⁴ A large number of these elevators have a gap between the gate or outer door and the hoistway door that is part of the elevator car.⁶⁵ Unfortunately, a number of small children have become trapped in this space, and then have either fallen down the elevator shaft or been crushed when the elevator car responds to a request for service.⁶⁶

In recent years, these elevators have become increasingly prevalent in larger homes including rental properties found in resort communities, thereby increasing the risk to families who may not be aware of the gap and the serious danger it may pose. According to information provided by the Commission, at least two children have suffered serious injuries in recent years by elevators in rental properties.⁶⁷ In addition, a two and-a-half year-old child was killed in Arkansas in February 2017 when he was crushed under an elevator car after being trapped.⁶⁸

The solution to preventing these tragic deaths and injuries is relatively simple, and involves closing the gap between the outer elevator door and the hoistway door.⁶⁹ Following the recent reports of deaths and injuries, it appears that Commission staff undertook several efforts to require manufacturers to provide a remedy to consumers that would close and correct the gap between the outer door and the hoistway door.

According to documents provided to the Committee, Commission staff organized a “Joint CPSC-Residential Elevator Action Phone Conference” on May 30, 2019.⁷⁰ This call was intended to bring CPSC staff together with representatives of the residential elevator industry to reach consensus on a remedy for potentially dangerous residential elevators. The agenda for the meeting notes that: “The Commission is determined to find a solution to this safety hazard.” The Agenda also stated that: “we have a strong desire to see a public notice maximized & identify a remedy that are [sic] at minimal or no cost to consumers.”⁷¹

⁶⁴ See Todd C. Frankel, *Home Elevators Have Killed and Injured Kids for Decades. Safety Regulators Won't Order a Simple Fix*, WASH. POST, July 18, 2019, available at https://www.washingtonpost.com/business/economy/home-elevator-deaths/2019/07/18/27b53434-968e-11e9-830a-21b9b36b64ad_story.html.

⁶⁵ See James Filippone, P.E., and John Koshak, *Solutions Needed to Ensure Children's Safety*, ELEVATOR WORLD, March 2014, at 91 (“Two physical elements allow child entrapment to occur: sill depth behind the closed swinging hoistway door, and door-to-door clearance between the closed swinging hoistway door and the closed car door and gate.”) (hereinafter “Filippone and Koshak”).

⁶⁶ See *id.*

⁶⁷ See Letter from CPSC Acting Chairman Ann Marie Buerkle to Senate Commerce Committee Ranking Member Maria Cantwell, July 31, 2019, at 2 (noting residential elevator deaths and injuries reported to the CPSC), attached as Exhibit I.

⁶⁸ See *id.*, see also Ryan Tarinelli, *Toddler Dies Under Little Rock Home's Elevator*, ARK. DEM.-GAZETTE, February 2, 2017, available at <https://www.arkansasonline.com/news/2017/feb/02/toddler-dies-under-home-elevator-201702-2/>.

⁶⁹ Filippone and Koshak, at 96 (“There is no amount of warning that will mitigate this risk, and the solutions are easy to implement.”)

⁷⁰ See Joint CPSC-Industry Residential Elevator Action Phone Conference, Agenda, May 30, 2019, attached as Exhibit J.

⁷¹ *Id.*

This meeting was then followed by a June 27, 2019, “Acting Chairman Ann Marie Buerkle Meeting with Elevator Stakeholders.”⁷² The draft agenda for that meeting provided to the Committee states the meeting would start with “introductions” and a “Statement on Nature of the Problem and Need for a Corrective Action Plan (CAP).” The meeting agenda also discusses “Potential CAP Provisions,” and a “Discussion on the Next Steps Toward CAP.”⁷³

To date, however, none of these plans have come to fruition. Instead, then-Acting Chair Buerkle issued a unilateral statement on August 1, 2019, with industry groups representing the elevator manufacturers.⁷⁴ The “safety alert” stated that: “Today, the Accessibility Equipment Manufacturers Association (AEMA) and the National Association of Elevator Contractors (NAEC) join me in warning consumers with home elevators and visitors to homes with elevators to protect small children from a deadly gap that may exist between the doors.”⁷⁵ The statement, however, was not (and is not) listed on the press release portion of the Commission’s website, and did not contain any remedy information for consumers.⁷⁶ Rather, the unilateral safety alert release stated: “we are urging consumers to have a qualified elevator inspector examine the home elevator for this dangerous gap and other potential safety hazards, inspecting to the latest safety standard, ASME A17.1 Safety Code for Elevators and Escalators.”⁷⁷

No further information was provided to consumers, no manufacturer or product names for elevators with defects that have caused injuries or deaths was provided, and no specific remedy or financial assistance was offered.⁷⁸ As with other recent Commission actions involving defective products that posed a risk of injury or death, consumers were left holding the bag.

THE CPSC APPROACH TO ALLOWING AMORPHOUS SAFETY WARNINGS OR “COUPON” AND “VOUCHER” REMEDIES FOR RECALLS UNDERMINES EFFORTS TO REMOVE DANGEROUS PRODUCTS FROM THE STREAM OF COMMERCE

The CPSC approach in the last two years to approving voluntary recalls that include a coupon or voucher as the sole remedy for all or part of a defective product recall is likely to undermine product safety. And the unilateral “safety warning” for potentially defective residential elevators illustrates an approach that provides no benefits to anyone, other than potential legal cover for the elevator manufacturers.

⁷² See Draft Agenda for June 27, 2019 Acting Chairman Ann Marie Buerkle Meeting with Elevator Stakeholders, attached as Exhibit K.

⁷³ *Id.*

⁷⁴ See U.S. Consumer Product Safety Commission, Safety Alert to Protect Children from a Deadly Gap Between Door of Home Elevators, Aug. 1, 2019, available at <https://www.cpsc.gov/about-cpsc/chairman/ann-marie-buerkle/statements/safety-alert-to-protect-children-from-a-deadly-gap> (hereinafter “*Unilateral Elevator Safety Alert*”).

⁷⁵ *Id.*

⁷⁶ The statement was issued on then-Acting Chairman Buerkle’s personal statements page, rather than as an official Commission action.

⁷⁷ *Unilateral Elevator Safety Alert.*

⁷⁸ See *id.* (“Dangerous gaps can be eliminated by placing space guards on the back of the room access door or installing an electronic monitoring device that deactivates the elevator when a child is detected in the gap. We also urge consumers to contact their elevator manufacturer or an elevator installer to obtain these critical safety devices and protect children from this hidden hazard.”)

In the past, the Commission has offered a “hybrid” option for certain defective products, mainly household appliances, that has provided either a free repair for the product or a coupon or discount for the purchase of a new product.⁷⁹ The key in those cases is that the consumer has an option that makes them “whole.” In both the BOB jogging stroller consent agreement and the Rock ‘n Play recall, the current CPSC approach will likely further reduce consumer product safety.

As detailed above, recall completion rates are already extremely low for many defective products, such as the BOB jogging stroller. Providing a sole remedy that does not incentivize return or destruction of the product will likely lower these rates even further.

Furthermore, these types of coupon, voucher, and amorphous “safety alert” settlements with companies undermine U.S. leadership in consumer product safety. The CPSC has long been recognized around the world as one of the premier product safety agencies, and many other consumer product regulators have sought to follow the CPSC lead on regulations and recalls. Unfortunately, the BOB jogging stroller consent agreement and Rock ‘n Play recall show that CPSC efforts are now lagging behind other world regulators and putting U.S. consumers at increased risk.

CONCLUSION AND RECOMMENDATIONS

Recent actions by the CPSC and then-Acting Chairman Buerkle, including the BOB jogging stroller consent agreement, the Rock ‘n Play recall, and the residential elevator “safety warning” indicate an inappropriate deference to industry and a failure to use existing statutory and regulatory tools, which is putting the safety of U.S. consumers at risk. New leadership at the CPSC has expressed an indication to take a more aggressive approach to protecting consumers and addressing past failures.

To comprehensively address these issues, Senate Commerce Committee Minority staff recommend that the Commission, at a minimum, take the following steps to protect consumers:

- 1) Increase the Use of the Imminent Health and Safety Warnings. The CPSC possesses the ability to take action to warn consumers about a defective product even when the product manufacturer refuses to consent to a recall or public notification.⁸⁰ The Commission did this by filing an administrative suit in the case of the BOB jogging stroller wheel detachments, but failed to do so in the case of the Rock ‘n Play, even though it was aware of 32 infant deaths associated with the product. This action would immediately provide notice to the public of specific products that may pose a substantial product safety hazard.

⁷⁹ See, e.g., U.S. Consumer Product Safety Commission, Release, Haier America Recalls Top-Mount Refrigerators Due to Fire Hazard, available at <https://www.cpsc.gov/Recalls/2018/haier-america-recalls-top-mount-refrigerators-due-to-fire-hazard> (offering either an in-home repair for the refrigerator or a “\$150 rebate towards the purchase of a qualified new Haier refrigerator”); U.S. Consumer Product Safety Commission, Release, GE Recalls Dishwashers Due to Fire Hazard, available at <https://www.cpsc.gov/es/Recalls/2010/ge-recalls-dishwashers-due-to-fire-hazard> (offering either in-home repair or a rebate towards the purchase of a new GE product).

⁸⁰ See 15 U.S.C. 2055(b)(4).

- 2) Fining Companies that Fail to Timely Report a Substantial Product Hazard. The Consumer Product Safety Act requires manufacturers to file a report with the CPSC “immediately”⁸¹ upon “obtain[ing] information which reasonably supports the conclusion that [a] product” poses a “substantial product hazard.”⁸² The failure to comply with this reporting requirement is unlawful and can result in penalties.⁸³ This reporting requirement is intended to prevent further consumer injuries or deaths. The CPSC should use its penalty authority more aggressively to gain compliance with the reporting requirement.

- 3) Refunds or Consumer-Friendly Repairs Should be the CPSC’s Default Remedies. Consumers are more likely to respond to recall notices, and remove defective products from their homes and the stream of commerce, when remedies are effective and easy to obtain. Refunds provide the largest incentives for consumers, and also make them “whole” after the return of a defective product. Similarly, at-home or other easy-to-access repairs can provide a complete remedy with no consumer cost or inconvenience. Coupon or voucher programs, on the other hand, often provide limited consumer response when provided as a sole remedy. In addition, they can serve as a perverse reward to a company selling a defective product by forcing consumers to buy another product from that manufacturer, rather than having a free choice of other replacement products that may be safer. The CPSC should refrain from providing these limited consumer remedies.

⁸¹ Reports generally must be filed within 24 hours of acquiring the relevant information. 16 C.F.R. 1115.14(e).

⁸² 15 U.S.C. 2064(b); 16 C.F.R. 1115.1-29.

⁸³ 15 U.S.C. 2069(c).