



**U.S. Consumer Product Safety Commission
OFFICE OF INSPECTOR GENERAL**



**Report of Investigation into Irregularities in the
FY 2022 Operating Plan Vote**

November 3, 2022

23-ROI-01



VISION STATEMENT

We are agents of positive change striving for continuous improvements in our agency's management and program operations, as well as within the Office of Inspector General.

STATEMENT OF PRINCIPLES

We will:

Work with the Commission and the Congress to improve program management.

Maximize the positive impact and ensure the independence and objectivity of our audits, investigations, and other reviews.

Use our investigations and other reviews to increase government integrity and recommend improved systems to prevent fraud, waste, and abuse.

Be innovative, question existing procedures, and suggest improvements.

Build relationships with program managers based on a shared commitment to improving program operations and effectiveness.

Strive to continually improve the quality and usefulness of our products.

Work together to address government-wide issues.



This is a redacted version of the Consumer Product Safety Commission Office of Inspector General's Report of Investigation into Irregularities in the FY 2022 Operating Plan Vote.

Agency management has chosen to exercise certain privileges regarding the public release of agency information. The information and privileges in question both belong to the agency. The agency's exercise of those privileges over their information is reflected in the redactions that follow.

Questions regarding redactions and requests for an unredacted copy of this report should be addressed to agency management.



November 3, 2022

TO: Alexander Hoehn-Saric, Chair
Peter A. Feldman, Commissioner
Richard L. Trumka Jr., Commissioner
Mary T. Boyle, Commissioner

FROM: Christopher W. Dentel, Inspector General

SUBJECT: Report of Investigation into Irregularities in the FY 2022 Operating Plan Vote

Historically, one of the strengths of the United States Government has been its adherence to the rule of law; the concept that laws should be equally enforced and not arbitrarily applied. This office was asked to investigate the circumstances surrounding an alleged arbitrary usurpation of the authority of presidentially appointed and Senate-confirmed Commissioners by the agency's acting General Counsel. This alleged usurpation involved the adoption of the Fiscal Year (FY) 2022 Operating Plan.¹

On September 24, 2021, the U.S. Consumer Product Safety Commission (CPSC) held a vote on its FY 2022 Operating Plan. The plan, with amendments, was adopted by a majority vote of the Commission over the strenuous objections of the acting Chairman. The acting General Counsel, at the direction of the acting Chairman, prepared a legal review to "determine what could be done" about the vote. She declared the vote "null and void" and, based on this, the vote was overturned. Ultimately, a second vote occurred reinstating the FY 2022 Operating Plan as originally adopted. On October 27, 2022, the Washington Post published an article regarding the above events. The article stated that its author had been provided access to a copy of the relevant legal review.

Despite the ultimate adoption of the FY 2022 Operating Plan, we agreed to open an investigation into the matter due to the fundamental issues raised by the acting General Counsel's assertions that she possessed the authority to nullify the votes of commissioners. We determined that there were procedural irregularities in the Commission vote on the FY 2022 Operating Plan; that the acting General Counsel's nullification of the vote was improper; and that there was an unauthorized release of a related privileged document to the Washington Post. Agency management concurred with our findings and generally concurred with the associated recommendations.

The implementation of the seven recommendations contained in this report should significantly improve the Commission's decision-making process, better secure sensitive information, and promote adherence to the rule of law at the CPSC.

¹ An "operating plan" is a blueprint of what the agency expects to work on during the next fiscal year.



EXECUTIVE SUMMARY

Report of Investigation into Irregularities in the FY 2022 Operating Plan Vote

November 3, 2022

OBJECTIVE A senior agency official asked the Office of Inspector General (OIG) to investigate the propriety of the acting general counsel's nullification of the Commissioners' vote on the Fiscal Year (FY) 2022 Operating Plan. Although at the time of the request the nullification had already been overturned by a vote of the Commission, the official was concerned that the legal review supporting the nullification remained in effect and constituted a precedent potentially allowing agency staff to nullify the votes of Commissioners in the future.

Based on the available information, we accepted the following allegations for investigation:

1. There were procedural irregularities in the Commission's vote on the FY 2022 Operating Plan.
2. The acting General Counsel exceeded the authority of her position, when at the direction of the acting Chairman she nullified the FY 2022 Operating Plan vote due to a procedural violation.
3. There was an unauthorized release of the privileged legal review to the Washington Post.

BACKGROUND The Inspector General Act of 1978, as amended, charges the Offices of Inspectors General to conduct investigations relating to the programs and operations of their agencies and to recommend policies designed to promote economy, efficiency, and effectiveness of said programs and operations.

This investigation covers events that occurred in September and October 2021. These events included the passage of the FY 2022 Operating Plan by a majority vote of the Commissioners and the subsequent nullification of two of the Commissioners' votes, the reinstatement of the amended FY 2022 Operating Plan, and the unauthorized release of a privileged legal review to the Washington Post.

ASSESSMENT Over the course of this investigation, based on all available evidence, the OIG determined by a preponderance of the evidence that:

1. There were procedural irregularities in the Commissioners' votes on the FY 2022 Operating Plan.
2. The acting General Counsel exceeded the authority of the position of general counsel when she nullified the FY 2022 Operating Plan vote due to a procedural violation; however, the decision to nullify the vote was not directed by the acting Chairman.
3. There was an unauthorized release of the privileged legal review to the Washington Post.

After reviewing a draft copy of this report, agency management concurred with our findings and generally concurred with the associated recommendations.

RECOMMENDATIONS This report includes seven actionable recommendations. When implemented, these recommendations should assist the U.S. Consumer Product Safety Commission in identifying and prioritizing efforts to improve its decision-making procedures, better secure sensitive information, and promote adherence to the rule of law at the U.S. Consumer Product Safety Commission.

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LIST OF ABBREVIATIONS

CFR	Code of Federal Regulations
Commission	The Commission of the CPSC
CPSC	U.S. Consumer Product Safety Commission
DMPs	Decision Making Procedures
FOIA	Freedom of Information Act
FY	Fiscal Year
OIG	Office of Inspector General
PD	Position Description
Roberts	Roberts Rules of Order, Newly Revised



REQUEST FOR INVESTIGATION

A senior agency official asked the Office of Inspector General (OIG) to investigate the propriety of the acting General Counsel's nullification of the Commissioners' vote on the Fiscal Year (FY) 2022 Operating Plan. Although at the time of the request the nullification had already been overturned by a vote of the Commission, the official was concerned that the legal review supporting the nullification remained in effect and constituted a precedent potentially allowing agency staff to nullify the votes of Commissioners in the future.

After a preliminary review of the circumstances surrounding the FY 2022 Operating Plan Vote, we determined that the allegations, if true, represented a fundamental violation of the concept of the rule of law. Of particular relevance to this investigation is the idea that laws and regulations must not be arbitrarily applied. If the allegation that the acting General Counsel unlawfully usurped the authority of the agency's presidentially appointed and Senate-confirmed Commissioners was true, this would be a clear violation of the rule of law at the U.S. Consumer Product Safety Commission (CPSC or Commission).¹

Based on the available information, we accepted the following allegations for investigation:

1. There were procedural irregularities in the Commission's vote on the FY 2022 Operating Plan.
2. The acting General Counsel exceeded the authority of her position when, at the direction of the acting Chairman, she nullified the FY 2022 Operating Plan Vote due to a procedural violation.
3. There was an unauthorized release of the privileged legal review to the Washington Post.

¹ In this report "CPSC" refers to the agency as a whole. The term "Commission" refers to the body of Commissioners as acting in an official capacity as a collegial body.



SCOPE AND METHODOLOGY

SCOPE

This investigation covers events that occurred in September and October 2021. These events included the passage of the FY 2022 Operating Plan by a majority vote of the Commissioners, the subsequent nullification of two of the Commissioners' votes, the reinstatement of the amended FY 2022 Operating Plan, and the unauthorized release of a privileged legal review to the Washington Post. Additionally, our investigation found a similar incident that occurred two weeks prior, referred to as the "Time Critical Ballot Vote," which is discussed as a comparator.

METHODOLOGY

The OIG interviewed eight CPSC personnel relevant to the investigation.

The OIG obtained and reviewed:

- a. relevant laws, regulations, and policies to gain an understanding of voting procedures
- b. Records of Commission Action relevant to the FY 2022 Operating Plan Vote
- c. public statements relevant to the FY 2022 Operating Plan Vote
- d. relevant agency emails
- e. the relevant Washington Post article



BACKGROUND

CPSC

The CPSC is an independent agency created in 1972 by the Consumer Product Safety Act, as amended, with a mission to protect consumers from unreasonable risks of injury or death associated with consumer products under the agency's jurisdiction.

The CPSC is composed of a maximum of five Commissioners, no more than three of whom may be of the same political party. The President, with the advice and consent of the Senate, appoints Commissioners to seven-year terms. Commissioners do not serve at the pleasure of the President and may only be removed for neglect of duty or malfeasance in office, but for no other cause. The President, again with the advice and consent of the Senate, selects one of the Commissioners to serve as Chairman. The CPSC Chairman shall:

...exercise all of the executive and administrative functions of the Commission, including functions of the Commission with respect to (A) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of commissioners other than the Chairman), (B) the distribution of business among personnel appointed and supervised by the Chairman and among administrative units of the Commission, and (C) the use and expenditure of funds.²

At the time of these events the Commissioners were:

- a. Acting Chairman Robert S. Adler – Democrat – Term expired October 2021
- b. Commissioner Dana Baiocco – Republican – Term expires October 2024
- c. Commissioner Peter A. Feldman – Republican – Term expires October 2026

The Chairman delegates most of the executive and administrative functions of the agency to the Executive Director. Most offices report to the Executive Director; however, certain offices, including the Office of General Counsel, report directly to the Chairman.

² See [15 United States Code 2053](#).



Decision Making Procedures and Relevant Commission Positions and Votes

The rules governing how the CPSC conducts meetings and decision-making votes are set out in the Commission's *Decision Making Procedures* (DMPs). [REDACTED]

[REDACTED] These procedures, roles, and two relevant votes are discussed in further detail below.

Decision Making Procedures: Commission rules for meetings and decision-making votes are governed by the DMPs. The DMPs are currently not released to the public; no one interviewed could definitively state why that was the case. Acting Chairman Adler indicated that he believed the DMPs should be made public. The current version of the DMPs was last amended on [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The DMPs are currently not released to the public; no one interviewed could definitively state why that was the case. Acting Chairman Adler indicated that he believed the DMPs should be made public.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³ In certain documents there are references to the Commission Secretary instead of Secretary. For consistency's sake, the term "Secretary" will be used throughout this report.

⁴ [REDACTED]



Secretary: The position of the Secretary is currently located in the Office of General Counsel.⁵ During the time period relevant to this investigation, we found discrepancies between the duties actually performed by the Secretary and the duties for the Secretary outlined in the relevant position description⁶ (PD) and section of the Code of Federal Regulations (CFR). In practice, the duties performed by the Secretary are administrative in nature. The main duties actually being performed by the Secretary are: facilitating the Commission's decision-making process by controlling document distribution to the Commission (such as ballot votes and briefing packages), documenting Commission actions, organizing Commission meetings and hearings, publishing the public calendar, making sure public information is posted on the web, and liaising between the staff and the Commissioners.

However, there are other duties attributed to the Secretary in the CFR that do not appear to be performed by the Secretary, such as interpreting the Privacy Act, the Freedom of Information Act (FOIA), and the Government in the Sunshine Act, as well as serving as Chief FOIA Officer.⁷

The PD associated with the position of the Secretary states that the Secretary's main duties are to provide administrative support to the Commission's decision making process, prepare and maintain records of Commission actions, manage the docket of proceedings, and implement the Government in the Sunshine Act and issue relevant reports. Additionally, of particular relevance, the PD states that the Secretary shall:

Serve as a technical authority on Commission policies and procedures, directives, delegations of authority and statutory and administrative requirements which apply to the Commission's decision-making processes. (PD factor 5)

As a technical expert, work in conjunction with the GC [General Counsel] to advise the Commission and other staff on policy and procedural matters relating to . . . the administrative regulations and agency policies and procedures with regard to the Commission's decision-making processes. (PD factor 4)

⁵See [eCFR: 16 CFR 1000.23 -- Office of Information and Technology Services](#).

⁶A "position description" is a document which sets out the duties of the position in question. The pay grade associated with a position is also based on its position description.

⁷ The relevant provisions of the CFR have not been updated since 2011 and are in need of revision; however, that is outside of the scope of this investigation.



We found no evidence of the Secretary serving as a technical authority, working in conjunction with the acting General Counsel, or substantively advising anyone regarding the Commission’s decision-making processes at any point in time relevant to this investigation.

General Counsel: As with the Secretary, the General Counsel has many duties vis-à-vis Commissioners and Commission meetings. With regard to Commission operations the General Counsel provides:

...advice and counsel to the Commissioners and organizational components of the Commission on matters of law arising from operations of the Commission.⁸

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

The General Counsel PD states that the General Counsel furnishes:

... legal and policy advice to the Commissioners and staff on all matters relating to consumer product safety programs and the operations of an independent federal regulatory agency.

The PD also states that the General Counsel further advises on all matters having legal implications at the CPSC, helps formulate the consumer products safety legislative program, directs the activities of the Office of General Counsel, and supervises all litigation.

Time Critical Ballot Vote: A key issue in the CPSC’s handling of the FY 2022 Operating Plan Vote involves how the Commission should deal with amendments being made to the subject of a pending vote.

[REDACTED]

⁸See [16 CFR 1000.14](#).



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

FY 2022 Operating Plan Vote: Three weeks later, the vote for the FY 2022 Operating Plan followed a similar pattern to that of the Time Critical Ballot Vote. There was an original proposal and substantive amendments were introduced [REDACTED]

⁹ Commissioners have up to three days to change their votes after the initial deadline. See DMPs Section VIII(C)(4).



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] However, as detailed below, acting Chairman Adler's response to this violation [REDACTED] was substantially different than his response to the similar violation that took place related to the [REDACTED]

[REDACTED]	
[REDACTED]	[REDACTED]

On Sunday morning, September 26, 2021, acting Chairman Adler consulted with newly appointed acting General Counsel Pamela Stone regarding his options related to the vote. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

On September 27, 2021, acting Chairman Adler issued a public statement in which he expressed his disappointment regarding what he viewed as his colleague's lack of "courtesy, comity, or fair play" and called upon Congress to confirm additional Commissioners. He did not mention that, at his request, the acting General Counsel had already determined that the vote in question was null and void.



Based on the acting General Counsel's determination, the Secretary published a formal Record of Commission Action declaring the acting General Counsel determined the September 24, 2021, vote was "null and void" on September 29, 2021. On September 30, 2021, Senator Wicker sent acting Chairman Adler a letter asking him to adopt the FY 2022 Operating Plan as approved on September 24, 2021. On October 1, 2021, the Commissioners held a ballot vote which declared the acting General Counsel did not have the authority to nullify a Commission vote and thus the FY 2022 Operating Plan approved on September 24, 2021 was adopted. On October 5, 2021, acting Chairman Adler issued a public statement both acknowledging the passage of the FY 2022 Operating Plan, as amended, and publicizing his complaints regarding what he viewed as a "lack of courtesy or fair play" and a violation of his due process rights.



ALLEGATIONS

Allegation 1. There were procedural irregularities in the Commission's vote on the FY 2022 Operating Plan.

We found that the manner in which substantive amendments were made to the FY 2022 Operating Plan constituted a violation of the notice requirements found in the Commission procedural rules and constituted a procedural irregularity.¹⁰ These procedural irregularities could have been avoided if the Commissioner(s) in question had: notified the proper parties of the proposed substantive changes to the FY 2022 Operating Plan; delayed the ballot vote to allow time to review the amendments; or changed the ballot vote to a decisional vote to foster discussion of the amendments.

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ [Dissenting opinion of CPSC Acting Chairman Robert Adler on Commission vote to implement roughly 50 amendments to FY 2022 operating plan without notice or an opportunity for deliberation or discussion.](#)



decisional meeting. It cannot be further deferred under VIII (A)(3) unless a majority of the Commission defers the decisional meeting.

All evidence available indicates that the Commissioners who voted to pass the FY 2022 Operating Plan did not share the amendments with the acting Chairman or [REDACTED]. Therefore, the Commissioners failed to follow the provisions [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] These procedural irregularities have occurred because of the [REDACTED] the increased use of virtual proceedings, and the length of time since the [REDACTED]
[REDACTED]

The Commission should consider forming a committee with agency staff representation to conduct the above referenced review. Particular attention should be given to promoting transparency by ensuring that relevant parties are properly notified when amendments are submitted.

If it takes place, this review process should also take into account what role the Secretary should play in the decision-making process. Clearly, the role detailed in the PD of a "technical expert" who ensures compliance with directives and statutes is not aligned with the actual duties carried out by the current secretary during the period of time covered by this investigation. If the Secretary was fulfilling the role described in the PD, several of the issues that resulted in this investigation may have been avoided entirely or at least mitigated. When reviewing the DMPs, the committee should consider the items set out in Appendix B. These items are the result of interviews with CPSC staff familiar with the current application of the DMPs.

We Recommend

1. CPSC staff should ensure the Commissioners are aware of the OIG's report and recommendations. The Commissioners should then determine whether they wish to revise the Decision Making Procedures to better conform with current agency needs.
2. The Commissioners should then determine whether the Decision Making Procedures should be published in order to ensure transparency when conducting Commission business. In the



alternative, if the decision is made to not publish them, the rationale for this decision should be recorded.

3. The Commission and the General Counsel should review the Secretary's position at the agency and consider implementing a more robust role for the Secretary regarding the implementation of the Decision Making Procedures.
4. The position description for the Secretary should be revised to reflect the actual duties performed by the Secretary.
5. If changes are made to the Decision Making Procedures, relevant staff should be trained on the new Decision Making Procedures.

Allegation 2. The acting General Counsel exceeded the authority of her position when, at the direction of the acting Chairman, she nullified the FY 2022 Operating Plan Vote due to a procedural violation.

We found that the acting General Counsel's decision to unilaterally nullify the FY 2022 Operating Plan Vote due to a procedural violation was arbitrary and exceeded the authority of the position of General Counsel. There is no evidence that the acting Chairman directed her to nullify the vote. For reasons detailed below, the agency should act to ensure that the legal review used to justify the nullification of the vote is not relied on to overturn future Commission votes.

The FY 2022 Operating Plan Vote occurred on the last business day of the tenure of acting General Counsel Jennifer Sultan who stepped down from the position on September 25, 2021. Ms. Sultan's move had been long planned and was not related to the vote. Ms. Stone assumed the position of acting General Counsel on Sunday, September 26, 2021.¹¹

The acting General Counsel exceeded the authority of the Office of General Counsel when she unilaterally nullified the FY 2022 Operating Plan Vote due to a procedural violation.

That same Sunday morning, acting Chairman Adler reached out to his new acting General Counsel to discuss his options regarding the vote. [REDACTED]

[REDACTED] The evidence indicates that the acting Chairman was unhappy with the amendments added to the FY 2022 Operating Plan and was seeking some form of legal redress. [REDACTED]

¹¹ As addressed in greater detail in [Allegation 3](#), the Washington Post incorrectly attributed the legal review nullifying the FY 2022 Operating Plan Vote to Ms. Sultan.



Later that same morning, the acting General Counsel drafted a legal review [REDACTED]. The acting General Counsel later acknowledged that the theory she employed to justify the nullification of the Commissioners' vote was "an unconventional choice."

The acting General Counsel provided a draft of her legal opinion to acting Chairman Adler and his staff. [REDACTED]

The legal review, as finalized and issued, is neither signed nor addressed to a particular office or individual. It follows no traditional organizational structure. In the words of one former General Counsel, the legal review is "rudimentary." The text of the legal review raises a number of issues, including: whether the acting General Counsel met her obligation to explain relevant matters to the extent reasonably necessary to permit her clients to make informed decisions; why relevant text was omitted from a block quote; the basis of her interpretation [REDACTED] [REDACTED] was not used to address the procedural violations in question.

Identifying the General Counsel's Client: The Office of the General Counsel provides:

...advice and counsel to the Commissioners and organizational components of the Commission on matters of law arising from operations of the Commission.¹²

Individuals who had previously served as acting or permanent General Counsels gave varying responses when asked how they balanced their obligations to the Chairman and Commissioners. Ultimately, however, all of them recognized the tension between having the Chairman serve as the General Counsel's supervisor and their duty to provide candid legal advice to the Commission and staff; even when such advice might potentially contravene the Chairman's wishes. When interviewed, acting General Counsel Stone stated that she knew she didn't just "serve the Chair." She explained that she viewed her duties as including providing legal advice to "the agency, the Commissioners, and leadership of the agency." It appears that she knew that the acting Chairman was not her only client, yet she effectively treated him as her only client when she

¹² See [16 CFR 1000.14](#).



drafted a legal review that failed to fully disclose to all the Commissioners the legal remedies available to them, as discussed below.

Lack of Candor when Providing Legal Advice: The acting General Counsel has acknowledged being aware of her obligation to provide legal advice to all of the Commissioners. She provided copies of the legal review, detailing her legal advice regarding the nullification of the relevant vote, to acting Chairman Adler, Commissioner Feldman and four other individuals who were not Commissioners. It does not appear that she provided a copy directly to Commissioner Baiocco.

The acting General Counsel also had an obligation to explain legal matters to the extent reasonably necessary to permit those clients to make informed decisions. Yet she failed to provide relevant legal advice to Commissioners Baiocco and Feldman. Her legal review failed to inform Commissioners Baiocco and Feldman of the potential remedies available to them to address the nullification of their votes. She also failed to provide all relevant information to Acting Chairman Adler. She failed to inform him that the decision to nullify the votes of Commissioners Baiocco and Feldman could be overturned by a subsequent vote of Commissioners Baiocco and Feldman.

As part of her explanation of the basis for her determination that the vote of the Commissioners should be nullified, the acting General Counsel relied upon [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

Typically, in legal writing, when pertinent legal authority is quoted, all of the relevant text is included. That did not happen in this legal review.¹³ As a result, the legal review failed to inform the Commissioners of their rights in relation to the nullification of the FY 2022 Operating Plan Vote.

By failing to provide any notice that relevant text had been excluded from the quote, the legal review not only omitted [REDACTED] [REDACTED] it failed to put them on notice that important language had been omitted.

During her interview, the acting General Counsel stated that despite her “unconventional” approach, the right thing happened because the Commissioners exercised their right to override General Counsel opinions:

I feel like I may have made an unconventional choice, but I feel the process worked, as the process is for the Commissioners to have the final say. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

However, what the acting General Counsel now describes as the process working and the “Commissioners having their voices heard,” happened despite the lack of candor in her legal advice. The acting General Counsel’s legal review did not inform Commissioners Baiocco and Feldman that they had the authority to override her decision to nullify their votes. It merely conveyed that the acting General Counsel had determined their votes were null and void.¹⁴

¹³ See *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346 (Fed. Cir. 2003), a case involving a government attorney whose omission of relevant language changed the original meaning of a quoted passage.

¹⁴ Agency management has raised an issue concerning whether it was the acting General Counsel’s intent to nullify the vote or merely to recommend that some unnamed third party nullify the vote. Based on both the language of the legal review, “According to Robert’s Rules, therefore, the vote is null and void . . .” and the language drafted by the acting General Counsel for use by the Secretary in the Notice to be published regarding the fate of the vote, “Upon request for review by the Acting Chairman, the Acting General Counsel has determined that the vote . . . is null and void because the Decision Making Procedures were not followed . . .” it appears clear that the General Counsel intended to nullify the vote.



Misapplication of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

For all of the reasons set out above, the decision of the acting General Counsel to nullify the Commissioners' votes was arbitrary and exceeded the authority of her position.

We Recommend

6. The General Counsel retract, or in some other way clarify, the status of the legal review nullifying the Commissioners' vote on the FY 2022 Operating Plan. It should be made clear that the legal review does not constitute an accurate summation of the General Counsel's views on the legal issues involved or a precedent for future vote nullifications.



Allegation 3. There was an unauthorized release of the privileged legal review to the Washington Post.

We found that the legal review regarding the nullification of the Commissioners' vote regarding amending the FY 2022 Operating Plan was released to the Washington Post without authorization.

On October 27, 2021, a Washington Post article was published about the FY 2022 Operating Plan Vote.¹⁵ In the article, reporter Todd Frankel wrote that the Washington Post "reviewed a copy" of the legal review.

Mr. Frankel incorrectly attributed authorship of the legal review to the former acting General Counsel Jennifer Sultan. Given that the legal review was not formally signed and the timing of the transition between acting General Counsels, this appears to have been a mistake rather than a deliberate act of misattribution.

None of the witnesses interviewed acknowledged having any information concerning how Mr. Frankel had the opportunity to review a copy of the legal review. No evidence was found indicating that Mr. Frankel was authorized to review a copy of the legal review.

Legal reviews are ordinarily not released outside of the agency. This is because they fall under the attorney-client privilege because they are communications between an attorney and client regarding a legal matter for which a client has requested professional legal advice. The public disclosure of what would otherwise be a communication protected by the attorney-client privilege may, under certain circumstances, constitute a waiver of the privilege.¹⁶

There was insufficient evidence to determine who released the legal review regarding nullification to the Washington Post.

We Recommend

7. The CPSC expand its existing training concerning information protection to include the prohibition on the release of privileged information and the possible consequences of same.

¹⁵Todd Frankel, "[Republicans use Senate confirmation delays to take control of CPSC, passing product safety rules that critics say put public at risk.](#)" *Washington Post*, October 27, 2021.

¹⁶For an in-depth discussion on attorney-client privilege and what is releasable under the FOIA, see *United States Department of Justice Guide to the Freedom of Information Act*. [Exemption 5 \(justice.gov\)](#).



CONCLUSION

Over the course of this investigation, based on all available evidence, the OIG determined by a preponderance of the evidence that:

1. There were procedural irregularities in the Commissioners' votes on the FY 2022 Operating Plan.
2. The acting General Counsel exceeded the authority of the position of General Counsel when she nullified the FY 2022 Operating Plan Vote due to a procedural violation; [REDACTED]
[REDACTED]
3. There was an unauthorized release of the privileged legal review to the Washington Post.

This report includes seven actionable recommendations. When implemented, these recommendations should assist the CPSC in identifying and prioritizing efforts to improve its decision-making procedures, better secure sensitive information, and promote adherence to the rule of law at the CPSC.



APPENDIX B: ITEMS TO CONSIDER WHEN REVISING THE DMPs

[REDACTED]



APPENDIX C: OIG COMMENTS REGARDING THE MANAGEMENT RESPONSE

The Office of Inspector General would like to thank agency management for their prompt response and overall cooperation with this investigation.

After reviewing management's response to our draft report, see Appendix D, we note that management concurred with our findings and generally concurred with our recommended corrective actions. In several cases, management either offered alternative corrective actions to address these findings or indicated that corrective action had already been taken.

As a result of the above, we have modified our first two recommendations to take into account concerns raised by agency management. We feel that these modified recommendations still addresses our findings while simultaneously better aligning with the agency's proposed corrective actions.

In regards to the areas in which agency management have indicated that they have already taken corrective action, we look forward to reviewing their efforts in this area as part of the existing recommendation follow-up process.



APPENDIX D: MANAGEMENT RESPONSE

Management provided a response to the report. A copy of the response begins on the next page.





Memorandum

TO: Christopher Dentel, Inspector General
FROM: Austin Schlick, General Counsel
SUBJECT: Management's Response to Draft Report of Investigation into Irregularities in the FY 2022 Operating Plan Vote

DATE: October 20, 2022

Management acknowledges receipt of the draft *Report of Investigation into Irregularities in the FY 2022 Operating Plan Vote* (Draft Report) and its recommendations. Management appreciates the attention of the Office of Inspector General (OIG) to this matter. Management concurs that there were procedural controversies in the course of adopting the Commission's Fiscal Year 2022 Operating Plan. Critically, however, the Commission resolved the matter by a majority vote on October 1, 2021. In Management's view, the Draft Report describes a difficult path to a timely outcome that accorded fully with all legal requirements for agency decision-making. Below we provide specific responses to the Draft Report's recommendations.

1. The Commission should form a committee to review, and if necessary, revise its Decision Making Procedures to better conform with current agency needs.

The Draft Report we have been provided finds instances in which the Decision Making Procedures (DMPs) were unevenly applied and that the then-Acting General Counsel misinterpreted the DMPs. But the Draft Report does not identify any deficiency in the provisions of the DMPs themselves. Nor does it note anything about the procedures that calls for their revision due to the mere passage of time. To the contrary, Management sees benefit to stable operating procedures. Because the thrust of the Draft Report is that the DMPs were not consistently followed during the brief time period under review, rather than that the DMPs are in any way unfit for their intended purpose, the report does not identify any need for revision of the DMPs.

Regarding implementation of the DMPs, Management agrees that improvements compared to the status quo in Fall 2021 should be made. Since the events discussed in the Draft Report and under the direction of Chair Hoehn-Saric, the Executive Director, the General Counsel, the Office of the Secretary, and the Agenda Planning Committee have all emphasized consistent adherence to the DMPs as well as to procedures the Commission has established outside the DMP process. Management believes that this emphasis on even application of the applicable procedures is the most direct and important response to the findings of the Draft Report. To that end, Management concurs that additional training on the requirements of the DMPs for relevant staff, including Commissioners and their personal staff, is warranted. Such training will be provided. In addition,

Management will explore whether there are additional procedures that could be implemented by the Office of the Secretary, or otherwise, to facilitate compliance with the DMPs in routine Commission activities.

2. The Decision Making Procedures should be published in order to ensure transparency when conducting Commission business. In the alternative, if the decision is made to not publish them, the rationale for this decision should be recorded.

The full Commission has addressed this issue. In voting to adopt the DMPs as internal operating procedures, the Commission approved their designation as “For Official Use Only,” and thus they are not available to the public. Management does, however, concur to the extent that Commission staff will ensure the Commissioners are aware of OIG’s report and recommendations. The Commission will determine whether it wishes to take further action on this recommendation to reconsider its prior decision.

3. The Commission and the General Counsel should review the Secretary’s position at the agency and consider implementing a more robust role for the Secretary regarding the implementation of the Decision Making Procedures.

The Position Description of the Secretary has been revised since the events examined in the Draft Report. It now provides in part that the Secretary will “[s]erve as a technical authority on Commission policies and procedures, directives, delegations of authority and statutory and administrative requirements which apply to the Commission’s decision making processes.” Further, “[a]s a technical expert,” the Secretary will “work in conjunction with the [General Counsel] to advise the Commission and other staff on policy and procedural matters relating to [applicable statutes] and the administrative regulations and agency policies and procedures with regard to the Commission’s decision-making processes.” This revised description of the Secretary’s role accurately captures the responsibilities of the incumbent, and her relationship with the current General Counsel and the Commission. While the General Counsel supervises the Secretary and has responsibility for interpreting Commission procedural documents subject to correction by the Commission, the role and expertise of the Commission Secretary regarding Commission procedures are robust and consistent with the Position Description. In fact, since the events discussed in the Draft Report, the Secretary has become a direct report to the General Counsel to better enable direct communication between the General Counsel and the Secretary on matters such as application of the DMPs.

Management accordingly concurs in this recommendation and considers it fulfilled. To the extent that OIG’s investigation suggests the Secretary had an uncharacteristically limited role in the Fiscal Year 2022 Operating Plan approval process, moreover, Management agrees greater inclusion of the Secretary—consistent with the current Position Description—might have improved the process surrounding the September 24, 2021, vote.

4. The position description for the Secretary should be revised to reflect the actual duties performed by the Secretary.

See response to Recommendation 3.

5. If changes are made to the Decision Making Procedures, relevant staff should be trained on the new Decision Making Procedures.

As explained in Management's response to Recommendation 1, Management concurs that additional training on the DMPs is warranted, and intends to provide such training.

6. The General Counsel retract, or in some other way clarify, the status of the legal review nullifying the Commissioners' vote on the FY 2022 Operating Plan. It should be made clear that the legal review does not constitute an accurate summation of the General Counsel's views on the legal issues involved or a precedent for future vote nullifications.

The Commission resolved this issue on October 1, 2021. The Record of Commission Action for the Fiscal Year 2022 Operating Plan reflects that a majority of Commissioners voted to adopt the following language:

The General Counsel has no authority under the statutes, regulations, and procedures governing the United States Consumer Product Safety Commission, to nullify a vote of the Commission. Assuming, *arguendo*, such authority were vested, it is the opinion of the Commission that the vote on the Fiscal Year 2022 Operating Plan (Briefing Package dated September 15, 2021) was conducted in accordance with Commission procedures and practices, notwithstanding any interpretation, intent, or meaning the Commission's Office of General Counsel (OGC) has provided to the contrary, and thus that this document was approved, as amended, on September 24, 2021.

As General Counsel I can confirm that this language in the Record of Commission Action is the definitive statement of the CPSC on this matter and supersedes the opinion of the then-Acting General Counsel that the full Commission was reviewing. Accordingly, Management considers this recommendation satisfied.

7. The CPSC expand its existing training concerning information protection to include the prohibition on the release of privileged information and the possible consequences of same.

Management concurs in this recommendation. The related topics on which CPSC currently provides mandatory training for all employees include Privacy, Prohibition on the Disclosure of Trade Secrets and Confidential Information, Ethics (including misuse of nonpublic information), Personally Identifiable Information, Records (i.e., safeguarding agency records), and Information Security Awareness regarding external threats. Training is provided through new employee onboarding, annual trainings provided by the Office of the General Counsel, and annual trainings completed in FedTalent on the Skillsoft platform. As necessary, CPSC supplements the Skillsoft module trainings with PowerPoints placed in FedTalent for employees to certify their review, and/or an annual training with an attendance certification. Failure to complete required trainings may result in loss of network access and disciplinary action.

In response to OIG's recommendation, Management intends to include, in new employee orientation and annual training for Commissioners and all Commission employees, information that specifically addresses the definition and requirements for safeguarding privileged information, with discussion of the potential consequences of wrongful disclosure.

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Management appreciates this opportunity to comment on the Draft Report and would be pleased to discuss these matters further with OIG.



For more information on this report please contact us at CPSC-OIG@cpsc.gov

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