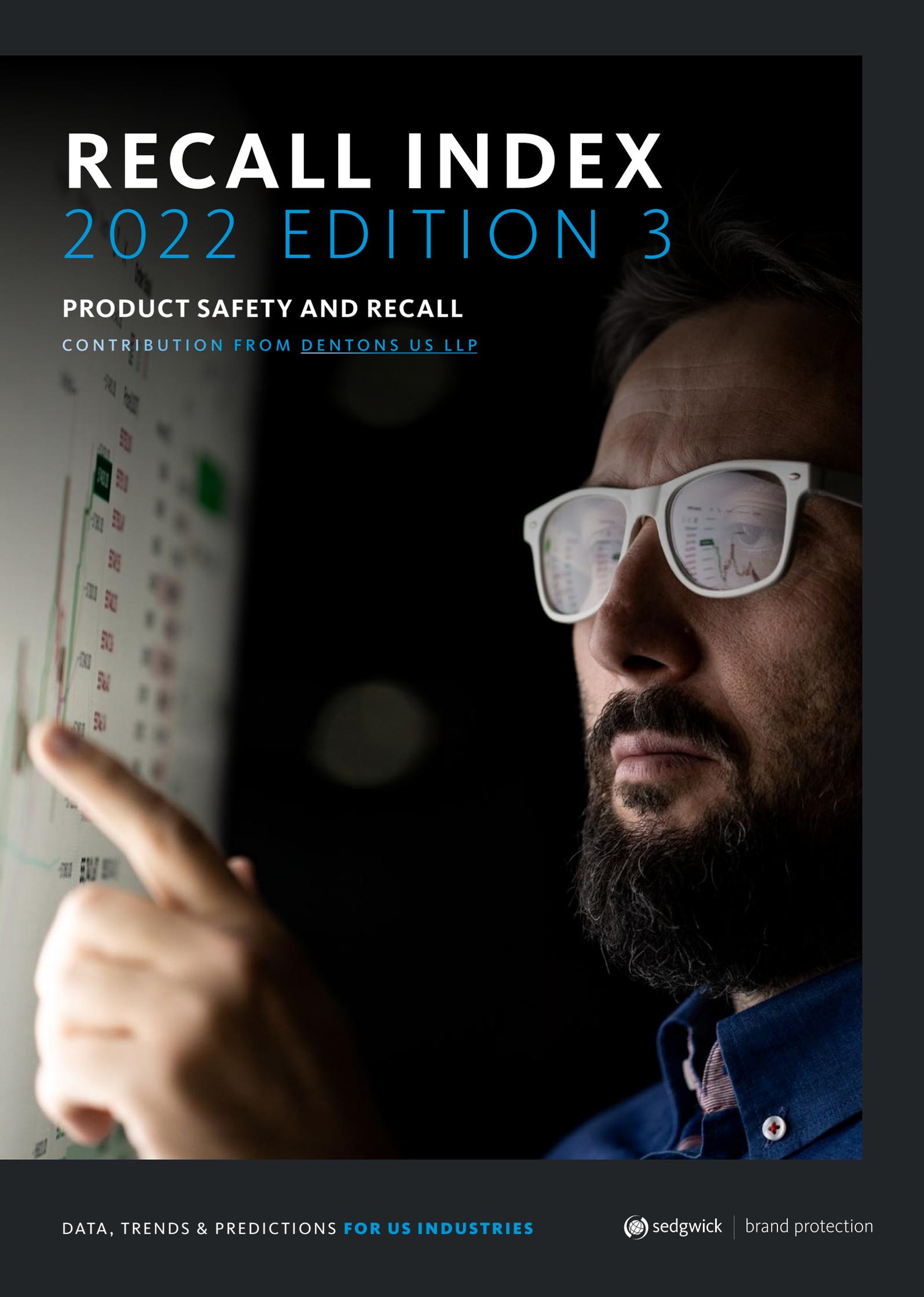


# RECALL INDEX

## 2022 EDITION 3

PRODUCT SAFETY AND RECALL

CONTRIBUTION FROM [DENTONS US LLP](#)



## FIVE KEY CPSC TRENDS FOR FISCAL YEAR 2023

The Consumer Product Safety Commission (CPSC) has demonstrated increasingly aggressive enforcement behavior in 2022, including by pursuing robust civil penalties and publishing a number of attention-grabbing unilateral press releases. The agency has also forecast criminal penalties in appropriate cases in the future.

Based on the Commission's [Fiscal Year 2023 Operating Plan](#) (FY2023 plan), the Commission intends to continue, and even intensify, its vigorous enforcement activities. By way of example, the Commission sought additional resources to increase its capacity to investigate and pursue civil penalty cases and requested a budget that would accommodate four additional full-time equivalent employees to specifically focus on civil penalty investigations for products recalled through eCommerce, defect case investigations and regulated product violations. The FY2023 plan also addresses strategic initiatives by the Commission like monitoring problematic recall activities and post-recall firm actions to identify targets for expanded recall announcements, renewed investigations or enforcement actions.

This article focuses on five key trends to keep in mind as consumer product companies strive for compliance and to avoid penalties in this progressively enforcement-centric regulatory landscape.

### 1. Expect escalating civil penalty activity.

First, the CPSC's civil penalty assessment activity shows no indication of slowing down. In fact, the Commission is calling for higher civil penalties.

CPSC Chair Alexander Hoehn-Saric has recently made several statements warning companies about the agency's desire to pursue a more aggressive approach. In one such statement, Chair Hoehn-Saric urged Congress to remove or dramatically increase

the existing limits on CPSC's civil penalty authority, saying that the current cap on civil penalty amounts is "a serious impediment" to deterring unlawful conduct under consumer protection laws.

Other CPSC Commissioners have similarly said that civil penalties should be higher to keep companies from behaving in ways that are not in consumers' best interests. [In a public statement](#) about a \$7.5 million civil penalty issued against an electronics company in July 2022, Commissioner Richard Trumka said he supported the penalty, "with the understanding that we are a new Commission with new priorities...As a new Commission, we must seek penalties that are high enough to deter bad actors in the first place and we will reject penalties that can be written off as a cost of business. I expect that our penalties will be multiples higher than they have been in the past."

Regarding the same \$7.5 million civil penalty, Commissioner Peter Feldman opined that the amount was "woefully inadequate." Similarly, in commenting upon a \$13 million civil penalty related to the sale of recalled goods in August 2022, Commissioner Feldman stated that a \$13 million fine for a company that had almost \$3.3 billion in profits and \$49 billion in sales last year amounted to "nothing more than a parking ticket...a minor inconvenience."

All Commissioners have signaled that civil penalties should consistently reflect the severity of the conduct in question. Commissioner Feldman has also called for more transparency and consistency in how civil penalties are calculated, commenting that factually dissimilar activity has led to similar civil penalty amounts.

**Takeaway:** Companies should look for increased civil penalty amounts and activity in the coming year.

### 2. Criminal penalties may be on the horizon.

A second trend that companies should prepare for is the increased pursuit of criminal penalties, including for knowing and willful late reporting. This is despite the fact that in the past the CPSC has very sparingly issued criminal penalties, and then only for the most egregious misconduct.

Recent criminal enforcement activity took place in 2021 when the Department of Justice filed criminal charges against an appliance manufacturer and two of its subsidiaries, including one U.S. company. The defendants had failed to notify the Commission that millions of dehumidifiers sold to U.S. consumers were defective and could catch fire.

In October 2021, [the U.S. subsidiary pleaded guilty](#), which resulted in \$91 million in monetary penalties and a requirement that the company provide restitution for any uncompensated victims of fires caused by its products. This was the first corporate criminal enforcement activity brought under the [Consumer Product Safety Act](#) (CPSA).

The July 2022 \$7.5 million electronics company civil penalty mentioned previously also brought the topic of criminal penalties back to the fore. Although the CPSC ultimately declined to pursue criminal penalties in that matter, it left the door open to do so in future enforcement actions. In fact, [Chair Hoehn-Saric's statement](#) referenced criminal penalties and Commissioner Trumka [expressly called on the DOJ](#) to open a criminal investigation.

And, while [Commissioner Feldman's statement](#) did not specifically mention criminal charges, he did say that he would "support other forms of relief when

our monetary civil penalty authority isn't enough." Commissioner Feldman made clear that "[e]very tool at CPSC's disposal should be on the table as the Commission negotiates and approves settlement agreements going forward."

**Takeaway:** The prospect for criminal penalties looms larger than ever before for allegedly non-compliant companies.

### 3. Third-party monitoring may be featured in civil penalty agreements.

The use of third-party compliance monitoring programs as a form of relief is yet another enforcement tool that the CPSC may increasingly use in 2023. Specifically, the Commission can require companies to engage independent third-party monitors to audit operations and ensure regulatory compliance at the companies' expense. This enforcement measure is more likely to be used where a company is a repeat offender, has a history of failing to follow agreements or has engaged in a particularly egregious offense.

While third-party monitoring has not been implemented in recent years, Commissioner Feldman recommended third-party monitoring in his statement regarding a \$13 million civil penalty related to the sale of recalled goods. [Commissioner Feldman's statement](#) referenced the Commission's use of third-party monitors in the past, stating that — with respect to the subject civil penalty — the Commission missed "an opportunity to send a strong message that it will make use of all its tools to create a principled and effective civil penalty regime."

**Takeaway:** All things considered, expect a renewed appetite for incorporating a third-party monitoring structure into corrective action plans going forward.



#### 4. Unilateral press releases will continue to proliferate.

A fourth tool that the Commission is expected to use aggressively moving forward is the unilateral press release. The CPSC issued more than ten unilateral press releases between January 11 and November 16, 2022, including four in September alone. As background, the Commission issues a unilateral press release when it cannot come to an agreement with a company on the need to recall a product. The announcements are similar to a recall because they are used to quickly communicate health and safety information to consumers.

The threat of a unilateral press release may be one way to compel an otherwise unwilling company to voluntarily recall their product, so as to avoid negative media attention for becoming crosswise with the Commission. Companies are inclined to demonstrate to their customers that they prioritize safety, so the ability to push back against this mechanism can be limited. Perhaps one of the highest profile cases of a unilateral press release [involved a major exercise equipment manufacturer](#) in April 2021. Though the [company initially refuted the claims](#) in the CPSC's unilateral release, it ultimately chose to recall the product a month later.

**Takeaway:** Companies who wish to control their own narrative and branding from the outset should be prepared for the unilateral press release CPSC flex.

#### 5. The CPSC has demonstrated a renewed focus on safety issues involving vulnerable populations.

The CPSC continues to focus its efforts on safety matters involving vulnerable consumers. While this focus should be no surprise, it again merits emphasis, particularly in light of the Commission's recent reinstatement on October 3, 2022 of the Children's Product Defect Team which had been disbanded in 2018 without explanation. [In his statement](#) about the team's return, Commissioner Feldman said, "The Children's Product Defect Team will help ensure that children's safety is once again a top priority."

**Takeaway:** Companies should note that the CPSC will continue to prioritize vulnerable populations, including but not limited to infants, children and the elderly.

### Looking forward

The CPSC's aggressive stance on enforcement, particularly in the instance of late reporting, only serves to emphasize the theme that the Commission has stressed for years "when in doubt, report." Since the Commission seems to be signaling more post-recall monitoring, companies should also take the time to review their recall plans and ensure that they include thorough monitoring and reporting guidelines.

Knowing that the CPSC is focused on harsher penalties may be the exact incentive some companies need to proactively engage in compliance-focused conduct.

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