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BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, INSURANCE AND DATA SECURITY

COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

U.S. SENATE

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Chairman Moran, Ranking Member Blumenthal and members of the Subcommittee on Consumer Protection, Product Safety, Insurance and Data Security, thank you for the opportunity to testify about the U.S. Consumer Product Safety Commission's (CPSC) voluntary recall process. My Bio is annexed.

I appreciate the opportunity to appear before you as a member of the National Association of Manufacturers CPSC Coalition, which provides a unified voice for manufacturers and retailers on CPSC-related issues. The NAM coalition is comprised of manufacturers, retailers, trade associations and law firms representing the array consumer product industries. Many of the CPSC's initiatives directly impact the collective of industries. Even industry-specific initiatives can set a precedent that impacts all manufacturers and retailers of consumer products. Members of the NAM CPSC Coalition are committed to consumer product safety and working in cooperation with the CPSC in furtherance of shared goals of risk reduction and hazard avoidance. We encourage improved collaboration between all stakeholders and the Commission and its staff before the Commission puts forth significant policy proposals. Cooperation with stakeholders while the agency is developing changes in substantive policies would lead to improved proposals and reduces the potential for conflicts or unintended consequences of that can arise. Too often, though, stakeholders and the rest of the public are provided limited notice of significant proposed changes to policies that could greatly impact the abilities of both the Commission, related government agencies and businesses to minimize risks posed to the public.

In November 2013, the CPSC issued a proposed rule (78 Fed. Reg. 69793) that could negatively impact the Commission's voluntary recall process and would place significant burdens on manufacturers and retailers. The CPSC conducted no public outreach as it developed its proposal. Despite extensive opposition to the proposed rule, the Commission voted in May to keep the issuance of a final rule in its FY 2015 operating plan. The Commission took this action despite repeated comments by Chairman Elliot Kaye that the voluntary recall rule is not a priority because it would not necessarily improve safety.

For nearly 40 years, manufacturers and retailers have watched and participated in the Commission's voluntary corrective action process. They have reported potential safety problems and undertaken voluntary corrective action for various reasons; sometimes out of an abundance of caution, protecting consumers by preventing future incidents and standing behind their products. For that reason, the CPSC's current system geared to encouraging expedient voluntary recalls has been and continues to be relatively effective in ensuring appropriate notifications to the CPSC and voluntary recalls in furtherance of product safety or availability of

improved products to customers and consumers. Simply stated, the existing voluntary recall process has proven an efficient and effective way of quickly addressing product safety concerns or providing consumers with options to enhance products in their poses session. There is no preponderance of data to support the conclusion that the CPSC's current approach to negotiating voluntary corrective actions is deficient or in need of radical change.

I. Executive Summary and Background

The CPSC's proposed rule includes several substantive provisions that would unfavorably alter the cooperative process by which firms work with the Commission to implement voluntary recalls. These substantive provisions would require firms to execute legally binding agreements and adopt compliance programs in voluntary corrective action plans. Rather than improving recalls, the proposed rule in its current form could negatively impact the efficiency, cooperative spirit and speed of the CPSC's voluntary recall process to the detriment of consumer product safety. Manufacturers and retailers are concerned that these proposed changes raise policy concerns that could negatively alter the longstanding process for implementing an expedient voluntary recall in cooperation with the CPSC.

For a number of reasons that will be discussed, the proposed rule is unnecessary, could substantially erode the success of the Commission's voluntary recall process, could undermine due process afforded under the Administrative Procedure Act (APA) and is not required under the Consumer Product Safety Act (CPSA). In the absence of any data that the CPSC's existing voluntary recall framework is inadequate and because aspects of the proposed rule are not needed per statute, I urge the Commission, consistent with comments in opposition and recent statements made in relation to the noticed rule to withdraw it at this time.

I also encourage the Commission to cooperatively develop with stakeholders strategies that will improve the effectiveness of recalls and accomplish the desired policy objectives in a flexible fashion. The proposed rule as drafted, could significantly impede and undercut the Commission's current relatively expedient voluntary recall practice. Careful consideration by the Commission in consultation with stakeholders would be preferable to precipitous action that might require correction later. The Commission should engage all interested parties—consumers, industry and staff—in constructive meetings to discuss ways the current corrective action process might be enhanced, if required based upon the evidence before it.

II. The Existing Recall Process is Effective

Throughout its history, the CPSC has relied on reporting and voluntary corrective action plans to remove hazardous products from the marketplace. While there have in rare instances been disputes between parties, delays or disagreements, the staff has adequate tools to obtain the desired corrective action or to address the risks. There are no published data to support the conclusion that the existing voluntary recall process is inadequate. In fact, the CPSC recently noted that 90 percent of recalls initiated through the CPSC's award-winning Fast Track recall process were commenced within 20 working days of notifying the Commission.[1] In light of such recent data showing the success of the existing voluntary recall process, the proposed rule's more substantive changes are plainly unnecessary and the Commission should withdraw the proposed rule. There is a compelling cliché that applies to the context in which this rule is

[1] See http://www.cpsc.gov/Global/About-CPSC/Budget-and-Performance/2014BudgettoCongressSupplementalAppendix.pdf

proposed: “If it ain’t broke, don’t fix it.” There is often wisdom in such clichés, and that wisdom has seemingly been ignored for certain aspects of this proposal.

III. The Proposed Rule Would Negatively Impact Implementation of Voluntary Recalls

The Commission asserts as background that the “Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016 (2008) (CPSIA), amended the CPSA to strengthen the CPSC's authority to recall products and to notify the public effectively about the scope of a recall and available remedies” (78 Fed. Reg. 69794). Unfortunately for the reasons set forth in more detail below, the proposed rule would create impediments to the Commission’s voluntary recall process and reduce recall effectiveness. There also has been no convincing data to support the conclusion that the proposal is necessary or that there is a problem that the Commission does not already have the authority and tools to address.

Rather than enhancing recalls, these provisions will make it more difficult for companies and compliance officers to undertake recalls. The proposed changes will extend the period of negotiation between a subject firm and the CPSC staff, slowing down or impeding agreement on corrective action plans. Disputes over descriptive language and format conventions of recall notices can delay the process without any measurable positive impact on recall effectiveness. Any delays in implementing a recall can result in increased risks to consumers. At the same time, the proposed provisions will force firms to more often seek the advice of counsel and will likely make the recall negotiation process more complicated and adversarial than necessary. This is contrary to the stated goal of such rule.

Perhaps most important, the CPSC’s proposal will fundamentally change the cooperative relationship between industry and the Commission that has resulted in thousands of reports and voluntary recalls. There is simply no evidence that any of these changes are necessary, that they will improve recall effectiveness in any way or that they add in any measurable way to protection of consumers. Instead of enhancing the current recall process, this proposed rule will be counterproductive in the Commission’s efforts to improve the effectiveness of recalls. New substantive requirements and increased enforcement jeopardy could have a chilling effect on how firms communicate and cooperate with the Commission—delaying the recall process.

Ultimately, consumers have to cope with an incredible amount of product information and information overload is a real problem that affects consumer response to recall notices. Many factors besides seeing a notice likely affect consumer response and recall effectiveness.[2] The CPSC may consider addressing this concern by working cooperatively with stakeholders, as the high number of recalls for products posing little or no risk has arguably reduced the effectiveness of efforts to protect the public from actual risks. This is a significant issue that likely has far more impact on the effectiveness of the CPSC recall program than anything in this proposed rule. The proposed rule does not help with this problem. If anything, it increases the amount of negotiation and workload for the staff no matter how serious the risk of injury and

[2] Commission “Recall Effectiveness” literature study, 2003. That study noted the need for additional research but there is no public information that shows that such research has taken place and it is not cited in the proposal. The Commission should focus on developing a tiered approach to recalls that measure success on the basis or relative risk and outreach, in lieu of metrics focused solely on product returns, which are impacted by a myriad of external factors beyond the control of CPSC or Industry.

does little to eliminate the problem of consumer information overload or to help consumers decide how to respond to CPSC recalls.

IV. The Statutory Pretext for Proposed Substantive Provisions is Unjustified and Does Not Comply with Required Rulemaking Procedures

The preamble to the proposed rule recognizes that section 214 of the CPSIA directs the Commission to issue guidelines for notice in mandatory recalls ordered after a substantial product hazard hearing. The Commission has in fact issued that regulation.[3] The preamble goes on, however, to suggest that the House of Representatives' committee of jurisdiction "explicitly expressed an expectation that similar information would be provided, as applicable and to the greatest extent possible" in voluntary recall notices. The Commission's assertion that the House committee, through a committee report, directed the Commission to issue regulations for the content of voluntary recall is incorrect and misrepresents the legislative history of the CPSIA. The actual language referenced by the Commission as providing authority to regulate voluntary recalls is provided below:

> *Subsection (c) further amends Section 15 by adding a new subsection (i) requiring the CPSC by rule to set guidelines on a uniform class of information in mandatory recall notices under subsection (c) or (d) or under section 12 of the CPSA. The guidelines should include information helpful to consumers in identifying the specific product, understanding the hazard, and understanding the available remedy. The Committee expects that similar information will be provided, as applicable and to the greatest extent possible, in the notices issued in voluntary recalls*.[4]

In citing this language, the Commission makes several fundamental errors. First, it ignores the fact that the legislation and even the committee comment do not suggest or authorize rulemaking with respect to voluntary corrective actions as the CPSIA explicitly did for mandatory recalls. Second, the Commission seeks to give legislative weight to language in the legislative history. It is a basic precept of administrative law that one looks first to the plain language of the statute. A committee report certainly cannot be given the weight of legislation. Additionally, the preamble ignores obvious qualifiers in the legislative history comment the Commission paraphrases. The committee report recognized that in voluntary corrective actions, "similar"—not necessarily identical—information could be provided. The language further uses the term "as applicable," recognizing that such notice requirements might not be applicable in all voluntary recalls. Finally, the scope and extent of many of the changes proposed in this rule exceed or are different in scope than the legislative and regulatory provisions for mandatory recalls.

Yet, based on that inadequate legal rationale and vague statements about the staff's experience with recalls, the detailed mandatory requirements contained in the proposed rule have many of the hallmarks of a substantive rule. The Commission asserts that its proposal is an "interpretative rule to set forth principles and guidelines for the content and form of voluntary recall notices that firms provide as part of corrective action plans under Section 15 of the Consumer Product Safety Act" (78 Fed. Reg. 69794-5). Though the APA (5 U.S.C. Subchapter II) does not explicitly define an "interpretative rule," certain characteristics of a rule that would make it an "interpretative rule" are universally accepted: An interpretative rule interprets a statutory term or agency regulation and is not legally binding on regulated entities or courts.

[3] 16 C.F.R. §§ 1115.23-29, 75 Fed. Reg. 3355 (Jan. 21, 2010)
[4] H.R. Rep. No. 110-501 at 40 (2008)

Conversely, a substantive rule has the force and effect of law (43 Fed. Reg. 34988, 34990, Aug. 7, 1978).

Many provisions of the proposed rule such as imposing mandatory and enforceable corrective action plans, prohibiting a firm from disclaiming admission of a defect or potential hazard and authorizing the staff to demand compliance program-related requirements in corrective action plans are in direct conflict with the "interpretative rule" definition. The proposed rule would place new obligations on companies, enlarge the scope of section 1115.20(a) and go beyond merely providing guidance about the existing voluntary recall rule. The Commission is proposing fundamental changes of longstanding practice that establish new rights and responsibilities and legally bind subject firms in ways not currently provided for under section 1115.20(a). Because the proposed rule would be the basis for enforcement decisions and would broaden existing legal requirements, the Commission should comply with the rulemaking procedures established by the APA for substantive rules.[5] It is improper to classify the proposed rule as "interpretative." As such, the Commission should have engaged in proper rulemaking procedures, including the analytical requirements that are statutorily mandated.

V. Voluntary Corrective Action Plans Are As a Practical Matter Already Binding

The Commission seeks to redefine voluntary corrective action plans as may be agreed to between firms and the Commission staff as re-codified distinct legally binding separate contracts. This is ostensibly related to a desire for greater leverage when dealing with the rare occurrence when a firm declines to honor its obligations under a voluntary corrective action plan. Yet this almost never occur and the Commission itself has and retains broad authority to take action under existing statutory authority to compel corrective action or issue unilateral public notice to prevent imminent hazards. Under such circumstances such provision is unnecessary, contrary to the letter and spirit of the original voluntary recall rule and not authorized by the CPSC's statutes (40 Fed. Reg. 30938, July 24, 1975). There is no compelling reason to transform a firm's voluntary, proactive efforts to address a safety concern into a legal negotiation over binding terms—the equivalent of a settlement agreement. This change would result in unintended consequences that would delay implementation of a voluntary recall. In practice many small businesses, which have been the engine for economic growth in the U.S.[6], voluntarily negotiate and implement corrective action plans directly with Commission staff (both within and without the CPSC's Fast Track recall Program) without the need for costly legal representation and protracted negotiation. To the extent the Commission seeks to impose additional contractual obligations related to unrelated quality assurance processes or require companies, as part and parcel of voluntary recalls, to admit the existence of a product defect when they do not believe one to exist, the requirement for legal review becomes essential instead of optional. For these reasons, many small businesses and industries regulated by the CPSC have opposed to this provision of the proposed rule.

Making voluntary corrective action plans legally binding is also unnecessary because the Commission has existing authority to address the very rare situation when a firm declines to comply with its voluntary recall plan. At the time of the CPSC's original voluntary recall rule—and now—the Commission has had the authority to seek a binding consent agreement if the

[5] See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000)

[6] Small businesses make up: 99.7 percent of U.S. employer firms, 64 percent of net new private-sector jobs, 49.2 percent of private-sector employment, 42.9 percent of private-sector payroll, 46 percent of private-sector output, 43 percent of high-tech employment, 98 percent of firms exporting goods, and 33 percent of exporting value. Source: U.S. Census Bureau, SUSB, CPS; International Trade Administration; Bureau of Labor Statistics, BED; Advocacy-funded research, Small Business GDP: Update 2002- 2010, www.sba.gov/advocacy/7540/42371

Commission has reason to believe that an enforceable agreement is necessary (16 C.F.R. § 1115.20(b)). In the entire history of the CPSC, it has used the consent order agreement option very sparingly, even when enforcing rules against repeat violators, yet the fact remains that the CPSC retains authority to act in the rare situation involving a recalcitrant firm.

The Commission's proposal would also undermine the original intent behind the voluntary corrective action rule—to remove impediments to quickly execute a voluntary recall. The Commission has long acknowledged that the "primary purpose of a corrective action plan is to protect the public from a substantial risk of injury presented by a consumer product and to do so as quickly as possible" (43 Fed. Reg. 34988, 34996, Aug. 7, 1978). In the past, reporting and corrective actions increased when cooperative efforts such as the Fast Track recall program made the negotiation and completion of recalls easier. Making the process more difficult and contentious for firms that want to conduct recalls will have the opposite effect. Among other things, the proposed rule would create additional obstacles that would encumber the CPSC staff and firms in trying to negotiate the terms of a corrective action plan and subsequent modification, which may improve the effectiveness of recall efforts. This would waste staff resources and delay protection of the public.

VI. The Commission Should Not Change a Firm's Ability to Disclaim Admission of a Defect or Potential Hazard

Voluntary corrective actions are often undertaken in the face of ambiguous or incomplete hazard information. At the same time, firms must worry that admissions about an alleged hazard can have legal consequences in product liability, other commercial contexts or in a civil penalty matter. For that reason and to encourage firms to quickly address safety concerns, the Commission provided that firms could disclaim that their voluntary actions constituted an admission either of the need to report or that a substantial product hazard existed. This has been an important incentive to reporting and cooperating in voluntary corrective action. The Commission provides no evidence that such disclaimers have in any way harmed consumer protection over the history of the recall program.

Now, the Commission proposes to give the CPSC staff veto authority over such disclaimers. The preamble indicates that the CPSC may actually use this change as "an opportunity for the Commission to negotiate and agree to appropriate admissions in each particular corrective action plan" (78 Fed. Reg. 69795).There are no data that demonstrate that this change might enhance recall effectiveness or public safety and certainly no indication in the proposed rule of how the current policy has hamstrung the Commission in achieving good corrective action plans or consent agreements to safeguard the public. This change would unreasonably restrict a firm's ability to disclaim admission of a defect or potential hazard and conflicts with the First Amendment rights of manufacturers and retailers to the extent that it would preclude them from making truthful public statements expressing their views regarding the existence of a safety defect.

In short, there is no compelling reason to change the Commission's current disclaimer practice in connection with a voluntary recall. This change can only delay recall implementation to the detriment of consumers. This provision is unsupported and unsupportable based on safety and constitutional considerations and would not withstand legal scrutiny.

VII. Compliance Programs Do Not Automatically Belong in Corrective Action Plans

The Commission proposes to include in corrective action plans binding "compliance program-related requirements." The preamble and proposed § 1115.20(b) suggest that such provisions would be "in the Commission's discretion." That decision might be based on multiple previous recalls in a short period of time, evidence of insufficient controls, evidence of a reporting violation or other factors (78 Fed. Reg. 69795). Under the proposed rule, such programs would be compulsory as part of a legally-binding corrective action agreement. This provision would have unintended consequences and is not authorized by any provision of the CPSA. Section 15 of the CPSA allows the CPSC to order recalls and notices; it does not give the agency authority to tell firms how to structure their businesses or internal procedures.

In practice, the compliance program requirements would dramatically slow the voluntary recall process. The CPSC staff would be required to conduct an appropriate investigation to determine whether the circumstances of a particular recall might merit revising a firm's existing compliance program. To forgo such an inquiry would deprive firms of due process and the opportunity to present information and arguments in defense of their existing compliance programs. Such process is afforded firms in the civil penalty context, but would not exist under the proposed rule (16 C.F.R. § 1119.5). This would result in delay for consumers awaiting implementation of a recall and is contrary to the intent of the original substantial hazard rule. Equally unacceptable would be the CPSC imposing a compliance program requirement in haste and without a fair or objective inquiry. The implementation of a voluntary recall is not the appropriate occasion for the CPSC to seek changes to businesses' compliance processes.

The proposed rule's insistence that multiple prior recalls would be a basis to demand compliance programs is also contrary to public policy and the lessons from the Commission's history. There are no data to support the conclusion that multiple recalls are indicative of an inadequate compliance program. Such recalls may indicate the exact opposite: Firms have demonstrated responsible scrutiny and action to ensure consumer safety. There is also no evidence that the absence of multiple recalls provides assurances that a firm has an adequate compliance program. Given the view by many—regulated industry and consumers alike—that product recalls are salutary actions taken by responsible economic actors when necessary or because of a desire to act out of an abundance of caution, the proposed rule's treatment of multiple recalls as evidence of poor compliance processes is wrong as a policy matter. The proposed rule would penalize those who act most responsibly, especially for carrying out a voluntary recall when a risk of serious injury is not likely.

The proposed rule acknowledges that compliance program requirements would "echo" similar requirements sought as part of recent civil penalty settlement agreements (78 Fed. Reg. 69795). Responsible companies should have compliance programs. However, apart from the Commission's desire to seek compliance programs, nowhere does the proposed rule identify the legal basis for the Commission to demand a compliance program in connection with a voluntary recall. For all the foregoing reasons, the Commission should withdraw this proposal.[7]

VIII. Requiring Corrective Action Plans to be Compliant with CPSC Rules is Unnecessary

The Commission provides in its proposed rule that "remedial actions set forth in a corrective action plan . . . [comply] . . . with all applicable CPSC rules, regulations, standards, or

[7] The proposed compliance program requirements would also be the basis for Commission enforcement decisions including the decision to seek civil penalties. This and other aspects of the proposed rule create substantive obligations that compliance with the rulemaking procedures established by the APA for substantive rules.

bans" (78 Fed. Reg. 69795). This would appear to be unnecessary and redundant and adds nothing of substance to existing safeguards. Manufacturers and retailers are nonetheless concerned that this provision could create additional enforcement mechanisms, particularly as the staff seeks to exercise some enforcement discretion in determining what violations to remedy and how to do so.

IX. Guidelines for Voluntary Recall Notices Will Not Improve the Effectiveness of Recalls

The staff defines the purpose of the proposed rule in terms of clearly communicating hazard and recall information to the public. Specifically, proposed § 1115.30 states that the guidelines will "help ensure that every voluntary recall notice effectively helps consumers and other persons to" identify the product, understand the actual or potential hazards, understand all available remedies and take appropriate actions (78 Fed. Reg. 69800). Many of these provisions are not supported by evidence that they will actually better inform or motivate consumers to participate in recalls. By mandating a laundry list of requirements and options for voluntary recall notices, the CPSC would constrain flexibility and may actually prevent more effective remedial actions that are not included on the prescribed list. The notice requirements seem to be based not in the principles for better notice cited but instead in existing staff practice and the rule for mandatory recalls under subpart C of 16 C.F.R. § 1115 (Guidelines and Requirements for Mandatory Recall Notices).

As discussed, the Commission lacks the statutory authority to issue guidelines for voluntary recall notices through regulation. Moreover, proposed subpart D mandates the content of voluntary recall notices, which clearly binds both the CPSC staff and firms and thus makes this provision a substantive change to the existing process.

a. Calling All Corrective Actions a "Recall" Reduces Effectiveness

The proposed rule requires use of the word "recall" in the heading and text of a recall notice, rather than any alternative term. Calling a corrective action plan a "recall" when the action needed to address a potential hazard is far more limited than a refund or replacement could mislead consumers. Calling each and every corrective action a "recall" also adds to growing concern that consumers are experiencing "recall fatigue" as a result of the increasing number of recalls.[8] As a result of recall overload, getting the attention of consumers when a notice involves a significant risk of harm contrasted with a minor technical issue or action out of an abundance of caution based on unverified information is becoming increasingly difficult. Rather than address these types of legitimate concerns, the proposed rule will contribute to this recall fatigue. A tiered approach with more accurate nomenclature may be useful to better distinguish Alerts, Warnings related to misuse of products and voluntary offerings of product accessories that enhance safe use by consumers of products.

b. Recall Notices Should Include Information That is Actually Helpful and May Not Need to Include Extraneous Information

The proposed rule requires the headline of a recall notice to include specific information, even if the information would not improve the effectiveness of the recall effort, and precludes

[8] See, e.g., Christopher Doering, *Surge in Products Being Recalled May be Numbing Consumers*, USA Today, June 10, 2012; Lyndsey Layton, *Officials Worry About Consumers Lost Among the Recalls*, Wash. Post, July 2, 2010.

information that could be helpful to consumers. The Commission's proposal would eliminate flexibility needed to most effectively communicate hazards to consumers in some circumstances. For example, the proposed rule requires the headline to include the type of product being recalled, but does not permit the headline to identify the model of the product at issue. As a result, the headline may draw the attention of many consumers who do not own the product, creating needless concern, while consumers who would recognize a popular product's name might overlook the notice. A headline focusing on the type of product may also needlessly tarnish a firm's entire product line when the safety concern is limited to a single model.

The proposed rule requires the listing of the names of "each manufacturer" including foreign and domestic firms, beyond those firms named on the product or the name a consumer is likely to associate with the product, typically the brand, listed manufacturer or private labeler. This exceeds the provision Congress prescribed for mandatory recalls and is not likely to assist consumers. The names of other manufacturers, foreign and domestic, will not help the consumer identify the product and does not serve the provision's stated purpose. Extraneous information may confuse consumers, add to the problem of consumer information overload and actually decrease the effectiveness of the recall notice.

Further, many manufacturers and private labelers view the identity of their product suppliers as confidential commercial information, and revealing this information to competitors or the public can effectively destroy a manufacturer's competitive advantage without a commensurate public safety benefit. Disclosure of the identity of a manufacturer could present significant trade secret concerns when this information must be made available to distributors and retailers. Companies have developed processes to protect this information, and those processes must be respected.

The Commission's proposal would also permit the staff to include a reference to a compliance program in the recall notice. However, the Commission provides no criteria for when this information should be included. Moreover, there is no evidence indicating that the inclusion of such information serves the stated purpose of subpart D and would improve the effectiveness of the recall. Since this information is not necessary to inform consumers of the recall, or motivate them to take necessary action, it does not further the objectives of a product safety recall notice and should be dropped from the proposed rule. An insistence by the staff that compliance program information be included in a recall notice would hinder the implementation of a timely and effective recall, and once again erode the cooperative nature of the voluntary recall program. The inclusion of this information could also mislead consumers by implying that a firm did not have an adequate compliance program and that it caused the defect. A company could face significant reputational harm from such a provision. There is simply no reason to believe that voluntary recall notices would be more effective because of inclusion of this information, which is not required by Congress for mandatory recalls.

c. Statements in the Notice and Disclosures of Information Should be Accurate and Truthful

The provision suggests that the recall notice should state that a hazard "can" occur when there have been incidents or injuries associated with the recalled product. Product hazards often are "associated" with a product but have nothing to do with a defect that leads to a recall. In some cases, it is clear that the account of an alleged incident is not reliable and using such incidents as a basis for such language is plainly unfair. Issues such as use, misuse, probability and other contributing factors may be necessary for the consumer to fully understand the

hazard and to assist them with their decision making. Firms may also recall products due to insignificant deviations from standards or for business reasons when even a remote risk, not reasonably likely to occur may have occur due to a variety of unreasonable circumstances. Requiring firms to provide information without the necessary context and qualifiers, such as identifying circumstances where a hazard "may" or "could" occur, would reduce the effectiveness of a recall notice by failing to accurately inform consumers. Such unequivocal language may not only be inappropriate when there is a low risk of injury, but could adversely affect companies in product liability litigation, particularly when viewed in light of the proposed rule's limit on disclaimers in notices.

The proposed rule indicates that a recall notice should include the names of "significant retailers" and establishes criteria defining when a retailer is considered significant. The proposal does not indicate how or whether the CPSC staff would apply the criteria. As the stated purpose of subpart D is to help ensure that a recall notice effectively helps the consumer identify the product, simply naming a large retailer would not provide the consumer useful information if that chain did not sell a significant number of products and would needlessly result in even greater information overload for consumers. This provision could lead to naming of firms because they have significant market presence and might obtain attention for a Commission press release at the cost of misleading consumers about the actual places where they purchased a particular product and may unfairly tarnish the reputations of retailers.

The Commission through proposed § 1115.34(n) is attempting to impose new reporting obligations on subject firms and requires the disclosure of information that may not improve the effectiveness of a recall notice. Mandating such information also may have unintended consequences, and the inclusion of that information may not be necessary. Moreover, incidents and their actual causation are sometimes disputed and can be the subject of on-going liability disputes or other legal processes. In these cases, corrective action may be delayed as the CPSC staff and the firm negotiate the disclosure of information that may not improve the effectiveness of the recall notice.

The provision also requires firms to "immediately" report any new information to allow the Commission to issue new recall notices. It is not clear whether the Commission intends the 24-hour definition of "immediately" in subsection 1115.15(e) to apply in this context. Firms may not be able to adequately report new information as they work to obtain reliable information about an alleged incident. An incident actually may not involve an initially named product or the defect identified in a recall. This provision may require firms to supply misinformation, which would harm efforts to accurately inform consumers.

Firms currently provide incident updates in monthly progress reports. In addition, the Commission advises firms that under section 15(b) they may have to report new or additional incident data that suggests that the scope of a defect or non-compliance is not understood. The proposal provides no evidence that this existing system is insufficient or does not allow the staff to make reasonable decisions with firms about the need for further notice. The proposal seems to place additional requirements upon firms and places them in additional enforcement jeopardy without evidence that this mandate will help protect consumers. This inflexible provision is more likely to lead to additional dispute rather than cooperation.

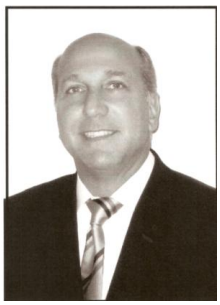
d. Changes in an Action Plan Should Not Trigger a New Agreement and Notice

Proposed § 1115.34(o)(4) would require that any changes to a voluntary corrective action plan must be memorialized in both a new agreement and a new notice. This could result

in further discussion and disagreements under this proposal and may delay useful changes that could protect consumers. In addition, some procedural changes may have absolutely no effect on consumers, and requiring that any change be communicated to consumers in such instances is unnecessary and may create unnecessary confusion and consumer information overload.

X. Conclusion

As many commenters to the CPSC's proposed rule requested, the CPSC should withdraw in its entirety this extra-statutory attempt to change 40 years of successful voluntary recall practice. The proposed rule could dramatically alter the CPSC's existing process that enables product safety goals to be realized in a timely and generally efficient manner. While the Commission may believe that requiring binding voluntary recall plans and compliance programs via a separate rule is desirable, it has provided no data on the record to support these changes. Furthermore the Commission's existing statutory authority allows it to act to address any imminent public hazard when and if merited under particular circumstances. Recognizing that approaches to voluntarily implemented corrective action plans differ and require creative solutions, depending upon the particular circumstances, we would hope that due consideration based upon a preponderance of the evidence would be required before advancement of such rule, as currently drafted. Substantive rules (notwithstanding labeling as "interpretative") may have unintended and adverse consequences on expedient voluntary corrective actions and should undergo more thorough administrative vetting prior to any imposition.



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BIOGRAPHY

Frederick (Rick) Locker is a principal partner in the law firm of Locker Greenberg & Brainin, LLP, 420 Fifth Avenue, New York, NY 10018 (fblocker@lockerlaw.com) . He is a member of various local, state and national bar associations. He is admitted to the Bar of the State of New York and various Federal courts throughout the country. He is also a member of the National Association of Manufacturers CPSC Coalition and acted on the Advisory Committee to the Harvard University Center for Risk Analysis. He has acted as counsel for many corporations in matters before independent federal regulatory agencies and in connection with the negotiation of numerous consumer product recalls.

The Firm is actively engaged in the representation of many large international and national trade associations and corporations, and has acted as Counsel to many Trade Associations including but not limited to, the Toy Industry Association ("TIA"), the Juvenile Products Manufacturers Association ("JPMA"), the Craft & Hobby Association, Inc ("CHA"), the Halloween Industry Association ("HIA") and the Childrenswear Manufacturer's Association (before it was merged into American Apparel & Footwear Association). The practice involves representation of associations and corporations in negotiations and proceedings before independent U.S. regulatory agencies such as the U.S. Consumer Product Safety Commission ("CPSC"), the Federal Trade Commission ("FTC"), the U.S. Food and Drug Administration ("FDA") and many State Attorney General Offices. The firm has litigated numerous matters involving regulation of a variety of consumer products in Federal District Courts and Circuit Courts of Appeals. Mr. Locker has frequently been invited to present testimony to U.S. Congressional Committees and various state legislative committees. Additionally, he serves as a participant and advisor to many voluntary standards committees developing standards to ensure the safety of a wide range of children's consumer products under the auspices of the American Society for Testing and Materials (ASTM). His firm is frequently engaged as a consultant for the purposes of reviewing consumer products for safety considerations. He is on the Board of many charitable organizations involved with children's issues nationally and internationally.