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Todd A. Stevenson
Secretary, Consumer Product Safety Commission
Office of the Secretary
Consumer Product Safety Commission, Room 820
4330 East West Highway
Bethesda, MD 20814

Re: Proposed Amendments to Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices (Docket Number CPSC- 2013-0040)

Dear Secretary Stevenson:

We respectfully submit the following comments regarding the proposed amendment to the regulations implementing voluntary recalls and related voluntary corrective action plans of section 15 of the Consumer Product Safety Act (CPSA) as set forth in 16 CFR Part 1115. 78 Fed. Reg. 69783 (Nov. 21, 2013). We appreciate the opportunity to provide our perspective on the proposed changes, and we ask you to consider our comments carefully as you finalize the rule.

RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry – retailers, product manufacturers, and service providers – which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA members appreciate the Consumer Product Safety Commission's (CPSC's or the Commission's) unswerving dedication and efforts to: improve the safety of consumer products; quickly remove unsafe products from the market; and engage and educate consumers about product safety issues. We share the CPSC's goal of ensuring the safety of all consumer products sold to U.S. consumers and the effective communication of product recalls. RILA's members have a tradition of working cooperatively with the CPSC to address product safety and consumer education issues. Several of RILA's members also participate in trusted partnership programs, including the CPSC's Voluntary Retailer Reporting Program, providing the Commission with comprehensive customer complaint data on a weekly basis and the combined Customs & Border Protection (CBP)/CPSC Importer Self-Assessment Product Safety Pilot (ISA-PS) program. RILA's member retailers regularly cooperate with the CPSC to recall products when manufacturers are unable or refuse to consent to a voluntary recall and to promote CPSC's consumer education programs. Through these efforts and others, RILA's members have worked closely with the CPSC to find practical ways to address consumer product safety issues.

RILA submits these comments detailing our significant concerns regarding the proposed Part 1115 rule in this spirit of maintaining a robust and collaborative partnership. We look forward to the opportunity to work with the Commission on this important issue.

I. EXECUTIVE SUMMARY

Over 40 years ago, the CPSC established a clear priority of putting consumer safety first and initiated a long standing practice of cooperation with the regulated community. For example, the CPSC and industry have worked collaboratively together to evaluate risks related to products and to develop new enhanced product safety standards.[1] Hundreds of millions, if not trillions, of consumer products have been sold in the U.S. marketplace in the last 40 years. The overwhelming majority of those products met all applicable safety standards and posed no safety risk to consumers with only a small fraction of products recalled.

The original Part 1115 rule addressed the small fraction of products requiring recall and recognized the Commission's authority to require the mandatory recall of a consumer product but noted that product recalls can be done more quickly and efficiently when the CPSC works cooperatively with companies on voluntary product recalls.[2] Since its establishment, the CPSC has worked with companies to recall potentially dangerous consumer products preventing untold number of injuries and deaths. It is unfortunate that the Commission now proposes to move away from a program that puts consumer safety first and fosters a sense of urgency in product recalls to one that appears to be focused on imposing additional requirements and punitive measures on recalling companies.

The proposed Part 1115 rule will add potential legal liability for recalling companies and additional requirements and hurdles that could deter reporting where there is legitimate doubt about the existence of a product hazard. This could have the unintended consequences of fewer product recalls. In addition, the proposed rule undermines the longstanding cooperative relationship between the CPSC and the regulated community by turning each voluntary recall into a potential civil penalties action and each corrective action plan into a *de facto* settlement agreement. RILA members are concerned that many of the proposed changes will create a much lengthier recall process, which will delay the removal of unsafe and noncompliant products from the marketplace. We have summarized our specific primary concerns below.

First, the CPSC has exceeded its statutory authority by proposing to make all voluntary corrective action plans legally binding and by imposing compliance plans as part of voluntary corrective action plans. The CPSC should retain the original language concerning the non-binding nature of corrective action plans and remove the compliance programs provisions of the proposal.

Second, proposed Part 1115 will impose new legally binding obligations on recalling companies, and therefore is a substantive rule that must meet the procedural requirements of the

[1] *See e.g.* 16 CFR Parts 1219, 1220, and 1500, Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs. 81766 75 Fed. Reg. 81766-81788.

[2] *See* 42 Fed. Reg. 46,720.

Administrative Procedure Act (APA). The Commission's lack of any valid rationale or justification for its proposal to overturn the 40-year practice of working cooperatively with industry on voluntary non-binding recalls raises APA concerns.

Third, the Commission's original public policy decision to make voluntary recall corrective action plans non-binding was correct. The current non-binding voluntary recall process where all work cooperatively together to implement and effectively communicate recalls has been overwhelmingly successful and should be retained. Proposed Part 1115, as currently written, is poor public policy and is in direct contradiction to the stated purpose for the creation of the rule. It will deter robust voluntary reporting and delay the recall of unsafe and potentially unsafe products from the market place, thereby exposing consumers to unnecessarily prolonged risk of injury. In addition, one tragic unintended consequence of the proposed rule will be the evisceration of the current Fast-Track Voluntary Recall Program.

Fourth, the CPSC's proposal will mandate specific forms of consumer notification without any evidence of their effectiveness. The CPSC should refrain from imposing arbitrary undue burdens on companies and suspend the rulemaking process until it can engage in a reliable study of the effectiveness of various methods of consumer notification. RILA members would welcome the opportunity to work the CPSC on this study.

Fifth, the Commission should also expressly recognize that retailers' customer lists contain confidential business information and retailers may seek to be reimbursed for direct consumer notification efforts if they choose to undertake them on a supplier's behalf. Recalling manufacturers and retailers should be given the flexibility they need to choose proven and effective means of communicating with their customers based on their consumer base.

Sixth, the recall notice content provisions should only require information that will enhance public safety and will not delay the recall process. Information regarding a company's participation in a compliance program is irrelevant to consumers and does not assist them in identifying the recalled product, the hazard or remedy.

Finally, the CPSC's proposal to require the listing of significant retailers, each manufacturer, the date of manufacture, and state of residence of all persons killed is potentially confusing and misleading to the consumer. As these sections do not advance the CPSC's goal of enhanced public safety, they should be dropped from the final rule.

Our comments are discussed more thoroughly below.

II. STATUTORY FRAMEWORK AND REGULATORY HISTORY

In 1972, the United States Congress enacted the Consumer Product Safety Act (CPSA),[3] establishing a new independent federal agency, the Consumer Product Safety Commission. The Consumer Product Safety Improvement Act (CPSIA) enacted in 2008 amended the CPSA in order to grant "enhanced mandatory recall authority," as well as to clarify aspects of remedial

[3] 15 U.S.C. §§ 2051−2089.

actions, including the establishment of guidelines for public notification of mandatory recalls.[4] Together the CPSA and CPSIA establish the framework, authority, and powers of the CPSC and detail its scope of jurisdiction over various consumer product safety issues.[5] Section 15(b) of the CPSA established a reporting requirement for manufacturers, distributers, and retailers as it pertains to information that reasonably supports the existence of violations of CPSC product regulations or the existence of substantial product hazards.[6] In addition, Section 15 more broadly provides for procedures for investigation, adjudication of remedial actions, and the form and manner of public notification.

At the very beginning of its history, the CPSC recognized that cooperation with regulated industry would yield significant public safety benefits for U.S. consumers. In 1975, the CPSC promulgated the original Part 1116 regulations, entitled "Policy and Procedures Regarding Substantial Product Hazards." [7] These rules comprised the primary blueprint for the reporting, investigation, adjudication, and resolution of cases involving substantial product hazards and potential violations of the CPSA. This regulation clearly delineated between voluntary and involuntary methods of remedial action.

The CPSC expressly stated that corrective action plans are "voluntary and non-binding," and therefore are "envisioned by the Commission as an expeditious means of protecting the public from a substantial product hazard." [8] In contrast, legally binding consent agreements accompanied by a Notice of Enforcement and an enforceable Commission Order were described as an escalatory option to a voluntary corrective action plan. This option was to be used in the "exceptional case" of "when, in the judgment of the staff, there is a lack of full confidence that the company would comply with a non-binding corrective action plan because of the prior experience of the staff with the manufacturer, distributor, or retailer, or other valid bases." [9]

The Commission, in September 1977, issued an interpretive rule, which further clarified the specific criteria for the CPSC staff in determining the appropriateness of pursuing a non-binding corrective action plan or consent agreement. What became current Section 1115.20 retained the preference found in the former Part 1116 for voluntary corrective action by manufacturers, distributors, and/or retailers of products that contain a defect which could create a substantial product hazard.[10]

The Commission's history clearly demonstrates the success of non-binding corrective action plans as voluntary product recalls have been the primary method of removing unsafe products from the marketplace. Since its establishment, the CPSC has only issued a very limited number of mandatory product recalls. In 1997, the Commission recognized and built upon the success of the voluntary recall and non-binding corrective action plan process and initiated the "No Preliminary Determination" voluntary recall process known as the "Fast-Track Program." This innovative program with its streamlined and improved reporting process demonstrated the CPSC's leadership on public safety and resulted in increasing the speed of removal of unsafe

[4] *See* Public Law 110-314.
[5] Sec. 4. [15 U.S.C § 2064].
[6] Sec. 15(b). [15 U.S.C § 2064.
[7] *See* 40 Fed. Reg. 30,937.
[8] *Id.*
[9] *See* 40 Fed. Reg. at 30,938.
[10] *See* 42 Fed. Reg. at 46,721. *See also* 16 CFR § 1115.20.

products from the marketplace. Under the Fast-Track Program, companies create a voluntary corrective action plan, designed to be implemented within twenty (20) working days of the company filing a full report.[11]

The CPSC has long recognized that working cooperatively with companies to quickly recall potentially unsafe products was critical to ensuring consumer safety. As detailed below, several key sections of the proposed Part 1115 rule will unfortunately undermine this long history of collaboration and cooperation with the regulated community and do nothing to further public interest.

III. ANALYSIS

A. The Proposed Rule Attempts to Exercise Power Not Granted by Congress

It is a basic principle of administrative law that, before a federal agency can issue a regulation imposing mandatory obligations, there must be some underlying statutory authority that provides the basis for promulgation of the regulations.[12] The proposed Part 1115 rule ignores this principle in two instances; 1) the proposal to make corrective action plans in voluntary recalls "legally binding"; and 2) the proposal to require compliance programs as part of some voluntary recalls. The CSPC is without the underlying statutory authority to impose either of these requirements.

1. The CPSC Lacks the Statutory Authority To Require That Voluntary Corrective Action Plans Outside of the Consent Order and Settlement Procedures Will Be Legally Binding on the Recalling Party

The proposed rule seeks to expand the enforceability of voluntary corrective action plans so that once a firm voluntarily agrees to undertake a corrective action plan, "the firm is legally bound to fulfill the terms of the agreement."[13] The Commission asserts that delays in product recalls caused by recalcitrant firms are the justification for this new legal obligation.[14] However, "no matter how 'important, conspicuous, and controversial' the issue…an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[15]

The Consumer Product Safety Act of 1972 (CPSA) set forth the structural and regulatory framework under which the Commission works to ensure the safety of the public, as it pertains to consumer products.[16] Over the last 40 years, this law has incorporated amendments from and has been affected by twelve different pieces of enacted legislation,

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[11] *Id.*

[12] Article I of the Constitution vests the legislative power of the United States in the Congress, and "the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitation which that body imposes." *Chrysler Corporation v. Brown, Secretary of Defense, et al.*, 441 U.S. 281 (1979) at 303, *See also, Food and Drug Administration et al. v. Brown & Williamson Tobacco Corp. et al* 529 U.S. 120 (2000).

[13] 78 Fed. Reg. at 69795.

[14] *Id.*

[15] *Food and Drug Administration et al. v. Brown & Williamson Tobacco Corp. et al* 529 U.S. 120 (2000) at 161.

[16] *See* 15 U.S.C. §§ 2051−2089.

including the Consumer Product Safety Improvement Acts of 1990 and 2008. Most recently, the CPSIA of 2008 specifically addressed the Commission's authority to order mandatory recalls and resolve violations cases through consent orders and settlement agreements.[17] In addition, Congress has expressly detailed the CPSC's authority to seek a preliminary injunction and judicial enforcement of a consent order and settlement.[18] Conspicuously absent is any authority given by Congress to enforce the terms of a voluntary corrective action plan that is entered into outside of a formal consent order and settlement.

The CPSC in the preamble to the proposed rule cites to a House of Representatives' committee report as the underlying authority for its action.[19] The Commission is mistaken in its reliance on a committee report in the absence of any underlying statutory authority. The Commission "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."[20] Additionally, the wording of the report itself does not support the CPSC's proposal to make voluntary corrective action plans legally binding. Specifically, the committee merely stated its expectation that the CPSC would require "similar" recall notice information in voluntary recalls situations, "as applicable and to the greatest extent possible" as to what is required in mandatory recall notices.[21]

The proposed Part 1115 rule is inconsistent with the intent that Congress expressed in the CPSA's and CPSIA's overall regulatory scheme and is not supported by the cited legislative history. As there is no statutory authority to provide a basis for the proposed requirement to make corrective action plans legally binding, this section should be struck from the final rule.

2. The CPSC Also Lacks the Statutory Authority to Require Compliance Programs as Part of Voluntary Corrective Action Plans

Similarly, there is no statutory authority for the CPSC to require companies to agree to mandatory compliance programs as part of a voluntary corrective action plan. Again, the CPSA explicitly details the authority of the Commission to resolve cases of violations of statutes within its jurisdiction. The CPSC does have authority to impose certain requirements in mandatory recalls and, recently, the CPSC has imposed compliance programs in several penalty case settlement agreements.[22]

However, the vast majority of recalls do not result in an initiation of a penalty case by the Commission after it has been determined that a product should be recalled. Additionally, voluntary recall situations, specifically Fast-Track recalls, occur well before any penalty case would be initiated. Despite the Commission's attempt to treat a voluntary recall corrective action plan as a *de facto* settlement of a penalty case, where arguably it has

[17] Public Law 110-314, 122 Stat. 3056-3057.
[18] Sec. 15(g). [15 U.S.C § 2064].
[19] 78 Fed. Reg. at 69794, citing H.R. Rep. No. 110-501 (2008).
[20] *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 517 (1988) at 126.
[21] H.R. Rep. No. 110-501 at 40 (2008).
[22] *See* CPSC Docket No.: 13-C0004 (Kolcraft Enterprises); CPSC Docket No.: 13-C0005 (Williams-Sonoma, Inc.).

authority to negotiate compliance programs as part of the settlement, the fact remains that voluntary corrective action plans are not formal settlements of violations under the terms of the Commission's authorizing statutes. Therefore, to ensure that the Commission's actions are consistent with its legislative mandate, the proposal to potentially require compliance programs as part of a voluntary recall corrective action plan should be deleted from the final rule.

B. The Proposed Rule Raises Significant Administrative Procedure Act Implications

1. Despite the Commission's Statements to the Contrary, the Proposed Part 1115 Rule is a "Substantive" Rule Subject to the Requirements of the APA

The Administrative Procedure Act (APA), 5 U.S.C. §551, *et seq.,* sets forth the statutory requirements for agency rulemaking. [23] In promulgating this proposed regulation as an "interpretative rule," the Commission asserts the §553(b)(A) exemption to the APA requirements.[24] However, as detailed below, the proposed rule lacks any rational justification as required by the APA.

The Supreme Court and many lower courts have spoken frequently on the differences between substantive and interpretative rules. The courts have narrowly limited the scope of interpretative rules when defining the boundaries of interpretative rules and substantive rules. A substantive rule has been described as a "'legislative-type' rule…affecting individual rights and obligations."[25] In contrast, an interpretive regulation "[indicates] an agency's reading of a statute or a rule. It does not intend to create new rights or duties, but only 'reminds' affected parties of existing duties."[26] In determining whether a particular regulation falls under the interpretive rule exception, the courts have declared, "the label that an agency chooses to describe its action is 'only indicative and not dispositive, of the agency's intent,' which may be inferred from the foreseeable effect that the rule will have."[27]

In asserting the interpretative rule exception to the requirements of the APA, the Commission states that "[t]he proposed rule would not establish any mandatory requirements."[28] This statement is not accurate. The proposed rule imposes new and significant legal obligations on regulated parties that substantially affect the rights of manufacturers, distributors, importers, wholesalers, and retailers operating under the current regulatory regime. In a dramatic reversal of nearly forty years of regulatory practice, the proposed Part 1115 rule would now make all voluntary corrective action plans legally binding upon the recalling company. This proposal neither reminds regulated parties of existing rights or duties, nor does it merely indicate the Commission's interpretation of or current thinking about its underlying statutory

[23] 5 U.S.C. §551-562.
[24] 78 Fed. Reg. at 69,798.
[25] *Chrysler Corporation v. Brown, Secretary of Defense, et al.,* 441 U.S. 281 (1979) at 302.
[26] *General Motors v. Ruckelshaus,* 742 F.2d at 1565.
[27] *Cubanski v. Heckler* 781 F.2d 1421 (1986), citing *Louisiana-Pacific Corporation v. Block,* 9. Cir., 1982, 694 F.2d 1205, 1210.
[28] 78 Fed. Reg. at 69,798.

authority. Instead, this rule seeks to create an entirely new obligation, which is the hallmark of a substantive rule. In addition, the proposed rule purports to give the CPSC authority to impose mandatory compliance plans on companies participating in voluntary recalls. Finally, former Chairman Tenenbaum's statement that it was the CPSC's expectation that the Proposed Voluntary Recall Guidelines would be the "minimum of what is required" is indicative of the Commission's expectation that the guidelines are mandatory and not voluntary.[29]

The Commission's clear intent is to create new, legally binding and mandatory regulatory obligations within the Commission's already potent arsenal of enforcement tools. As such, these regulations must conform to the procedural requirements imposed by Congress as set forth in the APA.

2. The Proposed Rule's Lack of Any Rational Justifications for the Proposed Changes to Make Voluntary Corrective Action Plans Legally Binding Potentially Raise Administrative Procedure Act Implications

The Commission appears to want to hedge its bets by treating the proposed rule as a substantive rule subject to the procedural requirements of the APA, while at the same time declaring that the rule is merely interpretative and the Commission is not required to do so. As discussed above, the proposed rule creates new mandatory obligations and is subject to the requirements of the APA. Therefore, the relevant inquiry is whether the notice of proposed Part 1115 meets the procedural requirements of the Administrative Procedure Act. A review of the proposed notice reveals a fatal flaw - the lack of any rational justifications for the proposal to make voluntary corrective action plans legally binding.

Pursuant to the requirements of the APA, when an agency is engaged in rulemaking it is required to "examine the relevant data and articulate a satisfactory explanation for its action" when promulgating regulations and rules.[30] The statute makes no distinction between an initial agency action and a subsequent agency action undoing or revising that action. The Supreme Court in *FCC v. Fox Television Stations* provided guidance to agencies when revising or undoing an initial agency action. *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-11 (2009). In that case involving the FCC's revocation of a prior agency interpretation and enforcement policies, the Court determined that the APA requires an agency to "display awareness that it *is* changing its position" and show that there are "good reasons for the new policy."[31] Although the Court declined to impose a heightened level of judicial review when an agency changes course, the Court did require the agency to "provide *some* explanation for a change, 'so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.'" [32]

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[29] *See* Statement of Chairman Tenenbaum during hearing on Notice of Proposed Rulemaking Regarding Voluntary Recall Notices and Corrective Action Plan, http://www.cpsc.gov/en/Newsroom/Multimedia/?vid=66325.
[30] *Motor Vehicle Mfrs Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983).
[31] *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-11 (2009).
[32] *Id.*

Here, the CPSC's proposal to make voluntary recall corrective action plans legally binding is directly contrary to its long held position that the voluntary recall corrective action plans are "non-binding." Indeed, the non-binding voluntary recall corrective action plans were touted by the Commission as an "expeditious means of protecting the public from a substantial product hazard."[33] As the CPSC now proposes to end a 40-year practice that has resulted in tangible safety benefits to consumers, it is required to provide significant and valid reasons for doing so.

To justify the proposed change, the Commission cites its inability to "enforce a corrective action plan if a recalcitrant firm violates the terms of the corrective action plan." [34] The Commission additionally states that it "has encountered firms that have deliberately and unnecessarily delayed the timely implementation of the provisions of their correction action plans."[35] As noted below, the CPSC already has existing statutory enforcement authority to address this issue. Therefore, these mere statements without any additional supporting evidence or demonstrated deficiencies with the current regulation are patently insufficient to meet the agency's burden of establishing that there are good reasons for such a significant change in policy. Any agency limitations on divulging enforcement information does not provide cover such that the agency can shield itself from this obligation.

The CPSC's own history clearly reveals that there is no justification for the proposed change. As the Commission notes within the proposed Part 1115 rule notice, since January 2010, the CPSC and industry have worked cooperatively together on over 1,000 voluntary corrective action programs and associated product recall notices.[36] These are not the statistics of a program that is in disarray and needs to be changed. On the contrary, these statistics demonstrate that the non-binding voluntary recall corrective action programs are overwhelmingly successful in promoting public safety and ensuring that unsafe products are quickly withdrawn from the marketplace.

There is nothing to indicate that most issues of implementation of the voluntary corrective action plan cannot be worked out cooperatively between the recalling party and the Commission. However, in the event that the CPSC does encounter a recalcitrant party that refuses to implement an agreed upon voluntary recall corrective action plan, the CPSC already has adequate enforcement tools. It can initiate an enforcement case against the company or initiate action to require the mandatory recall of a product.[37]

Given the lack of data suggesting a safety issue or other need for the change, it would be arbitrary and capricious, in violation of the APA, for the Commission to move forward with the proposed rule in the absence of valid articulated rationale and data to support this change in course.[38] Therefore, we urge the Commission to revise the proposed rule to

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[33] 40 Fed. Reg. at 30,937.
[34] 78 Fed. Reg. at 69,795.
[35] *Id.*
[36] 78 Fed. Reg. at 69,794.
[37] *See* CPSC Docket 12-1 (Maxfield and Oberton Holdings LLC); CPSC Docket No. 13-2 (Star Network USA)

[38] *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-11 (2009).

eliminate the wording that would make a voluntary recall corrective action plan legally binding.

C. The CPSC's Original Decision to Support a Voluntary Non-Binding Recall Process was Good Public Policy and Should Not Be Undermined

The CPSC's critical mission is to protect consumers from unreasonable risks of hard from consumer products. Every action that the Commission takes must be evaluated through this prism. Proposals that advance public safety goals should be supported and those that do not meet the goal of enhanced public safety should be dropped. Sadly, the CPSC's proposal to make voluntary recall corrective action plans legally binding, potentially require compliance programs as part of these plans and insert admissions into corrective action plans will not enhance public safety. The proposed rule would undermine the current successful practice of manufacturers and retailers working cooperatively on product recalls and create ineffective legally binding obligations for the manufacturer. Additionally, these proposals likely will cause firms to spend more time and resources negotiating corrective action plans and the contents of public notices, resulting in unnecessary delays in removing potentially dangerous products from the hands of consumers, and in the case of legitimate doubt about the existence of a risk of harm, may give firms the unintended incentive to delay reporting or report less. A tragic unintended consequence of the proposed rule will be the abandonment of the Fast-Track Program.

1. The Current Effective and Overwhelmingly Successful Non-Binding Voluntary Recall Process Should Be Retained and the Proposal for a New Ineffective Legally Binding Recall Process Should Be Dropped

RILA members support the current non-binding voluntary recall process as the most effective means of quickly withdrawing dangerous and potentially dangerous products from consumers' hands. Under the current process, all parties (the CPSC, manufacturers, distributors, importers and retailers) work cooperatively together to protect consumers and recall the product. The Commission's own numbers demonstrate the overwhelming success of the current program.[39]

The Commission's proposal to establish a new legally binding voluntary recall process ignores the fact that the voluntary cooperation of all parties in the supply chain is necessary for an effective recall. In most instances the recalling party will be the product manufacturer, not the retailer. The proposed rule attempts to impose obligations for direct consumer communication and in-store posters that necessarily fall on the retailer. It is critical that the CPSC understands that suppliers and retailers are distinct and separate legal entities. A recalling manufacturer has no authority to bind or agree to any obligation on behalf of the retailer under a voluntary recall corrective action plan, particularly one that is legally binding.

[39] 78 Fed. Reg. at 69794.

Currently, regardless of the fact that they are not legally required to do so, in most instances, retailers work cooperatively with recalling manufacturers on communicating recalls to consumers. However, as detailed further below, many retailers have no ability to meet the new mandatory requirement to "prominently" display in-store posters. Additionally, there are proprietary concerns about retailers' customer data. In the event that manufacturers agree to such actions as part of a binding voluntary corrective action plan, manufacturers will be put into the situation where they will be legally required to do something that they cannot fulfill. Additionally, the CPSC will not be able to enforce any "legally binding" corrective action plan agreed to by a recalling manufacturer against a retailer who is not a party to the agreement.

RILA urges the CPSC to retain the current effective and overwhelmingly successful non-binding voluntary recall process. The proposal for a "legally binding" corrective action plan is inoperable and ineffective in practice, and therefore, should be eliminated from the final rule.

2. The Proposed Rule Will Not Enhance Public Safety as Companies Will Be Deterred From Reporting Potentially Unsafe Products for Fear of the CPSC Imposing a Unwarranted Compliance Program

Companies spend a significant amount of time and resources to ensure that the products they manufacture or sell meet or exceed all applicable safety standards. The vast majority of retailers and manufacturers have robust compliance programs that are specifically tailored to their business operations and identified risks. The CPSC now proposes to insert compliance program-related requirements into the voluntary recall process. To date, the CPSC has only required compliance programs in a small number of consent order and settlement agreements.[40] These compliance program requirements have included oversight by the CSPC over the business' compliance program and mandatory reporting requirements. When a company agrees to a government imposed compliance program, it relinquishes control over its business operations. As a result, companies are reluctant to take any action that might trigger the imposition of a compliance program.

The commissioners and CPSC staff have consistently advised the regulated community "when in doubt, report a potential product safety issue." Currently, unless there are aggravating circumstances such as a pattern of egregious offences, there is no downside to a company that timely reports a potential product safety issue, irrespective of a determination of defect or safety hazard, and works with the CPSC to evaluate whether there is a substantial product safety hazard or standards violation present, and if necessary devise and timely implement an appropriate corrective action plan. Historically, there has been a spirit of cooperation between the CPSC and the regulated community with the shared goal of public safety.

As a result, many companies have chosen to follow the Commission's advice and report potential issues based upon one incident or customer complaint even in the absence of

[40] *See e.g., In the Matter of Ross, Inc. et al*, Settlement Agreement, CPSC Docket No. 13-C0006.

any verified product defect or risk of serious injury or death. This practice has allowed the CPSC to case a wide product safety net that captures numerous reports. From this pool, the CPSC can then select those reports it determines merit implementation of a voluntary corrective action plan. The current proactive and conservative approach has been successful in preventing untold number of injuries.

Under the proposed voluntary recall guidelines, one of the factors that the CPSC will look at when determining whether to require a compliance program as part of a voluntary recall corrective action plan is the number of recalls made by that company. This creates a disincentive for a company to report an issue rather than providing companies with an incentive to report and giving companies credit for having strong robust quality assurance and compliance programs that are able to detect potential issues. Instead of enhancing public safety, the proposed rule will chill voluntary reporting with the opposite result.

The disincentive is particularly acute for retailers who sell a large number and broad range of finished consumer products and typically are not product manufacturers. To the extent that a retailer's robust compliance program enables it to gather data related to the finished consumer product it sells and timely report potential issues to the CPSC, it should not then be penalized for acting proactively in the interest of its customers by then having a compliance program imposed by the CPSC.

From a policy perspective, the original rule got it right. We urge the Commission to renew its commitment to encouraging the reporting of potentially unsafe products and revise the language to eliminate the reference to mandatory compliance programs.

3. The CPSC's Proposals to Make Voluntary Corrective Action Plans Legally Binding, Add Compliance Programs and Require the Negotiations of Admissions Will Delay the Recall of Potentially Unsafe Products

The Commission's stated purpose for moving forward with the proposed amendments to Part 1115 is to streamline the voluntary recall process. However, the proposed changes to make voluntary recall corrective action plans legally binding, potentially impose mandatory compliance programs on the recalling company and require the negotiation of admissions in a corrective action plan will significantly delay the voluntary recall process.

A non-binding voluntary recall corrective action plan supports the critical public policy goal: the rapid removal of dangerous and potentially dangerous products from the marketplace. Currently, negotiations between the CPSC and the recalling company on the appropriate voluntary recall corrective action plan are typically done at the level of the company's product safety professional and the CPSC compliance staff. These competent industry and government product safety professionals cooperatively work together to address the scope of covered products, the remedy that will be provided to consumers, the method of consumer notification and the timing of the recall. Negotiations are done in the spirit of partnership with the shared goal of quickly removing potentially dangerous products from consumers' hands. To the extent that unforeseen circumstances arise

requiring an adjustment to the corrective action plan, the necessary changes can be agreed to quickly between the parties.

Most companies have strict corporate governance procedures with signature authority designations that specify the level of authority specified employees have to sign contracts and legally bind the company. These procedures often require legal review of a binding agreement or contract prior to signature. The purpose of a company's signature authority policy is to ensure that decisions that impose legal obligations on a company are vetted and all ramifications are considered prior to signature.

The CPSC's proposal to make corrective action plans legally binding will trigger these governance requirements and require companies to engage in internal vetting and legal review prior to signing the agreement. This is particularly true if the CPSC requests a compliance program or admissions as part of the voluntary recall corrective action plan. Any negotiation of compliance programs that may include required action and program implementation by the company, reporting requirements or admissions will be closely scrutinized by the company's legal counsel. The internal review and vetting process is time consuming and will delay the product recall.

The Commission's proposals to make corrective action plans legally binding, add compliance programs to corrective action plans and require negotiations of admissions do not advance its critical mission and public safety goals. There is no clear benefit to the Commission or consumers to add these provisions and the effects of such provisions will delay the removal of potentially dangerous products from the hands of American consumers. Therefore, these provisions should be deleted from the final rule.

4. The Proposed Rule Will Eviscerate the Fast-Track Recall Program

One of the most tragic unintended consequences of the CPSC's proposed part 115 rule will be the complete abandonment of the current award winning Fast-Track Program. When faced with a potential product safety issue, rather than waiting until the risk of harm is confirmed, currently a company can choose to act proactively to recall the product under the Fast-Track Program. Under the terms of the Fast-Track program, there is no preliminary determination of a defect or substantial product safety hazard prior to recall. Instead, the company creates a voluntary corrective action plan, designed to be implemented within twenty (20) working days of the company filing a full report, resulting in speedy withdrawal of a potentially unsafe product from the marketplace. This program has been successful as over 90 percent of recalls initiated through the Fast-Track program were commenced within 20 working days of reporting to the Commission.[41]

As noted above, the CPSC proposals to make corrective action plans be legally binding and to add compliance programs to corrective action plans based on the number of recalls will deter voluntary reporting. A company's disincentive to use the Fast-Track Program

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

to voluntarily recall potentially unsafe products will be even greater. Companies will not want to risk the imposition of legal responsibilities and obligations without a preliminary determination of a substantial product hazard prior to the recall. Consequently, those incidents that are "on the margins," where reasonable minds could disagree as to the existence of a product safety hazard, are at risk of going unreported under the proposed rule. Not only will this limit the CPSC's visibility to potential dangers, but will also limit the agency's ability to detect emerging trends.

To ensure the viability of the current Fast-track Program and the rapid recall of potentially unsafe products, we urge the Commission to revise the language to eliminate the reference to mandatory compliance programs.

D. The CPSC Should Promote Effective and Flexible Consumer Notification Requirements that will Result in Timely Product Recalls and Ensure that the CPSC and Recalling Companies Meet their Shared Public Safety Goals

The proposed rule sets forth a list of mandatory methods of consumer notification and then allows companies to choose two additional methods from a laundry list of options. Recalling companies are required to: issue a direct notice to known consumers; issue a press release or Recall Alert; prominently display in-store posters; and post a product recall notice on the company website. Companies must then choose an additional two methods of publication from an additional list of options.[42] The proposed rule imposes mandatory consumer notification requirements without reasonable data supporting their effectiveness, requires duplicative and redundant notices, and fails to provide recalling companies and retailers the flexibility they need to choose effective and individually crafted means of communicating with their customers. Additionally, the proposed rule ignores the reality of the limited authority of the most frequent recalling company – the product manufacturer - to affect some of the prescribed actions.

1. The CPSC Has Acted Prematurely in Prescribing Mandatory Methods of Consumer Communication Without Any Data Supporting Their Effectiveness

In 2003, the CPSC conducted an initial review of consumer recall communications and recall effectiveness rates.[43] The study reviewed message content, clarity and comprehension focusing on best practices to ensure message retention.[44] The study noted numerous reasons why consumers may choose not to act upon the remedy offered in a product recall including, negative impact of time and inconvenience of costs, task overload, the impact of time and pressure, social influence and perceived need for product.[45] Unfortunately, the CPSC has not followed up on this study to examine the

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[42] The options include: letter, electronic mail, or text message; video news release, You Tube or Instagram; newspaper, magazine or other publication; advertisement; and other social media.

[43] *Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior*, CPSC Order No CPSC-F-02-1391, Contract No. GS23F9780H (July 2003).

[44] *Id.* at 13-16.

[45] *Id.* at 22-27.

effectiveness of the various methods of communicating recalls to consumers to break through these barriers to returning recalled products and arbitrary.

For the reasons set forth below, retailers believe that several of the mandated and optional communications methods set forth in the proposed rule are not effective means of communicating critical product recall information to consumers. To burden retailers, (who generally are not the recalling party) with unproven methods of consumer communication is unreasonable.

Therefore, we urge that this portion of current rulemaking process be put on hold until the CPSC has an opportunity to conduct a review of the issue and has adequate data on the effectiveness of the various methods of consumer notifications. The Commission should develop adequate data to articulate a reasonable rationale to support a proposed rule with required consumer notification methods before it proceeds. We further urge the CPSC to work collaboratively with the regulated community including retailers to develop a better understanding of how to effectively communicate recall messages to consumers and appropriate solutions.

2. The CPSC's Proposal on Consumer Notification Requirements Should be Revised to Allow Companies Flexibility in Choosing Effective Methods of Communication and to Eliminate Duplicative and Redundant Notifications

Companies, particularly retailers, are adept in finding effective means of communication with their customers. For retailers, the viability of their business depends upon their ability to create relevant and engaging messaging and to devise and use effective communication methods targeting appropriate audiences. There is no "one size fits all" communication method. Each company will have a different program of communication tools depending on their business model and relationships with their customers.

The proposed Part 1115 rule requires a minimum of six separate communications of product recalls and establishes a "one size fits all" concept requiring that companies communicate recalls to consumers in specific ways regardless of whether that company's customers are accustomed to receiving communications by the mandated methods or if those communications will be effective. For example, if a membership retailer is able to notify all the customers of the recalled product directly, to require additional notices or posters is simply overkill and will not increase the effectiveness of the recall. Additionally, as detailed below, in-store posters are likely the least effective means of communicating product recalls. Yet, the proposed rule requires in-store posters be prominently displayed. Providing companies with the flexibility to adapt the mode of product recall communication to their customer base will improve the effectiveness of the consumer communication and eliminate redundant, duplicative notices.

Therefore, we recommend that the proposed rule be changed to limit the number of mandatory requirements and allow for this flexibility.

3. The Mandatory Requirement for Direct Customer Notification Potentially Requires Companies to Share Confidential Business Information and Runs Afoul of Customer Privacy Concerns

Section 1115.33(b)(2) of the proposed rule will require recalling companies to use a direct voluntary recall notice "for each customer for whom a firm has direct contact information, or when such information is reasonably obtainable from third parties, such as retailers, or from the firm's internal records."[46] The vast majority of recalls are initiated by the product manufacturer. A manufacturer will have records of its immediate customers (retailers, wholesalers or distributers), however in many, if not most cases, it will have no end-user consumer records. A manufacturer may have a small number of consumer records through its product registration program. The completeness and accuracy of this information is dependent upon the consumer.

In some cases, the retailer may have limited consumer purchase information, but it certainly will not have information on all consumers that purchased a product. The amount of consumer information a retailer has depends upon the nature of the retailing business and the method by which the item was purchased, along with the customer's willingness to provide personal contact information. Generally, membership retailers and retailers who sell on-line will have more information on consumers than retailers with only physical stores. The latter *may* be able to pull consumer purchase information from customers who participate in a company loyalty program or used a credit card to make their purchase. Retailers are unable to track consumers who purchase with cash unless they participate in a loyalty program.[47] Additionally, a retailer may be able to track purchasers of infant and toddler durable goods that sent in a product registration card to the retailer.[48] Also, retailers only maintain purchase information for a limited time period in accordance with their record retention policies. To the extent that a recall involves a product that was manufactured and sold several years previously, the retailer may no longer have any customer purchase information.

Retailers consider their customer lists to be highly valuable confidential business information. As a result, retailers are typically unwilling to turn over a customer list to a product manufacturer to allow the manufacturer to contact the retailer's consumers directly. Indeed, doing so could potentially violate the company's privacy policy and its commitment to its customers to use their information for specified purposes only.

In order to protect its confidential business information and the privacy of its customers, when requested by a recalling manufacturer or in accordance with its internal policies, a retailer often chooses to contact their customers directly rather then turn over their customer list to the recalling company. Regardless of what method a retailer uses to communicate a manufacturer's recall to its customers, whether by mail, email, text or

[46] 78 Fed. Reg. at 69800.

[47] The accuracy and completeness of a retailer's loyalty program information is directly related to the willingness of consumers to provide the needed information.

[48] A retailer will only receive product registration cards for infant and toddler durable goods where the retailer is the importer of the product and responsible for product registration. Again, the accuracy and completeness of the data is directly related to the willingness of consumers to provide the needed information.

phone, there is a cost connected to the direct customer notification. Since the retailer is not the product manufacturer and in fact is doing a service for the recalling company, it would be unfair for the retailer to bear the burden of this cost. As a result, most retailers may wish to charge back the cost for the communication of the product recall to the recalling supplier.

RILA recommends that the final rule be clarified to recognize that in most instances the recalling party will be the product manufacturer who will need to work cooperatively with retailers to contact customers on its behalf. A retailer's right to retain its business confidential customer lists and customers' rights to privacy should be recognized, as well as the retailer's right to be reimbursed for direct consumer notification efforts that it undertakes on a supplier's behalf.

4. The CPSC Should Move Beyond the Outdated and Ineffective In-Store Poster Requirement to Allow Companies to Use More Effective Communication Tools

We have detailed above our general concerns regarding the lack of reasonable data supporting the proposed mandated methods of communication to consumers. The need for sufficient data is particularly acute in connection with the proposed mandatory requirement for the prominent display of in-store recall posters.

The proposed rule does not recognize the business reality that many retailers frankly are unable to meet this requirement as they have no place to hang or post recall posters. Suggestions that posters can be posted on shelves or at customer checkout locations are unrealistic.[49] Paper posters posted in these locations would be subject to space limitations and will inevitably be quickly torn or inadvertently pulled down by customers or employees. Retailers would be required to constantly replace torn or damaged posters. To require the prominent display of in-store posters when the retailer is unable to meet this requirement or where the notice will be not be effective in informing the public about a product recall is an exercise in futility.

Another reason that in-store posters are ineffective is that the retailer's customer who originally purchased the recalled product may not be a current customer or may not be looking to the retailer for information regarding the recalled product. Many product recalls occur years after the product was manufactured and sold. Additionally, product recalls can involve large ticket items (e.g. household appliances) that are purchased infrequently. In both of these situations, affected consumers may no longer be customers of the retailer who is saddled with an in-store poster requirement. Even if the consumer is still a customer of the particular retailer, it is unlikely that the consumer will be looking for an in-store poster for information about the product. Again, without some scientific evidence or data that in-store posters are an effective method to communicate recalls, the CPSC should refrain from making this a mandatory requirement.

[49] As more retailers move to mobile checkout, the in-store checkout location will no longer be an option for posting in-store product recall information.

In the event that the CPSC does move forward with an in-store consumer notification requirement, the CPSC should not mandate a particular form of in-store consumer notification. Instead, the CPSC should give retailers the flexibility to provide consumers reasonable in-store access to recall information and to choose the communication method that is most effective and fits well with their business operations and constraints. Retailers should have the flexibility to provide in-store customer notification through a variety of methods.

For example, a retailer could choose to provide product recall information through an in-store kiosk or gift registry. A retailer that sells computers and provides in-store internet access could provide consumers the opportunity to use the in-store computers to view information about product recalls by pulling up information on its company website. Some retailers may choose to maintain a binder or folder of the information that is available to consumers upon request. In all of these examples, retailers are providing consumers reasonable in-store access to recall information without "prominently" displaying in-store posters.

RILA recommends that the CPSC refrain from making in-store posters a mandatory requirement until it has scientific evidence supporting the effectiveness of this method of consumer notification. If the CPSC moves forward with a mandatory in-store requirement, RILA recommends that the CPSC adopt a standard that would give retailers flexibility to provide reasonable in-store access to product recall information.

E. The Recall Notice Content Rule Should Only Require Information That Will Enhance Public Safety and Will Not Delay the Recall Process

The stated purpose of the proposed rule is to provide effective and timely notice to consumers.[50] The details to be included on the product recall notice are intended to give useful information that will allow the consumer to accurately identify the specific product being recalled, detail the hazard and associated risks, and clearly articulate the remedy and recommended actions to be taken by the consumer. Ultimately, the recall notice should encourage consumers to respond to the recall. However, as detailed below, several sections of the CPSC's proposal on recall notice content will delay the recall process and require inclusion of information that is potentially confusing and misleading to the consumer and do not serve to encourage the consumer to respond to the recall. As these sections do not advance the CPSC's goal of enhanced public safety, they should be dropped from the final rule.

1. Whether a Company Has Agreed to a Compliance Program Serves No Public Purpose in a Recall Notice and Requiring This Information Will Delay the Recall Process

As noted above, the CPSC has no statutory authority in the context of voluntary recalls to require that a company implement a mandatory compliance program. Even if the CPSC

[50] *See* 78 Fed. Reg. at 69,794.

did have the requisite underlying authority, the fact that a company has agreed to a compliance program is irrelevant to a consumer in a product recall situation and should not be included in a product recall notification.

The intent of recall communications is to motivate consumers to take action to remove unsafe products from the marketplace. All of the other information that is currently included in the voluntary product recall notice – identification of the product, hazard, risk, and remedy - is forward or consumer facing. Adding a provision announcing a company's agreement to a compliance program serves no purpose in a recall notice. It adds nothing of value for the consumer as it gives no additional information about the product, risk, hazard or remedy and potentially increases consumer confusion.

Additionally, this requirement will most certainly delay the recall process and is contrary to the CPSC's goal for the speedy public notification and recall of unsafe products from consumer's hands. As discussed above, negotiation of legally binding corrective action plans and compliance programs will be time-consuming as companies carefully scrutinize and deliberately negotiate the specific components, rights and obligations of a compliance program, including what can or will be disclosed in any public notice. Until the CPSC and the recalling party are able to come to an agreement, potentially unsafe products will remain in the marketplace endangering the safety of consumers.

To avoid consumer confusion and to ensure that recalls can be announced and implemented expeditiously, we recommend that the requirement to include a company's agreement to a compliance program from the product recall notice be eliminated from the final rule.

2. The Proposal to Require the Listing Of "Significant Retailers" on Product Recall Notices Unfairly Discriminates Against Large National and Regional Retailers and is Potentially Misleading to Consumers

Most recalls are initiated by product manufacturers and not by retailers who have no control over and little visibility into the manufacturing process or the manufacturer's product safety programs. Historically, retailers have been listed on product recall notices to provide information to consumers to assist in product identification. The proposed 1115 rule would require a product recall notice to list "significant retailers" of the product. Additionally, the proposed rule would allow the listing of a retailer if it is in the "public interest" (without defining or providing guidance when such a listing would be appropriate).[51] Of significant concern, based on the wording of the proposed rule, presumably any national or regional retailer would be listed as a "significant retailer" regardless of the actual number of units sold by that retailer.

In the hyper-competitive retail marketplace, companies can succeed or fail based on the public perception of their brand. As a result, companies work hard to protect their public image. A product recall conveys a negative message about that company to consumers.

[51] *See* 78 Fed. Reg. at 69,797.

Therefore, the Commission should take great care to ensure that retailers are only listed on the product recall notice when it is appropriate to do so, such as when a retailer is the exclusive retailer of the recalled product.

However, it is not appropriate to list national or regional retailers on product recall notices regardless of the number of units sold by that retailer. Such action will disproportionately and unfairly impact large retailers as they will be consistently listed in product recalls. It is also potentially misleading to consumers. Most importantly, the practice of listing "significant retailers" may result in consumers mistakenly believing that a product purchased at an unlisted retailer is not within the scope of the recall.

We recommend that the CPSC revise the regulations to clarify that the retailers that are listed on a product recall notice should be those that have sold a significant number of units of the recalled product. To avoid consumer confusion, wording that notifies consumers that the products may have been sold at retailers other than those listed on the recall notice should be included.

3. The Product Recall Notice Should Accurately Inform Consumers of the Risk Associated with the Recalled Product and List the Number of Units in the Consumer Marketplace Instead of the Total Number of Products in the Supply Chain

In order for a product recall notice to be effective, it must give consumers information that will allow the consumer to accurately identify the product and assess the hazard and risk related to the product. The current practice continued under the proposed rule is to list the total number of products in the supply chain subject to the product recall regardless of the location of the products and whether any products were every sold to consumers. This practice is misleading to consumers.

The majority of manufacturers and retailers have robust product safety compliance programs that allow them to proactively quarantine potentially unsafe products before large numbers of the products are sold to consumers. To the extent that the product safety recall notice lists the total number of units in the supply chain, including those that were never released to the public, the potential risk to the consumer is overstated. Additionally, this does not give credit to those businesses that stopped non-compliant products before sale to the public.

A more accurate way to convey the potential level of risk information to consumers would be to list only the number of units sold or in the hands of consumers in the product recall notice. If the Commission decides to continue its current practice of listing the total number of units in the supply chain subject to the recall on the recall notice, it should also add a separate notation that lists the number of units in the consumer marketplace. In this way, consumers will be able to accurately assess the risk related to the product recall and correctly evaluate a company's safety compliance program.

4. The Proposal to Require the Identification of the Manufacturer on the Recall Notice is Potentially Confusing to Consumers and Would Require Companies to Reveal Confidential Business Information

The purpose of the proposed rule is to provide consumers with information to enable accurate product identification. The recall notice content requirements should require only information that is relevant to product identification. The proposed rule to require the listing of "each manufacturer," including domestic and foreign firms' legal name, city and country of headquarters, in the recall notice does not meet this goal.

When attempting to determine whether a product is covered under a recall, consumers will look to the product itself or its packaging for identification information, which generally lists the brand, private labeler or listed manufacturer. This is the information that a consumer will associate the product. The listing of each manufacturer beyond those that are relevant to product identification is potentially confusing to consumers.

In addition, most manufacturers and importers consider the identity of their suppliers to be proprietary confidential business information. Companies spend a significant amount of resources developing supply chains that allow them to compete effectively in the marketplace. A requirement to list each manufacturer on the recall notice would reveal confidential business information and potentially eliminate any supply chain competitive advantage.

Therefore, we recommend that the CPSC amend the proposed rule to delete this as a required product recall notice content requirement.

5. Inclusion of the Date of Manufacture of the Product on the Recall Notice is Irrelevant to Accurate Product Identification and Potentially Confusing to Consumers.

Current product recall notices list the approximate dates of sale of the covered product. This information is useful to the consumer when attempting to determine whether a product in his or her possession is subject to a product recall. The proposed rule will now also require the date of manufacture of the product to be listed on the product recall notice. This information is irrelevant and useless to the consumer trying to determine if a particular product is subject to the recall. Unless the date of manufacture is part of a code identifying the product, a consumer has no way of knowing when the product was manufactured. It is much more likely that a consumer will remember the approximate date of purchase of the product.

Additionally, inclusion of the date of manufacture could be potentially misleading. Although many retailers operate on a "just in time" inventory system where the date of manufacture will likely be close in time to the date of sale of the product, there are numerous scenarios where the date of product manufacture could occur one or more years before the date of sale. If the date of manufacture is required to be part of the product recall notice, consumers could look only at the date of manufacture listed and

mistakenly believe that their products are not subject to the product recall resulting in a decrease in recall effectiveness.

To further the Commission's goal of ensuring clear communication of product recalls to consumers, we recommend that the rule be revised to eliminate the requirement to list the date of manufacture from the product recall notice.

6. The CPSC's Proposal to Require Listing the State of Residence of the Individual Involved in a Fatality Event is Irrelevant to a Consumer's Assessment of Risk Related to the Recalled Product and Misleading to Consumers

Retailers understand and support the CPSC's goal of clearly communicating potential hazard and risks related to the recalled product to consumers. We understand that including the age of an injured person could be relevant to consumers to enable them to understand the nature of a hazard and assess the potential risk related to a product. However, it is unclear how inclusion of the state of residence of the injured party will assist consumers in making that determination. Indeed, listing of the state of residence could be misleading if a consumer falsely assumes that a product not purchased in the named state is not covered by the recall.

The state of residence of an injured party has no bearing on either the significance or nature of the hazard, and does nothing to further the goal of encouraging consumers to respond to the recall. Therefore, we recommend that the CPSC amend the proposed rule to delete this as a required product recall notice content requirement.

CONCLUSION

RILA members recognize the CPSC's leadership in the area of product safety. RILA members share the CPSC's commitment to ensuring the safety of all consumer products sold in the U.S. market. We support the Commission's goal of developing product recall processes and procedures that embody a sense of urgency and reflect the need for rapid action to remove potentially unsafe products from the marketplace. Our comments are intended to inform the CPSC of the serious concerns regarding and potential unintended consequences related to the proposed rule. We urge the Commission to use our suggestions and comments to develop a rule that will truly enhance consumer safety without delaying the recall of unsafe and potentially products.

Specifically, we request the CPSC:

1. Delete the proposal to make corrective action plans "legally binding" as without statutory authority, inoperable, ineffective and inconsistent with the Commission's critical mission and public safety goals. The current successful and effective non-binding voluntary recall process should be retained;
2. Eliminate the proposal to negotiate compliance programs as part of a voluntary correction action plan. This will ensure that voluntary recalls are consistent with the Commission's

underlying statutory authority, maintain the viability of the Fast-Track Program and eliminate any deterrent to the timely reporting and implementation of recalls;

3. Suspend the mandatory consumer notification portion of the current rulemaking process until the Commission has the opportunity to conduct a study on the effectiveness of various methods of consumer notification, including in-store posters. We urge the CPSC to work collaboratively with the regulated community including retailers to develop a better understanding of how to effectively communicate recall messages to consumers;
4. Amend proposed Part 1115 to provide companies with the flexibility to adapt to what the firms know to be the most effective the method of product recall communication for their customer base;
5. Delete the requirement for prominently displaying in-store posters as ineffective. The final rule should incorporate provisions that give retailers the flexibility to provide reasonable in-store access to product recall information without specifying a particular method;
6. Clarify the final rule to recognize the different rights and obligations of recalling companies, most often product manufacturers and retailers. A retailer's right to retain its business confidential customer's lists, should be recognized, as well as the retailers right to be reimbursed for direct consumer notification efforts that it undertakes on a supplier's behalf;
7. Amend the definition of "significant retailer" to be listed on product recall notifications to be limited to those retailers that sold that product exclusively or those that sold a significant number of units of the recalled product. To avoid consumer confusion, wording that notifies consumers that the products may have been sold at retailers other than those listed on the recall notice should also be included on the recall notice; and
8. Revise the proposed Part 1115 rule to reflect our suggestions for listing only the number of units sold, and delete the each manufacturer, the date of manufacture and state of residence of all persons involved in a fatal incident as a required product recall notice content requirements as those provisions do nothing to encourage consumers to respond to the recall.

We appreciate your consideration of our comments and look forward to our continued partnership. Do not hesitate to contact me if you have any questions or need any additional information.

Sincerely,

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