July 15, 2014

VIA ELECTRONIC MAIL

The Honorable Robert Adler
Acting Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Acting Chairman Adler:

The undersigned organizations express concern with recent revisions to the standard monthly progress reporting form[1] for use in reporting progress toward completing the commitments made by firms in connection with Corrective Action Plans ("CAPs") related to voluntary product recalls. Though we appreciate efforts by the U.S. Consumer Product Safety Commission ("Commission" or "CPSC") and its staff to streamline the form, the revised form and new obligations that are being demanded by staff and included in new CAP acceptance letters from staff raise serious policy and legal concerns.

The revised form includes two new sections of particular concern. The Commission seeks information related to a firm's use of Facebook, Twitter and other social media in connection with the product recall. The Commission also asks firms about their efforts at monitoring online auction sites for the recalled product and to describe the "action taken" by the firm in connection with such efforts. We understand that new obligations to use social media and to monitor online auction sites are being included unilaterally and without supporting legal authority by CPSC Compliance staff in new CAP acceptance letters to recalling companies. Moreover, inclusion of these two new sections and the direction to use the new form when submitting monthly progress reports for previously-recalled products suggests a unilateral retroactive modification of previously-negotiated CAPs. It is particularly troubling that these changes are being implemented outside of the proposed rulemaking on voluntary remedial actions and guidelines for voluntary recall notices, which purports to cover these types of issues.

A strong cooperative partnership between the Commission and companies has been the cornerstone of the successful voluntary recall process for nearly 40 years. We encourage the Commission to engage stakeholders and work cooperatively with regulated entities to improve the effectiveness of both the voluntary recall process and related reporting.

I. Reporting On Social Media Activity

The addition of a section seeking information about how often a recalling firm has posted the recall notice on Facebook, Twitter or other social media, and how often the posting has been "liked" or "re-tweeted" implies that there is a requirement to participate in publicizing a recall via social media. However, neither the Consumer Product Safety Act ("CPSA") nor the current Commission rule for mandatory and voluntary recalls at 16 C.F.R. § 1115 ("Part 1115") contains this requirement. Moreover, in its recent proposal to establish guidelines for voluntary recalls, the Commission did not propose to make the use of social media mandatory when

[1] Accessed at http://www.cpsc.gov/Global/Business-and-Manufacturing/Recall-Guidance/MonthlyProgressReportRevisionFinal.pdf

implementing voluntary recalls. Rather, the proposal sought comment on a notification plan that would include a press release (or Recall Alert), an in-store poster, a website posting and "at least two additional methods of publication" from a list of several methods of publicizing a recall. Social media is only one such "additional" method, and a recalling firm would not be required to choose it. See Proposed Section 1115.33(a)(4) and (b). 78 Fed. Reg. 69793, 69800 (November 21, 2013).

As the Commission and the staff are expected to give full and open-minded consideration to all the comments that were filed in the docket of the proposal on voluntary recalls (Docket No. CPSC-2013-0040), we assume there has not been a final decision on whether to keep social media on a list of optional publicity methods for voluntary recalls. Even if the Commission adopts the proposed revisions to Part 1115 in their entirety, no statute or regulation would require recalling firms to use social media to publicize a recall.

Yet, Compliance staff is reportedly informing recalling firms that the use of social media to publicize voluntary recalls is a new requirement; firms declining to agree to use social media are being asked for written justification for their refusal. If these reports are true, we object to these demands that firms engage in activities which are not in fact required or which are not voluntarily included in a CAP. A demand by staff that firms use social media for recall publicity is especially troublesome as the Commission is still considering the good faith objections and other comments that were raised during the rulemaking proceeding. It is noteworthy that the Commission has never presented any evidence demonstrating that the use of social media is effective and useful in connection with product recalls.

We request that you instruct Compliance staff to immediately stop informing firms that there is a "requirement" to use social media in connection with voluntary recalls, and to stop inserting such provisions into CAP acceptance letters except where the firm has actually agreed to use social media. We also request that the new monthly progress reporting form and its associated guidance be amended to clarify that firms are required to only engage in and report upon activities that have been included in the negotiated CAP. Compliance staff should be instructed to refrain from imposing any new requirements on voluntary recalls that are not aligned with the statute and regulations governing the process.

II. Monitoring Online Auction Sites

The addition of a section on the monthly report seeking information on whether the recalling firm has found the recalled product on online auction sites raises additional serious concerns. As with the proposed requirement that firms use social media, there is no requirement in the CPSA or Part 1115 that recalling firms monitor online auction sites. Unlike the use of social media, the Commission did not propose to require firms to monitor online auction sites as a condition of participating in a voluntary recall with the CPSC. Thus, there is no basis for the Commission or the staff to expect recalling firms to monitor online auction sites to look for recalled products. Yet, some recent CAP acceptance letters have included an admonition that the approved CAP includes an "agreement" to monitor online auction sites—even when there was never any discussion of monitoring online auctions during the negotiation of the CAP.

There are several serious issues raised by this conduct. First, the CAP acceptance letter should reflect only the outcome of negotiations between the staff and the recalling firm and should not impose unilateral obligations that were not negotiated. Any obligation to monitor auction sites must be well grounded in law and, as noted above, there is no legal foundation for this obligation.

Second, requiring recalling parties to monitor online auction sites is an ineffective use of companies' resources. The goal of recalling companies is and should be taking actions to ensure removal of the largest number of recalled products from the marketplace. These actions often involve communication of the product recall to consumers and, in some instances, include direct communications with customers. To require companies—especially small companies—to monitor online auction sites for the sale of individual recalled products is an inefficient use of companies' limited resources and could detrimentally impact a company's ability to effectively recall a product.

Third, while recalling companies can request the removal of the product from an online auction site, they have no authority to enforce a prohibition of sale of the recalled item by any third party and no ability to require the auction site to remove the item. Auction sites are separate business entities which the recalling firm cannot control. Recalling firms typically have no business relationships with companies who own or manage online auction sites, much less the actual seller of the recalled product, and these companies in turn have no business reason to be responsive to requests to remove recalled products from sale. Additionally, a recall often encompasses only certain units of a model (e.g., units built between two specified dates), yet online auctions typically do not publish the date codes or serial numbers of the units being offered for sale. Therefore, a recalling company's effort to monitor online auction sites will be futile in effectively removing recalled products from the marketplace.

Fourth, the new monthly reporting form was issued without any guidance from CPSC staff on the level of expected monitoring or responsive action. For example, how many online auctions does the staff expect firms to monitor? Even a cursory review of online auctions available on the internet identifies many such sites. Does the Commission seek to require recalling firms to monitor local and regional online auction sites, neighborhood listservs, virtual yard sales and classified advertisement websites? Also, how often are firms expected to monitor these sites?

The unilateral, ill-defined and ill-considered imposition of a "commitment" to monitor online websites in the CAP acceptance letter places an extremely onerous, resource-intensive task on firms—adding further disincentives to participate cooperatively in voluntary recalls. The lack of objective criteria for the online auction monitoring efforts that are expected by the staff may lead to unacceptable compliance jeopardy for recalling firms who could be found to be in "violation" of the CAP if a recalled product is located for sale on an online auction site, no matter how obscure the site. When coupled with the recent proposal to make CAPs "legally binding," this is an untenable situation for recalling firms.

Most critically, the Commission has failed to engage the regulated industry in discussion about this subject, so there has not been any forum in which the industry's numerous concerns could have been shared with the staff. We ask that the Commission remove the section of the new monthly progress reporting form that pertains to online auction sites. We also request that the Compliance staff refrain from imposing any new "requirements" to monitor online auctions.

III. Complying with the Anti-Deficiency Act

The CPSC—not a manufacturer—has the legal responsibility to monitor online auction and resale sites and to take steps to enforce the statutory prohibition on selling recalled products. This raises a question of whether the staff's efforts to recruit manufacturers to conduct surveillance of online auctions are lawful under the Anti-Deficiency Act ("ADA"), 31 U.S.C. §§

1341 and 1342. Among other things, the ADA prohibits federal agencies from augmenting the appropriations granted to the agency from Congress by accepting voluntary services to perform tasks or services that the agency would otherwise itself be expected to perform with its appropriated funds. This provision has a dual purpose. It prevents claims against the government for compensation from the "volunteers" who performed the services. The law also keeps "an agency's level of operations within the amounts Congress appropriates for that purpose. The unrestricted ability to use voluntary services would permit circumvention of that objective."[2]

The general prohibition on accepting voluntary services can be overcome by an explicit statutory grant of authority to accept voluntary and uncompensated services. The CPSA, in section 27(b)(6),[3] provides that the Commission has the power "to accept gifts and voluntary and uncompensated services," but it does not provide the Commission authority to require members of the regulated community to act in the capacity of CPSC enforcement officials to monitor online auctions and respond to apparent violations of the prohibition on selling a recalled product. Stated simply, the CPSA provision on accepting voluntary and uncompensated services does not permit the Commission to ignore the prohibitions within the ADA.

IV. Complying with the Paperwork Reduction Act

We are concerned that the various forms of reporting and recordkeeping that CPSC staff is imposing on recalling firms through the CAP acceptance letter, related communications and the new monthly progress reporting form are in violation of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501 et seq., and its implementing regulations. The PRA requires the CPSC and other agencies to obtain approval from the Office of Management and Budget ("OMB") before proceeding with an information collection, regardless if the collection is mandatory or voluntary.[4] The Act defines a "collection of information" to include information obtained by an agency through the use of a form calling for identical reporting requirements imposed on ten or more persons. The fact that the CAP acceptance letter is ordinarily issued in connection with a voluntary recall does not change the statutory obligations placed upon the Commission by the PRA.

Because CPSC staff must expect 10 or more persons to complete the monthly reporting each month in connection with the multiple recalls that are ongoing at one time, it is subject to the requirements of the PRA. We are not aware of any attempt by the CPSC to obtain OMB approval for this form. It is certainly a violation of the PRA to imply to the regulated industry that the use of this form is mandatory or that failure to use it could give rise to any liability under the CPSA.

Moreover, the monthly recall progress report is not exempt from the "administrative investigation" exception of the PRA.[5] That exception is intended to preserve an agency's ability to engage in the collection of evidence pursuant to an investigation, such as by means of interrogatories, depositions and subpoenas, which are subject to supervision by a judge. The legislative history of the PRA makes clear the limited nature of this exception:

---

[2] Government Accountability Office, Principles of Federal Appropriations Law, Third Edition, Volume II at 6-95. Accessed at http://www.gao.gov/special.pubs/d06382sp.pdf

[3] 15 U.S.C. § 2076

[4] OMB's implementing regulations clarify that a "collection of information" includes "voluntary" collections of information. 5 C.F.R. § 1320.3(c).

[5] 44 U.S.C. § 3518(c)

> The language in this subsection regarding "an administrative action or investigation involving an agency against specific individuals or entities" is intended to preserve a well-settled exception for subpoenas and similar forms of compulsory process used for the collection of evidence or other information in an adjudication or investigation for law enforcement purposes. . . . Similar to the collection of information in litigation, an agency's intended use of investigatory and adjudicative process is sufficiently safeguarded through judicial superintendence to render unnecessary the administrative clearance process of this Act.[6]

The monthly recall progress reporting form is not similar to a subpoena or other compulsory process used to gather information in an investigation and is not subject to judicial superintendence. Perhaps most importantly, it is not part of any "administrative investigation" of compliance because there is no law or regulation mandating companies to conduct voluntary recalls or abide by any specific terms in doing so. While not dispositive, it is instructive to note that the National Highway Traffic Safety Administration considers its counterpart reports (the quarterly reports of recall completion) to be subject to the PRA.[7]

There are several reasons why the CPSC's distribution of the monthly reporting form would violate the PRA. Based on the regulations established by OMB, OMB will not approve a reporting requirement that is duplicative of information otherwise accessible to the agency.[8] The Commission has full access to online auction sites and can conduct its own monitoring of those sites. The Commission also has more effective means for addressing any recalled products found on such sites than recalling firms. Expecting these companies to do this work and report the results to the CPSC is seeking information that is duplicative of information otherwise accessible to the CPSC and inconsistent with PRA principles.

Additionally, OMB will not approve a reporting requirement that cannot be demonstrated to have "practical utility" to the agency, meaning that the agency can show an actual, timely use for the information in carrying out its mission.[9] Much of the information sought by the former monthly reporting form and some of the information on the new form would not meet this standard. For example, the number of "likes" posted about a recall featured on Facebook is not useful information because a "like" provides no information on whether or not an owner of recalled products or other person intends to participate in the recall. The information does not have practical utility to the agency. OMB also typically will not approve a reporting requirement that asks for specified information from the regulated industry more often than quarterly. The CPSC has no programmatic requirement that would support a monthly, as opposed to quarterly, collection of recall completion information without receiving OMB approval for the collection.[10]

Finally, compliance with the PRA has the additional laudatory benefit of preventing ad hoc changes to reporting requirements of the sort seen here. Once a "collection of information" is reviewed and approved by OMB, it cannot be changed without proceeding again through the review and approval process. This helps protect against "regulatory creep," where incremental additional burdens are imposed on the regulated industry without notice to the industry, or the opportunity to comment on the burdens or on the unintended consequences of the new requirements, and helps protect against the addition of unjustified reporting requirements on the

[6] S. Rprt. 96-930 at 56
[7] See OMB Control Number 2127-0004 and associated documents in the current inventory of approved Information Collections. Accessed at http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=2127-0004
[8] 5 C.F.R. § 1320.5(d)(1)(ii)
[9] 5 C.F.R. § 1320.5(d)(1)(iii)
[10] 5 C.F.R. § 1320.5(d)(2)

industry, such as those that were recently added to the monthly reporting form. Ad hoc changes by agencies in reporting requirements are exactly what Congress sought to prohibit when it passed the PRA in 1980 and its amendments in 1995.

V. Conclusion

We appreciate the opportunity to raise these concerns, and we trust that you will accept them in the constructive spirit in which we offer them. We remain committed to being good partners with the CPSC in the pursuit of product safety, but we also want to maintain the benefits of voluntary recall actions—and the Fast Track recall program in particular—without encumbering it with unexpected and unnecessarily burdensome requirements and expectations.

We continue to strongly encourage the Commission to engage with the regulated community and other stakeholders on ways in which to improve effectiveness of product recalls. We look forward to working with the CSPC and other interested parties on this issue. Please contact Erik Glavich, Director of Legal and Regulatory Policy of the National Association of Manufacturers, at (202) 637-3179 or eglavich@nam.org if you have any questions or would like to discuss this matter.

Sincerely,

Air Conditioning, Heating, and Refrigeration Institute
American Apparel & Footwear Association
American Cleaning Institute
American Home Furnishings Alliance
American Pyrotechnics Association
Association of Home Appliance Manufacturers
Baby Carrier Industry Alliance
Bicycle Product Suppliers Association
Business and Institutional Furniture Manufacturers Association
Coalition for Safe Affordable Childrenswear
Consumer Specialty Products Association
Fashion Jewelry and Accessories Trade Association
Halloween Industry Association
INDA, Association of the Nonwoven Fabrics Industry
International Sleep Products Association
Juvenile Products Manufacturers Association
Lighter Association
Motorcycle Industry Council
National Association of Manufacturers
National Retail Federation
Outdoor Industry Association
Outdoor Power Equipment Institute
Power Tool Institute
Real Diaper Industry Association
Recreational Off-Highway Vehicle Association
Retail Industry Leaders Association
Society of Glass and Ceramic Decorated Products
Society of the Plastics Industry, Inc.
Specialty Vehicle Institute of America
Sports & Fitness Industry Association
Synthetic Turf Council
Upholstered Furniture Action Council
Window Covering Manufacturers Association

cc: The Honorable Jay Rockefeller, Chairman, Committee on Commerce, Science and Transportation, United States Senate
The Honorable John Thune, Ranking Member, Committee on Commerce, Science and Transportation, United States Senate

The Honorable Fred Upton, Chairman, Committee on Energy and Commerce, United States House of Representatives
The Honorable Henry Waxman, Ranking Member, Committee on Energy and Commerce, United States House of Representatives
The Honorable Marietta Robinson, Commissioner, U.S. Consumer Product Safety Commission
The Honorable Anne Marie Buerkle, Commissioner, U.S. Consumer Product Safety Commission
Elliot Kaye, Executive Director, U.S. Consumer Product Safety Commission
Jay Hoffman, Director, Office of Financial Management, Planning and Evaluation, U.S. Consumer Product Safety Commission
Christopher Dentel, Inspector General, U.S. Consumer Product Safety Commission
Stephanie Tsacoumis, General Counsel, U.S. Consumer Product Safety Commission
Patricia Pollitzer, Assistant General Counsel for Regulatory Affairs, U.S. Consumer Product Safety Commission
Bridget Dooling, Policy Analyst, Food, Health, and Labor Branch, Office of Management and Budget