

*Via Electronic Filing*

July 13, 2017

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

Dear Secretary Stevenson,

The Retail Industry Leaders Association (RILA) respectfully submits the following comments to the U.S. Consumer Product Safety Commission (CPSC or Commission), regarding its Fiscal Years 2018 and 2019 Agenda and Priorities. RILA appreciates the opportunity to provide the perspective of its members regarding agency priorities and hopes that the Commission and agency staff carefully consider RILA's views while developing both the Fiscal Year 2018 Operating Plan and 2019 Budget Request.

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. As some of the largest U.S. importers, RILA members share the CPSC's commitment to product safety and ensuring that all products sold to U.S. consumers meet or exceed all applicable safety requirements and standards while facilitating legitimate trade.

As the CPSC continues to implement its 2016-2020 Strategic Plan, RILA submits these comments in the spirit of collaboration and partnership consistent with the guidance provided by the agency's "Policy on Establishing Priorities for Commission Action."<sup>1</sup> The comments below seek to provide input into the Commission's priorities, rulemaking, regulatory enforcement efforts, and the level of resources RILA believes the Commission should allocate for various agency activities in 2018 and 2019.

### **Executive Summary**

The CPSC and RILA members have a tradition of working together to address consumer product safety issues. In the area of enhancement of import surveillance, several RILA members participate the combined CPSC/Customs & Border Protection (CBP) Importer Self-Assessment Product Safety Pilot (ISA-PS) program and, most recently, two RILA members participated in the CPSC's E-filing Alpha Pilot. Some RILA members also participate in the CPSC's Retailer Reporting Program (RRP), which provides product safety-incident information to the CPSC to assist the agency in proactively identifying new emerging safety risks and product defect trends.

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<sup>1</sup> 16 C.F.R. § 1009.8.

In addition, RILA's member retailers regularly cooperate with the CPSC to promote CPSC's consumer education programs and third-party product recalls. Through these efforts and others, RILA's members work with the CPSC to find practical ways to enhance the safety of consumer products sold to American consumers and to quickly recall potentially defective and noncompliant products. As the agency continues its leadership transition, RILA's members look forward to continuing and strengthening this collaborative partnership.

As the Commission determines its 2018 and 2019 priorities, RILA respectfully submits its recommendations, summarized below:

*First*, the CPSC should increase and formalize opportunities for constructive engagement collaboration and cooperation with all stakeholders. Strengthening effective engagement between the agency and all affected stakeholders help drive better decision making and rulemaking by ensuring issues are fully vetted, decisions are supported by data, and regulations and programs are targeted to be most effective and streamlined to minimize burdens on regulated industry.

*Second*, the Commission should pursue a balanced and reasonable approach to rulemaking. The CPSC should focus on a variety of options for addressing important product safety issues including strengthening voluntary standards, enhancing product labeling and warnings and implementing consumer education campaigns. A key component to a balanced and reasonable approach to regulations is regularly scheduled retrospective reviews of the current regulations with the goal of eliminating unnecessary, ineffective and overly burdensome regulations.

*Third*, it is essential that the Commission provide clear guidance for best practices in product safety compliance programs and transparency in regulatory enforcement decisions, particularly in civil penalty determinations.

*Fourth*, the CPSC should invest in internal and external talent and resources to enhance the agency's data collection and predictive analytics capabilities. As part of this effort, RILA members urge the CPSC to formalize and expand the current Retail Reporting Program Pilot and develop a broader stakeholder electronic reporting program. Using this enhanced predictive analytics capability to analyze this expanded data set, the CPSC will be able to proactively identify product defect trends and emerging product safety risks.

*Fifth*, the CPSC should work collaboratively with government agency partners and stakeholders to develop a framework for risk-based assessment of new innovative technologies, which will address product safety risks while encouraging innovation. CPSC's efforts in this area should compliment and be consistent with efforts already under way within other federal agencies and voluntary industry working groups.

*Sixth*, RILA members support the Commission's efforts to strengthen its import surveillance capabilities. However, before moving forward with any future product safety-related filing requirement for imported products, it is essential that the CPSC articulate the metrics the agency will use to evaluate the data received from the Alpha E-filing Pilot. The goal of this review must be to limit specific data required on any future filing only to what is necessary to enhance the CPSC's import surveillance activities. Additionally, prior to moving forward to a Beta Pilot, the

agency should explore and incorporate technology to minimize administrative burdens on import filers.

*Finally*, RILA renews its recommendation that the CPSC develop a robust Trusted Trader Program with clearly defined benefits and obligations for participating parties as an integral part of the agency's risk-based import surveillance program. Such a program will allow the CPSC to focus its limited resources on high-risk importers and shipments of high-risk products while facilitating low-risk compliant trade.

Each of these points are discussed in more detail below.

**I. The CPSC Should Increase Opportunities for Constructive Engagement, Collaboration, and Cooperation with All Stakeholders, Including Establishing a Formal CPSC Federal Advisory Committee**

The CPSC, product manufacturers, retailers, consumers, safety advocates and state agencies share a common goal of ensuring the safety of all consumer products sold to U.S. consumers. To this end, RILA members were pleased to see stakeholder collaboration included as a part of the agency's 2016-2020 Strategic Plan.<sup>2</sup> Stakeholders, individually and collectively, can provide invaluable insight to regulators on the practical implications of rulemaking and enforcement, advise the Commission and agency staff on the inner workings of global supply chains, and offer meaningful manufacturing, import, and distribution expertise. Strong stakeholder collaboration and input yields a data-driven, cooperative, and practical approach to agency rulemaking, information collection, program development and implementation.

Retailers appreciate the Commission's recent efforts to engage stakeholders through the upcoming public workshop on the critically import topic of recall effectiveness. We are hopeful that the outcome of the workshop will be concrete action steps that the agency can take to: proactively identify emerging product safety risks and defect trends; improve communication of recalls to more effectively relay nature of safety risks; increase use of technology to deliver targeted recall information to affected consumers; and finally, more accurately define the measurement of the effectiveness of recalls beyond the current narrow focus solely on product return rates.

The Commission's stakeholder engagement efforts should not be limited to a single event and the decision of whether to engage with stakeholders should not be left to the discretion and preference of a specific agency leadership team. To ensure ongoing stakeholder engagement, RILA renews its recommendation that the Commission establish a permanent stakeholder group, under the Federal Advisory Committee Act, similar to the Advisory Committee on Commercial Operations ("COAC"). Stakeholder groups, such as the COAC, can create an open, constructive dialogue between the agency and the regulated community and provide consistent and structured insight to the agency as it carries out its core statutory mission.

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<sup>2</sup> See 2016-2020 Strategic Objective 4.3.

Finally, state legislation and regulation plays in increasingly active role in regulating the safety of consumer products, including bans on the sale of specific products, added product labeling and warning requirements and required reporting on chemicals in products. For retailers with national or large regional operations, the checkerboard of different federal and state requirements creates significant compliance challenges and costs. As part of its efforts to broaden its outreach to all stakeholders, RILA encourages the CPSC to engage with key state safety regulators on priority product safety issues. Such efforts will increase transparency and encourage convergence of regulatory approaches, as well as allow companies to streamline and reduce costs for product safety compliance programs.

## **II. The Commission Should Pursue a Balanced and Reasonable Approach to Rulemaking with the Goal of Advancing Product Safety While Not Unduly Burdening Industry**

A significant amount has been written recently about the costs and burdens on industry and the U.S. economy resulting from excessive and overreaching government regulations.<sup>3</sup> Moving forward, prior to issuing new regulations, the CPSC should first determine if the proposed regulation advances a substantial product safety interest and whether there are less burdensome means, such as a new voluntary safety standards, added warning or labeling requirements, or consumer education campaign, that could accomplish the desired safety goal.

Acting Chair Buerkle recently outlined her priorities and intention to take a balanced and reasonable approach to regulation. RILA members fully support this approach and applaud the CPSC's recent action to remove several controversial proposed rulemakings from its regulatory agenda, including proposed amendments to the Voluntary Remedial Actions and Guidelines for Voluntary Recall rule (16 C.F.R. § 1115), and the proposed amendments to information disclosure rules under Section 6(b) of the Consumer Product Safety Act (16 C.F.R. § 1101). The removal of these process-focused rulemakings will allow the agency to focus its limited resources on other efforts and programs that truly advance product safety.

Also as part of efforts to streamline government regulations, administrations regardless of party have sought to eliminate repetitive, ineffective and obsolete requirements. Earlier this year, President Trump issued Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs"<sup>4</sup> directing agencies to balance the burdens of new regulations by removing or eliminating overly burdensome and obsolete requirements.<sup>5</sup> Similarly, in 2016, the CPSC unanimously adopted its Plan for Retrospective Review of Existing Rules<sup>6</sup> and recently issued a request for comments asking shareholder to highlight potential regulations that can

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<sup>3</sup> See e.g., *Taming the Administrative State*, U.S. Chamber of Commerce, Environment Technology & Regulatory Affairs Division (March 30, 2017) and, *2017 NSBA Small Business Regulation Survey*, National Small Business Association (Spring 2017).

<sup>4</sup> Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*, January 30, 2017.

<sup>5</sup> Although Executive Order 13771 does not apply directly to independent agencies such as the CPSC, the Administration has requested and the new CPSC leadership has agreed to apply the spirit of the Order to its rulemaking efforts.

<sup>6</sup> CPSC, *Plan for Retrospective Review of Existing Rules*, April 1, 2016.

eliminated or updated without undermining consumer safety.<sup>7</sup> RILA strongly supports the Commission's efforts in this area and encourages the agency to greatly increase resources toward this project in its 2018 Operating Plan and 2019 Budget Request.

### **III. The CPSC Should Provide Transparency to its Enforcement Decisions and Clear Guidance on Product Safety Compliance Program Best Practices**

Last year, RILA and its members expressed concern regarding the former Chairman's 2016 statements regarding his desire to see "civil penalties in the double-digits" and the subsequent upward trend of civil penalty cases and high-dollar settlements. In 2016, the CPSC announced a record-breaking \$15.45M settlement with Gree Electric,<sup>8</sup> marking the first post-CPSIA maximum penalty settlement. This trend for multi-million dollar civil penalty settlements has continued in 2017. The CPSC's single-minded focus on obtaining high-dollar penalties settlements has created an adversarial relationship between the agency and the regulated community, and undermined past agency-industry collaborative efforts to strengthen industry-wide compliance programs.

RILA members urge the Commission to move beyond the pursuit of splashy headlines from high-dollar penalty settlement. Unfortunately, in focusing the agency's limited resources on civil penalty investigations and actions against larger companies because they can bear these record-breaking settlements amounts and, in most cases, have provided an easy-to-access record to the agency by self-reporting, the agency has not had the resources to focus on more egregious and willful violations by other actors. Although finding companies who have not self-reported will be more difficult and including smaller companies may not produce record-breaking settlement amounts, the agency should refocus its limited resources to finding and pursuing penalties in cases involving the most serious violations to most effectively deter future violations and advance consumer product safety.

In addition, the CPSC's continued failure to include critical facts, analysis of the enforcement action guided by statutory and regulatory frameworks, and specific aggravating and mitigating factors considered by the Commission in its penalty decision, leaves the regulated community with little guidance to enable companies to review and enhance product safety compliance programs. Recent statements by Acting Chair Buerkle and Commissioner Mohorovic have argued that the Commission should provide more guidance on compliance programs to industry and be more transparent in penalty decisions.<sup>9</sup> RILA agrees. Transparency and candor by the Commission on best practices for compliance programs, and how penalties are calculated including specific mitigating and aggravating factors will spur efforts by industry to enhance compliance programs. Commissioner Mohorovic's statement

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<sup>7</sup> CPSC Request for Information on Potentially Reducing Regulatory Burdens Without Harming Consumers, 82 Fed. Reg 27636, June 16, 2017.

<sup>8</sup> CPSC News Press Release 16-127, Gree Agrees to Pay Record \$15.45 Million Civil Penalty, Improve Internal Compliance for Failure to Report Defective Dehumidifiers, March 25, 2016.

<sup>9</sup> See e.g., Statement of Commissioner Joseph P. Mohorovic Regarding the Commission's Annual Agenda and Priorities Hearing and the Opportunity for Reform of the Commission's Civil Penalty Policies and Practices, June 9, 2016; Statement of Commissioner Joseph P. Mohorovic Regarding the Commission's Provisional Acceptance of a Settlement Agreement with Gree Electric, March 24, 2016; and Statement of Commissioner Ann Maire Buerkle on Commission's Growing Civil Penalty Settlements, May 25, 2016.

includes a thoughtful list a suggested actions steps that the CPSC can take to work with the regulated community to accomplish this goal.<sup>10</sup> For example, the CPSC Office of the General Counsel could issue guidance on how the CPSC evaluates the effectiveness of product safety programs similar to the Evaluation of Corporate Compliance Program Guidelines issued by the Department of Justice earlier this year<sup>11</sup> and hold webinars and training forums for the regulated community. RILA urges the Commission to dedicate sufficient staff resources and funding in FY 2018 and 2019 to review and implement these suggested action steps.

#### **IV. The CPSC Should Invest in Data Collection and Predictive Analytics Technology and Work with Stakeholders to Enhance and Leverage Its Data Collection and Hazard Analysis Capabilities to Proactively Identify Defect Trends and Emerging Product Safety Risks**

The CPSC's 2016-2020 Strategic Plan promotes increasing the agency's capacity for predictive modeling and enhancing staff analysis of emerging hazards.<sup>12</sup> RILA members support the agency's commitment to data-driven decision making in rulemaking and regulatory enforcement, and the CPSC's efforts to enhance its data collection and analysis capabilities. To this end, RILA has detailed in prior comments and oral testimony the value of real time, product specific safety-incident data provided under the Retailer Reporting Program (RRP) pilot and opportunities for program's improvement and expansion.<sup>13</sup>

To date, the agency has based its review of the usefulness of the data received through the current ad-hoc RRP pilot, which does not have standardized processes or procedures, and instead, operates through independent agreements with the participating companies. RILA continues to believe that the usefulness of the RRP data would be more properly evaluated if the Commission explored the potential benefits of an expanded formalized electronic reporting program. By investing in advanced data analytics tools, the CPSC would be able to use RRP data, along with the vast amount of additional product safety data received by the CPSC through traditional Section 15b reports and other sources, to proactively identify emerging product safety hazards and defect trends. Defective and noncompliance products would be removed from the marketplace more quickly preventing untold consumer injuries and property damage. RILA urges the CPSC to incorporate investment in internal and external talent and advance data analytics tools and dedicate the necessary resources to support the expansion of the RRP program in its 2018 Operating Plan and 2019 Budget Request.

#### **V. The CPSC Should Work Collaboratively with its Government Agency Partners to Develop a Framework for Risk-Based Assessment of New Innovative Technologies**

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<sup>10</sup> Statement of Commissioner Joseph P. Mohorovic Regarding the Commission's Annual Agenda and Priorities Hearing and the Opportunity for Reform of the Commission's Civil Penalty Policies and Practices, June 9, 2016;

<sup>11</sup> Department of Justice, Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs, February 8, 2017.

<sup>12</sup> Performance Goal 2.1.1, CPSC Strategic Plan 2016-2020, p. 24.

<sup>13</sup> CPSC Hearing on Data Sources and Consumer Product-Related Incident Information, June 26, 2015 and RILA Testimony on Data Sources and Consumer Product-Related Incident Information, June 26, 2015.

The United States has a long history of fostering invention and the development of new innovative products that meet consumer needs and expectations. Business and product innovation is a core strength of the U.S. economy and a major generator of jobs. One key area of innovation is the development of internet-connected home devices, appliances, tools, toys and other objects known as the Internet of Things (IoT). These innovative products are in high demand by consumers because they provide increased and convenient access to information and new and enhanced product functionality. While at the same time, these products create security, privacy and safety challenges.

Today, innovation is occurring at an ever-increasing rate while regulatory agencies struggling to keep pace. Currently, there are a multitude of federal agencies<sup>14</sup> and industry groups<sup>15</sup> grappling with IoT-related issues. Depending on the nature of the IoT product, it may be regulated by multiple federal agencies, including the CPSC and the Federal Trade Commission (FTC). Both the CPSC and the FTC have recently issued reports noting the significant benefits to consumers and the risks involved with internet-connected Smart technology.<sup>16,17</sup> Specifically, CPSC's report noted that IoT Smart technology offers important product safety-related opportunities (e.g., automatic product registration, increased recall effectiveness) and challenges (e.g., potential for system hacking and failed software updates that affect performance). In addition, the report called out the CPSC's lack of internal resources and staff to be able to address these multiple challenges.

Moving forward, it is critically important that the Commission engage with partner government agencies and other stakeholders to develop a comprehensive risk-based approach to regulation of IoT products to address privacy, cybersecurity, and consumer product safety concerns while continuing to promote product innovation. The CPSC's efforts in this area should not duplicate, but instead, should complement and be consistent with efforts already under way within other federal agencies and voluntary industry working groups. Such an approach must recognize the unique nature and benefits of IoT products and the difficult challenge that product manufacturers face when trying to create impenetrable cybersecurity barriers to block hackers.

RILA urges the CPSC to adopt a risk-based reasonableness product safety standard for IoT products similar to the FTC's standard for data privacy. The FTC has rejected *per se* liability for data breaches, and instead, requires that companies have a "reasonable" data security program that takes into consideration the sensitivity of data collected, scale and scope of operations and level of risk if a data breach occurs. Similarly, the sole fact that an IoT

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<sup>14</sup> See e.g., Department of Homeland Security, Strategic Principles for Securing the Internet of Things (IoT), November 15, 2016; Department of Transportation, National Highway Traffic Safety Administration, Cybersecurity Best Practices for Modern Vehicles. (Report No. DOT HS 812 333, October 2016); and Department of Commerce, National Telecommunications & Information Administration, Multistakeholder Process: Internet of Things (IoT) Security Upgradability and Patching, Notice of Open Meeting 82 Fed. Reg 29845, June 30, 2017.

<sup>15</sup> See e.g., [The Digital Standard](#), a collective effort to create a digital privacy and security standard to help guide the future design of consumer software, digital platforms and services, and Internet-connected products. The effort is led by Consumer Reports, Disconnect, Ranking Digital Rights and the Cyber Independent Testing Lab, with the assistance from Aspiration and participation from a broad community of researchers, testers and hobbyists.

<sup>16</sup> CPSC Staff Report, Potential Hazards Associated with Emerging and Future Technologies, January 18, 2017.

<sup>17</sup> FTC Staff Report, Privacy & Security in a Connected World, January 2015.

product has suffered a security breach should not automatically render the item “defective” or create a “substantial product hazard” and require a recall. Rather, the CPSC should develop a standard and enforcement processes that includes review of the overall security framework and protections for an IoT product, analysis of the current and potential safety risks to consumers, identification of any remedial measurement required, and assessment of the likely of future incidents. Using this process and based on the totality of factors, the CPSC can then determine whether or not an IoT product should be recalled.

RILA urges the Commission to dedicate the necessary staff and resources in its priorities for Fiscal Years 2018 and 2019 to engage with partner government agencies and other stakeholders to develop a comprehensive risk-based approach to regulation of IoT products. Additionally, resources should be dedicated to the development of a reasonableness IoT product standard and enforcement processes that will foster and not hinder the development of the new innovative IoT products that consumers want.

## **VI. Enhancement of CPSC’s Import Surveillance Activities.**

RILA members support the CPSC’s efforts to strengthen its import surveillance activities through enhancement of its Risk Assessment Methodology (“RAM”) for targeting high-risk and potentially unsafe and non-compliant products prior to importation into the United States. In this regard, RILA offers the following suggestions for the agency to consider as it moves forward with its import surveillance priorities for FY 2017 and 2018.

a. Any Future CPSC Import Filing Requirement Should be Limited to the Specific Data Necessary to Enhance the CPSC’s Import Surveillance Activities and Incorporate Technology to Minimize Administrative Burdens on Filers

RILA fully supports the CPSC’s recent decision to pause its development of a proposed electronic product safety-related filings for imported products to review the data collected from the agency’s Alpha E-filing Pilot to ensure the value of the collected information and to reduce unnecessary administrative burdens and costs for importers. As part of this process, the CPSC should clearly articulate the metrics it will use to evaluate the value of the Alpha Pilot information for purposes of enhancing the CPSC’s import surveillance program. Additionally, the Commission should explore the use of technology to ease the costs and administrative burdens of any future e-filing requirement. The agency should move forward with a Beta Pilot only after these tasks are accomplished.

b. A Trusted Trader Program is an Integral Part of a Risk-Based Import Surveillance Program

RILA renews its recommendation that the agency develop a robust government-industry partnership or Trusted Trader program that includes significant trade benefits for importers willing to subject their product safety compliance programs, import processes, and supply chains to CPSC scrutiny. A Trusted Trader program for low-risk importers will allow the CPSC to allocate its limited resources to target high-risk importers and



products. Therefore, the development of a Trusted Trader program is a key component to a robust risk-based CPSC import surveillance program.

RILA appreciates the Commission's decision to allocate staff resources towards the development of a Trusted Trader program and placement of this initiative in the CPSC's 2016-2020 Strategic Plan.<sup>18</sup> However, recent comments by agency leadership and staff have raised concerns that the creation of a CPSC Trusted Trader program could be delayed until after CBP completes development of its trusted trader program. RILA urges the Commission to move forward now and not delay the development of a mutually beneficial government-industry partnership program pending another agency's uncertain timeline.

Instead, a CPSC Trusted Trader Program, which should include companies that currently participate in the CPSC/CBP ISA-PS program, can be developed and implemented now based upon the risk-based approach to import surveillance already agreed upon in the interagency process. Ultimately, the new CPSC Trusted Trader program can be incorporated into any final CBP trusted trader program with minimal modifications. Therefore, RILA urges the CPSC to allocate sufficient resources in Fiscal Years 2018 and 2019 to develop a risk-based, voluntary Trusted Trader program with clearly defined obligations and benefits for program participants.

As the CPSC moves forward with its review and development of any future phases of the E-filing Pilot and development of a Trusted Trader program, RILA urges the CPSC to continue and broaden stakeholder engagement. It is only through constructive dialogue between the agency and impacted stakeholders that the agency can develop a final import surveillance program that will safeguard consumers while avoiding needless regulatory burdens on legitimate trade.

## Conclusion

RILA appreciates the opportunity to provide these written comments on the CPSC's FY 2018-19 priorities and budget, and requests the opportunity to provide additional oral comments on these issues at the CPSC's upcoming Priorities Hearing scheduled for June 26. RILA and its members share the Commission's commitment to improving consumer product safety and look forward to continuing to work collaboratively with the agency to advance our shared safety goals.

Sincerely,



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<sup>18</sup> 2016-2020 Performance Goal 2.2.1.