RILA
RETAIL INDUSTRY LEADERS ASSOCIATION
Educate.Collaborate.Advocate.

1700 North Moore Street, Suite 2250, Arlington, VA 22209

Filed Electronically

September 30, 2017

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

RE: **Request for Information on Potentially Reducing Regulatory Burdens Without Harming Consumers (Docket No. CPSC-2017-0029)**

Dear Acting Secretary Mills,

The Retail Industry Leaders Association (RILA) respectfully submits the following comments to the U.S. Consumer Product Safety Commission (CPSC or Commission), regarding the Commission's Request for Information on ways to lessen burdens and reduce costs of its existing rules, regulations, or practices without harming consumers. RILA appreciates the opportunity to provide the perspective of its members regarding various burdens imposed on the retail industry by the existing regulatory landscape, and is grateful to have the opportunity to suggest areas in which these regulatory and administrative burdens might be lessened without lessening safety protections for consumers.

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 has invited comment "seeking information on suggestions for way the Commission could reduce burdens and costs of its existing rules, regulations, or practices," RILA submits these comments in the spirit of collaboration and partnership with the Commission. In addition to suggested revisions to existing regulations, the comments include suggestions for additional action steps that the Commission can take to relieve unnecessary burdens or eliminate uncertainty without increasing consumer safety risk. These comments also inherently include, to the extent possible, information relevant to agency's "Plan for Retrospective Review of Existing Rules" Section (V)(b). We look forward to continuing to work with the CPSC to achieve our shared product safety goals.

Executive Summary

RILA's comments are divided into four broad topic areas: 1) withdrawal of ongoing rulemakings and greater use of enforcement discretion; 2) increasing transparency and consideration of mitigating evidence for civil penalties: 3) enhancing Section 15 (b) reporting and voluntary recall requirements; and 4) additional action the CPSC can take to relieve burdens. Each of these topics areas is summarized

briefly below:

First, RILA notes that there are several areas in which the CPSC can either amend existing regulations or withdraw ongoing rulemakings to alleviate burdens on the regulated community. RILA members are not seeking wide-sweeping changes to the regulatory landscape, but merely common-sense changes that would not affect consumer safety.

RILA urges the CPSC to address the following issues via amendment of regulations or withdrawal of ongoing rulemakings: (1) withdrawal of the proposed amendments to 16 CFR § 1110, which have not proven necessary and have the potential to impose burdensome new requirements on importers and private labelers; (2) withdrawal of the proposed amendments to 16 CFR § 1115, which would create disincentives for conducting voluntary recalls contrary to the best interests of consumer safety; (3) withdrawal of the proposed amendments to 16 CFR § 1101, as unnecessary except as related to streamlining the 6(b) notification process; (4) withdrawal of the proposed upholstered furniture flammability rulemaking, saving CPSC resources by relying on California TB-117-2013 as a *de facto* national standard; and (5) use of enforcement discretion to no longer require certificates of compliance for exemptions and determinations, eliminating a significant paperwork expense.

Second, it is imperative that the Commission provide a greater level of transparency with respect to its calculation of civil penalties. Currently, the CPSC's regulation describes a list of factors without any guidance as to how these factors are used in computing a civil penalty amount. Particularly considering the Commission's recent penchant for imposing multimillion dollar penalties, a more transparent civil penalty system should be developed that provides general guidance concerning the impacts of the various factors, including mitigating factors, while also avoiding the inadvertent creation of a strict penalty matrix.

Third, there are several administrative steps that the Commission can take to enhance Section 15(b) reporting and voluntary recall requirements and reduce burdens on industry including, providing guidance on reporting requirements, developing a tiered recall system pilot, removing mandatory use of in-store recall posters and formalizing and expanding the current Retail Reporting Program pilot and the agency's data analytic capabilities to proactively identify emerging risks and safety trends.

Fourth, this final category includes additional action the CPSC can undertake to relieve burdens on industry through the development of a Trusted Trader Program, and continuing efforts to relieve third-party testing costs.

Each of these points are discussed in more detail below.

I. Withdrawal of Ongoing Rulemakings & Greater Use of Enforcement Discretion

RILA and its members believe there are various areas in which the Commission can amend existing regulations or withdraw ongoing rulemakings that are unnecessarily burdensome or cause confusion as to regulatory requirements. RILA also believes the agency can use its inherent enforcement discretion to eliminate burdensome application of existing rules – all without increasing the risks to consumers.

a. CPSC Should Withdraw the 1110 Rulemaking and Seek Greater Stakeholder Input Regarding the Costs of E-filing

Over four years ago, the CPSC proposed amendments to 16 CFR § 1110 ("1110 Rule").[1] The proposed amendments included new certificate e-filing requirements for importers as well as new obligations for private labelers of domestically produced products. When the amendments were first proposed in May 2013, they were met with wide-spread opposition from commenters for a multitude of reasons. In addition to objections regarding the proposed e-filing requirement for certificates (discussed in more detail below), RILA also opposed the proposal to shift a certification obligation to private labelers and the potential requirement to disclose confidential business information.[2] Finally, the current 1110 Rule seems to be working with few problems and there is no public information indicating an increased risk to consumers based on flaws in the existing rule. For these reasons, RILA believes the proposed amendments to the rule may be a solution in search of a problem and the rulemaking should be terminated. The 1110 Rule should be withdrawn because the proposed amendments are unnecessary, outdated and would impose burdensome requirements on importers and private labelers.

It must be noted that many of the proposed amendments to the 1110 Rule are unrelated to e-filing component of the proposed rule and the withdrawal of the proposal would not affect the agency's ability to continue exploring e-filing. RILA does have concerns, however, with the potential cost of implementing electronic filing and suggestions for the steps the agency should take before moving from the "alpha pilot" to a "beta pilot."

RILA is encouraged that the CPSC plans to conduct a study that measures the benefits for the purposes of import surveillance of obtaining certain data points electronically. However, there does not appear to be a plan to more accurately gauge the corresponding costs associated with importers being able to accurately submit each of the required data points in electronic form. Feedback from the alpha pilot participants clearly identified the burdensome manual process required to retrieve and provide electronic certificate information with each individual import entry and the need for a technology solution to relieve the administrative burden of e-filing. While some larger companies with robust information technology departments may be able to undertake the burden of developing and implementing new software systems to track and submit requisite e-filing information, the majority of importers, particularly small businesses, will not be able to reasonably afford the costs of collecting and submitting these data points. Before proceeding with a "beta pilot" the agency should formally assess expected costs to the agency and industry to determine whether the costs bear a reasonable relation to the benefits to justify moving forward with a modified e-filing requirement.

Consistent with the factors articulated by the CPSC in setting rule review priorities, the relevant factors favor termination of the proposed rulemaking.[3] First, the current rule remains effective as written. Rule 1110 contains a clear standard for safety certification, which would be replaced with a

[1] https://www.cpsc.gov/Regulations-Laws--Standards/Rulemaking/Final-and-Proposed-Rules/Certificates-of-Compliance

[2] RILA has previously provided comments regarding this subject. *See* July 29, 2013 Comments Re: Proposed Amendments to Part 1110 (Docket Number CPSC-2013-0017); October 31, 2014 Comments Re: Proposed Amendments to 16 CFR Part 1110 (1110 Rule) (Docket Number CPSC-2013-0017).

[3] Consumer Product Safety Commission, Plan for Retrospective Review of Existing Rules, April 2016 (hereafter "CPSC Plan").

complex and burdensome standard if amended as proposed. Second, implementation of the proposed rulemaking would create significant regulatory burden on retailers, effectively transferring the certification obligation to retailers who are private labelers of domestic products. Private labelers often have little or no manufacturing expertise and are often not in an ideal position to issue a certificate. Third, the proposed rulemaking would violate the requirements of Section 6(b) of the CPSA with respect to tacit publication of confidential business information. Given these considerations and the fact that the agency can continue exploring the potential need and feasibility of e-filing regardless of whether the proposed amendments to the 1110 Rule are pending, the agency should withdraw the proposed rulemaking.

b. CPSC Should Withdraw its Rulemaking Regarding Voluntary Recalls

RILA previously has provided comments to the CPSC regarding proposed amendments to 16 CFR § 1115 ("Voluntary Recalls Rule").[4] RILA believes strongly in the necessity of a cooperative relationship between the Commission and the regulated community. Indeed, the CPSC has readily acknowledged that the overwhelming majority of product recalls are voluntary recalls where the recalling company works cooperatively with the CPSC to remove potentially defective or noncompliant product from the U.S. market. The Voluntary Recalls Rule, however, appears to take voluntary cooperation and use it in an adversarial manner against companies electing to conduct voluntary recalls with the agency. The proposed amendments seek to make a corrective action plan (CAP) binding, adding potential legal liability that turns each CAP into a *de facto* settlement agreement – a reversal of a decades old CPSC policy decision on this very same issue. The amendments would also impose internal compliance programs and remove the right of companies to deny the existence of a substantial product hazard as a prerequisite to voluntarily move forward with the CPSC to issue a recall.

As numerous commenters have previously noted, the effect of the amendments to the Voluntary Recalls Rule would be to discourage companies from voluntarily reporting potential safety issues and substantially increase the legal costs associated with conducting a voluntary recall, particularly for small businesses. This will have its largest impact in the "grey area" where it is unclear whether a report to the CPSC is warranted. The CPSC has consistently urged companies "when in doubt, report" and industry has largely followed this advice. This cooperative reporting has resulted in the agency receiving information regarding potential products issues well in advance of statutorily required reporting. The Commission is able to use this information to proactively identify product safety trends, and if necessary, work with industry to recall defective and unsafe products. However, under the proposed amendments a company may believe it is in its best interests to not report to avoid the new CPSC legal requirements and administrative burdens. This is a situation of unintended consequences and clearly the Commissioner would not deliberately seek to limiting companies' voluntary reporting, and moreover such a result is not in the best interests of consumer safety.

The CPSC, consumers, manufacturers and retailers share a common goal of increasing the effectiveness of recalls. The proposed Voluntary Recall Rule takes a misguided approach to achieving this shared goal. Rather than moving forward with the Voluntary Recall Rule, instead, as detailed in Section III below, RILA members suggest that the CPSC work collaboratively with stakeholders to find non-regulatory means to increasing recall effectiveness. To this end, RILA members commend the

[4] *See* February 4, 2014 Comments Re: Proposed Amendments to Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices (Docket Number CPSC-2013-0040).

Commission staff for their work in putting on its July 25, 2017 Recall Effectiveness Workshop. Stakeholders throughout the consumer product safety community were able to come forward and discuss what truly makes an effective recall and how recalls can be improved to increase recall effectiveness. It is worth noting that very few of the proposals contained in the proposed amendments to the Voluntary Recalls Rule were brought up by CPSC staff or stakeholders during the workshop. It is also telling that the adoption of the proposed amendments to the Voluntary Recalls Rule was not suggested by any participants, including consumer advocates, as a step to improve recalls. This suggests that the collective product safety community does not consider the proposed amendments as an effective means of improving voluntary recalls. It also demonstrates that withdrawing this rule would not increase the risk of harm to consumers.

Although currently this rule is on the "back burner," in that it is not on the list of CPSC priorities, it is still hanging over the head of regulated industry and the Commission should take the steps necessary to withdraw it. Doing so would also have the benefit of eliminating any potential confusion over the requirements associated with voluntary recalls, especially for small businesses that may have less familiarity with the applicable requirements.

c. CPSC's 6(b) Information Disclosure Rulemaking Should be Withdrawn or at a Minimum Modified Before Finalization

With respect to the proposed amendments to 16 CFR § 1101 6(b) ("6(b) Rule"), RILA believes any changes unrelated to streamlining the process of 6(b) notifications using the business portal or other electronic means are unnecessary and add to the burdens placed on the regulated community. Withdrawing the proposed amendments would not pose a risk to consumers given that the CPSC has a statutory mechanism for circumventing 6(b) requirements when warranted for public safety purposes. The proposed rule should either be withdrawn or finalized in a manner that only addresses the electronic notification component, which would streamline the process of working with the agency on 6(b) notifications.

d. CPSC Should Withdraw the Upholstered Furniture Flammability Rulemaking as Unnecessary to Advance Consumer Safety

RILA also urges the CPSC to terminate the rulemaking with respect to upholstered furniture flammability standards as superseded by current industry standards and unnecessary to advance consumer safety. Over the past several years, consumers have requested manufacturers to design products that maintain consumer safety while eliminating flame retardant chemicals. In recognition of consumer preferences, California issued TB117-13 in 2013 (effective January 1, 2015), to require smolder tests for upholstery fabrics rather than open flame tests. TB117-13 smoldering test mirrors current consumer lifestyles while continuing to protect consumers. The test methods have proven to be effective, repeatable, and sufficiently-correlating to full-scale furniture. Due to the size of the California marketplace, most manufacturers, importers, and retailers alike make and sell goods adhering to California's standards.

Imposition of a CPSC required open flame standard in addition to the smolder test from TB117-13 would impose a significant regulatory burden on industry due to increased compliance and testing costs. Moreover, requiring compliance with an open flame standard could require the introduction of chemical flame retardants, seemingly in direct contradiction of the agency's recent position with respect

to the use of organohalogen flame retardants in upholstered furniture. Additionally, such a requirement would have an uncertain safety value given the oft-cited CPSC tests showing that flame retardant treated foams do "not offer a practically significant greater level of open flame safety than [] untreated foams" in upholstered furniture.[5] Given consumer demands for flame retardant free upholstered furniture, an effective industry flammability standard that protects consumers, and the fact that work on this rule has consumed CPSC resources for decades, the agency should terminate its current rulemaking and provide the marketplace with long-awaited finality regarding the requirements for upholstered furniture flammability.

e. CPSC Should Employ Greater Use of Enforcement Discretion With Respect to Certificates of Compliance For Exemptions and Determinations as Well as Refrigerators

Last year, in an effort led by Commissioner Mohorovic, the CPSC demonstrated leadership in reducing unnecessary burdens on industry by exercising enforcement discretion with respect to certificates of compliance for low-risk adult apparel products that were considered "categorically safe," where companies were nevertheless required to certify that those products were compliant.[6] The Commission's exercise of enforcement discretion has had a dramatic impact, saving industry an estimated $250 million per year. RILA members support the CPSC extending this approach and exercising enforcement discretion for other exemptions and CPSIA determinations. If a product is unequivocally determined to be compliant by its very nature or exempt from a regulation because it has certain characteristics, then requiring a certificate of compliance merely adds unnecessary paperwork, "red tape," and costs without any corresponding safety benefit. There is no justification for requiring certificates of compliance in these instances, as the certificates do not improve or ensure the safety of consumers. Instead, they merely confirm what the Commission has already determined – that certain materials are safe.

Additionally, RILA supports the CPCS's use of enforcement discretion with respect to the issuance of certificated for compliance with the Refrigerator Safety Act (15 U.S.C. §§ 1211-1214) and associated regulations (16 CFR 1750). Under the Act, refrigerator manufacturers must certify that their products adhere to standards which address hazards from the 1950s. These old standards address hazards that no longer exist due to emergence of technology and the new ways in which refrigerators are manufactured. For example, former latch mechanisms of the 1950s are no longer utilized and have not been used in many yesrs. It is therefore wasteful for manufacturers and sellers of refrigerators to certify compliance with these very outdated requirements.

Requiring certificates of compliance in the types of circumstances listed above results in unnecessary burdens to companies that must meet those certification requirements. As CPSC's use of enforcement discretion for adult apparel resulted in $250 million per year impact to industry, RILA believes that the CPSC's selective use of enforcement discretion in other areas will result in significant overall savings for the regulated community. Most importantly, however, is that reducing the paperwork requirement will result in no lessening of consumer safety, as the products/product components involved will either (1) have already been determined by the CPSC to be safe; or (2) in the case of refrigerators, no longer utilize the mechanisms regulated by the rule.

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[5] https://www.cpsc.gov/PageFiles/93436/openflame.pdf, p 23.
[6] Statement of Commissioner Joseph P. Mohorovic Regarding the Commission's Decision to Exercise Enforcement Discretion Regarding Certificates of Compliance for Low-Risk Adult Apparel, Feb. 24, 2016.

II. Increased Transparency and Consideration of Mitigating Evidence for Civil Penalties

The CPSC has traditionally acknowledged that agency and industry cooperation is imperative to ensure the safety of consumers. To achieve the correct balance to promote broad cooperation, however, it is imperative that regulated industry have some degree of understanding of the basis for certain CPSC actions. The imposition of multimillion dollar civil penalties is one such action.

The regulated industry looks to the CPSC for guidance on best practices for compliance programs, timely reporting, enforcement priorities, as well as, the type of cooperation expected by the Commission during investigations and enforcement proceedings. The need for guidance is especially true in the area of civil penalties, where the experiences of individual companies who are subject to civil penalties collectively extend to the regulated community as a whole. Unfortunately, the current civil penalty process lacks transparency and squanders opportunities for the CPSC to provide clear guidance to industry.

For example, in looking at recent civil penalty settlements, industry understands that the CPSC has issued a civil penalty demand and a settlement is eventually reached with the company involved, however there is very little understanding by the industry of how the CPSC's initial penalty demand was formulated. Those who have been subject to a CPSC penalty investigation, reached settlement agreements with the CPSC and are privy to all the non-public information underlying their cases also lack clarity as to factors that the CPSC uses when determining a penalty or settlement amount. Even some CPSC Commissioners, who have access to and have consulted with CPSC staff on the facts of specific cases, have expressed frustration with the lack of CPSC policy and consistency regarding penalty calculations.[7]

While RILA members are not in favor of a strict penalty matrix, we have included two suggestions below that would help to improve the regulated community's understanding of the general basis underlying the CPSC's penalty demands and settlements. Importantly, achieving this end does not increase the risk of injury or death to consumers.

a. The CPSC Should Amend 16 CFR § 1119.4 to Include Mitigating Factors and Provide Clarity on Penalty Calculations

The current civil penalties regulation defines the factors that are taken into account in formulating a civil penalty amount, but it does not describe how these factors influence the amount. It also does not highlight a number of potential mitigating factors that should be taken into account when formulating civil penalties. There are also several other areas that can easily be pointed to where more guidance would be useful (e.g., what weight do prior penalties carry over time and how many years must pass before a prior penalty no longer influences a current penalty?). Acting Chairman Buerkle discussed the overall dilemma regarding civil penalties in her 2016 statement where she noted:

"Unfortunately, neither the statute nor the regulation says much about *how* these

[7] Statement of Commissioner Joseph P. Mohrovic Regarding the Commission's Provisional Civil Penalty Settlement with Sunbeam Products, Inc. D/B/A/ Jarden Consumer Solutions, June 6, 2016; Statement of Commissioner Ann Marie Buerkle on the Proposed Civil Penalty Settlement with LG Electronics (Tianjin) appliance Co., Ltd., and LG Electronics USA, July 24, 2015.

> factors will affect a penalty. All else equal, I would think that a company that reports before any serious injury has occurred should be subject to a lower penalty than a company that waits until an injury has occurred . . . Yet when the Office of General Counsel sends up a recommendation for approval of a civil penalty settlement, it often seems as though the staff highlights the aggravating factors that support a higher penalty amount and ignores or downplays the mitigating factors. There appears to be little or no consistency on how factors are treated from case to case."[8]

Because concern about the lack of transparency in the current civil penalties process is shared by industry and those at the highest levels of the agency, RILA believes 16 CFR § 1119.4 ("Civil Penalties Regulation") should be revisited to increase general transparency and understanding of penalty amounts. In addition to efforts aimed at increasing transparency, the review should include the ability of companies to cite additional mitigating factors such as self-reporting, participation in CPSC-industry partnership programs (e.g., the joint CPSC/Customs and Border Protection (CBP) Importer Self-Assessment – Product Safety (ISA-PS) Program or Retailer Reporting Program (RRP) Pilot), cooperation with recall and penalty investigation, and other facts demonstrate a company's high regard for consumer safety and a willingness to cooperate with the CPSC.

RILA members are seeking more transparency not a penalty matrix. While striking the right balance in this respect may be difficult to achieve, there is no doubt that the current situation can be improved and RILA is committed to be a constructive partner in that process.

b. <u>The Commission Should Issue Guidance on Civil Penalties</u>

In the alternative, or in addition to above proposed revision of the regulation, RILA urges the CPSC to publish guidance regarding how the Office of General Counsel (OGC) takes various civil penalty factors into consideration when formulating penalty amounts. For example, everyone is well aware that the Commission takes into account the size of the company in determining civil penalty amount. However, it is not clear how this works, functionally, and companies are left to wonder to what degree the amount of their civil penalty exposure is simply due to their size versus the culpability of the conduct at issue. This uncertainty has been exacerbated by the former Chairman's 2016 statement regarding his desire to see "double-digit civil penalties"[9] and the subsequent upward trend of high-dollar settlements against very large companies that are presumably in a better position to shoulder the burden of multimillion-dollar penalties.

As potential examples of how the agency can provide this guidance, RILA suggests publication of hypothetical examples to broadly illustrate how OGC uses the civil penalty factors in determining penalty amounts, including aggravating and mitigating factors as well as any information the agency would typically consider non-public. A webinar that is made available on the CPSC's website where staff discusses the penalty process and the penalty factors would also help to provide general guidance in a different format. These ideas, as well as other suggestions, were outlined by Commissioner Mohorovic

[8] Statement of Commissioner Ann Marie Buerkle on the Commission's Growing Civil Penalty Settlements, May 25, 2016.
[9] Chairman Kaye, March 2, 2016 at the International Consumer Product Health and Safety Organization annual conference in Washington, D.C.

in a very detailed statement regarding the reform of the agency's civil penalty policies and practices.[10] RILA believes each of those suggestions should be considered by the Commission.

One of the stated goals of civil penalties is to promote general deterrence of future violations. However, the current civil penalty regime is so opaque that even current CPSC Commissioners have trouble understanding how it works. If a penalty calculation process cannot be understood, it cannot reasonably be expected to effectively promote deterrence because the regulated community is unaware of what policies drive substantially different penalty amounts. RILA hopes the Commission will consider revising 16 CFR § 1119.4 and one or both of other actions suggested above so that companies can gain a better understanding of the general basis for different civil penalty amounts and best practices for compliance programs.

III. Enhancing Section 15(b) Reporting & Voluntary Recall Requirements

a. The Commission Should Publish Section 15(b) Reporting Guidance

Under Section 15(b) of the CPSA, certain parties in the supply chain are required to report potential product hazards when they "obtain information which reasonably supports the conclusion that such product . . . contains a defect which could create a substantial product hazard or creates an unreasonable risk of serious injury or death."

RILA notes the difficulty in the interpretation of "obtains information which reasonably supports the conclusion that such product . . . contains a defect which *could* create a substantial product hazard." (emphasis added). This language is vague, and does not give regulated parties a useful standard for understanding when a report is required. The implementing regulations provide some guidance, but more clarity with respect to the reporting requirement would reduce the burden and uncertainty currently associated with trying to decide whether something is reportable to the CPSC. Acting Chairman Buerkle has previously commented on this issue, stating that:

> "[t]rying to decide when a product defect 'could' present a substantial product hazard is inherently subjective; there is no standard one can rely on in making that judgment . . . Instead, the regulations fall back on the same advice our staff has given over many years: 'when in doubt, report.' While that guidance may keep a company out of trouble in many cases, it also serves to highlight the inherent uncertainty of the matter."[11]

Moreover, the CPSC's advice of "when in doubt, report" is not required by statute. Particularly considering the Commission's imposition of multimillion dollar civil penalties for failure to timely reporting, more useful guidance should be provided by the agency. Again, RILA believes the use of hypothetical examples that illustrate timely versus late reporting scenarios could be helpful to those trying to comply with the law. Issuance of this type of guidance (or guidance, generally) would provide much needed clarity, allowing companies to be more confident in knowing when to report. This would, in turn, have a positive impact on consumer safety because companies would be more likely to report

[10] Statement of Commissioner Joseph P. Mohrovic Regarding the Commission's Annual Agenda and Priorities Hearing and The Opportunity for Reform of The Commission's Civil Policies and Practices, June 9, 2016.
[11] Statement of Commissioner Ann Marie Buerkle on the Commission's Growing Civil Penalty Settlements, May 25, 2016.

issues that the agency considers to be a reportable safety concern, rather than minor items that the agency does not believe are reportable and needlessly divert scarce agency resources away from other areas of greater concern.

b. The CPSC Should Consider Conducting a Tiered Recall Pilot

The CPSC should consider a pilot project to test the implementation of a tiered recall system to determine whether such a practice should be instituted broadly for all CPSC recalls. Under the current system, every publicly announced action regarding a potentially hazardous product is called a "recall" without regard to the severity of the safety issue. Thus, the term "recall" is used even if the safety issue is very low risk (e.g., the announcement is to provide customers with warning stickers to put on the product or requests consumers to inspect for an issue like mold). Because the term "recall" is used by the CPSC relating to all safety-related actions from the most serious life and death safety issue to minor mundane issues, consumers no longer feel a sense of urgency to act when they see a CPSC recall. A suggested transition to a tiered recall system prioritizing the level of severity of the safety issue was repeatedly raised by stakeholders during the CPSC's Recall Effectiveness Workshop. RILA agrees that implementation of such a system would be beneficial to product safety.

Under a tiered recall system, not all potential hazards would be marked as a "recall." Some, for example, could be considered "warnings" or "safety alerts" or some other title instead. In addition, under a tiered recall system, the CPSC should require less burdensome action steps for recalls in which (1) the level of risk of potential harm to consumers is low; (2) the product has not been widely distributed; or (3) where a vast majority of purchasers are known and can be directly contacted by the recalling company. As an example, the FDA has implemented a tiered recall system, separating recalls into multiple "classes" based on probability and severity of harm to consumers. The CPSC should review the FDA's and other agency's tiered recall systems to glean best practices when developing a pilot to test this common-sense approach prior to adoption by the CPSC.

At the same time, not all corrective actions may fit nicely into defined recall tiers. For this reason, some flexibility within the tiered system would need to be retained for both the recalling party and the CPSC staff. Tiered recalls would combat the oft-cited problem of recall fatigue among consumers by providing mechanisms for "sounding the alarm" for more serous hazards and dealing with less serious hazard quickly, easily, and without the same level of burdens.

c. Remove the Mandatory Use of In-Store Recall Posters for All Recalls

While in-store recall posters are not listed as a mandatory requirement under any statute or regulations, recall posters are listed as a requirement in the CPSC's Track Recall Guidance.[12] As a result, in-store posters have become a *de facto* requirement for every recall except for recalls that qualify as recall alerts. RILA has previously submitted comments and testimony outlining the challenges, costs and administrative burdens of in-store recall poster requirements.[13] Given the substantial number of recalls are announced each year and how many different store locations large retailers have, posting and maintaining recall posters is a significant burden. Additionally, and for similar reasons, in-store recall posters are widely regarded as outdated and in most instances, are an ineffective means of

[12] https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance/CPSC-Fast-Track-Recall-Program.
[13] RILA Testimony on FY 2016 and FY 2017 Budget and Priorities, June 25, 2015.

communicating recall information to consumers.

RILA again raised this issue at the CPSC's Recall Effectiveness Workshop and the only individual who defended the usefulness of the posters simply stated that in-store posters should not be abandoned altogether because there could exist some circumstances where posters might be helpful. RILA shares this sentiment and believes the agency should discontinue the requirement for recall posters in most recall CAPs. In-store poster should *only* be required in certain circumstances when CPSC staff determines that in-store posters would be a critical means of communication *for that particular product and retailer*. It is RILA's belief that such scenarios will be limited. This type of action would save significant resources without negatively impacting consumer safety.

d. Expand and Formalize Retailer Reporting Program Pilot into a Robust Agency-Industry Partnership Program

Commission leadership has consistently stated that the CPSC is a data-driven agency, in that its decisions and rulemakings are based on sound data and science. For the CPSC to meet its important safety mission today and tomorrow, it cannot stay stagnant merely doing the same thing. It must continue to increase its sources of valuable data, as well as, enhance its data analytics capabilities. Without such continuous improvement, the agency will fall woefully behind and will not be able to protect U.S. consumers. RILA believes the formalization and expansion of the Retailer Reporting Program (RRP) pilot would benefit consumer product safety by increasing the data available to the Commission.

RILA has previously testified before the CPSC on this issue and noted that retailers can provide unique data, as they are at the "front lines" of early detection of product risks.[14] Retailers receive hundreds of reports each day because consumers often report potential product hazards to the store where they purchased the product rather than reporting to the product manufacturer. Allowing retailers and other interested industry partners to provide this information and building systems internally at the CPSC to efficiently process and analyze data from various sources about the same product would enhance the Commission's ability to determine when a specific product should be reviewed or investigated.

RILA urges the CPSC to expand the RRP pilot into a robust CPCS-industry partnership program and to use technology to create a tool that allows participating companies to proactively file data with the CPSC consistent with the requirement of an initial Section 15b report. RILA has reiterated this request to the agency for years and believes it to be one of the greatest win-win reforms the Commission could undertake. As Acting Chairman Buerkle has repeatedly emphasized, the CPSC should promote data-driven decision making, and enhancing collection of this type of data only serves to emphasize this approach.

IV. Additional Burden-Relief Items

a. The CPSC Should Move Forward with Its Trusted Trader Program

[14] RILA Testimony on Data Sources and Consumer Product-Related Incident Information, June 25, 2015. *See also,* RILA Testimony for Hearing on FY 2018 and FY 2019 Proposed Agenda and Budget Priorities, July 26, 2017.

As RILA has commented to CPSC previously, a government-industry partnership or trusted trader program for low-risk importers is a key component to a strong risk-based import surveillance program. RILA therefore renews its recommendation that the agency move forward with development of a robust Trusted Trader Program beyond the current ISA-PS program that includes tangible trade benefits for importers willing to subject their product safety compliance programs, import processes, and supply chains to CPSC scrutiny. This course of action is consistent with RILA's position that the CPSC should focus its limited resources and enforcement efforts on high-risk importers and product shipments.

While CBP is currently seeking to complete its own trusted trader program, RILA members note that the timeframe for CBPs finalization of its program is uncertain, and delay of the CPSC's program is therefore not warranted. Review of CBP's Trusted Trader Framework clearly allows partner government agencies (PGAs), including the CPSC, to develop agency-specific trusted trader programs that meet the needs of that agency. The CBP's Trusted Trader Framework provides a mechanism by which various PGA's trusted trader programs can be aligned with and incorporated into a single program to increase efficiencies and reduce costs.

> The Trusted Trader Strategy will strive to provide other U.S. partner government agencies (PGAs) with a tangible opportunity to incorporate their trusted trader programs into the Trusted Trader Framework; resulting in enhanced efficiencies, a reduction in government-wide resources expenditures, enhanced information sharing, and an integrated platform to support both trade and CBP's objectives in facilitating international trade.[15]

Therefore, there is no reason why the Commission should not move forward with development of a CPSC Trusted Trader Program.

b. <u>The CPSC Should Continue Seeking Opportunities to Reduce Third-Party Testing Costs Consistent with Assuring Compliance Pursuant to PL 112-28</u>

While the staff did produce a briefing package[16] regarding potential opportunities to reduce third-party testing costs consistent with assuring compliance and Congress has previously funded additional work in this area, the agency should not turn away from these efforts now. Instead, the CPSC should redouble its efforts given the current federal focus on regulatory reform and the five years that have passed since CPSC staff last looked at this specific issue broadly. Any activities in this area would serve to reduce burdens on the regulated community without introducing additional risks to consumers.

Additionally, PL 112-28, §2(a)(3)(C) states that if the CPSC "determines that it lacks authority to implement an opportunity for reducing the costs of third-party testing consistent with assuring compliance . . . it shall transmit a report to Congress reviewing those opportunities, along with any recommendations for any legislation to permit such implementation." At least one such recommendation regarding the certification of manufacturing processes was made by CPSC staff in 2012 but it was not pursued by the Commission at that time. If the Commission focuses additional resources

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[15] https://www.cbp.gov/sites/default/files/assets/documents/2016-Aug/Trusted%20Trader%20Title%20Page%20.pdf.

[16] Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products, August 29, 2012.

in the area of reducing third party testing burdens consistent with assuring compliance as a part of its regulatory reform efforts, then it should also consider a reexamination of the previous CPSC staff legislative suggestion and any other potential new legislative recommendations for Congress.

c. The CPSC Should Continue Funding Research of Alternative Test Methods

RILA also encourages the development of alternative testing techniques that may reduce the costs of third-party testing. RILA therefore asks the CPSC to continue its endeavors to aggressively explore and fund research of alternative testing. Improvements would greatly reduce the burden on industry without increasing risks to consumers.

d. The CPCS Should Establish a Stakeholder Working Group Focused on Test Burden Reduction

Finally, to assist the CPSC in its efforts to reduce unnecessary testing burdens, the CPSC should develop a stakeholder working group tasked with reviewing testing burdens and developing suggestions for how these can be reduced without sacrificing safety of consumers. The working group should have recurring meetings and regular progress reports delivered to the Commission with recommendations. This living and flexible approach would ensure that the CPSC receives timely suggestions for testing burden reduction and that the working group remained relevant.

Conclusion

RILA appreciates the opportunity to provide these written comments regarding the Commission's Request for Information on Reducing Regulatory Burdens. We 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,

Kathleen McGuigan

Kathleen McGuigan
Senior Vice President & Deputy General Counsel
(703) 600-2068
kathleen.mcguigan@rila.org