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"Consumer Product Safety and the Recall Process"

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Chairman Moran, Ranking Member Blumenthal, distinguished members of the Subcommitee, thank you for the opportunity to appear before you today to discuss product safety and the recall process at the U.S. Consumer Product Safety Commission (CPSC) in connection with your oversight hearing. I am honored to speak on product safety, an issue that has been a passion and driving force throughout my career. I am attorney in private practice here in the District of Columbia and served as the general counsel of the CPSC from 2008 to 2012 during the implementation of the Consumer Product Safety Improvement Act (CPSIA). During my time at the CPSC, I supervised the development of the mandatory recall rule required by Congress to be promulgated as part of the CPSIA. I also supervised the lawyers serving the Office of Compliance and Field Investigations in handling hundreds of recalls a year and addressing emerging risks and recall effectiveness.

I. Voluntary Recall Statutory and Regulatory Framework

The CPSC operates under a statutory scheme that depends upon reporting by manufacturers, distributors and retailers. CPSC is not a preapproval agency. Its authorizing

statute, the Consumer Product Safety Act, requires that manufacturers, distributors and retailers report both violations of the statute and regulatory requirements as well as defects that present a substantial product hazard or unreasonable risk of serious injury or death. The entire statutory construct depends on an engaged regulated community that monitors products to ensure timely and accurate self-reporting to the agency.

Determining whether a product has a defect that presents a substantial product hazard can be a very time consuming and difficult process. It depends on whether the product exhibits a pattern of defect, the number of defective products distributed in commerce, severity of the risk, likelihood of injury among other things. The challenge of determining whether a safety risk exists can be particularly difficult for a retailer or distributor that is not as close to the design and development of the product as the manufacturer.

Nearly all recalls conducted with the CPSC are voluntary, with most firms agreeing to cooperate with the Commission to recall and address potential product hazards. Indeed, under Democrat Ann Brown's chairmanship of the CPSC in 1995, the Commission streamlined the process for voluntary engagement on recalls with the CPSC by announcing the Fast Track recall process. As former Chairman Brown explained in a letter to the United States House of Representatives in May of 2014, the CPSC's engineering review of whether a product contained a defect that created a substantial product hazard could take months to perform monopolizing critical agency resources. Streamlining the program to allow for manufacturers, distributors and retailers to conduct voluntary recalls without a CPSC engineering determination allows for consumers to get a remedy faster – whether a refund, repair, or enhanced instructional information. The CPSC's Fast Track program did just that and won an innovation in government award. The twenty (20) day process for negotiating a recall under the Fast Track program

provides incentives to companies to cooperate with the government without fear of an adverse determination regarding the safety of their product.

II. The Voluntary Recall Rule

As originally described on the Commission regulatory agenda, the proposed voluntary recall rule would have taken the requirements for mandatory recall notices, a rule promulgated as required by Congress in the CPSIA, and expanded those requirements to voluntary recall notices. The CPSC has individually negotiated voluntary recalls for over 30 years and, in doing so, has built trust with firms and created common practices that have been incorporated into the mandatory recall notices rule. Similar guidance has already been provided by the Commission in its comprehensive Recall Handbook.

The proposed rule was amended during the Commission's deliberations to eliminate the option to engage in a voluntary recall without entering into a legally binding agreement. It would also allow the Commission to impose compliance program requirements on a firm seeking a voluntary recall as part of a now legally binding corrective action plan governing the conduct of the recall. I will address each of those issues.

A. Legally Binding Corrective Action Plans

Under the current regulations, voluntary corrective action plans expressly are not legally binding. 16 CFR § 1115.20(a). The Commission has preserved the option to impose a legally binding consent order in voluntary settlement with the CPSC. 16 CFR § 1115.20(b). The original voluntary recall rule promulgated in 1975 distinguished between the voluntary, non-binding corrective action plan and the binding consent agreement, explaining that the consent agreement should only be used where there was "a lack of full confidence that the company would comply with a non-binding Corrective Action Plan" based on the staff's prior experience

with the firm. 40 Fed. Reg. 30,938 (July 24, 1975). The non-binding corrective action plan was established specifically "as an expeditious means of protecting the public from a substantial product hazard," in contrast to having to take time to go through the process of securing a consent order. *Id*. at 30,937; *see* 16 CFR § 1115.20(b). The regulations were revised in 1977 to include criteria for the staff to use in determining whether it is appropriate to pursue a non-binding corrective action plan or consent agreement. 42 Fed. Reg. 46,721 (Sept. 16, 1977); *see* 16 CFR § 115.20(a)(2).

During my tenure as the general counsel, in 2010, the CPSC went even further to exercise its power to seek a legally binding corrective action in a court ordered consent decree where a firm repeatedly failed to engage voluntarily to come into compliance with its statutory and regulatory obligations. The consent decree ordered a mandatory compliance program to be established, including independent oversight by a "Product Safety Coordinator" approved by the CPSC to monitor for product safety violations and compliance with reporting obligations.

Thus, the Commission has an array of options at its disposal to use with firms depending on the circumstances. The Commission's proposal to make all voluntary corrective action plans legally binding would represent a clear and dramatic turnabout: "once a firm voluntarily agrees to undertake a corrective action plan, the firm is legally bound to fulfill the terms of the agreement." 78 Fed. Reg. 69, 795, 69, 799. This change addresses concerns about "recalcitrant firm[s]" that "have deliberately and unnecessarily delayed the timely implementation of the provisions of their corrective action plans." 78 Fed. Reg. 69, 795. The CPSC already has a consent decree option to address recalcitrant firms making this change unnecessary.

B. Negotiating Compliance Program Terms in the Context of a Voluntary Recall

The voluntary recall rule proposal also subjects any firm engaging with the CPSC to the prospect of a legally mandated compliance program being imposed upon them during the course of a voluntary recall. The consequences of this proposal include:

- Imposing potentially significant delay in the voluntary recall process so that terms can be negotiated, vetted, and finalized, thereby gutting the streamlining benefits of the Fast Track program;
- Shifting CPSC resources away from getting unsafe products out of the hands of consumers toward negotiating and enforcing corrective action plan agreements; and
- Causing firms to reevaluate their cooperation with the Commission given –
    - the potential for future litigation with the CPSC over enforcement of corrective action agreements;
    - the need for publicly traded companies to approve the terms of a binding agreement and ensure compliance with such an agreement to meet duties owned to their shareholders; and
    - the effect corrective action plan agreements might have if introduced as evidence in product liability litigation.

To encumber the voluntary recall process with the negotiation of such compliance program terms would undermine the expedience of the Fast Track program. As Ann Brown stated in her May 2015 letter, this has the potential to delay "an otherwise effective recall weeks or even months due to haggling over legalities." The CPSC has acknowledged the same from the start, stating in the preamble to its reporting rule, "[b]y offering and accepting a corrective action plan, the subject firm and the Commission save considerable time and effort that would

otherwise be devoted to negotiating the more complex details of and completing the paperwork necessary for a consent order agreement. ***As a result, the hazard is remedied faster, and the consumer is protected earlier.***" 43 Fed. Reg 34988, 34996 (August 7, 1978) (emphasis added). The CPSC went on to note that most firms comply with the corrective action plan and "for those few subject firms which do not" the Commission has the options of pursuing a consent decree or adjudicative action. *Id.* The same remains true today.

The binding corrective action plan proposed in the voluntary recall rule may prove tantamount to extracting a consent decree without jumping through the protections and formalities built into the consent decree process. For example, Commission staff would no longer have to provide the firm with a draft complaint outlining its case. *See* 16 CFR § 1115.20(b). There would be no requirement that the corrective action plan be published in the *Federal Register* for comment or that the Commission formally consider any objections it received. *Id*. at § 1115.20(b)(4), (5). The CPSC would not settle its charges against the firm, which is mandatory for a consent order. *Id*. at § 1115.20(b)(1)(iii).

While there is certainly a time and place for imposing compliance program terms, the consent decree process already allows for such negotiation by the CPSC, and is the more appropriate place for that to occur. Without describing the legal authority for imposing compliance terms outside a consent decree process, the voluntary recall rule proposal describes that imposing a compliance program may be appropriate where there have been "[m]ultiple previous recalls," a failure to timely report under Section 15(b), or actual "[e]vidence of insufficient or ineffectual procedures and controls . . . ," though is clear that "[t]he Commission always retains broad discretion to seek a voluntary compliance program agreement." One of the issues with this formulation is that the number of voluntary recalls is not necessarily indicative of

a need for a compliance program. There is a not-so-subtle implication that recalls reflect a failure in the existing corporate compliance program when in fact the recall evidences the success of a compliance program that works exactly as it should – one designed to catch and act upon product issues before they become a problem.

III. The Retailer Reporting Program

Through the retailer reporting program, firms have voluntarily engaged in the very compliance activities the Commission seeks to impose in the voluntary recall rule. The uncertainty as to the status of the retailer reporting program and how it relates to the current expectations of the CPSC with regard to reporting merits examination.

The retailer reporting program is used by many of the participants as part of their overall corporate compliance program to identify emerging risks and ensure regulatory compliance. The program unquestionably serves the interest of the health and safety of the consumer by promoting transparent data sharing and analysis as well as early engagement with the CPSC. Program participants work with the CPSC to share safety related complaint information, using established trigger words to triage and escalate those complaints likely to raise safety concerns. Routine reporting through the program encourages frequent engagement with the CPSC on safety related concerns and ensures timely notification of potential defects.

The retailer reporting program follows CPSC policy encouraging that subject firms not delay reporting in order to determine to a certainty the existence of a reportable noncompliance, defect or unreasonable risk and the CPSC's statements that an "obligation to report may arise when a subject firm receives the first information regarding a potential hazard, noncompliance or risk." 57 Fed. Reg. 34222. It also meets the CPSC's guidance to err on the side of over-reporting and when in doubt, to report. 49 Fed. Reg. 13820 (April 6, 1984).

Program participants have worked closely with the CPSC staff to develop search terms and processes to limit their reports to those complaints that may reflect potential hazards and defects. They devote substantial resources to collecting and sharing the data with the CPSC in a format compatible with the CPSC's data requirements. The CPSC benefits from obtaining this data from the retailers in a scalable, unified and usable format based upon agreed upon search terms. The Commission has always made reporting easier for a "retailer of a product who is neither a manufacturer or importer of that product, and their reporting obligation is somewhat more streamlined than the expectation for a manufacturer or importer. 16 CFR §1115.13 (b), *see, e.g.*, 49 Fed. Reg. 13820. This is because retailers tend to less knowledge of design and manufacturing issues. Yet they can have more visibility into consumer feedback and complaints with the product after sale.

With robust data sharing from all retailers, the CPSC would be in a position to aggregate data across retailers to spot emerging trends. The collection and use of this data is consistent with today's focus on a more proactive safety system. As the import process becomes more automated in the coming years, the potential exists for retail complaint data about a product to be linked to import data providing the agency the opportunity to use technology as a window into the entire product lifecycle here in the United States. While perhaps still an aspirational goal for the agency (and certainly requiring notice and comment to provide for due process protections), the use of the data in this way could help modernize how the CPSC spots emerging hazards and stops hazardous products at the ports.

I hope these comments on product safety and the recall process have been useful. Thank you again for the opportunity to testify today, and I will be happy to answer any questions.