S. HRG. 114–220

CONSUMER PRODUCT SAFETY AND THE RECALL PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, INSURANCE, AND DATA SECURITY

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

OCTOBER 8, 2015

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ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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CONSUMER PRODUCT SAFETY AND THE RECALL PROCESS

THURSDAY, OCTOBER 8, 2015

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, INSURANCE, AND DATA SECURITY,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:02 a.m. in room SR–253, Russell Senate Office Building, Hon. Jerry Moran, Chairman of the Subcommittee, presiding.

Present: Senators Moran [presiding], Blunt, Gardner, Daines, Nelson, Klobuchar, and Blumenthal.

OPENING STATEMENT OF HON. JERRY MORAN, U.S. SENATOR FROM KANSAS

Senator MORAN. Good morning. I call the Subcommittee hearing to order and welcome our guests.

This is our second of this Congress as efforts to provide oversight to the Consumer Protection—excuse me. Let's do this again.

[Laughter.]

Senator MORAN. Good morning. Welcome. We are glad to have you here. And this hearing is now called to order.

This hearing is our Subcommittee's second of this Congress as it relates to oversight of the Consumer Product Safety Commission. And we have the Chairman and Commissioner Buerkle with us, and we are delighted to hear what they have to say in just a few moments.

Then we will be joined by a second panel of experts who are involved in the consumer product community and particularly on the issues that are scheduled to be discussed in this subcommittee hearing today.

Product safety is not a Republican or Democrat issue; it is something that I can't imagine that anyone doesn't care about. The hearing today will focus on CPSC's recalls, the Commission's efforts to spot emerging hazards and remove potentially dangerous products from the marketplace quickly.

Specifically, I look forward to discussing the Retailer Reporting Program, a voluntary program through which participating retailers submit weekly and product-specific reports to the Commission.

We will also discuss the Commission's proposed rule on voluntary remedial actions and guidelines for voluntary recall notices, commonly known as the Voluntary Recall Rule. We will also discuss

how the proposed rule may impact the longstanding Fast Track Product Recall Program.

CPSC has a long history of success in its mission to keep Americans safe. The Commission's track record, specifically on consumer product recalls, has been marked by innovative thought and engagement with relevant stakeholders.

A prime example of this out-of-the box thinking was the creation of the Commission's Fast Track Program in the 1990s, where it instituted alternative recall procedures to work closely with companies to expedite the recall process. The result of this program was to allow for an open exchange of critical information between the Commission and the recalling company and to create flexibility to remove potentially harmful products from shelves more quickly.

Ultimately, it was American consumers and families who benefited. The Ford Foundation and Harvard University named CPSC the winner of the Innovations in American Government Award for its work on this program. And it has received high marks from consumer groups and industry stakeholders alike.

CPSC adopted a similarly innovative approach to its market surveillance and emerging hazards identification activities when it instituted the Retailer Reporting Program more than a decade ago. This program created incentives for participating retailers to hand over detailed and product-specific incident reports to the Commission in exchange for recognition by the Commission that participation in the program satisfied statutory reporting obligations.

This recognition was a true benefit to participating companies, as it provided a measure of certainty on how to meet the obligations. In exchange, the Commission gained access to a trove of near-realtime data about consumer product trends in the marketplace.

Recent Commission activity, however, indicates a potential shift with respect to CPSC's attention on these matters. With respect to Fast Track, recent attempts to advance the proposed Voluntary Recall Rule have drawn overwhelmingly bipartisan concern that the proposals would unnecessarily delay the recall process.

Last year, Senators Casey and Toomey sent a letter to then-Acting Chairman Adler stating that the proposed changes seemed to jeopardize the efficiency of the existing process, which could increase the risk of harm to consumers.

In a letter dated May 30, 1914—2014—I thought my glasses would make a difference.

[Laughter.]

Senator MORAN. In a letter dated May 30, 2014, former CPSC Chairwoman Ann Brown voiced similar concerns. Chairwoman Brown described the Fast Track Program as hugely successful, resulting in recalls being announced faster and better protecting consumers from injury. She believed the proposed rule would undermine the Fast Track Program, removing incentives for firms to participate in the first place.

And I ask unanimous consent that these letters be entered into our record.

So ordered.

[The information referred to follows:]

UNITED STATES SENATE
Washington, DC, January 30, 2014

ROBERT S. ADLER,
Acting Chairman,
U.S. Consumer Product Safety Commission,
Bethesda, MD.

RE: PROPOSED RULEMAKING ON VOLUNTARY PRODUCT RECALLS

Dear Chairman Adler:

We have recently become aware of a proposed rule by the Consumer Product Safety Commission (CPSC) that could greatly increase the cost and complexity of recalling harmful consumer products.

As you know, the agency currently operates a "Fast Track" program that is well regarded and has a history of success. Since its inception in 1997, the program has allowed companies to recall products when they have reason to believe their products will harm consumers. The vast majority of companies across the Nation comply with the program, and companies in Pennsylvania often initiate product recalls as a precautionary measure, even where there is no evidence of injury to consumers. As the CPSC itself points out, the advantage of its award winning program is that it permits companies to remove potentially hazardous products from the marketplace as quickly and efficiently as possible, without requiring CPSC staff to make a preliminary determination that the product is hazardous. Because the program makes recalls voluntary and utilizes standard-form documents that can be expeditiously reviewed and executed, product recalls occur rapidly and efficiently.

Unfortunately, the proposed changes seem to jeopardize the efficacy of the existing process, which could increase the risk of harm to consumers. The proposed rule makes "voluntary" product recall Action Plans legally binding and requires companies to state with specificity each instance in which a product causes harm. We worry that these changes may discourage companies from initiating precautionary recalls and increase compliance and administrative costs. Companies that recall products will have to utilize lawyers to negotiate their "legally binding" documents and will involve upper corporate management to approve forward-looking obligations. Similarly, the CPSC will have to devote more time and personnel to negotiating recall documents and may be subject to litigation to determine whether a particular product is hazardous. Given these issues, we are concerned that the proposed change could ultimately keep harmful products on store shelves for longer periods of time, and thus increase the risk of harm to consumers.

Given the longstanding success of the Fast Track program, and the paramount importance of maintaining effective procedures for recalling dangerous products, we encourage the Commission to very carefully consider any changes it seeks to make to its Fast Track recall program.

Sincerely,

ROBERT P. CASEY, JR.,
United States Senator.
PATRICK J. TOOMEY,
United States Senator.

May 30, 2014

Hon. FRED S. UPTON,
Chairman,
Committee on Energy and Commerce,
U.S. House of Representatives,
Washington, DC.

Hon. HENRY A. WAXMAN,
Ranking Minority Member,
Committee on Energy and Commerce,
U.S. House of Representatives,
Washington, DC.

Dear Chairman Upton and Ranking Minority Member Waxman,

I had the privilege of serving as Chairman of the U.S. Consumer Product Safety Commission from March 1994 until November 1, 2001. During my time as Chairman, we prevented numerous deaths and injuries through enforcement actions, product recalls and working with consumers, consumer groups and firms regulated by the Commission. Product safety is best accomplished when government, industry and consumers work together.

Under the Consumer Product Safety Act (CPSA), manufacturers, distributors, and retailers of consumer products must report certain potential product hazards to the Commission. They must report immediately if they obtain information which reasonably supports the conclusion that a product (1) fails to comply with certain man-

datory or voluntary standards, (2) contains a defect which could create a substantial product hazard, or (3) creates an unreasonable risk of serious injury or death.

If the Commission believes that a product presents a substantial product hazard to the public, it may pursue corrective action. Early in my Chairmanship, I learned that some number of companies were offering to conduct product recalls but because of entrenched procedures, those firms were not allowed to proceed with a recall until the CPSC staff performed a technical evaluation of the product involved, agreed that there was a product safety problem by making a "Preliminary Determination" (PD) of hazard, and then sent a letter to the firm advising it of the preliminary determination of hazard and requesting a product recall.

This process could and often did take many months-months without a recall, months where consumers were at risk, even though the firm was ready, willing and able to proceed with a recall at the time of its report. We changed this bureaucratic process early in my tenure as Chairman by creating the Fast Track Product Recall program in August 1995.

Originally called the "No PD" program, firms who reported to CPSC, identified a product safety problem, agreed to and initiated a recall within 20 working days of their report, no longer required a staff technical evaluation of the problem reported. Rather than performing a technical evaluation to confirm the product problem reported upon, the CPSC staff evaluated the remedy proposed to assure that it adequately addressed the problem identified and spent time working with the firm on conducting the product recall.

The Commission made this Fast Track program permanent on March 27, 1997, and it has been hugely successful. More than one-half of all CPSC recalls are now conducted through the Fast Track Program. Recalls conducted through this program benefit consumers, the recalling firm and the CPSC. Recalls are announced faster better protecting consumers from injury. Recalling firms do not receive a letter stating that the CPSC staff has preliminarily determined their product is a substantial product hazard. And the government spend less resources investigating a product that a company has already agreed should be recalled.

The CPSC staff received a "Hammer" Award from Vice President Albert Gore's National Partnership for Reinventing Government for the Fast Track Product Recall Program. This award honored Federal employees for significant improvements to customer service and for making the government work more efficiently. Also in 1998, the Fast Track Program was named a winner of the prestigious Innovations in American Government award, an awards program of the Ford Foundation and Harvard University, administered by Harvard University's John F. Kennedy School of Government in partnership with the Council for Excellence in Government.

Now this award winning program appears to face the risk of being unintentionally undermined by a rule proposed by the CPSC in November 2013 that is intended to enhance voluntary recalls by setting forth principles and guidelines for the content and form of voluntary recall notices that firms provide as part of corrective action plans. One of the CPSC's proposals is to prohibit firms desiring to conduct a voluntary recall from disclaiming that there is a hazard presented by their product unless the Commission agrees to the disclaimer. I am concerned that this proposal if adopted could undermine the efficacy of the Fast Track program. Another proposal would classify a voluntary Corrective Action Plan (CAP) as "legally binding" thus transforming a CAP into a Consent Decree, potentially delaying an otherwise effective recall weeks or even months due to haggling over legalities. A Fast Track procedure would be rendered impossible under these circumstances.

CPSC urges firms to err on the side of caution by reporting potential product safety problems and conducting recalls. It is my understanding that virtually every firm that reports under the CPSC mandatory reporting requirement and requests to participate in a Fast Track recall,asserts that their product does not present a substantial product hazard, but nonetheless they wish to conduct a recall. If reporting firms are not allowed to make this disclaimer, they have no incentive to participate in the Fast Track Program.

Not making the disclaimer may be perceived in product liability litigation as akin to admitting that the product reported on is a substantial product hazard. If so, reporting firms might just as well report to CPSC, not offer to conduct a recall, and take the chance that the CPSC staff might conclude their product is not a substantial product hazard and that no recall is necessary.

If this occurs, recalls would be delayed, CPSC would be required to use substantial technical resources to evaluate products so that the staff can determine whether to make a preliminary determination of hazard, and consumers are left unprotected potentially for many months.

I respectfully request that the Committee urge the Commission to consider its proposed rule carefully and to assure that it does not adversely affect CPSC's Fast Track Product Recall Program.

Sincerely,

ANN BROWN.

CC:

The Honorable Lee R. Terry, Chairman
Subcommittee on Commerce, Manufacturing and Trade

The Honorable Jan Schakowsky, Ranking Member
Subcommittee on Commerce Manufacturing and Trade

The Honorable John D. Dingell
Member of Congress

The Honorable Robert A. (Bob) Adler, Chairman
U.S. Consumer Product Safety Commission

The Honorable Marietta S. Robinson, Commissioner
U.S. Consumer Product Safety Commission

The Honorable Ann Marie Buerkle, Commissioner
U.S. Consumer Product Safety Commission

Senator MORAN. Despite these concerns, the Voluntary Recall Rule is explicitly included in the Commission's Fiscal Year 2016 rulemaking agenda and operating plan, released just a few weeks ago. This rule would require that the terms of a corrective action plan, once entered into, be legally binding upon manufacturers and would prohibit them from disclaiming the presence of a product hazard.

Previously, the Chairman has indicated this rule is not a priority for the agency, so I am anxious to hear from the commissioners what has prompted its inclusion in the Fiscal Year 2016 rulemaking agenda and discuss the merits of the rule as it pertains to the fundamental objective of the Commission and this subcommittee: ensuring consumer safety.

The Commission's current Retailer Reporting Program allows participant firms to report, on a voluntary basis, timely, detailed, and product-specific information. The chairman has often said that he believes the Commission to be a data-driven agency. At the same time, some on the Commission have expressed concerns about CPSC's ability to handle large volumes of product safety data and to make sophisticated safety inferences from that reporting.

This summer, CPSC staff went so far as to inform RRP participants that the Commission would no longer consider RRP submissions to satisfy the Commission's voluntary reporting requirements and that it would no longer accord confidentiality to those reports.

The program remains a pilot program, despite having been initiated nearly a decade ago, and there is growing consternation among program participants who want clear guidance from the Commission of its intentions with respect to RRP.

It is intuitive that this data could be used to identify trends on emerging product safety hazards, and thus the program clearly has potential to improve consumer safety and save lives. But if the program is not functioning properly and generating positive results, if there is not a clear benefit to the Commission and to program participants, then we ought to have a serious discussion on how to improve it, because in my view the consumer would ultimately benefit.

As the Commission weighs its decision, it would be useful to hear directly from commissioners and other stakeholders today about

CPSC's data analytical capabilities and how it can best leverage existing resources, including cooperative partnerships with the private sector, to make critical safety inferences from retailer data.

Before I turn the microphone over to the Ranking Member, Senator Blumenthal, I want to reiterate that we all share this common goal of protecting consumers, and, on these issues that I have mentioned, there is a clear and reasonable oversight role for this subcommittee to provide toward that end.

Thank you to all of our witnesses for being here today, and I look forward to the testimony and a conversation that will be productive as we discuss these issues.

And I welcome and thank my Ranking Member, Senator Blumenthal, and recognize him.

STATEMENT OF HON. RICHARD BLUMENTHAL,
U.S. SENATOR FROM CONNECTICUT

Senator BLUMENTHAL. Thank you, Senator Moran. Mr. Chairman, thank you for having this hearing, which is enormously important to consumer protection.

Thank you to our witnesses, Chairman Kaye and Commissioner Buerkle, for being here today. Thank you for your very diligent and dedicated work on a commission and a mission that is paramount in importance to ordinary Americans, working families, and consumers, who rely on the safety of their products when they buy and use them. And they often are, unfortunately, unaware of the dangers that are created by those products, particularly defects in those products.

This committee, unfortunately, knows quite a bit about recalls. We have seen what happens when companies fail to disclose or report, whether by neglect or deception, dangerous and sometimes deadly product defects to oversight agencies like yours.

We also know all too well the dangers that are posed by recalls that are not conducted with sufficient diligence and haste. And this committee and its members are keenly aware of the needless, preventable tragedies inflicted on Americans because they are all too often kept in the dark, and are not notified of hazards by corporations or individuals with the responsibility to do so.

I have been fighting on the issue of automobiles for better disclosure. And the reason is, and I think also the reason for Americans' increased interest, is the latest instance with GM, where 120-plus people were killed by a defective ignition switch, known to the company for years before it was disclosed, and then only disclosed because of public pressure and because of investigative work by some of the government agencies with responsibility. But it was too late, much too late, for those 120-plus people who were killed, as well as their families, and for others who were injured as a result.

Americans deserve and need to know whether their cars, toys, or appliances or any other products are unsafe, and they should be notified not years down the road but right away.

The sad reality is that recalls, whether for cars or consumer products, so often fail to inform the public adequately and so often fail to get defective and unsafe products off the road or out of homes. Kids in Danger, whose executive director is testifying today, has research showing that the recall completion rate for children's

products, whether they are fixed or destroyed, is only about 10 percent. That is absolutely shocking.

Among the children's products that were already in consumers' hands by the time they were recalled, the recall completion rate is a woeful 3.96 percent. Such figures are appalling and astonishing, to say the least, and even more so when they concern a vulnerable population, like our children, who couldn't tell you about the CPSC or any other government agency that is supposed to protect them or about the nature of the corporations that manufacture those products.

And let me stress this point—that is why the CPSC's proposed rule for correction action plans to put in place commonsense baseline responsibility for companies that agree to voluntary recalls is so critically important. Too few consumers are ever notified about product recalls. The notices, even when they get them, are vague and ambiguous and, in fact, sometimes downright confusing and deceptive. And they all too often also fail to stress the urgency of taking remedial action.

When the CPSC has no mechanism to ensure that these companies are actually keeping their word and faithfully conducting their recalls, too much uncertainty and danger are left for the American consuming public.

I know certain members of certain industries are up in arms. I know that there is opposition to this proposed rule and that making voluntary recalls legally binding is said to be somehow too onerous, financially burdensome or cumbersome on these companies.

But the simple fact of the matter is, all we are saying is that companies should have to do what it has committed to do: to warn consumers of a potentially dangerous product and then let them clearly know the steps they can take to avoid the danger. It is about accountability. It is just fair, and it is also common sense.

Whether a recall occurs because the CPSC mandates it or because the company volunteers a fix, the risk posed to consumers is the same from an unsafe or defective product, and it ought to be remedied.

While the mechanisms to initiate a voluntary or mandatory recall may be different—and they are, often—— neither process should mean that a company is absolved of accountability and from their corporate responsibility and trust to make things right. That is a very simple, straightforward, commonsense principle that animates and supports this proposed rule.

And I look forward to your testimony.

Thank you.

Senator MORAN. Thank you, Senator Blumenthal.

We now recognize our first panel. And that panels consists of Mr. Elliot Kaye, Chairman of the Consumer Product Safety Commission, and Ms. Ann Marie Buerkle, a commissioner of the Consumer Product Safety Commission.

Chairman Kaye, welcome. And please begin your testimony.

STATEMENT OF HON. ELLIOT F. KAYE, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Mr. KAYE. Thank you. Good morning, Chairman Moran, Ranking Member Blumenthal, and the members of the Subcommittee.

Thank you for the invitation to come speak about the United States Consumer Product Safety Commission's recall process. I am pleased to be joined today by my friend and colleague, Commissioner Ann Marie Buerkle.

U.S. Government agencies with recall authority have struggled for decades with effectively reaching consumers about recalls. Our experience at the CPSC has mirrored that of our sister agencies.

When I became Chairman last summer, I asked our staff to take a fresh look at how we and other agencies process and monitor recalls, with an eye on reaching more consumers and reaching them more quickly. My primary objective is a recall process that is even more focused on consumer protection.

Toward that end, we are taking numerous steps to enhance the effectiveness of the recalls that we announce. These include: one, shortening the length of time it takes to alert the public to a product recall; two, working with individual recalling companies to ensure the monthly progress reports that they submit are accurate; three, identifying priority recalls so that the agency can provide enhanced monitoring of those critical recalls; and, four, urging recalling firms to use social media and search engine optimization to broaden the notice of recalls.

We also continue to consider whether enhancing or changing our regulations could have a positive effect on this process. And I hope, as we go through that process, that there is room for us to exercise our independent, objective judgment and to reach different conclusions from others, potentially, and not feel like that process is an unfair one.

As far as notifying consumers sooner, in Fiscal Year 2015, we announced recalls to consumers, on average, 4 to 5 days faster than we did in the previous fiscal year.

In terms of broader dissemination, in addition to the hundreds of recalls that we have conducted in cooperation with Canada in the past 7 years, we have increased our coordination with safety agencies in other countries. Since 2013, we have conducted 7 trilateral recalls with both Canada and Mexico, 3 of which were announced simultaneously in all 3 markets, including a recall last month of 1.3 million bicycles involving 13 recalling manufacturers and distributors. Coordinated recall announcements increase efficiency and lead to less confusion for consumers.

The improvements we are making to the process will still be insufficient, though, without a significantly increased effort by recalling companies. There is no way around that fact.

As we all have experienced as consumers, companies spend a tremendous amount of effort and resources, including time, money, and creativity, on marketing their products to us. But at the CPSC, we often do not see a commensurate effort on the recall side.

Parents of young children, of which I am one, in particular, are extremely busy. Many companies seem to embrace that fact when marketing their products and seem to ignore it when recalling those same products.

I believe that companies should dedicate the same effort to recalling dangerous products as they do marketing them. In doing so, companies should use all of the tools at their disposal to inform and motivate consumers to take action. We have seen companies

have successful recalls by offering incentives, such as gift cards for small amounts or free or discounted products, to motivate consumers to take advantage of the recall remedy.

We have also seen some companies recall effectively using their social media platforms. Others, unfortunately, have used lesser-followed social media accounts to disseminate information or they bury the recall information under a difficult-to-find "Recalls" tab on a website.

While such actions might check the box for publicizing recalls, they do not lead to effective ones, and they certainly do not strike me as a genuine attempt to protect consumers. I expect companies to ensure that recall information is featured prominently on their websites and social media sites instead of making consumers search for that information.

Beyond a more prominent website placement, the use of social media needs to become more prevalent. For many companies, social media is an ideal medium to reach a large number of consumers simultaneously. Companies can use their social media sites to collect and monitor data regarding the reach of their recall message, and Facebook is a perfect example of this. It is the largest social media site today. Nearly all companies have a Facebook presence for marketing purposes, and they should be using this for recall purposes as well.

Unfortunately, the CPSC itself does not yet have a Facebook presence. And I would think and hope that those who support government transparency, informing consumers, and genuine recall effectiveness would endorse CPSC going onto Facebook.

We certainly welcome all feedback and ideas as we continue to enhance our recall effectiveness efforts. Thank you again for the invitation to speak to you about the CPSC's recall process and the lifesaving work undertaken by our staff. I look forward to answering any questions you may have.

[The prepared statement of Mr. Kaye follows:]

PREPARED STATEMENT OF HON. ELLIOT F. KAYE, CHAIRMAN,
U.S. CONSUMER PRODUCT SAFETY COMMISSION

Good morning Chairman Moran, Ranking Member Blumenthal and the members of the Subcommittee. Thank you for the invitation to come speak about the United States Consumer Product Safety Commission's recall process. I am pleased to be joined today by my friend and colleague, Commissioner Buerkle.

U.S. Government agencies with recall authority have struggled for decades with effectively reaching consumers about recalls. Our experience at CPSC has mirrored that of our sister agencies. Expanding technologies simultaneously create new challenges in capturing consumers' attention and present new opportunities to do the same.

When I became Chairman last summer, I asked our staff to take a fresh look at how we and other agencies process and monitor recalls with an eye on reaching more consumers and reaching them more quickly. My primary objective is to move to a recall process that is even more focused on consumer protection.

Toward that end, we are taking numerous steps to enhance the effectiveness of the product safety recalls that we announce. These steps include: (1) shortening the length of time it takes to alert the public to a product recall; (2) working with individual recalling companies to ensure monthly progress reports provided to the Commission accurately reflect the steps taken by the recalling company and ensuring the accuracy of their data; (3) identifying priority recalls so that the agency can provide enhanced monitoring of those critical recalls; (4) improving technology so recalling companies can provide recall progress report information to the staff through a one-stop business portal; (5) expanding the use of social media by the CPSC to

reach targeted audiences; and (6) urging recalling firms to use social media and search engine optimization to broaden the notice of safety recalls to reach as many owners of recalled products as possible. Beyond these steps, we continue to consider whether enhancing or changing our regulations could have a positive effect on this process.

We have placed a priority on getting recall information to the public more quickly and more broadly, two elements critical to a more effective recall. In Fiscal Year 2015, we announced recalls to consumers, on average, 4–5 days faster than we did in the previous fiscal year. In addition to the hundreds of recalls that we have conducted in cooperation with Canada in the past seven years, we have increased our coordination with safety agencies in other countries. Since 2013, we have conducted seven trilateral recalls with both Canada and Mexico, three of which were announced simultaneously in all three markets, including a recall last month of 1.3 million bicycles involving 13 recalling manufacturers and distributors. Coordinated recall announcements increase efficiency and lead to less confusion for consumers.

The improvements we are making to the process will still be insufficient without a significantly increased effort by recalling companies. There is no way around that fact. As we all have experienced as consumers, companies spend a tremendous amount of effort and resources, including time, money and creativity, on marketing their products to us. But, at CPSC we often do not see a commensurate effort on the recall side. Parents of young children, in particular, are extremely busy. Many companies seem to embrace that fact when marketing their products and seem to ignore it when recalling those same products. I believe that companies should dedicate the same effort to recalling dangerous products as they do marketing them.

Companies should use all of the tools at their disposal, including customer lists, incentives and social media, to inform and motivate consumers to take action. Recalls are more effective when customers are directly notified and for many products, companies have the ability to do this through their existing customer records. We have seen companies have successful recalls by offering incentives, such as gift cards for small amounts or free or discounted products, to motivate consumers to take advantage of the recall remedy. These are some of the creative solutions that we believe companies can use to improve recall effectiveness.

We have seen some recalling companies effectively use their social media platforms. Others, unfortunately, have used lesser-followed social media accounts to disseminate information or bury recall information under a difficult-to-find recalls tab on a website. While such actions might "check the box" for publicizing recalls, they do not lead to effective recalls; they certainly do not strike me as a genuine attempt to protect consumers. I expect companies to ensure that recall information is featured prominently on their websites and social media sites, instead of making consumers search for the information. As consumers, we can all easily recognize when looking at a company's website what is a priority and what is not.

Beyond far more prominent website placement, the use of social media needs to become more prevalent. For many recalls, social media is the ideal medium to reach a large number of consumers simultaneously, especially when compared with some of our historic notification methods such as posters in retail locations. Through social media sites, companies can collect and monitor data regarding the reach of their recall message.

Facebook is the largest social media site today, boasting nearly 1.5 billion monthly active users as of this past summer. Nearly all major companies have an active presence on Facebook for marketing purposes, which should also be used to disseminate recall information more widely to consumers. Unfortunately, the CPSC itself does not yet have a Facebook presence. Those who support government transparency, informing consumers and genuine recall effectiveness should endorse CPSC going onto Facebook.

I welcome feedback aimed at increasing recall effectiveness. Earlier this year, the non-profit advocacy group, Kids In Danger, issued a report that examined children's product recalls during the last ten years. I give credit to them for reporting on our effectiveness and encouraging others to focus on this important issue. Their work has better informed our processes and amplified our call that companies have a far greater role to play.

Thank you, again, for the invitation to speak to you about the CPSC's recall process and the life-saving work undertaken by our staff. I look forward to answering any questions that you may have.

Senator MORAN. Mr. Chairman, thank you very much.
Commissioner Buerkle?

STATEMENT OF HON. ANN MARIE BUERKLE, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

Ms. BUERKLE. Thank you, Mr. Chair.

Chairman Moran, Ranking Member Blumenthal, and distinguished members of this committee, thank you for holding today's hearing on compliance activities at the Consumer Product Safety Commission.

In my testimony before this subcommittee last June, I mentioned some concerns, and today's hearing gives me an opportunity to further explain them.

The first concern I have is the proposed Voluntary Recall rule. The Consumer Product Safety Improvement Act of 2008 required CPSC to issue guidelines for notices in mandatory recalls, which the Commission can order only after a trial-type hearing. The vast majority of CPSC recalls are not mandatory, but voluntary, and, of those, approximately 60 percent are Fast-Track recalls.

The House committee said nothing about a regulation for voluntary recall notices. It merely said that it expected similar information would be provided in voluntary recalls. Remarkably, the CPSC majority produced a proposal that goes far beyond the concept of a voluntary recall. It also ignored the serious concerns expressed by the Office of Compliance.

My concerns with the Voluntary Recall Rule, as it is proposed, are as follows: Number one, the proposed rule would require all corrective action plans, the voluntary plans submitted by the private party executing the recall, to be legally binding.

This is a startling departure from the status quo. In 1978, the Commission intentionally decided that corrective action plans should not be legally binding. Without the legally binding provision, the Commission observed, and I quote, "The hazard is remedied faster, and the consumer is protected earlier."

My second concern has to do with the Voluntary Recall Rule reversing another longstanding rule, which allows a recalling firm to state that submission of a voluntary corrective action plan does not constitute an admission that a substantial product hazard exists. Uncertainty on this point would discourage many companies from conducting voluntary recalls at the Consumer Product Safety Commission.

Number three, the notice provisions of the proposed rule are not consistent with congressional intent.

Number four, the proposal specifies certain cases in which recalling firms would have to include a plan for future compliance plans. Every company should have a plan for how they will meet their obligations under the law, but if we try to force that type of requirement into a voluntary recall plan, it will significantly delay the recall announcement and leave the consumer at risk for a longer time.

Senators from both sides of the aisle have weighed in on this, and one of the most outspoken critics has been the former CPSC chair Ann Brown, a Democrat and consumer advocate. She recognized the disclaimer provision would destroy the key incentive to participate in the highly successful Fast Track Recall Program.

We are now at the start of a new fiscal year, and it is time for resolution. My Democrat colleagues have had several opportunities

to withdraw this proposal, but they have refused. And, in fact, they have moved in the wrong direction, voting to approve the CPSC's fall reg agenda with an expectation that the Voluntary Recall Rule will be finalized by September 2016. In the meantime, this proposal looms large over the regulated community.

Adding to that uncertainty, it has been over a year since the CPSC changed the legal understandings of the successful Retailer Reporting Program, no longer assuring the reports meet their obligations and the information will be kept confidential.

Adding further to the uncertainty is another 2013 proposal that relates to section 6(b) of the Consumer Product Safety Act, requiring our agency to take reasonable steps to ensure that public statements about specific products are fair and accurate.

Add to this the Chairman's public statements that he wants the Office of General Counsel to seek higher civil penalties and that Compliance has been without a permanent leader for 5 years, and the result is a regulated community that is alienated, beleaguered, and uncertain.

The voluntary recall proposal must be withdrawn. CPSC can do a much better job. And the Chairman talked about it in his opening statement; we all believe in consumer safety. And I firmly believe we can do a far better job of protecting the consumer if we regain the trust of the regulated community and find ways to collaborate with them rather than to intimidate them.

I thank you for this time and for holding this hearing, and I look forward to your questions.

[The prepared statement of Ms. Buerkle follows:]

PREPARED STATEMENT OF HON. ANN MARIE BUERKLE, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

Chairman Moran, Ranking Member Blumenthal, and distinguished Members of the Committee, thank you for holding today's hearing on compliance activities at the Consumer Product Safety Commission.

In my testimony before this subcommittee last June, I mentioned my concern that the Commission seems to be turning its back on some of the highly successful compliance programs that depend on close collaboration with industry and moving instead towards a more adversarial posture. Today's hearing gives me an opportunity to further explain my concerns.

Perhaps the most vexing example of the problem is the proposed "voluntary recall" rule.[1] The original idea behind that proposal was to establish guidelines for the information to be included in voluntary recall *notices* (mostly press releases that are negotiated between CPSC and firms conducting a voluntary recall). The Consumer Product Safety Improvement Act of 2008 (CPSIA) required CPSC to issue such guidelines for notices in *mandatory* recalls, which the Commission can order only after a trial-type hearing.[2] The vast majority of CPSC recalls are not the mandatory type, but voluntary. Recognizing this, the report accompanying the House version of CPSIA, after discussing the requirement for mandatory recall notices, said "the Committee expects that similar information will be provided, as applicable and to the greatest extent possible, in the notices issued in voluntary recalls." H.R. Rep. No. 110–501.

The House Committee said nothing about a *regulation* for voluntary recall notices—it merely said that it expected similar information would be provided in voluntary recalls. Remarkably, while citing that modest expectation, the CPSC majority produced a proposal that goes far beyond the content of press releases and

[1] *Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices,* 78 Fed. Reg. 69793 (Nov. 21, 2013).

[2] See 15 U.S.C. § 2064(i). CPSC issued the required notice regulation for mandatory recalls in 2010. *Guidelines and Requirements for Mandatory Recall Notices,* 75 Fed. Reg. 3355 (Jan. 21, 2010). The rule was codified at 16 C.F.R. part 1115, subpart C.

would, if adopted, fundamentally defeat the concept of a voluntary recall. It also ignored the serious concerns expressed by the Office of Compliance.

My concerns are as follows:

1. The proposed rule would require all corrective action plans—the voluntary plans submitted to the Commission by the private party executing the recall—to be legally binding agreements. For those who deal with CPSC on a regular basis, this is a startling departure from the status quo. In the original voluntary recall rule, which was adopted in 1978, the Commission intentionally decided that corrective action plans should *not* be legally binding.[3] The Commission recognized that in the vast majority of recalls, allowing voluntary corrective action plans, subject to staff approval, would save considerable time and effort that would otherwise have to be spent in negotiating a legally binding consent order agreement. Saving that time, the Commission observed, means that "the hazard is remedied faster, and the consumer is protected earlier."[4]
2. The proposed voluntary recall rule would also reverse another longstanding rule of the Commission, which allows a recalling firm to state explicitly that submission of a voluntary corrective action plan does not constitute an admission that a substantial product hazard exists.[5] Under the proposed rule, as amended by the Commission majority, a recalling firm could no longer disclaim a defect unless the Commission staff agrees. Given the enormous consequences a negative ruling could have for product liability cases, uncertainty on this point would discourage many companies from conducting voluntary recalls with CPSC.
3. The notice provisions of the proposed rule are not consistent with Congressional intent as they require participants in a voluntary recall to do much more than is required of firms who are ordered to do an involuntary or mandatory recall after unsuccessful litigation against the Commission.
4. The proposal specifies certain cases in which recalling firms would have to include a plan for future compliance as part of their immediate corrective action plan. While I think every company should have a plan for how they will meet their obligations under the law, my objection is that if we try to force that type of requirement into a voluntary recall plan, particularly one that would be legally binding, it will significantly delay the recall announcement and leave consumers at risk for a longer time.

Opposition to the proposed voluntary recall rule did not come only from businesses. Senators from both sides of the aisle have weighed in against it. One of the most outspoken critics of the proposed rule has been former CPSC Chairman Ann Brown, a Democrat and leading consumer activist appointed to the Commission by Pres. Bill Clinton. She recognized that the proposed disclaimer provision would destroy the key incentive to participate in the CPSC's highly successful Fast Track recall program, which was instituted during her tenure as Chair. She added that a Fast Track procedure would be "rendered impossible" in any case if corrective action plans were required to be legally binding.

Last July, the House of Representatives voted to defund any CPSC activity connected to the voluntary recall proposal. It was in the aftermath of that action that my colleague Mr. Kaye took over as Chairman of the agency. When asked about the controversial recall proposal and how he planned to handle it, he indicated in a number of public statements that he planned to focus on other activities that would have "clear safety justifications."

I agreed with that position because the voluntary recall proposal, if finalized, would seriously undermine our Fast Track and voluntary recall programs and thus could not be justified on safety grounds. Now we are at the start of another Fiscal Year and it is time for resolution. My Democrat colleagues have had several opportunities to withdraw the proposal, but they have consistently refused. Most recently, they moved in the wrong direction, voting to approve the CPSC's fall Regulatory Agenda with an expectation that the voluntary recall rule would be finalized by September 2016.

In the meantime, the proposal continues to loom large over the regulated community. There are a number of other actions or inactions that compound the uncertainty. More than a year ago, CPSC abruptly changed the legal understandings on

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[3] See 16 C.F.R. § 1115.20(a). The regulation expressly reserves to the Commission "the right to seek broader corrective action if it becomes aware of new facts or if the corrective action plan does not sufficiently protect the public." *Id.*

[4] Substantial Product Hazard Reports, 43 Fed. Reg. 34988, 34996 (Aug. 7, 1978).

[5] 16 C.F.R. § 1115.20(a)(1)(xiii).

which the successful Retailer Reporting program has operated for more than ten years. After the participants strenuously objected, the staff backtracked and undertook a more thorough review of the program. At the staff's request, most of the participants have continued to provide the same type of reports to the Commission. But without the former assurances that the reports will satisfy statutory reporting obligations and the information will be kept confidential, the uncertainty has grown intolerable and at least one major retailer has given up on the program.

Adding further to the uncertainty is another 2013 proposal that relates to section 6(b) of the Consumer Product Safety Act, 15 U.S.C. §2055(b). The statute generally requires CPSC to take reasonable steps to ensure that public statements about specific products are fair and accurate. The proposed rule would weaken the protections of the current CPSC regulation and deviate from the intent of Congress.

Add to this the Chairman's frequent public statements that he wants the Office of General Counsel to seek higher civil penalties for reporting violations, as well as the fact that the Office of Compliance has been without a permanent leader for five years now, and the result is a regulated community that is feeling alienated, beleaguered and uncertain.

The CPSC can do a better job of protecting consumers if we regain the trust of the regulated community and find ways to collaborate with them rather than intimidate them. To that end, the voluntary recall proposal must be withdrawn. We have accomplished the original objectives of the Congress. There is no need to disturb or disrupt the current, successful recall process.

Senator MORAN. Commissioner, thank you very much.

Chairman Kaye, let me start with you. It does seem that in the past you indicated that safety issues were your greatest priority and discounted the idea of moving forward with this topic, this rule.

Let me ask you, is this—and yet, in the Fiscal Year 2016 regulatory agenda, this rule remains. Is it the intention of the Commission to move forward on this rule?

Mr. KAYE. Thank you, Mr. Chairman.

Yes, it is accurate that I have said that. I have been very clear about that. My colleague sitting to my left knows that I have said that, and it is true.

Every day, at the end of the day, I get daily death reports. I look through them and they are about 2-year-olds who drown, 35-year-olds who are poisoned to death from carbon monoxide from a portable generator, or a 50-year-old who has an ATV crush them.

This is what I see every night before I go home. And when I became Chairman, it is addressing those types of hazards that I have definitely made the top priority. I have been very clear about that, and I think the direction of the agency has reflected that.

Before I became Chairman—and as I explain this, I am not in any way excusing what has gone on. But the rules to which the Commissioner has referred, the 6(b) rule and the voluntary notice recall rule, were already on our books. We had already put out the NPRs, the notice of proposed rulemaking, for both of those. And so, as a matter of course, our staff puts them in the proposed operating budgets and the proposed performance budget requests that the Commission moves forward with every year.

As we always do and as we just experienced at the end of the last fiscal year a few weeks ago, work that we hoped to have gotten done during that year's operating plan, because of extenuating circumstances, doesn't all get done. And so those rules get carried over that haven't been finished.

To have taken them off the books, so to speak, to have voted affirmatively to have ended them, to me, would have been inefficient. There already is an open rulemaking. I think that that rulemaking,

should we turn to it, gives us an opportunity, in any direction, to explore how we can enhance our recall effectiveness process.

Everybody seems to want us and industry to have a more effective recall process. I think that that rulemaking can take many different forms and should be a potential vehicle to do that. I am not necessarily wedded to any particular provision in there. I am more wedded to trying to find, as I mentioned in my opening testimony, a process that is even more focused on consumer protection.

So I will continue to devote my time to those primary hazards that I mentioned at the beginning of this answer, but if we can also work in time, working with our colleagues —no surprises here— working with our colleagues to try to enhance that process through both voluntary efforts, guidance, and potential rulemaking, I am certainly going to continue to want to have all those options available.

Senator MORAN. So, Mr. Chairman, what would you expect to happen next in regard to this rule?

And then I will ask Commissioner Buerkle to respond to what you said. But what you are suggesting, to me, is that this rule, the process began before you arrived as Chairman. It is something that is on the agenda, in a sense, through the process that the Commission normally follows. It is not where the Commission is focusing its attention at the moment. But you are uninterested in withdrawing the rule in case the attention should be or, in the Commission's view, becomes important to be considered at some point in time.

Is that what I heard you say?

Mr. KAYE. That was 100 percent accurate. Thank you.

Senator MORAN. Thank you. Perhaps I can listen better than I can speak.

[Laughter.]

Senator MORAN. Then let me ask you, if you are not going to withdraw the rule, for a couple of commitments from you. And one would be that you will keep this subcommittee, the Commerce Committee, fully informed of your intentions in advance of any— let me say it this way. Before you change your intentions in regard to this rule, would you agree to notify us and let us know what those plans are?

Mr. KAYE. Absolutely, if you will take my calls.

Senator MORAN. Yes, sir.

Mr. KAYE. OK.

Senator MORAN. And, second, would you agree that there would be value in engaging in what I would call the CPSC community, consumer advocates, the business community, to have discussions about this topic before you engage in pursuing that rulemaking?

Mr. KAYE. Well, we are certainly not going to spring anything on anybody, if that is what you are concerned about. Sometimes whether we like it or not, we do have those conversations, and those dialogues happen all the time. And it is an ongoing topic, and that is why we are having a hearing today.

And so I am not a believer in big surprises. We will continue to be very transparent. I think we have, not only because of our formal meetings policy but also informally, how we have conducted ourselves with the current commission, I think we have an incred-

ible amount of openness and transparency. And that will continue on this and other issues.

Can I just say quickly, one thing that is really important is I am not wedded to this particular rule. I am not wedded to a specific legal or voluntary approach. I am wedded to a goal, the goal of improving the recall process. And if it turns out that some form of this rule, in any direction, is a valuable piece of that, then I am going to pursue that. And of course we are going to be open about that.

Senator MORAN. I appreciate your answer. But I would add that, in addition to the transparency that you committed to, part of that is, you indicated, not wanting to spring something on someone. In addition to that, my request for a commitment is that you will seek input in this rule from consumer advocates and the business community that care about the outcome of that decision.

Mr. KAYE. Yes. And, certainly, if we end up deviating substantially from—if we end up even doing another version of a rule and we deviate substantially from the Notice of Proposed Rulemaking, I would expect we would have to do another Notice of Proposed Rulemaking. And that will of course involve notice and comment.

Senator MORAN. Thank you, Mr. Chairman.

My time has expired. I will give Commissioner Buerkle a chance to respond in my next opportunity to ask questions.

Senator Blumenthal?

Senator BLUMENTHAL. Thanks, Mr. Chairman.

Let me ask Commissioner Buerkle, I know you said that there is no need to disrupt the current successful recall process. How can a 10 percent recall effectiveness rate be considered successful?

Ms. BUERKLE. Thank you, Senator Blumenthal.

I think that when we look at recall effectiveness, it is very important—and in your opening comment, you mentioned the car issue, the automobile issues. The recalls we do at CPSC, on many occasions, don't compare to other government agency recalls. A lot of the consumer products we deal with are smaller, less expensive, and, in many cases, if someone is aware of the recall, they just disregard and they throw the product out.

There are a whole lot of issues that we deal with in recall effectiveness in trying to measure it. And I would say that looking at that percentage and using what was in the report——

Senator BLUMENTHAL. Well, let me just say, though—and I apologize for interrupting, but my time is limited—that the number that I have given you, 10 percent, pertains to products whether they are fixed or destroyed. And the rate that applies to children's products is even lower, 3.96 percent.

So can we really say the process is working now?

Ms. BUERKLE. I would say the best measurement of recall effectiveness is looking at the injury and the death rate post-recall-notice. That is the most accurate number that we have in terms of whether a recall is effective. And that number, in speaking with Compliance, because they are the ones who measure these statistics, that number is down, and post-recall we don't see the injuries and deaths.

And that is because there are so many other factors getting to the 10 percent. For instance, if I had a fitness tracker and there

was a recall for rashes and I didn't get the rash, I am not going to return my product. So it is subjective, on some levels, recalls are. It depends on the value. It depends on the age of the product.

Compliance tells me that right now we depend on our recall information coming from the recalling company who is doing the recall and that the information they give to us is paper, so there is a data integrity issue.

So just to use that figure, I think a more relevant and certainly more important one is that post-recall-notice injury and death rate.

Senator BLUMENTHAL. Well, I would like to see numbers.

Ms. BUERKLE. We will be happy to provide those to you.

Senator BLUMENTHAL. And then I would like to see a justification for the continuing risk that those numbers may well reflect, risks that continue even after consumers are warned.

Let me ask you, Chairman Kaye, about the Retailer Reporting Program that was designed through the CPSC to collect data from incident reports on both injuries and deaths in order to better identify these kinds of emerging hazards.

Initially, this program emphasized the use of corrective actions over civil penalties. Under the program, as you know, to meet reporting requirements, participating retailers have to submit complaint and incident data to the CPSC every week, which seems like a constant influx of information.

In order to be useful for the Commission to use it in spotting potential hazards, the data submitted by retailers, I think, would need to be formatted in a way that is readable and searchable for the Commission and for the public.

Is this data provided now in a standardized format? And, in your view, has the program really provided value to the Commission?

Mr. KAYE. Thank you, Senator.

I am glad you raised the Retailer Reporting Program. And it is a bit of a misnomer to even call it a program. It was an ad hoc arrangement with seven different retailers that evolved over time separately with those seven different retailers, or not even only retailers but other companies. As you mentioned, really more of a compliance effort.

I thought it was a creative approach at the time; certainly something that I have looked at since I have become Chairman.

I would say that, from my perspective of discussing this with our epidemiologists—and I think that is important, for us to focus on those experts who actually understand data and data analytics and the value of certain data and the comparative value of it—it is viewed as a useful data source but in the lower tier of data sources that we receive and rely upon to try to protect the public.

Since it has some value, both to the epidemiologists and to our compliance staff, we try to figure out how we can go forward in a way that does exactly what you mentioned, Senator, have the information provided to us in an accessible and usable format, standardized format, and open that up potentially—this is the direction I am intrigued by moving in—open that up to the larger regulated community so that they can file all of this information electronically and we can then feed that into our data pools and try to use that to mine that data to better predict where we see trends.

I think that the biggest stumbling block, if this is the direction that we move in, the biggest stumbling block, frankly, is resources. It is extremely expensive to both build, operate, and maintain that type of data warehouse. And before we come asking for money to do that or try to shift priorities to at least get it off the ground, I want to make sure that there is actually a return on investment that we feel like is worth it.

Senator BLUMENTHAL. Thank you.

My time has expired. And thank you, Mr. Chairman.

Senator MORAN. Senator Klobuchar?

STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

And thank you to both of our witnesses. I have worked hard on consumer issues for quite a while, and I appreciate the work both of you are doing.

I know that in 2008 this committee worked on the Consumer Product Safety Improvement Act to strengthen and empower the CPSC. This bill had bipartisan support and made a difference in protecting the public, and I hope we continue in that vein.

I thought I would just ask briefly some questions, just what you have been touching on with our recalls.

Commissioner Kaye, I know that the CPSC has taken the lead on improving some of the recall processes for the Federal agencies, including the website recall.gov. However, the reality is not all consumers are aware of recalls; they don't really know where to look for them.

And what can be done to improve the way that recalls are publicized?

Mr. KAYE. Thank you, Senator.

And if I may digress for a minute, I want to congratulate you for your winning the National Consumers League award earlier this week, which was a recognition, a much deserved recognition, for all that you have done for consumers. And since I am in my official capacity here, I don't think our ethics lawyers can prohibit me from saying something to you about that.

[Laughter.]

Mr. KAYE. We have worked really hard to try to figure out——

Senator KLOBUCHAR. It would be sad to get an ethics violation for talking about a consumer award——

Mr. KAYE. It would.

Senator KLOBUCHAR.—so that is good. All right.

Mr. KAYE. During official testimony that I had so eagerly and excitedly showed up for.

It has been really challenging to try to figure out ways to better reach consumers. And as I mentioned in my opening testimony, this has been a decades-long problem. And I remember even hearing from folks at NHTSA that they, even with automobiles, have a hard time getting close to 80 percent with a car with a serious problem. And so, as my colleague mentioned, it is even more difficult when you talk about products that might be relatively disposable, have low value.

What we have found is that the more that companies can engage consumers directly, the more that they offer incentives, the more outreach that they do, the higher the value of the product, the more consumers are likely to act.

And I am serious about what I mentioned in my opening statement. It is frustrating to see companies tripping over themselves to get the attention of parents, in particular, of these products from a marketing perspective.

The basic assumption that they do when they are marketing it is, we really have to work hard to compete to get these parents to pay attention to our product, so we are going to spend all the time and the money and come up with very creative advertising to get them to focus on our materials.

But as soon as they make those sales, if those products are recalled, they take the opposite assumption. They assume putting it on some lower-tier social media account, if they even do that, is good enough to reach those same parents that a few months ago they believed were very distracted.

Senator KLOBUCHAR. OK.

Mr. KAYE. And so we are really looking for a greater commitment from industry, just match what you do on the marketing side. And we think that would make a tremendous difference.

Senator KLOBUCHAR. Good point.

Commissioner Kaye and Commissioner Buerkle—you have mentioned cars, Commissioner Kaye. The auto industry, as you know, recalled a record 64 million vehicles in 2014. Defective ignition switch with GM. We had the Takata airbag. We have had hearings here. We have now the ongoing Volkswagen issue, an unbelievable story which we won't get into right now.

But what do you think that NHTSA and the EPA can learn from CPSC's recall process? And what do you think the best practices are for this upcoming recall notification with Volkswagen?

Mr. KAYE. Again, reaching out to consumers directly, using creative social media approaches. And trying to put the best and the brightest within the companies and the PR firms and human-factors experts to try to reach and understand how to reach people, how to really work to capture their attention, I think, is one of the better lessons that I have picked up along the way.

Senator KLOBUCHAR. All right. Thank you.

Commissioner Buerkle?

Ms. BUERKLE. Well, I would say that, yes, social media. Things have changed with the development of social media. But the American people are bombarded daily, 24/7, with information, and I think on some levels, at least for CPSC, there may be a recall fatigue issue that we really need to address. What the Chairman said about understanding human behavior, what they listen to, what gets their attention, those kinds of factors must be considered.

But it is not just an issue of social media; it is looking at the product, it is looking at the consumer and understanding where they are going to get their information most efficiently and most effectively.

Senator KLOBUCHAR. Very good.

And just to one issue I am not going to ask but I will probably just do it in writing, detergent pods. Maybe in writing you could

give me a progress report on that. I know that the industry has come together with some changes, which is truly a good thing. And Senator Durbin and I and others have been involved in this for a while, and that is positive.

The second issue is pool safety. It has been in the news a little. I won't discuss how it may be in the context of the Presidential campaign.

But the Virginia Graeme Baker Pool and Spa Safety Act, as you know, was something that I worked really hard on. It was named after Secretary of State Baker's granddaughter, who tragically died in a swimming pool. And we had another girl in Minnesota where the same thing happened.

And, Chairman Kaye, could you talk about any updates we have on numbers? Because, from my perspective, we have seen a major decrease with only a little bit of work in terms of some drains, and the CPSC has done a great job of education.

And you might want to make it quick, so we can get to my colleagues here.

Mr. KAYE. The Act has been a tremendous success. That is the bottom line. The numbers have dropped. I believe we are still at zero deaths since the Act was passed.

Senator KLOBUCHAR. What an unbelievable story.

So thank you all for your work. It should make you feel good about what you do. And, every so often, we do a few good things here. So thank you very much.

Senator MORAN. Thank you, Senator Klobuchar.

Senator Daines?

STATEMENT OF HON. STEVE DAINES, U.S. SENATOR FROM MONTANA

Senator DAINES. That is a tough question to follow, Senator Klobuchar.

Thank you, Mr. Chairman, for holding this hearing.

Last time that you both testified, this committee had just passed the RIDE Act, which postponed the CPSC's controversial rulemaking for recreational off-highway vehicles.

In my home state of Montana, off-highway vehicle recreation, including ATVs and recreational off-highway vehicles, has an economic impact of nearly $400 million. These vehicles are essential for Montana ranchers, for farmers, for sportsmen to specifically travel off-highway.

ROVs are not meant to be operated on streets and highways and should not be regulated as such. Montana continues to see residents transition, and we are seeing it all the time, from ATVs and 4x4s to ROVs. So I am encouraged to hear that the CPSC and industry are working together to develop voluntary standards so that, hopefully, legislation won't be necessary.

Chairman Kaye, I am encouraged by reports the CPSC is working collaboratively on developing these voluntary standards that would mitigate negative impacts to the economy while still protecting consumers. What is the status of this ROV written negotiations between industry and the agency? And what do you see as the likely outcome?

And a follow-up on that would be, do you intend on terminating the mandatory rulemaking process?

Mr. KAYE. Thank you, Senator. I am pleased to continue the dialogue that we have had in the past on this important issue.

You are correct, the trend has been very positive. And considering where both Commissioner Buerkle and I entered this about a year-plus ago—for Commissioner Buerkle, 2 years for me; in the last year in this position—the tone has changed tremendously for the positive. The negotiations, even including—I believe it was this past Monday there was a long meeting, which all reports were extremely productive.

I think we are close. Or they are close, I should say, because we stay out of it. My hope is that they will see it through.

I think what is critical—and you mentioned the RIDE Act—is that those technical issues that the RIDE Act would have us study through the National Academy of Sciences have been worked out, as far as I understand it, and they are really just down to some final number choices to figure out where along the risk spectrum everyone can agree which vehicles pose a reasonable risk and which ones pose an unreasonable risk.

And the reason I mention the RIDE Act is, my hope is that if there is an agreement reached—and this is critical—if there is a voluntary standard agreement reached, it is very important that that rider or any type of rider that would force the Commission to spend money studying those technological issues doesn't go through, because it would be a waste. The issues will have already been resolved, and it will require the agency to spend money unnecessarily. And it really will delay us seeing through the final aspects of this voluntary standard.

If there is an agreement reached and our staff believes that it adequately addresses the hazards and it will be substantially complied with, then they would send up a package for the Commission to vote, along the lines of what you are talking about, to terminate the rulemaking.

Senator DAINES. Right. Thank you.

Commissioner Buerkle, you have been involved in that process too. What is your perspective?

Ms. BUERKLE. Thank you, Senator.

Well, I am optimistic, as well. I attended, I have attended all of the meetings, in particular Monday's meeting, and I am optimistic that—really, I must commend both sides for working as diligently as they did.

But I really do feel that the legislation should stay in place until the mandatory standard in the rule is removed. Because there needs to be clarity, and I think that is the clarity. When that mandatory rule is taken off the books, then the RIDE Act can go away.

I think the agency learned a lot from this experience. And I really do want to encourage us; we should be engaging with the regulated community prior to proposed rules, because a lot of time was wasted trying to get to—as the Chairman mentioned, we started out so far apart. And if we could have that dialogue before a proposed rule comes out, I think we begin at a closer place and we certainly can shorten that time for——

Senator DAINES. Yes. And I applaud the collaborative effort that has been going on.

Ms. BUERKLE. And the other effort, I think, is the agency, we learned a lot from the industry. They came up with a testing method for vehicle stability that has profited everybody in terms of the knowledge and the information, and our staff was so pleased to get that information. That is collaborative effort, that is working together, and we need to be open to that kind of effort.

Senator DAINES. And to build on that, speaking of collaboration, I know the U.S. military has purchased a large quantity of ROVs for military use in Afghanistan as well as around the world.

Given the military's extensive use of these vehicles in the most extreme conditions, has the CPSC asked the military about its experience with the safety of the vehicle or its views on design or performance?

Mr. KAYE. Yes, Senator, we have engaged the military. And since any ROVs that the military would specifically purchase for military use would not be subject either to the voluntary standard or the mandatory standard because they are not consumer products, I don't have a concern that we would unintentionally create an issue for the military.

Senator DAINES. All right. Thank you. I am out of time.

Senator MORAN. Senator Daines, thank you.

We are now joined by the Ranking Member of the Full Committee, Senator Nelson.

Welcome. If it fits your schedule and you are prepared, you are welcome to question our witnesses or make a statement.

Senator NELSON. Do you have any more questions?

Senator MORAN. We are going to have another round, and it appears that you and I are—you have the first round and I have the second round.

Senator NELSON. You go ahead.

Senator MORAN. All right. Very good.

Let me then turn to Commissioner Buerkle.

You heard the Chairman indicate about the Voluntary Recall Rule, the intentions, which as I have tried to restate and I think the Chairman agreed with the way I restated it, which is they are going to be included in the 2016 plan, but no intention now or the foreseeable future to pursue that rule.

Your reaction to the Chairman's statements?

Ms. BUERKLE. Thank you, Senator.

In my opening comments, I talked about uncertainty. And this rulemaking looming, it looms large over the regulated community. And when I hear the Chairman say "should we turn to it," that creates a lot of questions in the regulated community's mind.

The second piece about this voluntary recall, the proposed rule, is that it is toxic. As soon as you mention it, the regulated community, everyone, just sort of groans because of the concern and all of the negative comments we received about it.

And I have talked to the Chairman, and I will continue to do that. I think the best way to proceed is to get it off the books, have that dialogue you have asked us to have with all of the stakeholders, and then proceed in an orderly manner.

But if I could very honest about this, I think we have complied with the statute. We have the mandatory rule in place. We have guidelines in our recall handbook for voluntary recall notices. I think we have complied. If we need to modernize this rule because there are components of social media that may enhance our voluntary recall notices, so be it, but I don't think that that would necessitate any rulemaking. We could perhaps do that in our handbook, or we could modernize the mandatory rule. There are a lot of options here.

But in all of what we do, the best way we are going to achieve safety for the consumer is to have good relationships. And I think this would be a really good-faith effort on behalf of the agency that we withdraw this rule and we start again and we discuss what do we need to enhance, as Senator Blumenthal mentioned, our recall effectiveness. Will social media help that? If so, how can we do that?

But to continue on with this very—I call it toxic because, the Chairman knows, it makes everyone cringe as soon as you mention it. And there is a lot of pressure from within the agency, from other commissioners; they want to proceed with this. So it puts the Chairman in a difficult spot.

So I think for the sake of everyone and for clarity for the regulated community, if we take it off our books, if we start again, if we have that discussion and we determine what we really need to perhaps enhance recall effectiveness, that would be a more prudent way to proceed.

Senator MORAN. Mr. Chairman, is there anything you can do today to eliminate uncertainty and provide clarity?

Mr. KAYE. Thank you, Mr. Chairman. I am honored you think that I even sit in a position that has that capability.

[Laughter.]

Mr. KAYE. I would disagree slightly with my colleague, who I really do have a wonderful relationship with. That is not lip service. Every week, we sit down and talk individually, and even though we disagree on many issues that we talk about, we do get along very well personally, and I really value her input.

I don't have the same experience with the regulated community, and I also don't think you can call the regulated community one entity. For me, there are two different conversations that I have with industry whose products that we do or could regulate.

When I get outside of Washington, which I do often and try to do within the means of our budget, and I sit down with companies and I talk to them on their home turf, in their factories, about what is concerning them, this rule never comes up, ever. And then I raise it, and they give me a blank stare. They don't know what I am talking about.

I believe that this rule and the toxicity, the churning that is associated with it, is not an accurate reflection of what is actually going on in corporate boardrooms and in company headquarters outside of Washington. I think that it is the product of a smaller group that pays closer attention to us that sees value in highlighting controversial aspects of it.

And I think it is important for us to make sure that when we talk about the regulated community and talk with the regulated

community, that we are hearing from those who are actually affected by what we might do, not those who purport to represent those companies.

Senator MORAN. How do you consider what former Chairwoman Brown said in her letter, particularly as it relates to the Fast Track Product Recall Program? What is the consequence of this rule, potential rule, to Fast Track?

Mr. KAYE. Well, this is probably not something witnesses normally like to do, but I admit I don't understand her concerns. She is by far the standard against which any chairman should measure him or herself. She is a legend at the agency, and I very much value what she has done and her opinion. But I have had a hard time reconciling her concerns, as were expressed in her letter, with the rule itself. I am just not seeing it. And I have asked folks who are far smarter than I am, and I just haven't been able to pick up on what the concerns are.

Senator MORAN. So you don't see the potential rule as a problem related to Fast Track?

Mr. KAYE. I don't. I don't understand why it would be. If Fast Track, as far as I understand it, is a prepackaged agreement, and if companies, whatever the requirements are of Fast Track, if companies still want to go down that route, whether it is legally binding, not legally binding, whatever it ends up being, if they agree to pursue that route and they want to go Fast Track, then they are still going to do it.

As far as I understand it. But, again, I might be missing something when it comes—she probably has, as the creator of that program, a far better understanding and a more nuanced understanding of how she sees that program.

Senator MORAN. Commissioner Buerkle?

Ms. BUERKLE. Mr. Chairman, the Fast Track Recall Program allows a company to come to us and say, I think this may be a problem, I think perhaps it should be considered being recalled. Our staff does not make a preliminary determination that there is a substantial product hazard. So they don't go through that analysis, and the product is recalled. That is the kind of behavior we want to encourage.

But if you put compliance plan, you put legally binding, and you add all of these factors into that, that slows that process way down. And this is someone who is coming to us voluntarily saying: I think, I am not even sure, I think this may, you know, create a hazard. Our staff with the Fast Track doesn't make the preliminary determination, but we get that product out, we err on the side of caution.

We are telling manufacturers, we are telling retailers: when in doubt, report. We want to encourage that behavior. And if we add all of these bells and whistles to this, we are going to slow down and impede the Fast Track Program.

Senator MORAN. Let me get to two other topics quickly.

First of all, let me explore something that, Commissioner Buerkle, you and Senator Blumenthal, the conversation you had. I am interested in the answer about the 10 percent, what that includes and what it doesn't include. But I want to know if you have

access to the data that you described as being the best criteria to determine success or failure of a recall, death or injury post-recall.

So does the Commission have that data available? That is a standard that could be determined?

Ms. BUERKLE. Yes. The commission does receive that data.

Part of our problem, as I mentioned earlier, is so much of the recall information we get comes through a secondary party, through the recalling firm. That is an issue we have. Oftentimes, it will come later on in another form.

But when a corrective action plan is put into place, and they are part of the reports that they are requested to submit on a regular basis, that will have any followup injury data or death information.

But we do track those numbers the best we can given all the limitations and the issues with data integrity. But we do track those. And from what I understand from Compliance, those numbers are good, post-recall, the rates of injuries and deaths.

Senator MORAN. Thank you very much.

Let me turn to the Ranking Member, Senator Nelson. And I just have a couple more questions after Senator Nelson.

STATEMENT OF HON. BILL NELSON, U.S. SENATOR FROM FLORIDA

Senator NELSON. Thank you, Mr. Chairman.

If I may submit for the record an opening statement?

Senator MORAN. Without objection.

[The prepared statement of Senator Nelson follows:]

PREPARED STATEMENT OF HON. BILL NELSON, U.S. SENATOR FROM FLORIDA

Thank you, Chairman Moran and Ranking Member Blumenthal, for taking a look at an issue that should cause alarm for all American families—and that is our terrible track record for notifying and remedying recalled consumer products.

It's been seven years since we passed the Consumer Product Safety Improvement Act, and that law has greatly contributed to public safety.

However, the completion rates for recalls remain stubbornly—and alarmingly—low. Too many dangerous products remain in consumers' homes.

Parents expect to be notified promptly and clearly if it turns out that a toy they bought for their children could actually maim or kill them.

And parents expect to be told how and when they can get that defective toy fixed or replaced.

But, as we all know, that's not happening.

The recall completion rates for consumer products—including children's products—are so low it's just sad.

According to one of the consumer groups that will appear before the Committee today, Kids in Danger, the recall effectiveness rate in 2012 for children's products was terrible—with only about 4 percent of those products reported as being either corrected or destroyed.

That makes the recall rates for the defective Takata airbags and the General Motors defective ignition switches look great by comparison.

And, let me tell you: Neither Takata nor GM has any reason to be proud of their track records when it comes to recalls.

So, why are recalls for consumer products so ineffective?

The answer seems obvious to me: Because companies are under no legal obligation whatsoever to notify effectively and to actually carry out the recall.

Yes, a company may do the right thing by letting CPSC know about an unsafe or defective product and by coming up with a voluntary recall—known as a "Corrective Action Plan"—to get the product out of consumers' homes. But what good is that if the company doesn't follow through and take the steps it promised to take?

An unsafe product doesn't magically become safer if a company's recall is voluntary instead of mandatory, so why should a company be able to pretend that's the case?

That's why I urge both the Commission and industry to do better.

We must figure out a more effective way to get these products out of the hands of consumers—out of the hands of children.

We all know that the current system is not working.

We must do better.

And doing better can't simply be the status quo, which too often seems to be a completely voluntary process that just doesn't get the job done.

Thank you, Mr. Chairman.

Senator NELSON. Thank you for the opportunity, Mr. Chairman.

This is a little commission that I appreciate so much, because you are the one group that is standing between defective products and the consuming public. And I want to give you two examples that, unfortunately, I had been personally involved in.

The first is, after our state was pretty well covered up by a number of hurricanes in 2004 and 2005, there was a lot of building that occurred to repair the damaged structures, and there was such a demand on building materials that wallboard started coming in from China that was not only defective but it was so filled with sulphuric gas that it was not only hazardous to the health of people that were living in the houses but it would turn all of the metal objects, including the silverware, brown in the entire house. This is how bad it was. Now, not the least of which, you could tell it when you walked in the house because it smelled like rotten eggs.

I had to get involved, because we had a lot of people in Florida that were affected by this. And, lo and behold, these people had turned to their insurance company, and the insurance company said, "We don't know you." They had turned to their bank to try to work with them, because in many cases their pediatricians were telling them, "Get the children out of the house," and they would have to go and rent someplace. And often what had happened is they had turned to the builder of the house, and the builder had gone bankrupt or they had moved on.

And so these folks, they didn't know where to turn. And so your handy-dandy Senator from Florida actually went to China, and, of course, I got the actual brush-off.

That is where your agency comes in, because we got you to start doing tests and so forth. And the long and short of it is that the only financially responsible party was, in some case, the insurance companies of the distributors.

I even met the Chinese president in a diplomatic reception, and of course didn't expect that he knew anything about it, but confronted him with the issue and outlined what is happening.

The government of China has kept hands off. The government of China often is an investor, if not the owner, of these companies that were mining it. They traced it to a particular mine where this wallboard was using that material.

Now, that is one very bad example for the American consuming public, and there were a lot of people that were harmed. And only years later are they getting part compensation because of the lawsuits that occurred.

I will give you another one. The origin of this one is also China. We had a number of children that were harmed and choked to death because of defective Chinese toys.

It is your organization that stands in the way of these defective products and the public being harmed. What are you doing to make

sure, Mr. Chairman, that the Chinese manufacturers and distributors stand by their products and actually carry through with the recall of the toys and the recall of the wallboard?

Mr. KAYE. Thank you, Senator. And, of course, thank you for your years and years of leadership in terms of revitalizing this commission and giving us some of the tools that we have needed to do exactly that.

The first step in this process is to stop products at the ports before they ever get into hands of consumers. And thanks to Congress's direction in section 222 of the Consumer Product Safety Improvement Act, we did create a pilot program to begin better targeting at the ports.

We cannot get that to a national scale, though, without more funds from Congress, both in the form of a direct appropriation as a bridge and, ultimately, we think, consistent with other agencies' border authorities, a user fee that is reasonably pegged to be able to give us the resources to turn that pilot into a national-scope, data-driven enforcement tool. So that is critical on the front end.

On the back end, we actually have, over the past few years, developed a far better relationship with the Chinese government. It is a bit counterintuitive in light of what you said, where there is at least a belief of a financial incentive with the government in some of these companies. In many of those areas, that has not prevented them, as far as we can tell, from actually taking information that we share with them post-recall and post-port-stoppage when we have actionable information, where they can go in and do something about it.

We also have a presence on the ground in China in the form both of CPSC staff and also a foreign national who supports that staff at the State Department. And I think that we are building toward a more effective agency, but in the absence of having the resources to really push beyond our borders, it is going to continue to be a challenge.

Senator NELSON. Do you need additional authority?

Mr. KAYE. We certainly need the user-fee authority. Absolutely.

Senator NELSON. All right.

Now, a few years ago, we were talking about a bill called the Foreign Manufacturers Legal Accountability Act, in which they would have to appoint a U.S. agent, so if people were hurt by their products, we wouldn't go through this nonsense that we have gone through on the defective Chinese wallboard. Would that help?

Mr. KAYE. That would help tremendously. Absolutely.

Senator NELSON. Is there any provision in the corrective action plan negotiated by the Office of Compliance that contemplates such a later action for a recall failure?

Mr. KAYE. In terms of having a U.S. presence when there is a foreign manufacturer?

Senator NELSON. On any kind of recall remedy.

Mr. KAYE. It becomes far more challenging for us when it is a foreign entity. And so, unfortunately, it is not as robust as I would like to see it.

Senator NELSON. What about the compliance and the actual consumers that are subject to these defective products? Their willing-

ness to come forward is pitifully low. It is something like only 4 percent. So does this corrective action plan address that?

Mr. KAYE. It attempts to address it, but, as you are pointing out, it is often not that successful, which is why we are taking a fresh look at trying to figure out how can we be more creative and, ultimately, how can companies do more to try to make those agreements more effective.

Senator NELSON. That is a problem we ought to continue to look at. Because you get particularly a foreign product that comes in and it is defective, and yet people don't realize it. And so the ones that have come forward are just de minimis. And yet the defective product is out there, choking children in the case of the defective Chinese toys.

Senator MORAN. Senator Nelson, thank you. We are happy to use this subcommittee's jurisdiction to explore a number of issues related to certainly consumer protection.

I also would use this opportunity to indicate that in a couple of instances, Mr. Chairman, you indicated a need for additional resources. That is not an unusual statement by any witness in any setting here.

I serve on the Appropriations subcommittee that has jurisdiction over your commission. You indicated the need for additional resources for data, big data, and here in this import surveillance issue. I would be happy to encourage the Chairman of the Subcommittee to have a CPSC subcommittee hearing related to your Commission, at which you would have the opportunity to make the case for those resources.

I am an optimist, in the sense that I believe we are not going to have another—at least another series of continuing resolutions and believe that we are going to do an appropriation bill. And I think it is a place in which we can help prioritize spending at the Commission based upon the input of yours and others.

Mr. KAYE. Thank you, Mr. Chairman.

If I felt—and hearing you, I think you are saying I would have this opportunity—if I felt that there was a genuine receptiveness, despite the budget climate, for the Congress to hear us out and to recognize that there are two different CPSCs you can have—you can have the CPSC that is funded, in my perspective, at a very artificial level. Because it has always been funded in that general area, and regardless of what problems exist, that is just the money it is going to get.

Or you could have the CPSC that actually is able to step in and address things that I think parents are expecting to be addressed—crumb rubber, phthalates, flame retardants. There are so many different areas—portable generators, drowning prevention, ROVs, ATVs, window coverings. Every day, as I mentioned earlier, I get these reports. These are ongoing issues. We are not even remotely close to being funded at the level that would allow us to really make a difference.

So if I thought that there would be an interest in having that honest discussion, recognizing that we have limitations, too, and we would have to own up to our mistakes over the years, which I am willing to own up to, where we have thought that one thing would be the answer and it turned out not to be the answer and

we may not have used our funds as efficiently as possible, if we could have that discussion, I would absolutely love to have that discussion, either in the form of a hearing, or a meeting at our lab so folks can understand how we have used the appropriations. In any context, I would absolutely show up.

Senator MORAN. I appreciate those sentiments. I would indicate that, of the two topics that we talked about additional resources, one of them is included in the president's budget request, one is not. So it involves others other than just Congress. It involves your commission and the OMB and the administration.

Let me ask Commissioner Buerkle, any response on the funding issues?

Again, we all face constraints. None of us get to spend the money that we want, but there is a matter of prioritization. But I am very anxious for the day in which not every item of spending is considered of equal value.

And you can certainly make the case and I think many members of Congress have believed that a priority should be the safety of consumers. And as you describe it, who could disagree with that? So the opportunity that we have is certainly restricted, but what a great day it would be if we had the opportunity to say, "We are going to spend more money here because it is more important."

And at too many instances, with no budget passed by Congress and an appropriation process stalled, we just continue, in a sense, from 1 year to the next without determining what matters the most based upon what you tell us, based upon what we hear from our constituents, based upon what we think is important in our hearts. We don't have the opportunity often enough around here to actually utilize the power of the purse to try to deal with the most important problems that our country faces.

Commissioner?

Ms. BUERKLE. Thank you, Mr. Chairman. I do have a couple of things I would like to say about that.

Number one, with regards to retailer reporting, you mentioned funds for data. We have a current program in place right now where there are seven participants. And the Chairman said you could hardly call it a program, but I think a lot of retailers have depended on that program to meet their reporting responsibilities. And we have relied on that information. It is very valuable to us.

To Senator Nelson's point, he is talking about catching Chinese, you know, either defects or a violative product. The best way to do that is on the front lines with the retailers.

And so, I guess, in general, what I am encouraging our agency to do is, we can't wait around for additional funding. There are so many issues with that. If we think something has value, we need to reshift and look at our priorities. Perhaps we could move away from the civil penalty and some of those resources and move those resources over to make sure retailer reporting gets a fair deal.

I think there are—we talked about import surveillance. I am opposed to the user fee. I think it is unconstitutional, and I mentioned that the last time I was here.

But, as an agency, if it comes to crumb rubber, if we think crumb rubber is an emerging hazard or risk, we need to address that. We can't wait and sit back on our laurels and say, "Well, if we get the

funding." I think the agency has a far more important mission, and that is to make sure we are on the cutting edge. If we identify a hazard or a risk or we think it is, it is a question of shifting priorities and making sure that we attend to what is most important.

With regards to import surveillance, we do have the capability right now to be at all of our ports. In terms of the data, it is a question of people reviewing that data. But it is national, so to speak, because we are getting the information from all of the ports. But it is a question of making sure we look at that data.

So there are ways to, I think, reshift our priorities, make sure we are tending to what is most urgent.

I think collaborative efforts with the regulated community, whether it is retailer reporting, in so many levels, is the key to consumer safety. Having them work with us and we not working against them is how we are going to best affect consumer safety. Because they are willing to work with us, and I think the conversations that have gone on within the agency, whether it is higher civil penalties or something, they alienate. And I think we need to draw the regulated community closer to us.

Senator MORAN. Thank you very much.

A couple other things I just want to touch briefly, and then we will move to our next panel.

First, I want to express my concern about the general counsel's reinterpretation of section 15 as it relates to the consequences, the privacy consequences, of someone reporting under the Retailer Reporting Program. I am worried that we are going to diminish the value of that program.

And then, second, Mr. Chairman, we had a conversation at our hearing on June 17 in which I raised the topic of fireworks and the audible standard. My understanding from our conversation, your testimony that day was, by the end of the Fiscal Year, a few days ago, that there would be some resolution or at least development in regard to trying to get a subjective standard. We talked about the science of this issue.

And I just would ask you again if we are there and if you could fulfill my request for some certainty there.

Mr. KAYE. Thanks, Mr. Chairman. And you are right. Your memory is very good. I did say that we would have by the end of this past fiscal year a package from the staff. And as I mentioned earlier, sometimes everything that is being worked on just doesn't make it up by a certain deadline.

The package is close. I know that they wanted to do a little bit more technical work. But I am hopeful, when they send that package up—which, again, we are going to live by our commitment to send that to your office—that we will be moving toward a road of much more certainty.

Senator MORAN. I am not quibbling about 7 days.

Mr. KAYE. OK. I appreciate that.

Senator MORAN. I just wanted to raise this issue with you again and ask for your assistance.

Mr. KAYE. Absolutely.

Senator MORAN. Thank you both very much for your testimony, and we will call the second panel to the table. Thank you.

Mr. KAYE. Thank you.

Ms. BUERKLE. Thank you very much.

Senator MORAN. And that panel consists of Mr. Frederick Locker, who is a Partner with Locker Greenberg & Brainin, on behalf of the National Association of Manufacturers; Mr. Jonathan Gold, Vice President, National Retail Federation; Ms. Cheryl Falvey, Partner at Crowell & Moring in Washington, D.C.; and Ms. Nancy Cowles, Executive Director, Kids in Danger, Chicago, Illinois.

Mr. Locker, welcome. And to all of you, welcome to the Committee. And we look forward to—I look forward to hearing your testimony.

STATEMENT OF FREDERICK (RICK) LOCKER, PARTNER, LOCKER GREENBERG & BRAININ, LLP, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. LOCKER. Thank you, Mr. Chairman. We welcome the opportunity to be here and talk with you today about these very important issues.

So I have spent more than 30 years focusing on improving safety standards for a wide array of children and other consumer products. And maintaining an effective, expedient recall or safety alert process, I believe, is in everyone's interest. It is and should remain a nonpartisan issue.

I appear before you as a member of the National Association of Manufacturers' CPSC Coalition, which provides a unified voice for manufacturers and retailers on CPSC-related issues. We are comprised of manufacturers, retailers, trade associations, a wide array of stakeholders within and without a variety of industries.

We are committed to consumer product safety and working in cooperation with the CPSC, an agency we have supported for many, many years. And we have a shared interest and goals in risk reduction and hazard avoidance. We encourage improved collaboration between all stakeholders, the Commission, and its staff. And we have supported the mission of the agency and, importantly, funding for it, as well, for many, many years.

Now, in November 2013, the CPSC issued a proposed rule that you have focused on here today. And while well-intended, we came to the conclusion that it could negatively impact the Commission's voluntary recall remedy process.

And let's understand what we are talking about. Most recalls, clearly, you know, 99.5 percent of them, are what we call voluntary recalls today. They may occur because of a violation of an act or a regulation, which is in the minority, but most occur because of unforeseen circumstances and are developed and implemented voluntarily by companies in collaboration with the agency.

This year, as you have noted, it remained in the operating plan, despite comments that such a rule is not a priority and that it needs to be reworked.

So, for nearly 40 years, you know, manufacturers and retailers have extensively participated in the Commission's plans. Now, the CPSC proposed rule includes, as you have noted, several substantive provisions that would unfavorably alter the cooperative process—at least, that is what we believe—by which firms work with the Commission to implement these voluntary recalls.

These substantive provisions would require firms to execute legally binding agreements in the doc compliance programs as part of a voluntary corrective action plan. So, rather than improving these recalls, they could negatively impact the efficiency, cooperative spirit, and the speed that is evident in the current voluntary recall process. And this could be the detriment of consumer product safety.

And CPSC has noted that 90 percent of recalls initiated through its, as you have cited, award-winning Fast Track Program were commenced quickly and occurred with relative speed and alacrity. We are concerned that there is a current creeping, if you will, a paralysis by bureaucracy before it gets to that point. And, actually, the Fast Track recalls, which the former chairman of the agency, a Democratic chairman, cited to, has actually become a much slower process than it used to be.

I am not saying that when it rises to the Commission level that they don't act fast. I am saying it is taking longer to get to that level. So, in that regard, we say do not diminish the existing reporting and recall process that is flexible and effective.

We say do not require over-lawyering of negotiated voluntary actions. Remember, most businesses that are in our members, 80 percent of them, and 90 percent of American businesses are small businesses. They are the job creators. They tend to approach these agencies in a cooperative fashion. They want to negotiate. Very often, they want to implement corrective action plans or do recalls. And they want to do so without having to engage a lawyer, which can be expensive, with all due respect to my brethren in the legal community.

So we don't want to take that away. We don't want to create additional liability or have factors that come into play that would require them to over-lawyer and delay the process. We want it to proceed in an efficient manner.

We say, as part of that, you shouldn't require automatic admissions of disclaim liability or a defect in a plan. In the commission's own recall handbook, in your own rules, in your own statutes, you say that there is not a presumption of defect or liability. But yet, in this rule, it would impose one.

So that is why we think you had a lot of comments in opposition to it, and that is why I think both commissioners recognize there needed to be a change.

And, finally, we believe the Commission can actually already act should the public be at risk. So, as Senator Nelson noted, if there is an imminent hazard, the Commission has ample authority to act, and it can act against any distributor, manufacturer, or retailer of that product. And they do so. And that is what experience tells us; they have that authority.

And, finally, compliance assurances, which were built into the rule, should not be part of a voluntary corrective action plan, which should stand on their own so that they can be efficiently and quickly implemented.

And, in conclusion, I would simply say, as in the medical community, I would cite to the Hippocratic Oath, which is, "Do no harm," and the same should apply to safety regulators. We all have an in-

terest in promoting safety and making sure it is effectively carried out.

In short, we believe that collaborative processes, which many people here today have talked about, that promote voluntary corrective actions in a timely, expedient manner should not be undermined by imposition of additional extraneous requirements that could hamper flexible and creative solutions that often come into play in the voluntary-initiated recall processes, distinct from mandatory recalls.

The commission should consider a refined communications strategy for such action plans that clearly identify and communicate the hazard sought to be remedied and the remedy available. Not every action needs to be labeled a, quote/unquote, "recall." Experience indicates that alerts, information and education efforts, and offerings of accessories that enhance safety by product category can reduce misuse and can be extremely beneficial to the American consumer and to American business.

Safety is good business. Safety is an important aspect of business. If you don't have that reputation for selling safe products, you are not going to be in business for a very long time.

Maintaining this flexible system that encourages and rewards such efforts we believe is highly, highly desirable. And we welcome the recently noted collegiality among the commissioners, as they have talked about, and would urge all of them to work toward noncontroversial, effective solutions that actually enhance creative, expedient, voluntary recalls.

Thank you.

[The prepared statement of Mr. Locker follows:]

PREPARED STATEMENT OF FREDERICK (RICK) LOCKER, PARTNER, LOCKER GREENBERG & BRAININ, LLP, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Chairman Moran, Ranking Member Blumenthal and members of the Subcommittee on Consumer Protection, Product Safety, Insurance and Data Security, thank you for the opportunity to testify about the U.S. Consumer Product Safety Commission's (CPSC) voluntary recall process. My Bio is annexed.

I appreciate the opportunity to appear before you as a member of the National Association of Manufacturers CPSC Coalition, which provides a unified voice for manufacturers and retailers on CPSC-related issues. The NAM coalition is comprised of manufacturers, retailers, trade associations and law firms representing the array consumer product industries. Many of the CPSC's initiatives directly impact the collective of industries. Even industry-specific initiatives can set a precedent that impacts all manufacturers and retailers of consumer products. Members of the NAM CPSC Coalition are committed to consumer product safety and working in cooperation with the CPSC in furtherance of shared goals of risk reduction and hazard avoidance. We encourage improved collaboration between all stakeholders and the Commission and its staff before the Commission puts forth significant policy proposals. Cooperation with stakeholders while the agency is developing changes in substantive policies would lead to improved proposals and reduces the potential for conflicts or unintended consequences of that can arise. Too often, though, stakeholders and the rest of the public are provided limited notice of significant proposed changes to policies that could greatly impact the abilities of both the Commission, related government agencies and businesses to minimize risks posed to the public.

In November 2013, the CPSC issued a proposed rule (78 Fed. Reg. 69793) that could negatively impact the Commission's voluntary recall process and would place significant burdens on manufacturers and retailers. The CPSC conducted no public outreach as it developed its proposal. Despite extensive opposition to the proposed rule, the Commission voted in May to keep the issuance of a final rule in its FY 2015 operating plan. The Commission took this action despite repeated comments by Chairman Elliot Kaye that the voluntary recall rule is not a priority because it would not necessarily improve safety.

For nearly 40 years, manufacturers and retailers have watched and participated in the Commission's voluntary corrective action process. They have reported potential safety problems and undertaken voluntary corrective action for various reasons; sometimes out of an abundance of caution, protecting consumers by preventing future incidents and standing behind their products. For that reason, the CPSC's current system geared to encouraging expedient voluntary recalls has been and continues to be relatively effective in ensuring appropriate notifications to the CPSC and voluntary recalls in furtherance of product safety or availability of improved products to customers and consumers. Simply stated, the existing voluntary recall process has proven an efficient and effective way of quickly addressing product safety concerns or providing consumers with options to enhance products in their poses session. There is no preponderance of data to support the conclusion that the CPSC's current approach to negotiating voluntary corrective actions is deficient or in need of radical change.

I. Executive Summary and Background

The CPSC's proposed rule includes several substantive provisions that would unfavorably alter the cooperative process by which firms work with the Commission to implement voluntary recalls. These substantive provisions would require firms to execute legally binding agreements and adopt compliance programs in voluntary corrective action plans. Rather than improving recalls, the proposed rule in its current form could negatively impact the efficiency, cooperative spirit and speed of the CPSC's voluntary recall process to the detriment of consumer product safety. Manufacturers and retailers are concerned that these proposed changes raise policy concerns that could negatively alter the longstanding process for implementing an expedient voluntary recall in cooperation with the CPSC.

For a number of reasons that will be discussed, the proposed rule is unnecessary, could substantially erode the success of the Commission's voluntary recall process, could undermine due process afforded under the Administrative Procedure Act (APA) and is not required under the Consumer Product Safety Act (CPSA). In the absence of any data that the CPSC's existing voluntary recall framework is inadequate and because aspects of the proposed rule are not needed per statute, I urge the Commission, consistent with comments in opposition and recent statements made in relation to the noticed rule to withdraw it at this time.

I also encourage the Commission to cooperatively develop with stakeholders strategies that will improve the effectiveness of recalls and accomplish the desired policy objectives in a flexible fashion. The proposed rule as drafted, could significantly impede and undercut the Commission's current relatively expedient voluntary recall practice. Careful consideration by the Commission in consultation with stakeholders would be preferable to precipitous action that might require correction later. The Commission should engage all interested parties—consumers, industry and staff—in constructive meetings to discuss ways the current corrective action process might be enhanced, if required based upon the evidence before it.

II. The Existing Recall Process is Effective

Throughout its history, the CPSC has relied on reporting and voluntary corrective action plans to remove hazardous products from the marketplace. While there have in rare instances been disputes between parties, delays or disagreements, the staff has adequate tools to obtain the desired corrective action or to address the risks. There are no published data to support the conclusion that the existing voluntary recall process is inadequate. In fact, the CPSC recently noted that 90 percent of recalls initiated through the CPSC's award-winning Fast Track recall process were commenced within 20 working days of notifying the Commission.[1] In light of such recent data showing the success of the existing voluntary recall process, the proposed rule's more substantive changes are plainly unnecessary and the Commission should withdraw the proposed rule. There is a compelling cliché that applies to the context in which this rule is proposed: "If it ain't broke, don't fix it." There is often wisdom in such clichés, and that wisdom has seemingly been ignored for certain aspects of this proposal.

III. The Proposed Rule Would Negatively Impact Implementation of Voluntary Recalls

The Commission asserts as background that the "Consumer Product Safety Improvement Act of 2008, Public Law 110–314, 122 Stat. 3016 (2008) (CPSIA), amended the CPSA to strengthen the CPSC's authority to recall products and to notify the

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

public effectively about the scope of a recall and available remedies" (78 Fed. Reg. 69794). Unfortunately for the reasons set forth in more detail below, the proposed rule would create impediments to the Commission's voluntary recall process and reduce recall effectiveness. There also has been no convincing data to support the conclusion that the proposal is necessary or that there is a problem that the Commission does not already have the authority and tools to address.

Rather than enhancing recalls, these provisions will make it more difficult for companies and compliance officers to undertake recalls. The proposed changes will extend the period of negotiation between a subject firm and the CPSC staff, slowing down or impeding agreement on corrective action plans. Disputes over descriptive language and format conventions of recall notices can delay the process without any measurable positive impact on recall effectiveness. Any delays in implementing a recall can result in increased risks to consumers. At the same time, the proposed provisions will force firms to more often seek the advice of counsel and will likely make the recall negotiation process more complicated and adversarial than necessary. This is contrary to the stated goal of such rule.

Perhaps most important, the CPSC's proposal will fundamentally change the cooperative relationship between industry and the Commission that has resulted in thousands of reports and voluntary recalls. There is simply no evidence that any of these changes are necessary, that they will improve recall effectiveness in any way or that they add in any measurable way to protection of consumers. Instead of enhancing the current recall process, this proposed rule will be counterproductive in the Commission's efforts to improve the effectiveness of recalls. New substantive requirements and increased enforcement jeopardy could have a chilling effect on how firms communicate and cooperate with the Commission—delaying the recall process.

Ultimately, consumers have to cope with an incredible amount of product information and information overload is a real problem that affects consumer response to recall notices. Many factors besides seeing a notice likely affect consumer response and recall effectiveness.[2] The CPSC may consider addressing this concern by working cooperatively with stakeholders, as the high number of recalls for products posing little or no risk has arguably reduced the effectiveness of efforts to protect the public from actual risks. This is a significant issue that likely has far more impact on the effectiveness of the CPSC recall program than anything in this proposed rule. The proposed rule does not help with this problem. If anything, it increases the amount of negotiation and workload for the staff no matter how serious the risk of injury and does little to eliminate the problem of consumer information overload or to help consumers decide how to respond to CPSC recalls.

IV. The Statutory Pretext for Proposed Substantive Provisions is Unjustified and Does Not Comply with Required Rulemaking Procedures

The preamble to the proposed rule recognizes that section 214 of the CPSIA directs the Commission to issue guidelines for notice in mandatory recalls ordered after a substantial product hazard hearing. The Commission has in fact issued that regulation.[3] The preamble goes on, however, to suggest that the House of Representatives' committee of jurisdiction "explicitly expressed an expectation that similar information would be provided, as applicable and to the greatest extent possible" in voluntary recall notices. The Commission's assertion that the House committee, through a committee report, directed the Commission to issue regulations for the content of voluntary recall is incorrect and misrepresents the legislative history of the CPSIA. The actual language referenced by the Commission as providing authority to regulate voluntary recalls is provided below:

> *Subsection (c) further amends Section 15 by adding a new subsection (i) requiring the CPSC by rule to set guidelines on a uniform class of information in mandatory recall notices under subsection (c) or (d) or under section 12 of the CPSA. The guidelines should include information helpful to consumers in identifying the specific product, understanding the hazard, and understanding the available remedy. The Committee expects that similar information will be provided, as ap-*

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[2] Commission "Recall Effectiveness" literature study, 2003. That study noted the need for additional research but there is no public information that shows that such research has taken place and it is not cited in the proposal. The Commission should focus on developing a tiered approach to recalls that measure success on the basis or relative risk and outreach, in lieu of metrics focused solely on product returns, which are impacted by a myriad of external factors beyond the control of CPSC or Industry.

[3] 16 C.F.R. §§ 1115.23–29, 75 Fed. Reg. 3355 (Jan. 21, 2010)

plicable and to the greatest extent possible, in the notices issued in voluntary recalls.[4]

In citing this language, the Commission makes several fundamental errors. First, it ignores the fact that the legislation and even the Committee comment do not suggest or authorize rulemaking with respect to voluntary corrective actions as the CPSIA explicitly did for mandatory recalls. Second, the Commission seeks to give legislative weight to language in the legislative history. It is a basic precept of administrative law that one looks first to the plain language of the statute. A committee report certainly cannot be given the weight of legislation. Additionally, the preamble ignores obvious qualifiers in the legislative history comment the Commission paraphrases. The committee report recognized that in voluntary corrective actions, "similar"—not necessarily identical—information could be provided. The language further uses the term "as applicable," recognizing that such notice requirements might not be applicable in all voluntary recalls. Finally, the scope and extent of many of the changes proposed in this rule exceed or are different in scope than the legislative and regulatory provisions for mandatory recalls.

Yet, based on that inadequate legal rationale and vague statements about the staff's experience with recalls, the detailed mandatory requirements contained in the proposed rule have many of the hallmarks of a substantive rule. The Commission asserts that its proposal is an "interpretative rule to set forth principles and guidelines for the content and form of voluntary recall notices that firms provide as part of corrective action plans under Section 15 of the Consumer Product Safety Act" (78 Fed. Reg. 69794–5). Though the APA (5 U.S.C. Subchapter II) does not explicitly define an "interpretative rule," certain characteristics of a rule that would make it an "interpretative rule" are universally accepted: An interpretative rule interprets a statutory term or agency regulation and is not legally binding on regulated entities or courts. Conversely, a substantive rule has the force and effect of law (43 Fed. Reg. 34988, 34990, Aug. 7, 1978).

Many provisions of the proposed rule such as imposing mandatory and enforceable corrective action plans, prohibiting a firm from disclaiming admission of a defect or potential hazard and authorizing the staff to demand compliance program-related requirements in corrective action plans are in direct conflict with the "interpretative rule" definition. The proposed rule would place new obligations on companies, enlarge the scope of section 1115.20(a) and go beyond merely providing guidance about the existing voluntary recall rule. The Commission is proposing fundamental changes of longstanding practice that establish new rights and responsibilities and legally bind subject firms in ways not currently provided for under section 1115.20(a). Because the proposed rule would be the basis for enforcement decisions and would broaden existing legal requirements, the Commission should comply with the rulemaking procedures established by the APA for substantive rules.[5] It is improper to classify the proposed rule as "interpretative." As such, the Commission should have engaged in proper rulemaking procedures, including the analytical requirements that are statutorily mandated.

V. Voluntary Corrective Action Plans Are As a Practical Matter Already Binding

The Commission seeks to redefine voluntary corrective action plans as may be agreed to between firms and the Commission staff as re-codified distinct legally binding separate contracts. This is ostensibly related to a desire for greater leverage when dealing with the rare occurrence when a firm declines to honor its obligations under a voluntary corrective action plan. Yet this almost never occur and the Commission itself has and retains broad authority to take action under existing statutory authority to compel corrective action or issue unilateral public notice to prevent imminent hazards. Under such circumstances such provision is unnecessary, contrary to the letter and spirit of the original voluntary recall rule and not authorized by the CPSC's statutes (40 Fed. Reg. 30938, July 24, 1975). There is no compelling reason to transform a firm's voluntary, proactive efforts to address a safety concern into a legal negotiation over binding terms—the equivalent of a settlement agreement. This change would result in unintended consequences that would delay implementation of a voluntary recall. In practice many small businesses, which have been the engine for economic growth in the U.S.,[6] voluntarily negotiate and implement

[4] H.R. Rep. No. 110–501 at 40 (2008)

[5] See *Appalachian Power Co.* v. *EPA,* 208 F.3d 1015, 1028 (D.C. Cir. 2000)

[6] Small businesses make up: 99.7 percent of U.S. employer firms, 64 percent of net new private-sector jobs, 49.2 of private-sector payroll, 46 percent of private-sector output, 43 percent of high-tech employment, 98 percent of firms exporting goods, and 33 percent of exporting value. Source: U.S. Census Bureau, SUSB, CPS; International Trade Administration; Bureau of Labor

corrective action plans directly with Commission staff (both within and without the CPSC's Fast Track recall Program) without the need for costly legal representation and protracted negotiation. To the extent the Commission seeks to impose additional contractual obligations related to unrelated quality assurance processes or require companies, as part and parcel of voluntary recalls, to admit the existence of a product defect when they do not believe one to exist, the requirement for legal review becomes essential instead of optional. For these reasons, many small businesses and industries regulated by the CPSC have opposed to this provision of the proposed rule.

Making voluntary corrective action plans legally binding is also unnecessary because the Commission has existing authority to address the very rare situation when a firm declines to comply with its voluntary recall plan. At the time of the CPSC's original voluntary recall rule—and now—the Commission has had the authority to seek a binding consent agreement if the percent of private-sector employment, 42.9 percent of private-sector payroll, 46 percent of private-sector output, 43 percent of high-tech employment, 98 percent of firms exporting goods, and 33 percent of exporting value. Commission has reason to believe that an enforceable agreement is necessary (16 C.F.R. § 1115.20(b)). In the entire history of the CPSC, it has used the consent order agreement option very sparingly, even when enforcing rules against repeat violators, yet the fact remains that the CPSC retains authority to act in the rare situation involving a recalcitrant firm.

The Commission's proposal would also undermine the original intent behind the voluntary corrective action rule—to remove impediments to quickly execute a voluntary recall. The Commission has long acknowledged that the "primary purpose of a corrective action plan is to protect the public from a substantial risk of injury presented by a consumer product and to do so as quickly as possible" (43 Fed. Reg. 34988, 34996, Aug. 7, 1978). In the past, reporting and corrective actions increased when cooperative efforts such as the Fast Track recall program made the negotiation and completion of recalls easier. Making the process more difficult and contentious for firms that want to conduct recalls will have the opposite effect. Among other things, the proposed rule would create additional obstacles that would encumber the CPSC staff and firms in trying to negotiate the terms of a corrective action plan and subsequent modification, which may improve the effectiveness of recall efforts. This would waste staff resources and delay protection of the public.

VI. The Commission Should Not Change a Firm's Ability to Disclaim Admission of a Defect or Potential Hazard

Voluntary corrective actions are often undertaken in the face of ambiguous or incomplete hazard information. At the same time, firms must worry that admissions about an alleged hazard can have legal consequences in product liability, other commercial contexts or in a civil penalty matter. For that reason and to encourage firms to quickly address safety concerns, the Commission provided that firms could disclaim that their voluntary actions constituted an admission either of the need to report or that a substantial product hazard existed. This has been an important incentive to reporting and cooperating in voluntary corrective action. The Commission provides no evidence that such disclaimers have in any way harmed consumer protection over the history of the recall program.

Now, the Commission proposes to give the CPSC staff veto authority over such disclaimers. The preamble indicates that the CPSC may actually use this change as "an opportunity for the Commission to negotiate and agree to appropriate admissions in each particular corrective action plan" (78 Fed. Reg. 69795).There are no data that demonstrate that this change might enhance recall effectiveness or public safety and certainly no indication in the proposed rule of how the current policy has hamstrung the Commission in achieving good corrective action plans or consent agreements to safeguard the public. This change would unreasonably restrict a firm's ability to disclaim admission of a defect or potential hazard and conflicts with the First Amendment rights of manufacturers and retailers to the extent that it would preclude them from making truthful public statements expressing their views regarding the existence of a safety defect.

In short, there is no compelling reason to change the Commission's current disclaimer practice in connection with a voluntary recall. This change can only delay recall implementation to the detriment of consumers. This provision is unsupported and unsupportable based on safety and constitutional considerations and would not withstand legal scrutiny.

Statistics, BED; Advocacy-funded research, Small Business GDP: Update 2002–2010, *www.sba.gov/advocacy/7540/42371*

VII. Compliance Programs Do Not Automatically Belong in Corrective Action Plans

The Commission proposes to include in corrective action plans binding "compliance program-related requirements." The preamble and proposed § 1115.20(b) suggest that such provisions would be "in the Commission's discretion." That decision might be based on multiple previous recalls in a short period of time, evidence of insufficient controls, evidence of a reporting violation or other factors (78 Fed. Reg. 69795). Under the proposed rule, such programs would be compulsory as part of a legally-binding corrective action agreement. This provision would have unintended consequences and is not authorized by any provision of the CPSA. Section 15 of the CPSA allows the CPSC to order recalls and notices; it does not give the agency authority to tell firms how to structure their businesses or internal procedures.

In practice, the compliance program requirements would dramatically slow the voluntary recall process. The CPSC staff would be required to conduct an appropriate investigation to determine whether the circumstances of a particular recall might merit revising a firm's existing compliance program. To forgo such an inquiry would deprive firms of due process and the opportunity to present information and arguments in defense of their existing compliance programs. Such process is afforded firms in the civil penalty context, but would not exist under the proposed rule (16 C.F.R. § 1119.5). This would result in delay for consumers awaiting implementation of a recall and is contrary to the intent of the original substantial hazard rule. Equally unacceptable would be the CPSC imposing a compliance program requirement in haste and without a fair or objective inquiry. The implementation of a voluntary recall is not the appropriate occasion for the CPSC to seek changes to businesses' compliance processes.

The proposed rule's insistence that multiple prior recalls would be a basis to demand compliance programs is also contrary to public policy and the lessons from the Commission's history. There are no data to support the conclusion that multiple recalls are indicative of an inadequate compliance program. Such recalls may indicate the exact opposite: Firms have demonstrated responsible scrutiny and action to ensure consumer safety. There is also no evidence that the absence of multiple recalls provides assurances that a firm has an adequate compliance program. Given the view by many—regulated industry and consumers alike—that product recalls are salutary actions taken by responsible economic actors when necessary or because of a desire to act out of an abundance of caution, the proposed rule's treatment of multiple recalls as evidence of poor compliance processes is wrong as a policy matter. The proposed rule would penalize those who act most responsibly, especially for carrying out a voluntary recall when a risk of serious injury is not likely.

The proposed rule acknowledges that compliance program requirements would "echo" similar requirements sought as part of recent civil penalty settlement agreements (78 Fed. Reg. 69795). Responsible companies should have compliance programs. However, apart from the Commission's desire to seek compliance programs, nowhere does the proposed rule identify the legal basis for the Commission to demand a compliance program in connection with a voluntary recall. For all the foregoing reasons, the Commission should withdraw this proposal.[7]

VIII. Requiring Corrective Action Plans to be Compliant with CPSC Rules is Unnecessary

The Commission provides in its proposed rule that "remedial actions set forth in a corrective action plan . . . [comply] . . . with all applicable CPSC rules, regulations, standards, or bans" (78 Fed. Reg. 69795). This would appear to be unnecessary and redundant and adds nothing of substance to existing safeguards. Manufacturers and retailers are nonetheless concerned that this provision could create additional enforcement mechanisms, particularly as the staff seeks to exercise some enforcement discretion in determining what violations to remedy and how to do so.

IX. Guidelines for Voluntary Recall Notices Will Not Improve the Effectiveness of Recalls

The staff defines the purpose of the proposed rule in terms of clearly communicating hazard and recall information to the public. Specifically, proposed § 1115.30 states that the guidelines will "help ensure that every voluntary recall notice effectively helps consumers and other persons to" identify the product, understand the actual or potential hazards, understand all available remedies and take appropriate

[7] The proposed compliance program requirements would also be the basis for Commission enforcement decisions including the decision to seek civil penalties. This and other aspects of the proposed rule create substantive obligations that compliance with the rulemaking procedures established by the APA for substantive rules.

actions (78 Fed. Reg. 69800). Many of these provisions are not supported by evidence that they will actually better inform or motivate consumers to participate in recalls. By mandating a laundry list of requirements and options for voluntary recall notices, the CPSC would constrain flexibility and may actually prevent more effective remedial actions that are not included on the prescribed list. The notice requirements seem to be based not in the principles for better notice cited but instead in existing staff practice and the rule for mandatory recalls under subpart C of 16 C.F.R. § 1115 (Guidelines and Requirements for Mandatory Recall Notices).

As discussed, the Commission lacks the statutory authority to issue guidelines for voluntary recall notices through regulation. Moreover, proposed subpart D mandates the content of voluntary recall notices, which clearly binds both the CPSC staff and firms and thus makes this provision a substantive change to the existing process.

a. Calling All Corrective Actions a "Recall" Reduces Effectiveness

The proposed rule requires use of the word "recall" in the heading and text of a recall notice, rather than any alternative term. Calling a corrective action plan a "recall" when the action needed to address a potential hazard is far more limited than a refund or replacement could mislead consumers. Calling each and every corrective action a "recall" also adds to growing concern that consumers are experiencing "recall fatigue" as a result of the increasing number of recalls.[8] As a result of recall overload, getting the attention of consumers when a notice involves a significant risk of harm contrasted with a minor technical issue or action out of an abundance of caution based on unverified information is becoming increasingly difficult. Rather than address these types of legitimate concerns, the proposed rule will contribute to this recall fatigue. A tiered approach with more accurate nomenclature may be useful to better distinguish Alerts, Warnings related to misuse of products and voluntary offerings of product accessories that enhance safe use by consumers of products.

b. Recall Notices Should Include Information That is Actually Helpful and May Not Need to Include Extraneous Information

The proposed rule requires the headline of a recall notice to include specific information, even if the information would not improve the effectiveness of the recall effort, and precludes information that could be helpful to consumers. The Commission's proposal would eliminate flexibility needed to most effectively communicate hazards to consumers in some circumstances. For example, the proposed rule requires the headline to include the type of product being recalled, but does not permit the headline to identify the model of the product at issue. As a result, the headline may draw the attention of many consumers who do not own the product, creating needless concern, while consumers who would recognize a popular product's name might overlook the notice. A headline focusing on the type of product may also needlessly tarnish a firm's entire product line when the safety concern is limited to a single model.

The proposed rule requires the listing of the names of "each manufacturer" including foreign and domestic firms, beyond those firms named on the product or the name a consumer is likely to associate with the product, typically the brand, listed manufacturer or private labeler. This exceeds the provision Congress prescribed for mandatory recalls and is not likely to assist consumers. The names of other manufacturers, foreign and domestic, will not help the consumer identify the product and does not serve the provision's stated purpose. Extraneous information may confuse consumers, add to the problem of consumer information overload and actually decrease the effectiveness of the recall notice.

Further, many manufacturers and private labelers view the identity of their product suppliers as confidential commercial information, and revealing this information to competitors or the public can effectively destroy a manufacturer's competitive advantage without a commensurate public safety benefit. Disclosure of the identity of a manufacturer could present significant trade secret concerns when this information must be made available to distributors and retailers. Companies have developed processes to protect this information, and those processes must be respected.

The Commission's proposal would also permit the staff to include a reference to a compliance program in the recall notice. However, the Commission provides no criteria for when this information should be included. Moreover, there is no evidence indicating that the inclusion of such information serves the stated purpose of subpart D and would improve the effectiveness of the recall. Since this information is

[8] See, *e.g.,* Christopher Doering, *Surge in Products Being Recalled May be Numbing Consumers,* USA Today, June 10, 2012; Lyndsey Layton, *Officials Worry About Consumers Lost Among the Recalls,* Wash. Post, July 2, 2010.

not necessary to inform consumers of the recall, or motivate them to take necessary action, it does not further the objectives of a product safety recall notice and should be dropped from the proposed rule. An insistence by the staff that compliance program information be included in a recall notice would hinder the implementation of a timely and effective recall, and once again erode the cooperative nature of the voluntary recall program. The inclusion of this information could also mislead consumers by implying that a firm did not have an adequate compliance program and that it caused the defect. A company could face significant reputational harm from such a provision. There is simply no reason to believe that voluntary recall notices would be more effective because of inclusion of this information, which is not required by Congress for mandatory recalls.

c. Statements in the Notice and Disclosures of Information Should be Accurate and Truthful

The provision suggests that the recall notice should state that a hazard "can" occur when there have been incidents or injuries associated with the recalled product. Product hazards often are "associated" with a product but have nothing to do with a defect that leads to a recall. In some cases, it is clear that the account of an alleged incident is not reliable and using such incidents as a basis for such language is plainly unfair. Issues such as use, misuse, probability and other contributing factors may be necessary for the consumer to fully understand the hazard and to assist them with their decision making. Firms may also recall products due to insignificant deviations from standards or for business reasons when even a remote risk, not reasonably likely to occur may have occur due to a variety of unreasonable circumstances. Requiring firms to provide information without the necessary context and qualifiers, such as identifying circumstances where a hazard "may" or "could" occur, would reduce the effectiveness of a recall notice by failing to accurately inform consumers. Such unequivocal language may not only be inappropriate when there is a low risk of injury, but could adversely affect companies in product liability litigation, particularly when viewed in light of the proposed rule's limit on disclaimers in notices.

The proposed rule indicates that a recall notice should include the names of "significant retailers" and establishes criteria defining when a retailer is considered significant. The proposal does not indicate how or whether the CPSC staff would apply the criteria. As the stated purpose of subpart D is to help ensure that a recall notice effectively helps the consumer identify the product, simply naming a large retailer would not provide the consumer useful information if that chain did not sell a significant number of products and would needlessly result in even greater information overload for consumers. This provision could lead to naming of firms because they have significant market presence and might obtain attention for a Commission press release at the cost of misleading consumers about the actual places where they purchased a particular product and may unfairly tarnish the reputations of retailers.

The Commission through proposed § 1115.34(n) is attempting to impose new reporting obligations on subject firms and requires the disclosure of information that may not improve the effectiveness of a recall notice. Mandating such information also may have unintended consequences, and the inclusion of that information may not be necessary. Moreover, incidents and their actual causation are sometimes disputed and can be the subject of on-going liability disputes or other legal processes. In these cases, corrective action may be delayed as the CPSC staff and the firm negotiate the disclosure of information that may not improve the effectiveness of the recall notice.

The provision also requires firms to "immediately" report any new information to allow the Commission to issue new recall notices. It is not clear whether the Commission intends the 24-hour definition of "immediately" in subsection 1115.15(e) to apply in this context. Firms may not be able to adequately report new information as they work to obtain reliable information about an alleged incident. An incident actually may not involve an initially named product or the defect identified in a recall. This provision may require firms to supply misinformation, which would harm efforts to accurately inform consumers.

Firms currently provide incident updates in monthly progress reports. In addition, the Commission advises firms that under section 15(b) they may have to report new or additional incident data that suggests that the scope of a defect or non-compliance is not understood. The proposal provides no evidence that this existing system is insufficient or does not allow the staff to make reasonable decisions with firms about the need for further notice. The proposal seems to place additional requirements upon firms and places them in additional enforcement jeopardy without evidence that this mandate will help protect consumers. This inflexible provision is more likely to lead to additional dispute rather than cooperation.

d. Changes in an Action Plan Should Not Trigger a New Agreement and Notice

Proposed § 1115.34(o)(4) would require that any changes to a voluntary corrective action plan must be memorialized in both a new agreement and a new notice. This could result in further discussion and disagreements under this proposal and may delay useful changes that could protect consumers. In addition, some procedural changes may have absolutely no effect on consumers, and requiring that any change be communicated to consumers in such instances is unnecessary and may create unnecessary confusion and consumer information overload.

X. Conclusion

As many commenters to the CPSC's proposed rule requested, the CPSC should withdraw in its entirety this extra-statutory attempt to change 40 years of successful voluntary recall practice. The proposed rule could dramatically alter the CPSC's existing process that enables product safety goals to be realized in a timely and generally efficient manner. While the Commission may believe that requiring binding voluntary recall plans and compliance programs via a separate rule is desirable, it has provided no data on the record to support these changes. Furthermore the Commission's existing statutory authority allows it to act to address any imminent public hazard when and if merited under particular circumstances. Recognizing that approaches to voluntarily implemented corrective action plans differ and require creative solutions, depending upon the particular circumstances, we would hope that due consideration based upon a preponderance of the evidence would be required before advancement of such rule, as currently drafted. Substantive rules (notwithstanding labeling as "interpretative") may have unintended and adverse consequences on expedient voluntary corrective actions and should undergo more thorough administrative vetting prior to any imposition.

Senator MORAN. Mr. Locker, thank you very much.

Mr. Gold?

STATEMENT OF JONATHAN GOLD, VICE PRESIDENT, SUPPLY CHAIN AND CUSTOMS POLICY, NATIONAL RETAIL FEDERATION

Mr. GOLD. Mr. Chairman, thank you very much for the opportunity to testify this morning.

I would like to discuss three specific issues: the proposed Voluntary Recall Rule, the Retailer Reporting Program, and the Fast Track Recall Program.

NRF is the world's largest retail trade association, representing all segments of the retail industry. We have had a proud history of engaging with the CPSC, particularly since the enactment of CPSIA. While we have had a number of issues with that law and its implementation and interpretation by the agency, we have always sought to positively interact with the CPSC with the viewpoint and objective of ensuring that the products our members sell are safe for American families.

The retail community has spearheaded many product safety initiatives and efforts that go well beyond legal and regulatory requirements. By continuing to work in partnership with the CPSC, we can help focus on the issues of greatest concern while using the agency's limited resources to go after the truly bad actors.

With this spirit of partnership and product safety in mind, it is with some hesitance that I testify today, questioning the manner in which the CPSC has approached the key issues of: Voluntary Recall Rule proposal, inaction to date on expanding and appropriately implementing the Retailer Reporting Program, and what has been generally observed to be a reduction in the agency's Fast Track Recall Program.

I would observe and ask the Commission and this subcommittee to consider the fact that we have witnessed a somewhat concerning

and increasingly prevalent trend at the CPSC to look first and last to retailers for responsibility under section 15 with regard to reporting and recall obligations. I would urge that this committee ask whether the CPSC is forgoing the tools provided under the law in favor of convenience.

NRF and its members understand and embrace their obligations under the law, but others in the supply chain, especially product manufacturers, may have better and more immediate knowledge of the products and possible safety issues.

With regard to the Voluntary Recall Rule, NRF submitted detailed public comments on the NPRM in February 2014. In those comments, we set forth in detail how we believe that the proposal could negatively impact the CPSC's critical safety mission by making it significantly more difficult for retailers and other recalling firms to undertake voluntary recalls jointly with the agency.

The Subcommittee should observe that the CPSC does have the clear authority to seek to force a company to recall a product, should that become necessary, and the agency has exercised this power on occasion. However, the current Voluntary Recall Rule assumes, as it should, that the vast majority of companies fully cooperate with the CPSC in developing and undertaking product safety recalls.

There may be some disagreement over things like the language of the recall press release or some other minor issues, but NRF members are strongly motivated to recall products as quickly as possible.

Unfortunately, a number of provisions of the proposed rule, including one that would make corrective action plans legally binding, we believe would not only discourage companies from approaching the CPSC about a product safety issue that they have identified, but would make voluntary recall agreements much more legally risky for firms to undertake.

This might lead to them being resistant to various requests the agency might make of them in the context of a recall. This could, therefore, not only reduce the number of necessary recalls, but it is also highly likely to unnecessarily drag out the recall process.

Let me now discuss the Retailer Reporting Program. NRF fully supports this important program. It has resulted in a significant number of necessary recalls that might not otherwise have occurred. It also provides the agency with an excellent early warning system to identify and respond to new and emerging product safety hazards and patterns. It is the very model of a public-private partnership that is a win-win for the agency, companies, and consumers alike.

We understand that the CPSC is actively reviewing the program and potential options for changing it, but, after several years of review, we are still waiting to hear when those changes might occur.

We recently communicated with the commissioners, asking not only for that progress to move forward but, perhaps more importantly, calling into question the recent position that participation in the program does not and can never constitute compliance with a company's reporting obligations under section 15(b) of the Consumer Product Safety Act.

If, in fact, this is the position of the commission, then we not only question the factual accuracy of this but its legal and logical soundness. This has not been an issue in the program previously, and we wonder why it has now become an issue. This may dissuade potential participants from ever participating in the program.

We would like to see the program opened to new participants and believe the agency should work with current participants on addressing any issues of concern or ways to enhance the program to benefit the agency, the participants, and consumers.

Another great example of a program that has resulted in several hundred recalls, and much faster than they would have otherwise, is the Fast Track Recall Program, which encourages companies to undertake recalls within 20 days or less of initiating the process. In exchange, the CPSC does not make a preliminary determination for the product, which can have negative legal and other repercussions for recalling companies and is not necessary to initiate a recall of potentially dangerous products.

Anecdotal reports continue to emerge that the agency is now, in various ways, disfavoring the Fast Track Program. This appears to in part be motivated by a desire to seek incriminating information about companies' potential failure to have met their 15(b) reporting obligations. While NRF certainly does not question the right and duty of the CPSC to appropriately investigate companies for this and other violations of the law, this should not come at the cost of fewer and slower product safety recalls.

While we wanted to highlight a few of our concerns on these issues, NRF and its members again want to emphasize that the retail industry is continuously seeking ways to partner with the agency in order to improve the overall recall process. In this regard, we continue to believe that an advisory committee comprised of all stakeholders would benefit the agency and better enable it to address these and future issues.

Thank you, Mr. Chairman. I look forward to your questions.

[The prepared statement of Mr. Gold follows:]

PREPARED STATEMENT OF JONATHAN GOLD, VICE PRESIDENT, SUPPLY CHAIN AND CUSTOMS POLICY, NATIONAL RETAIL FEDERATION

Mr. Chairman and distinguished Senators:

Thank you for the opportunity to testify this morning on "Consumer Product Safety and the Recall Process." I would like to discuss three specific issues now before the agency relating to this process: the proposed Voluntary Recall Rule, the Retailer Reporting Program and the Fast Track Recall Program.

The National Retail Federation is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the U.S. more than 45 other countries. Retail is nation's largest private sector employer, supporting one in 4 U.S. jobs—over 42 million working Americans. NRF's *This is Retail* campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

NRF has also had a proud history of engaging with the Consumer Product Safety Commission, particularly since the enactment of the landmark Consumer Product Safety Improvement Act of 2008. While we have had a number of issues with that law and its implementation and interpretation by the agency, we have always sought to positively interact with the CPSC via the submission of numerous public comments, participation in working groups, roundtable discussions, and through

other avenues. And we have always done this with the viewpoint and objective of ensuring that the products our members sell are safe for American families. Indeed, it has been the retail community that has spearheaded many product safety initiatives and efforts that go well beyond legal and regulatory requirements. By continuing to work in partnership with the CPSC we can help focus on the issues of greatest concern, while using the agency's limited resources to go after the truly bad actors.

With this spirit of partnership and product safety in mind, it is with some hesitance that I testify today questioning the manner in which the CPSC has approached the key issues of the Voluntary Recall Rule proposal; inaction to date on expanding and appropriately implementing the Retailer Reporting Program; and what has been generally observed to be a reduction in the agency's Fast Track Recall Program.

Also at the outset, Mr. Chairman, I would observe and ask the Commission and this Subcommittee to consider the fact that we have witnessed a somewhat concerning, and increasingly prevalent trend at the CPSC to look first, second and last to retailers for responsibility under Section 15 of the Consumer Product Safety Act with regard to reporting and recall obligations. This trend has gone largely unexamined by Congress, and I would urge that this committee ask whether the CPSC is forgoing the tools provided under the law in favor of convenience for the agency. NRF and its members understand and embrace their obligations under the law, but others in the supply chain, especially the manufacturers of the products, may have better and more immediate knowledge of the products and possible safety issues. Those companies should also be examined for their obligations under the law.

Proposed Voluntary Recall Rule

With regard to the Voluntary Recall Rule, NRF submitted detailed public comments on the Notice of Proposed Rulemaking in February 2014. In those comments, we set forth in detail how we believe that the proposal as currently written could negatively impact the CPSC's critical safety mission by making it significantly more difficult for retailers and other recalling firms to undertake voluntary recalls jointly with the agency.

The Subcommittee should observe that the CPSC does have the clear authority to seek to force a company to recall a product, should that become necessary, and the agency has exercised this power on occasion. However, the current *voluntary* recall rule assumes, as it should, that that the vast majority of companies fully cooperate with the CPSC in developing and undertaking product safety recalls. There may be some disagreement over things like the language of the recall press release and other, generally minor issues. But NRF members are strongly motivated to recall products as quickly as possible. Indeed, it is their best interest to do so.

Unfortunately, a number of provisions of the proposed rule, notably including one that would make corrective action plans legally binding, we believe, would not only discourage companies from approaching the CPSC about a product safety issue that they have identified (and hundreds do approach the agency every year), but would make voluntary recall agreements much more legally "risky" for firms to undertake. This might lead to them being resistant to various requests the agency might make of them in the context of a recall. This could, therefore, not only reduce the number of necessary recalls (at least those conducted jointly with the CPSC), but it is also highly likely to unnecessarily drag-out the recall process. I will also note that there is no legal obligation in the first instance for a company wishing to undertake a recall to in fact do so with the CPSC (as long as the reporting obligation is met), so we could well see many more so-called "unilateral" recalls, which may not be in the public's best interest.

Retailer Reporting Program

Let me now discuss the Retailer Reporting Program. NRF fully supports this important program. It has resulted in a significant number of necessary recalls that might not otherwise have occurred. It also provides the agency with an excellent early warning system to identify and respond to new and emerging product safety hazards and patterns. Indeed, it is the very model of a government-private partnership program that is a win-win for the agency, companies and consumers alike. We understand that the CPSC is actively reviewing the program and potential options for changing it. But after several years of review, we are still waiting to hear when those changes might occur.

We recently communicated with the Commissioners, asking not only for that progress to move forward but perhaps, more importantly, calling into question the position of the agency's General Counsel, without apparent explanation, that partici-

pation in the Retailer Reporting Program does not and can *never* constitute compliance with a company's reporting obligations under Section 15(b) of the Consumer Product Safety Act. If in fact this is the position of the General Counsel and the Commission as a whole, then we not only question the factual accuracy of that statement but its legal and logical soundness. This has not been an issue in the program previously and we wonder why it has now become one, and this may dissuade potential participants in the program from ever considering it in the future.

We would like to see the program opened to new participants and believe the agency should work with current participants on addressing any issues of concern or ways to enhance the program to benefit consumers, the agency and the retail industry.

Fast Track Program

Another great example of a program that has resulted in several hundred recalls, and much faster than they would have otherwise, is the Fast Track Program, which as you have heard encourages companies to undertake recalls within 20 days or less of initiating the process. In exchange, the CPSC does not make a "preliminary determination" for the product—essentially a finding that a product is in fact defective and that the defect poses a substantial product hazard. Such a finding can have negative legal and other repercussions for recalling companies and is not necessary to initiate a recall of potentially dangerous products.

Unfortunately, anecdotal reports continue to emerge that the agency is now, in various ways, disfavoring the Fast Track Program. This appears in part to be motivated by a desire to seek incriminating information about companies' potential failure to have met their 15(b) reporting obligation. While NRF certainly does not question the right and duty of the CPSC to appropriately investigate companies for this and other violations of the law, in our view this should not come at the cost of fewer and slower product safety recalls.

While we wanted to highlight a few of our concerns on these issues, NRF and its members again want to emphasize that the retail industry is continuously seeking ways to partner with the agency in order to improve the overall recall process, and we look forward to continuing to do so. And in this regard we continue to believe that an advisory committee comprised of all stakeholders would benefit the agency and better enable it to address these and future issues.

Thank you again Mr. Chairman and Members of the Subcommittee. I would be happy to address any questions you have.

Senator MORAN. Mr. Gold, thank you.

Ms. Falvey?

STATEMENT OF CHERYL A. FALVEY, PARTNER, CROWELL & MORING LLP; FORMER GENERAL COUNSEL, CONSUMER PRODUCT SAFETY COMMISSION

Ms. FALVEY. Thank you, Chairman Moran, for the opportunity to address product safety, which has been a driving force in my career for almost 30 years.

My written testimony really focuses on the law, because I served as a General Counsel of the Consumer Product Safety Commission from 2008 to 2012 when the CPSIA was being implemented. And, in particular, I was involved in supervising the Mandatory Recall Rule that was adopted during that time period.

While my written testimony gets very detailed into the statute and the regulations, I thought I would take this opportunity to step out of that and make some higher-level points.

We are at a really exciting time when it comes to product safety and harnessing big data, to use that to spot emerging hazards faster. More data in a data-driven world is what I heard the first panel talking about today. It enables the agency to pinpoint the problem in a global supply chain at the component or even factory level and then turn around and allow us to contact consumers who purchase the product directly.

So technology and data can help with the whole gamut of issues that your hearing has covered today, from the timely identification of hazards to recall effectiveness.

And with statutes and regulations that were written years before the technology advances that will take us into this new era of product safety, it is important that we step back and make sure that with each regulatory move we are positioning ourselves to take advantage of that technology to make consumers safer and businesses more efficient.

At the end of the day, the regulated community, the manufacturers and retailers, are in business to serve and retain customers. And offering safe and compliant products is of paramount importance in the pursuit of those goals. Safety is nonpartisan, and it is good business.

So the entire statutory scheme depends on the engagement of the regulated community in monitoring their products to ensure the timely and accurate self-reporting to the agency of potential serious issues. The lessons of product safety right now, whether it is cars, food, or consumer products, it demands early and transparent engagement with the Commissioner and the Commission and identification of the hazards in a fast way.

And both the Fast Track Program and the Retailer Reporting Program that we have been talking about today enable the regulated community to work closely with the agency to meet those goals. CPSC thrives on remedying hazards fast and getting consumers protected early. And that is really what the Fast Track Program was all about.

Most of the participants comply with the regulations and their requirements, and the Commission has options beyond the voluntary corrective action plan if they do not. They can impose a legally binding consent order in a voluntary settlement by regulations. The regulations explain how to do that and to do that when there is a lack of full confidence that the company will comply with the corrective action plan. And they give criteria as to when the staff should use the voluntary process versus the consent decree process.

I will spend a minute on the issue with regard to the Retailer Reporting Program. It is used by the participants as part of their overall corporate compliance program. They are investing significant resources in creating data that is scalable, unified, and usable for the commission. They work closely with the staff to develop the search terms and to limit their reports to the matters that really are the heart of the reporting obligation under section 15(b).

The collection and use of that data across retailers with robust sharing will enable the CPSC to aggregate that data. And as the import process becomes more regulated by technology, as well, the potential exists to link the retail information with the information that we are getting at the ports and use that technology to look at the entire lifecycle of a product.

And while that may be an aspirational goal for the agency and may require additional funds and certainly notice and comment rulemaking, the use of that really might get at the return on investment the agency is looking for and help modernize how the Commission spots emerging hazards and stops those products at

the ports rather than focusing on the store shelves, which is a theme that was coming as we went through the Consumer Product Safety Improvement Act.

Thank you very much, and I am happy to answer questions.

[The prepared statement of Ms. Falvey follows:]

PREPARED STATEMENT OF CHERYL A. FALVEY, PARTNER, CROWELL & MORING LLP; FORMER GENERAL COUNSEL, CONSUMER PRODUCT SAFETY COMMISSION

Chairman Moran, Ranking Member Blumenthal, distinguished members of the Subcommittee, 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 pro-

tections), 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.

Senator MORAN. Thank you. Thank you for sharing your expertise.

Ms. Cowles?

STATEMENT OF NANCY A. COWLES, EXECUTIVE DIRECTOR, KIDS IN DANGER (KID)

Ms. COWLES. Thank you. Thank you, Chairman Moran, for allowing us to testify here today.

KID, as you may know, is a nonprofit organization. We were founded in 1998 by two University of Chicago professors whose son, Danny, was killed in a recalled portable crib at childcare.

Today, I will review the KID research that we have already heard a little bit about on children's product recalls and address a voluntary recall rule proposed by CPSC, product registrations, and steps we can all take to make recalls more effective.

Stronger standards, port surveillance, testing requirements, and tools like *saferproducts.gov* have reduced recalls. We now need to address the gap between recalling a product and getting it out of consumers' homes.

In February, KID released a report on children's product recalls. The findings are promising for safety. Injuries reported from products prior to recall was the lowest in over a decade. Looking at the 10 years of data, we can see that when a strong standard is adopted, such as those required by Danny's Law, recalls of that product class decline.

Eighty-nine percent of young parents are on social media, yet our research found that only 23 percent of the companies who are on Facebook used Facebook for posting on their recalls.

We also looked at the monthly corrective action report data. It shows products that were with the manufacturers, distributors, or retailers were retrieved, but only 4 percent of recalled products already in consumer hands were accounted for.

This summer, because of our concern over the millions of recalled products still out in homes and childcare, we began a research project with the Illinois Institute of Technology's Institute of Design. Graduate students conducted extensive interviews with stakeholders, qualitative research with parents, and literature review on the topic and are building a knowledge base that will be used to create an action plan to improve recall outcomes. We look forward to updating you on the results of that research later this year.

KID supports the provisions of the CPSC proposed rule to set forth principles and guidelines for corrective action plans and believe it will improve recall effectiveness. The CPSC's main tool to protect consumers is the corrective action plan or recall.

As our research has shown, the majority of recalled products remain unaccounted for, and some cause death and injury years later, like the crib that killed Danny. So it makes sense to establish a set of minimum requirements for voluntary recalls, allowing CPSC to use its years of experience in developing corrective action

plans to make them more effective. It will eliminate delays that currently occur when details that should not be negotiable take time to negotiate and will allow the CPSC and recalling firms to use tools such as social media more effectively.

I found it surprising that companies routinely sign agreements with a government agency that they are then not held responsible for fulfilling. Companies should be subject to a binding agreement when they agree to a compliance plan.

Too often, a lack of internal controls or systems leads to potentially unsafe products that must be recalled. Especially in cases of repeat offenders, we support the implementation of an effective compliance program in the corrective action plan.

We support the voluntary recall notice principles. In fact, we recommend that CPSC consider broadening its own use of social media to convey recall notices. Consumers trust and respect the Consumer Product Safety Commission, and its notice postings on Twitter are shared widely. Similar action on Facebook and other social media sites would increase the likelihood a consumer will learn of a recall and take action.

The CPSIA requires that infant and toddler durable products include a product registration card in their packaging and a means to register online. This allows manufacturers to contact consumers directly when there is a recall. What we need now is some reporting on how this is working. Companies should be encouraged to share results so CPSC and others can work to make the system stronger.

It is not enough to do a recall if the product remains in consumer homes. We do not stop looking for mines in a minefield simply because no one has stepped on it yet. We keeping looking to avoid that next mine going off. The same should be true of recalls.

We recommend that Congress request from CPSC an annual report of the same monthly report number that we use in our report. We believe that the sunshine that that will shine on this problem of recall effectiveness will, by itself, improve recall efforts.

The best way to reach owners of recalled products is to do direct notification, assisted by product registration, social media, and reverse marketing. To echo Chairman Kaye, these companies know exactly how to reach consumers when they are selling a product. They should use those same means to get those unsafe products out of their homes.

I did run out of time, but I had one more thing I want in the record, and that is that the Cubs won last night.

[Laughter.]

[The prepared statement of Ms. Cowles follows:]

PREPARED STATEMENT OF NANCY A. COWLES, EXECUTIVE DIRECTOR, KIDS IN DANGER (KID)

Thank you, Chairman Moran, Ranking Member Blumenthal and Subcommittee members for this opportunity to testify before you today regarding the Consumer Product Safety Commission and recall effectiveness.

KID is a nonprofit organization dedicated to protecting children by improving children's product safety. The organization was founded in 1998 by Linda Ginzel and Boaz Keysar, after the death of their son Danny Keysar in a recalled portable crib at a licensed child care home. A portion of the Consumer Product Safety Improvement Act (CPSIA) is named after Danny. As Danny's mother said when she testified

before a House Subcommittee more than a decade ago, "improved children's product safety will be Danny's legacy."

Today's hearing is on consumer product safety and the recall process. I will review research conducted by KID on children's product recalls over the last decade. This research addresses not only the types of products recalled, but also the participation rate and the efforts made by companies to reach consumers. I will address the voluntary recall and corrective action rule proposed by CPSC and product registration. I will also talk about steps we can all take to make recalls more effective.

As I mentioned, a dangerous crib that had been recalled five years before his death killed Danny. He was the fifth child to die in that particular product—the PlaySkool Travel-Lite Crib—another died a few months later. There were fewer than 12,000 of these cribs in circulation. However, the company sold their patent for the deadly rotating side rail to four other companies. One million five hundred thousand portable cribs were made with that deadly design. About 1.2 million of them remain unaccounted for. There have been 19 deaths in total, the most recent we are aware of took place in 2007. The toll of recalled products left in homes and childcare facilities is too high for our families to bear.

From the beginning, KID worked to reach parents with information about recalls. No one in the licensed home where Danny spent his days had heard of the recall—not even the state inspector who visited the facility just days before Danny's death. Recalled products don't look dangerous or broken. It isn't until the rail rotates unexpectedly under the weight of a waking child standing up and collapses around his neck that the flaw becomes apparent—at least to parents and caregivers. So KID began by focusing on how to reach those using the products with the recall news. But new products were recalled all the time. We realized the danger in the crib wasn't that it was recalled, but that it was unsafe from the day it was made. Therefore, KID spent many years working to improve children's product safety, making recalls less common.

Stronger standards, port surveillance and testing requirements have reduced recalls and improved safety. We now need to keep strengthening that safety net and address the gap between recalling a product and getting it out of our homes.

KID's Research on Children's Product Recalls

In February, KID released *A Decade of Data: An In-depth Look at 2014 and a Ten-Year Retrospective on Children's Product Recalls*.[1] The report reviews recall data from the U.S. Consumer Product Safety Commission (CPSC) for 2014 as well as previous years. The findings are promising for safety. Children's product recalls were only 25 percent of the recalls issued by CPSC—down from a high of well over half the recalls. Injuries reported from products prior to recall was the lowest since we started studying recall rates in 2001. Seventy-five children's products were recalled in 2014—so about 1.5 children's product recalls a week—down from three a week some past years. When we looked at 10 years of data, we saw that when a strong standard is adopted, such as those required by Danny's Law, recalls of that product class decline—keeping us all safer.

However, there were still 17 million individual children's products recalled in 2014. In addition, our research shows most of those are likely to remain in consumer hands without fixing the hazard or replacing it with a safer product.

In addition to looking at the recalls, we looked at what we could see publically about company activity to spread the word to consumers. Because of Illinois law and CPSC urging, most companies now post recalls on their websites. A consumer who was aware of the recall can usually easily find the information on line and participate. However, not many people spend their days scanning child product websites to see if there is a new recall. After direct notification—e-mail, texts, mail or phone calls, social media is the best way to reach directly to consumers.

It is very likely that many followers of companies on Facebook and Twitter have purchased a product from the company—which is why it is a great resource for getting the news out. According to Dana Points, editor-in-chief of Parent's Magazine, 89 percent of young mothers are on social media. Yet, our research found that for children's products recalled in 2014, 76 percent of companies had a Facebook account but only 13 (23 percent of those with an account) used it for posting a recall notice. Forty-nine percent of companies had a Twitter account and 32 percent of those used it to post a recall notice (12). There is a lot of room for growth here.

Then, with the perspective a year gives, we looked at the available data on how successful recalls are. You would be surprised how hard this information is to find. We requested, through the Freedom of Information Act, the monthly corrective action reports required for corrective action plans or recalls. First, let me say that we

[1] *http://www.kidsindanger.org/docs/research/2015__KID__Recall__Report.pdf*

did not get information on 40 percent of the 2013 children's product recalls. Either manufacturers had not filed the forms, CPSC could not find the files where they should be or companies did not follow up on the FOIA request and KID does not have the budget to sue them to comply. Therefore, our database is 61 Monthly Progress Reports for Corrective Action Plans and Incident Updates.

Products that were with the manufacturer, their distributors or retailers at the time of recall are likely to be accounted for in most cases. But for those with consumers? Only 4 percent of them were accounted for through this reporting. Some recalls were more successful than others were and some of the forms were completed with mathematically impossible numbers—fixing more products than were made for instance. Nevertheless, even if this number is lower than the actual, it still shows a dismal problem.

KID has done other research in this area. We did focus group research with parents, grandparents and childcare providers. All wanted recall information that was easy to understand and invited action. In particular, they were looking first for a brand and product name with a picture to answer the question—do I have this product? If yes, they want to know specifics they can check—model number, years sold and where it was sold to confirm they have the recalled item and then why it is being recalled and what action is expected. They expect companies to find them to alert them.

In addition, this summer, because of our concern over the millions of recalled products still out in homes and childcare, we began a research project with the Illinois Institute of Technology's Institute of Design. Graduate students in design theory conducted extensive interviews with stakeholders, qualitative research with parents and literature review on the topic and are building a knowledge base that will be used to create an action plan for all stakeholders to improve recall outcomes. We look forward to updating you on the results of that research later this year.

Voluntary Recall Notices and Corrective Action Plans

In late 2013, the U.S. Consumer Product Safety Commission proposed an interpretive rule to set forth principles and guidelines for the content and form of voluntary recall notices that firms provide as part of corrective action plans under Section 15 of the Consumer Product Safety Act (CPSA). It has not been adopted. The rule is similar to what is required for mandatory recalls in CPSIA. The existing regulations provide for notice to the public of the corrective action that a firm agrees to undertake, but do not provide any guidance regarding the information that should be included in a recall notice issued as part of a corrective action plan agreement.

The proposed rule would set forth the Commission's expectations for voluntary remedial actions and recall notices, bearing in mind that certain elements of product recalls vary and that each notice should be tailored appropriately. The proposed rule also provides that corrective action plans may include compliance program-related requirements when appropriate. In addition, the proposed rule would make the corrective action plan agreed to by CPSC and the recalling party legally binding. KID supports the provisions of this proposed rule and believe it will help to get information out to consumers.

The CPSC's main tool to protect consumers is the corrective action plan or recall. It is through these efforts that unsafe products are identified to the public with the goal of repairing, replacing, or removing them from use to avoid the hazard posed by the product. As our research has shown, the majority of recalled products remain unaccounted for with most of the products presumably still in use. Unlike food recalls, where the product has often been consumed prior to the recall, consumer products remain in use for years after a recall, as deaths[2] in a decades-old hope chest that was recalled[3] in 1996 illustrate. Or the 2007 death of a little boy in a crib of the same design that killed Danny Keysar in 1998 and was recalled 11 years earlier. More information presented clearly to consumers at the time of the recall, additional ways to deliver recall information, and a legally binding corrective action plan would reduce the number of dangerous products that remain in consumer hands after recall.

It makes sense to establish a set of minimum requirements for voluntary recalls, just as the CPSIA did for mandatory recalls. This would allow the CPSC to use its years of experience in developing corrective action plans to make them more effective. It will eliminate delays that currently occur when details that should not be

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[2] *http://www.nbcnews.com/health/child-deaths-are-tragic-reminder-products-pose-risk-long-after-2D11939815.*

[3] *http://www.cpsc.gov/en/Recalls/1996/CPSC-The-Lane-Furniture-Company-Announce-Recall-for-In-Home-Replacement-of-Locks-on-Cedar-Chests/*

negotiable take days, weeks, or months to negotiate, and will allow the CPSC and recalling firms to more effectively use new tools such as social media to reach consumers.

KID supports efforts to make corrective action plans legally binding. In fact, I found it surprising to learn that companies routinely sign agreements with a government agency that they are not held responsible for fulfilling. These plans are negotiated and agreed to by the recalling company, but without legally binding language, there is no pressure on recalcitrant companies to comply fully. Just as consumers are subject to binding contracts when they purchase products and services such as credit cards and Internet service, companies should be subject to a binding agreement when they agree to a compliance plan regarding a recalled product.

Without meaningful enforcement authority, the CPSC has been limited in the ways that it can remove dangerous products from the market and from use by consumers. Making corrective action plans legally binding allows the CPSC to take action, as necessary, more promptly and without additional expense, to see that the plan is actually implemented.

CPSC's has preferred remedies—refunds, replacements or repairs. The proposed rule would require companies that propose different remedies to show that those other remedies will be equally successful. We believe only refunds or replacements should be options in corrective action plans involving products that have caused death or severe injury. Leaving it in consumers' hands to repair a faulty, deadly product can often lead to delayed or poor repairs and additional injuries, as we saw with immobilization kits for drop-side cribs. In addition, the CPSC's sanctioned repairs should not leave consumers with products that don't comply with current safety standards. Such products could pose risks to consumers. In those instances, replacement or refund is a more appropriate remedy.

Too often, a lack of internal controls or systems leads to a potentially unsafe product that must be recalled. By announcing the recall without fixing the problem that led to it, additional problems with other products may follow. Especially in cases of repeat offenders, for those companies with multiple recalls, we support the implementation of an effective compliance program in the corrective action plan.

KID supports the Voluntary Recall Notice Principles, which echo Section 16 CFR 1115.26 for mandatory recalls. In particular, we support web page posting—viewable when first landing on the page and additional means such as social media. We would also recommend that the CPSC consider broadening its own use of social media to convey recall notices. Consumers trust and respect the CPSC, and its notice postings on Twitter are usually shared widely. Similar action on Facebook and other social media sites would increase the likelihood a consumer will learn of a recall and take action. Such social media use to improve consumer awareness of safety recalls is not, in our view, in any way legally limited by Section 6(b) of the CPSA, since it includes only publically available information. CPSC can put additional controls on its Facebook page, as many nonprofits and other entities do, to restrict postings from others there.

The proposed changes also covered the actual recall notice. These notices should be written and disseminated in such a way that consumers will be motivated to take action and that other entities such as the media, nonprofit organizations, retailers and local community officials will be motivated to share in the dissemination of the information. These changes will enhance the ability of consumers to quickly and effectively gather pertinent information from recall notices to ascertain: whether they have the product in question; what the safety risk is; how severe the risk is; and what they should do. In 2013, KID conducted focus group research with parents, childcare providers, and grandparents. The research showed that being able to make these determinations quickly is an important factor in how likely someone is to take the information seriously and take actions to remove the product from their home.

KID strongly supports the proposed rule and guidelines. These actions will strengthen recall effectiveness and will enable the use of additional resources to communicate the vital safety information in recall notices to the consumers using the products.

Product Registration for Juvenile Products

The CPSIA also requires that infant and toddler durable products, such as cribs, strollers and high chairs, include a product registration card in their packaging and provide an opportunity to register online. This gives manufacturers the information necessary to directly contact consumers in the event of a recall or other product safety issue. Too many consumers never hear about a recall of a product that they have in their home and as a result continue to use recalled products. Today, most manufacturers have both online registration sites and include the cards. KID has evaluated 157 manufacturer websites and found that almost all have online sites

that consumers can use to register infant durable products. What we need now is some reporting on how this is working. What percentage of products are registered? Does it improve recall participation? What is being done to encourage consumers to participate? Companies should be encouraged to share results so CPSC and others can work to make the system stronger. Again, from her testimony in 2004, Linda Ginzel stated that she firmly believes that her beloved son Danny would be alive today if the Playskool Travel Lite had come with this simple registration card.

Conclusion

CPSC is a very different agency from the 1998 agency that struggled to get the word out on recalls using limited tools and funds. CPSC staff uses all the tools at their disposal to work with companies and consumer groups to get dangerous products off store shelves, off online sites and out of our homes and childcare. However, with abysmal recall participation rates, more must be done.

It is not enough to do a recall if the product remains in homes and in use. We do not stop looking for mines in a minefield because no one has stepped on it yet. We keep looking to avoid that next mine going off. The same should be true of recalls. We need to set goals for successful recalls and require additional action if the number reached stay below that goal.

Sometimes a little sunshine helps move progress along. What if Congress requested an annual report from CPSC of those same monthly report numbers KID uses in our report? We believe the light that sheds on recalls would improve the record keeping and the recall efforts. CPSC has the information—it is a low cost effort to help ensure once companies have recalled a product it does not remain in use.

We believe the best way to reach owners of recalled products is to do direct notification, assisted by product registration, social media and reverse marketing in cases where it is warranted. These companies know exactly how to reach consumers to sell products. They should use those same methods to reach consumers to remove dangerous products from their homes. A recall announcement should not be the end of the responsibility of the company.

We can all do our part to educate parents and caregivers on recalls and the importance to stay informed and take action. However, the CPSC and companies must take the first steps to improve the chances a consumer will learn of a recall on their product and will be willing to take action.

Senator MORAN. We will allow that to be stated as long as we can at least talk about the Royals, as well.

[Laughter.]

Senator MORAN. Thank you all very much for your testimony.

Ms. Cowles, let me start with you. I want to give you a chance to tell me—because you are the one at the table, I think, that supports the Voluntary Recall Rule, and I want to explore that with you.

Tell me about the Fast Track Program. Do you think it is not working? Working?

Ms. COWLES. Well, the Fast Track Program, like much at CPSC, is secret from those of us on the outside. So I can't——

Senator MORAN. You don't have—all right.

Ms. COWLES. I have no information. But I would say that, if it is as stated here, you know, that it allows companies to come ready to do a recall when they find a defect in their product, I don't think there is anything in this rule that would stop them from doing that.

Senator MORAN. And do you agree with everything in the rule or just parts of it?

Ms. COWLES. What I agree with are efforts by the Consumer Product Safety Commission to improve the abysmal rates that we are seeing on recall effectiveness. I think, for instance, again, things like using social media, putting the recall on the front of

your website so that people can see it, telling consumers there is a defect.

I mean, we heard a lot about that that is going to delay. "If we have to say there is a problem with our product, we don't want to do that." That is going to drive down recalls. If you tell consumers, "We are recalling this, but we don't think anything is wrong with it," you are not going to get consumers to take that out of their home.

So I agree with Chairman Kaye that we can still talk about how the final rule looks, but to say that, for every single time a company comes forward with a recall, CPSC has to renegotiate are they going to put it on social media, what is every word that is going into the recall notice—that those things are negotiated over and over every single time.

And the thought that, you know, this would bring more lawyers in. I am not sure how many recalls Cheryl addressed at the Commission where there was not a lawyer on the other side.

So we hear a lot of doom and gloom when consumer protections are being talked about. And like with *safeproducts.gov,* like with parts of the CPSIA, in the long run, when those problems are worked out, we end up not seeing what has been predicted.

Senator MORAN. Thank you.

Let me use something you said to expand the conversation to the rest of the panel.

Tell me about your relationship, interaction, ability to present information and receive information from the Commission. Does that exist, and is it satisfactory if it does? What could be done to make certain that, from the retail manufacturing as well as the safety advocates, how do we make certain that the Commission has the willingness and ability to pay attention to concerns?

Mr. Locker, you were nodding your head, which——

Mr. LOCKER. Well, I mean, you know, first of all, I just want to comment on some things that were made—some statements that Ms. Cowles made.

In my experience and I think in most practitioners' experience, we would take exception that agreements with the Commission are routinely ignored. I mean, there is a serious price to pay, both legally, morally, ethically, and in the court of public opinion, if you do not follow through on your obligation to conduct a recall that you voluntarily agreed to. It simply doesn't happen.

Now, that doesn't mean some disagreements don't arise occasionally as to, you know, how effective you are being in the process. But the fact of the matter is, in my experience, people that agree to a recall commit to it.

Now, to your question about information——

Senator MORAN. Mr. Locker, I was only going to say I need to learn from you to answer the question that I want to answer.

Mr. LOCKER. Right. I will definitely answer your question in terms of information.

Right now, the Commission has broad authority to obtain information from companies and retailers and distributor of a product and any importer of a product. And they exercise that authority vigorously, and they get that information.

It used to be that it was more of a two-way street, and, currently, information tends to be embargoed, considered or labeled by legal staff as work product at the agency. And information about a company's product should be available to that company. So if there is testing information, evaluative information, issues related to the safety of that product, how it is being used, those companies should have access to that information rather than it being kept from them, especially if it is going to form the basis of a discussion.

Because when you have, as my colleague Commissioner Adler—or Professor Adler, I call him—would say when negotiating with the government, it is good to have transparency between the parties so you can have a meeting of the minds. I am concerned that right now that information is not as forthcoming as it should be.

Senator MORAN. Any others want to comment on this?

Ms. Falvey, I don't know what your post employment at the Commission has entailed, but has the Commission changed over time in its willingness to receive input from those affected by their decisions?

Ms. FALVEY. I think this current commission is very open to receiving information. I think we heard that, in terms of working on rules like the ROV rule, the laundry pod work that has been done, on a voluntary standard.

I think, though, that where the breakdown occurs is between staff and compliance professionals out in the field working in the companies when they are trying to talk about a particular product, a particular recall, a particular issue. And that is what Mr. Locker was talking about.

The concern about, "Well, if I share this information with you, I could not necessarily make out a case against you," creates more of a litigious position between the regulated entity and the commission, when 90 percent or more of what is going on at the Commission is done on a voluntary basis.

Senator MORAN. Thank you.

Let me ask perhaps Mr. Gold or Ms. Falvey, your clients, they are thinking about section 15 reporting obligations with the uncertainty that exists today from the Commission on whether or not the Retailer Reporting Program satisfies that requirement.

Describe the thought process on the part of a retailer in weighing their benefits to participate in the program. If there is uncertainty, what does it do in that regard, and what are the consequences to the effectiveness of the program?

Mr. GOLD. I think that is one of the outstanding issues that we are trying to identify with the CPSC as they are doing their review, where are they in that whole process.

I think for retailers and others who want to participate in the program, they see the benefit of being able to provide that information. It is a lot of information they provide, as has been identified. If that information is not protected and does not meet the goal of meeting your 15(b) requirement, companies aren't going to want to participate and provide this information that could then be used against them for something else.

So it is that protection and it is that willingness to provide that information with that benefit in place, as well.

Again, we think it is a benefit to both the CPSC and for the retailers and manufacturers who participate in that program. Again, as was noted, it has been a 10-year pilot. It is time we move beyond the pilot phase and really look at how do we implement this, like other agencies have done with other programs that are public-private partnerships that help advance the mission of the agency.

So I think companies are really weighing that, trying to figure out—they want to do the right thing, but if they are not going to be guaranteed some of these benefits for some of these protections, they might not be as willing to participate and help this process move forward.

Senator MORAN. You heard the Chairman's testimony. You heard the Commissioner's reply or response to the same kind of question. Would you be any more certain today where we are this afternoon—it is almost noon. Are you any more certain late this morning than you were early this morning about what is happening at the Commission in regard to this issue?

Mr. GOLD. No.

Senator MORAN. OK.

Mr. GOLD. Unfortunately.

And, you know, I think we urge them to wrap up their decision on this, and I know companies are eagerly waiting to see whether or not this is a program they want to participate in. I think they would like to, depending on how this shakes out. But, you know, we really urge the Commission to continue with their work on their evaluation of the program.

And hopefully they take into account what the participants of the program have said have been the benefits for both the participants and the agency. And we appreciate Commissioner Buerkle's response on that. You know, we align with her, with what she said with the value of the program.

Senator MORAN. I want to make sure I understand this, but there are two aspects. One of this is privacy, and one of it is the certainty of whether or not it satisfies the requirement. The rule has a consequence on two issues that may cause a company from refraining from participation. One is what happens to the information, and, two, whether it satisfies a legal requirement.

Is that accurate?

Mr. GOLD. Yes. I believe so. In talking about the Voluntary Recall Rule separate from the Retailer Reporting Program, yes, I believe that is accurate.

Senator MORAN. OK.

Mr. Locker?

Mr. LOCKER. Yes, I just want to comment on the—you know, there is a third aspect to the Retailer Reporting Rule. These entities agreed to do this at tremendous expense and built it into their compliance programs under a supposition that they were not going to face increased civil liability with the agency. That was the trade-off. And they have acted in good faith on that for many years.

To change those rules now is—fundamentally, there is an unfair due process issue. And so, you know, many courts have ruled that sometimes just changing interpretive guidelines that have been substantively relied upon without going through adequate rule-

making and without adequate due process should not occur. And I think that is a third element at play for retailers.

Senator MORAN. Thank you.

Any other comments from any of the witnesses? Anything that you want to make certain gets into the record before we close this hearing?

Mr. LOCKER. I would like to comment on one issue, and that is—and there has been a lot of discussion both in the first panel and this panel on what is or isn't an effective recall. And a lot of that has to do with how you define what a recall is.

So if you are measuring recall effectiveness by the amount of product that gets returned, regardless of an evaluation of the length of useful life of that product, its cost, its shelf life, how it is used by consumers, the perception of risk on that product—and I think Commissioner Adler wrote a *Law Review* article on that before he became a commissioner—then you are going to doom yourself, in effect, to failure. You will never have an agency that achieves an effective recall rate because the rate itself is inherently going to be low because of the measurement metrics that you are using.

On the other hand, if you look at this issue, as soon other agencies do, like the Food and Drug Administration, on measuring the effectiveness of a recall by how that recall is communicated, including using social media and whatever media is available—and that, by the way, I would argue, why companies that do voluntary recalls with the agency actually prefer and like the Commission to issue the press release, because they feel it can get through the marketplace and fragmented media clutter, and the message gets out there. If you measure it by that metric, then you would have, actually, an agency that has, I would argue, very effective rates of recall effectiveness.

So I think you are informed by how you look at that.

Ms. COWLES. Can I just——

Senator MORAN. Yes, ma'am.

Ms. COWLES.—respond to that?

And I agree that there are many—and that is why, as I said, KID is pulling together experts to look at this issue of recall effectiveness.

I think, by any measure you use, 4 percent of the products with consumers participating is an abysmal number. Even if we doubled, tripled, quadrupled it by using your different measures to say if people threw them out or whatever, that is still a lot of products.

And our organization is a testament to it. I deal every day with parents whose children are killed or injured by recalled products. So to say that, you know, as long as my company announces the recall and sends out a social media tweet, we have done our job—again, you know how to reach us when you are selling us the product. You should put the same time, effort, and money into reaching the consumers when you are trying to retrieve it.

And some of these products had very few injuries or death before they are recalled, but there are catastrophic injuries. And, obviously, the death of a child is nothing anyone wants to face. So to say, "As long as no other death takes place, we are going to assume

it is a successful recall," doesn't understand the issue of consumer products and how they remain in the homes.

Senator MORAN. Any other comments?

Very good. I thank you for your testimony.

The hearing record will remain open for 2 weeks. During this time, senators are asked to submit any questions for the record. Upon receipt, the witnesses are requested to submit their written answers to the Committee as soon as possible.

Again, thank you for your testimony.

The hearing is concluded.

[Whereupon, at 11:58 a.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF WALT A. SANDERS, WASHINGTON DC COUNSEL, SAFE FIELDS ALLIANCE

Chairman Moran and Ranking Member Blumenthal:

My name is Walt Sanders, outside counsel for the Safe Field Alliance.

The Safe Fields Alliance is a coalition of artificial turf companies dedicated to educating stakeholders around the safety of synthetic turf fields using crumb rubber.

Nothing is more important than the safety and health of children, which is why when making decisions related to children's safety and health, we have to look at the facts and the science—which in this case are extremely clear. An overwhelming body of scientific evidence shows that synthetic turf with crumb rubber infill is safe for children to play on. We believe that rigorous science and unbiased research is the best antidote for uncertainty, and we always welcome additional research.

We are submitting testimony today because of the focus of this hearing on CPSC enforcement powers and responsibility.

Last week, the NBC Nightly News ran a story that called into question the safety of crumb rubber, the infill used to support many of the synthetic turf fields installed throughout the Nation. The NBC report cited a number of cancer cases brought into the public domain by a soccer coach from Seattle. The soccer coach claims that crumb rubber may have caused these cancers.

First and foremost, our sympathy goes out to the cancer patients and their families featured in the NBC report. Nothing is more important than the safety and health of children. That is why when making decisions related to children's safety and health we have to look at the facts and the science, which in this case are extremely clear: synthetic turf fields using crumb rubber are safe.

Dozens of scientific studies, including peer-reviewed academic analyses and Federal and state government reports, have all found no connection between these fields and cancer or other health issues.

When this issue was first raised in 2008, a number of studies were commissioned and the overwhelming majority of the scientific community was satisfied that the results showed no reason for concern. As NBC notes in its report, "No research has linked crumb or shredded rubber to cancer."

We join the chorus of voices calling on the Environmental Protection Agency and the Consumer Product Safety Commission to take a stand. In our view, scientific studies analyzed by independent third-parties that hold up under peer-review from qualified toxicologists are the best antidote for uncertainty.

The NBC report cited several chemicals found in crumb rubber as points of concern. However, this information is misleading without context and without baselines, especially given that we all eat, drink, and breathe trace levels of chemicals in our daily lives. Industry voluntarily ensures the levels of any chemicals in synthetic turf fields are lower than the Consumer Product Safety Commission's lead and chemical standards for children's toys and the Environmental Protection Agency's safe standards for urban and rural soils.

More research can always be done, and we are willing to support any additional scientific studies in any way we can. However, it should be pointed out that over a decade of research has not produced a single published, peer-reviewed study that shows that crumb rubber is unsafe.

The industry voluntarily came to CPSC in 2008 after the State of New Jersey raised safety issues when the State environmental agency found traces of lead in turf fields in New Jersey. CPSC staff conducted testing on samples collected as part of an official investigation which was initiated by concerns from the State of New Jersey. CPSC staff concluded that artificial turf was safe for kids to play on, and issued a press release announcing that result.

CPSC has since then revised their statement to limit it to the specific issues that they studied (lead in turf) and posted a statement to that effect on their website as an amendment to the 2008 report.

Since then the turf industry has removed all lead from its turf fields.

The issue is now the safety of crumb rubber.

The industry has met with the CPSC Commissioners on several occasions and has shared all of the relevant research related to the safety of synthetic turf. The industry's position has not changed with respect to the safety of their products.

Scientific research from academic, Federal and state government organizations has unequivocally failed to find any link between synthetic turf and cancer.

We are committed as an industry to the safety of our fields and the athletes that compete on them—which is why we have encouraged the rigorous work from third-parties that has taken place over decades to confirm there, are no negative health effects connected to synthetic turf. We are always open to sharing this available wealth of research with concerned individuals or organizations, and are fully confident in this body of findings.

Regrettably, Chairman Kaye has made public statements saying the CPSC can no longer stand behind the safety of synthetic turf and crumb rubber, but has not stated a reason why. This contradictory information has created confusion in where the CPSC stands with regard to the safety of synthetic turf and crumb rubber, and has left parents, coaches, and local communities confused and wanting for information from the CPSC and other Federal agencies.

In July we met with Chairman Kaye and his staff and updated the agency on the most recent scientific evidence that crumb rubber does not pose a health risk. We sent a follow up letter to Chairman Kaye shortly after the meeting requesting the Commission to work with the industry and to update the public on the progress of CPSC's work on this issue. As of this date, we have not received a response to the letter, which we now submit for the record.

What the industry is asking for from CPSC is the assurance that the agency will take the necessary steps to analyze the existing scientific data on whether is a public statement on the progress of its work. Synthetic turf is a consumer product and CPSC has a responsibility to the public to act and not leave the public at a loss for direction.

Perhaps this Committee will provide the Commission with some direction.

Thank you, Mr. Chairman for the opportunity to present this testimony.

July 20, 2015

Hon. ELLIOT F. KAYE,
Chairman,
U.S. Consumer Product Safety Commission,
Bethesda, MD.

Dear Chairman Kaye,

Thank you very much for giving us the opportunity for our companies to brief you on recent efforts by the industry to establish the safety of synthetic turf and crumb rubber. We especially appreciate the assistance of your staff, Steve McGoogan, and Jonathan Midgett in helping to arrange the dynamics and success of the webinar/teleconference format of the meeting. It is unfortunate that time constraints placed our presentation into overdrive as the science and studies involved in assessing the safety of synthetic turf and crumb rubber are highly complex.

Because of the importance of this issue, it is worth reiterating the salient points of our presentation:

- The synthetic turf industry has worked closely with rubber recyclers who have been voluntarily complying with crumb rubber standards that are very strict and comply with the California Human Health Screening Level standard for heavy metals and meet the EPA *de minimus* standard for exposure to carcinogenic PAH's. We insist that the tire recycling industry supply our industry exclusively with car/light truck tires that are domestically produced. We welcome feedback on these compliance standards.
- Science continues to strongly support the safety of crumb rubber. Lab testing of crumb rubber toxicity in multiple continents by academia, toxicologists and independent schools has shown toxins in crumb rubber to be substantially below any reasonable base line such as standards developed for urban/rural soils, children's toys, California Prop 65 standard and many other similar base lines. We would not use crumb rubber as an infill for our product if this was not the case.
- The types of cancers being linked to crumb rubber by media reports, primarily adolescent lymphoma and leukemia, have been researched extensively in the past and there are multiple IARC publications that show no link between these

types of cancers and overexposure to chemicals of any kind including highly carcinogenic cigarette smoking. We expect the work being done by the Association of State and Territorial Health Officials (ASTHO) will confirm these findings.

What we took away from this meeting is the following:

- CPSC staff expressed a willingness to open up a constructive dialog with our companies to continue to assess existing studies and emergent science to assess the safety of synthetic turf and crumb rubber;
- Our companies will continue to provide CPSC with new science and emerging data that will help establish that synthetic turf and crumb rubber do not pose a health risk to consumers;
- We will continue to encourage EPA, CDC, ASTHO and other entities involved with assessing the safety of turf and crumb rubber, to provide the agency with findings validating the safety of turf and crumb rubber;
- CPSC expressed a willingness to explore the possibility of working with the ASTM Subcommittee in its efforts to establish chemical standards for crumb rubber.

We look forward to building a constructive and ongoing dialog with the CPSC that will hopefully result in the agency's public commentary that will dispel misunderstandings and misconceptions about the benefits of synthetic turf to the general public.

Thank you again for listening to our presentation.

Sincerely,

DARREN GILL,
Vice President, Marketing
FieldTurf.

ROM REDDY,
Managing Partner,
Sprinturf.

HEARD SMITH,
President,
Astroturf.

PREPARED STATEMENT OF AL GARVER, PRESIDENT, SYNTHETIC TURF COUNCIL

Chairman Moran and Ranking Member Blumenthal:

Recent news reports have focused on a desire for the U.S. Government to issue updated or additional guidance on the safety of synthetic turf fields containing crumb rubber infill. The calls come from parents of children who play on synthetic turf, and are echoed by officials at the local and state level who continue to inquire about persistent but unfounded concerns over the safety of crumb rubber infill.

The Synthetic Turf Council (STC) remains a strong advocate of science-based research and reporting on the safety of synthetic turf. We serve as a clearinghouse for the more than 50 studies that have addressed various concerns on synthetic turf, including those conducted by local, state and Federal agencies. In each case, and as the Consumer Product Safety Commission has previously acknowledged, study results show no elevated health risks associated with synthetic turf or its components.

We remain supportive of any new or expanded research that addresses the desire for additional information. However, there have been efforts in five state legislatures in the past year to impose moratoriums on synthetic turf while additional research is conducted. Each legislative committee who has examined the science has determined no such actions are necessary.

This was the case in California earlier this year when legislation was introduced that called for a state-sponsored study into the safety of synthetic turf with crumb rubber infill. That bill originally called for a moratorium that would prevent schools and municipalities from making their own informed decisions. California legislators appropriately took the moratorium off the table, and moved forward with a three-year $2.85 million study to be conducted by CalRecycle under guidance by the state's Office of Environmental Health Hazard Assessment. It will be the most thorough and exhaustive study to date, but will not impose an unnecessary sanction that ignores the vast amount of existing research that has never drawn a connection between synthetic turf and health concerns.

Beyond supporting further research, the STC and its members routinely assist parents, schools and government agencies with information that helps them understand how and why synthetic turf fields are pose no elevated risk compared to regular grass fields. These synthetic turf systems are tremendously beneficial for thousands of schools and communities. Recognizing that questions remain, the STC took further steps to create voluntary testing guidelines for infill products used in synthetic turf.

In August, 2015, the STC issued testing guidelines based upon European Standard EN 71–3, which sets exacting limits for various elements found in children's toys. This standard allows crumb rubber to be tested in comparison to everyday products used by children, and is a respected and widely-recognized health and human safety protocol based upon quantified toxicology test methods.

There are more than 12,000 synthetic turf fields in use across the United States, including those used by professional sports leagues, collegiate teams, public and private school systems, parks departments and municipalities. In many cases, these organizations have assessed the existing research on field safety and concluded there is no elevated risk to those who play on them. Further, a number of schools have conducted their own crumb rubber infill analysis in the past year based on persistent concerns. In each case, those who have shared their findings report no plausible link between crumb rubber and cancer.

We are encouraged that the health and safety of those who play on synthetic turf is receiving attention at the Federal level. The STC remains committed to assisting in any way to help bring closure to the issue that has created unnecessary confusion and lingering questions.

The STC website, *www.syntheticturfcouncil.org,* includes the many studies on the human health and environmental safety of synthetic turf and crumb rubber.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO HON. ELLIOT F. KAYE

Recall Effectiveness

Question 1. Chairman Kaye, you testified that you are not "wedded" to the provisions of the proposed Voluntary Recall Guidelines rule, but rather you are "wedded to the goal of enhancing recall communications and effectiveness."

In both formal comments on the rule and in testimony before the CPSC, stakeholders have requested that the Commission establish a collaborative, cooperative working group comprised of the CPSC, consumer advocates, manufacturers and retailers to address recall effectiveness, conduct a scientific study of consumer behavior to determine the most effective methods for communicating recalls to consumers and to establish best practices for conducting recalls.

Does the CPSC plan to establish an informal working group to address potential ideas for improving recall effectiveness? If so, what is the timeline for doing so? If the CPSC does not intend to establish a working group or engage in related stakeholder outreach on this issue, why not?

Answer. While I am open to all avenues that would genuinely assist recalling companies and the agency with enhancing the recall process, we do not have plans at this time to establish a working group. As we have a very engaged set of stakeholders, including on this issue, we will continue to benefit from their feedback even without creating a working group. As we consider what changes we might pursue, there will continue to be significant dialogue with our stakeholders, especially those who truly believe in recall effectiveness.

Question 2. Chairman Kaye, many recalled products are returned to retailers by consumers, but as you are aware some consumers instead choose to modify use of a product to address the risk or will simply dispose of it altogether.

My understanding is the agency's current measurement of recall effectiveness only includes products that are returned to the retailer and manufacturer. What is your strategy to ensure that the measurement of recalls accurately reflects all actions taken by consumers in response to recalls?

Answer. Recall effectiveness is calculated using data supplied by the recalling firm or retailer that tracks the number of consumers requesting the remedy identified in the recall notification. To date, CPSC staff has not been able to identify a cost-effective, timely and efficient way to also track the actions of individual consumers who choose to take some action other than the remedy identified in the recall notification. The Commission is open to ideas of including in our measurement additional actions by consumers that can be captured in a cost-effective, timely and efficient manner.

Question 3. Recently the Juvenile Products Manufacturers Association (JPMA) announced an educational campaign entitled "It's not hard! Fill out your card" to inform parents and caregivers of the important of filling out product registration cards, allowing them to receive direct notification of product recalls. In addition to social media channels and working through member companies, JPMA emphasizes product registration cards as the easiest way to ensure that information gets to families in the event of a product recall.

Has the CPSC partnered with the JPMA on this campaign? If not, does the CPSC see this campaign as a good example of how to improve recall effectiveness? What does the agency do to encourage similar education efforts?

Answer. While CPSC did not partner with the JPMA on its registration card campaign, the agency has been active on this front. In addition to routinely meeting with and educating trade associations and other groups to encourage innovative approaches to direct recall notification, CPSC has promoted the use of registration cards through several different avenues. In February 2015, CPSC issued a blog (*http://onsafety.cpsc.gov/blog/2015/02/04/product-registration-cards-think-safety-not-marketing/*) related to the product registration card requirements in Section 104 of the Consumer Product Safety Act. Within the blog, the agency recognized the contributions of the JPMA, the Consumer Federation of America and Kids In Danger in assisting our agency with outreach and education as we work to encourage consumers to fill out these cards. During her tenure, former Chairman Inez Tenenbaum took part in an event with the Attorney General of Illinois, Lisa Madigan, and consumer advocates to promote the use of registration cards. In early 2016, I plan to join with National Highway Traffic Safety Administrator Mark Rosekind for an event that is intended to collaborate with developers and data specialists on innovative, mobile solutions for the registration of consumer products.

We welcome any campaign aimed at improving recall effectiveness through direct notification. There is no doubt that direct notification is a highly effective means of notifying consumers about recalls. Therefore, we always encourage companies to use direct notification for recalls when contact information is available.

Question 4. Chairman Kaye, you and your fellow Commissioners have stressed in public statements and in testimony before the Senate and House oversight Committees that the CPSC is a data driven agency. Recent GAO reports have identified the CPSC's lack of data analytics capabilities as a fundamental issue.

Given the critical role that accurate and timely data and the ability to quickly and efficiently analyze data plays in the CPSC's core mission of identifying emerging product safety risks and injury trends, please describe the CPSC's current data analytic capabilities, including current staffing levels, systems and proportion of the agency's budget.

In recent years, how has the agency responded to the increase in available data and the emergence of new technologies and analytic capabilities? What are your plans for hiring, training, and deploying additional data analytic staff going forward as it pertains to enhancing CPSC's systems and data analytic capabilities?

Answer. An October 2014 GAO report states that GAO staff interviewed CPSC officials, industry representatives, consumer groups and subject-matter experts who said that additional resources such as hiring staff with expertise in technical areas, including toxicology, public health, epidemiology, and engineering could improve the timeliness of CPSC's response to new or emerging product risks. In addition to inadequate resources, the report discussed multiple factors that affect how quickly CPSC responds to new and emerging hazards. Some of the factors that were discussed in the report include: (1) the legal standard for proving that a product is an imminent hazard requires extensive data analysis; (2) CPSC's inability to establish information-sharing agreements with foreign counterparts may hinder our ability to respond to a potential hazard in a timely way; (3) CPSC addresses product hazards after the product has entered the market rather than using a preventative framework such as pre-market approval (such as the FDA or EPA); and (4) CPSC's delay in receiving death certificates. I do not perceive any of these very accurate factors to point to a specific deficiency in how we analyze data. Rather, the GAO correctly pointed out that with additional resources and authority, more could be done by CPSC to promote public safety and done faster. I completely agree with this assessment and continue to believe the public, especially children, have been put at risk because of these factors.

The CPSC must determine quickly and accurately which product hazards represent the greatest risks to consumer safety. Information on injuries, deaths, and other consumer product safety incidents comes from a wide range of sources, including consumers and consumer groups, hospitals and clinics, industry and the media. Used and resale consumer products must also be monitored to prevent previously identified hazardous products from re-entering the marketplace. A large volume of

data must be analyzed to identify patterns and trends that reflect potential emerging hazards. Moreover, the CPSC has to determine which addressable hazards present the greatest risk to the consumer to focus the agency's limited resources. The CPSC's request for FY 2016 allocates $46 million, of the total $129 million requested, to help provide for the timely and accurate detection of consumer product safety risks.

With regard to increases in available data and the emergence of new technologies and analytic capabilities, in recent years the CPSC has made significant investments in information technology to enhance and streamline hazard detection processes and improve analytic capabilities. This includes the development and improvement of the Consumer Product Safety Improvement Act of 2008 (CPSIA)-mandated, open government public database (available at: *www.SaferProducts.gov*), which enables consumers and others to submit reports of harm to the CPSC and view publicly reported incident information in a Web-based, searchable format. SaferProducts.gov is one of the many successes of the CPSIA. In response to Section 222 of the CPSIA, we also created a pilot Risk Assessment Methodology (RAM) system that enables the CPSC to analyze systematically a limited set of import line entries to identify the highest risk shipments, facilitating our import surveillance efforts at certain ports.

The agency also developed the Consumer Product Safety Risk Management System (CPSRMS), to standardize how data are captured and to enable expanded and expedited data collection and analysis. CPSRMS currently has several analytical components: SaferProducts.gov, which consists of a public portal, a business portal, and a searchable incident database; an internally facing application for CPSC staff to analyze and triage incident reports; and a case management system for CPSC staff to respond to incidents. CPSRMS is the agency's primary tool for managing domestic incident data and makes more information available so that agency staff can quickly process domestic incidents. The FY 2016 funding request of $2.7 million is to continue to support and upgrade this domestic incident management system.

Each year, through the National Electronic Injury Surveillance System (NEISS), the CPSC collects information about product-related injuries treated in hospital emergency rooms. This unique system provides statistically valid national estimates of product-related injuries from a probability sample of hospital emergency rooms. The FY 2016 budget request of $2.2 million for NEISS activities will fund the following work: collection and review of data from approximately 100 hospitals; technical and statistical support for data collection; coordination of NEISS activities funded by other Federal agencies through reimbursable agreements; and travel to hospitals for training, quality control, and recruitment of additional hospitals into NEISS to maintain the statistically valid sample size.

Data collected from a range of sources including consumers, newspapers, medical examiners and coroners, health care professionals, state death certificates and retailers, is coded, compiled, and analyzed by a staff of 35, including some mathematical statisticians, in CPSC's Division of Data Systems in the Directorate of Epidemiology (EPDS). Additionally, EPDS is supported by a staff of 13 contractors. The Division of Hazard Analysis in the Directorate of Epidemiology (EPHA) currently has 12 mathematical statisticians who have received formal education and training in statistics. EPHA makes use of both probabilistic and nonprobabilistic data on injury and potential injury incidents and fatalities. EPHA (as well as other domains within CPSC) uses statistical software for analysis including SAS, JMP, R, and Excel.

The Directorate of Epidemiology's staffing ceiling is currently set at 51. Resource needs are regularly reassessed and data analytic staff will be added as warranted and as agency priorities and funding levels permit. We will continue to seek additional funds to enhance further our data capabilities and analytics and hope Congress agrees with the health and safety value these efforts provide.

Question 5. Chairman Kaye, can you expound on the results and effectiveness of the Buckyballs recall? My understanding is this recall was unique in that the CPSC assumed the responsibilities of the recalling firm. Of the 2.5 million sets sold, what was the product return rate? What this an effective recall in the agency's view?

Answer. The Buckyballs matter was settled pursuant to an agreement between Maxfield and Oberton Holdings, LLC ("M&O") and the CPSC (the "Settlement Agreement"). Because M&O had commenced dissolution and liquidation proceedings, the Settlement Agreement called for the CPSC staff to create a "Recall Trust" administered by a third party trustee (the "Trustee") that would implement the corrective action plan (CAP) set forth in the Settlement Agreement. The CAP provided for a recall of Buckyballs. To effectuate the recall, the Trustee engaged a company that specialized in claims processing. This entity processed claims, submitted claims to the Trustee and issued payments to approved claimants.

The Settlement Agreement required several methods of conveying notice of the recall: a press release; additional publicity; and a website publicizing and implementing the recall. Among other actions, the Recall Trust reported it sent e-mail notices of the recall to more than 100,000 consumers and retailers and arranged for social media advertisements that reportedly were displayed 89 million times.

In accordance with the Settlement Agreement, the Recall Trust provided refunds to consumers who returned qualifying products within the agreed-upon six-month recall period. Also in accordance with the Settlement Agreement, the Recall Trust implemented fraud detection procedures to ensure that the Recall Trust paid only valid claims.

The Recall Trust reported it received a total of 3,415 claims. The Trustee approved 2,720 total claims and paid refunds to those claimants. The Recall Trust identified some claims as deficient because of missing information or as potentially fraudulent. Claimants were given the opportunity to remedy deficient claims and to provide more information regarding claims with indicators of fraud; 460 of the claims originally identified as deficient were remedied and paid.

Retailer Reporting Program

Question 6. Chairman Kaye, participants in the Retailer Reporting Program (RRP) have operated under the understanding—and been consistently reassured—that data submitted to the CPSC under the program meets their obligations to file an initial report under 15(b). This RRP data has resulted in multiple product recalls and was recently cited as one source of data in the CPSC staff recommendation for a new standard for an infant durable product.

What kind of analysis did the CPSC conduct in deciding to no longer allow RRP participants to meet their initial 15(b) reporting requirements by submitting data under the RRP? Did the CPSC conduct any engagement with RRP participants prior to this change in practice? Has the CPSC had any engagement with RRP participants after this change in position, and what have been the results of those discussions?

Answer. The Retailer Reporting Pilot Program (RRP) began in 2004 as part of the resolution of a civil penalty case with a single retailer. Over time, the concept was expanded to include additional companies under circumstances that differed from company to company and pursuant to different understandings. The RRP did not—and to date, does not—have formal documentation or uniform agreed-upon terms. Rather, participants—who were not limited to retailers—were added individually over nearly a decade pursuant to individualized understandings that reflected CPSC staff's assessment at that time of the value of the data that might be provided by a specific company. The information reported by participants and the mechanism for reporting varied from participant to participant.

In the first year of the pilot program, CPSC received 2,623 reports from the single participating retailer. During the next few years, additional firms were brought into the pilot program, culminating in seven participating firms in 2009. The number of reports submitted grew as participants were added, with a total of 21,000 reports submitted in 2009. Between 2009 and 2015, the number of reports submitted by the seven participating firms has increased by more than 40 percent, from 21,000 reports to just over 30,000 reports.

Since 2004, CPSC has received and processed 207,340 participant reports. Of the 4,020 recalls issued from 2004 through 2015, 0.6 percent (23 recalls) were cases where the participant report was the initial source of hazard information. In short, this amounts to an average of one recall for every 9,000 reports submitted, processed and analyzed over close to a 12-year period. It is important to remember that the firms involved in the 23 recalls would have been required to report the incidents behind these recalls in order to fulfill 15(b) reporting requirements, even in the absence of a Retailer Reporting type program.

As part of a careful review of the Retailer Reporting Pilot Program, in July 2014 CPSC's Office of General Counsel sent a letter to all RRP participants clarifying the legal implications of participation in the RRP with respect to Section 15(b) reporting obligations and potential civil penalties. In this letter, the General Counsel stated, "Participation in the RRP *does not replace, alter, limit or have any impact whatsoever on the statutory duty of participants to report information as required under Section 15(b)* of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064. The letter goes on to state, "Participation in the RRP does not provide 'safe harbor' protection from Section 15(b) reporting obligations or possible related civil penalties. Specifically, submitting data to CPSC in connection with the RRP does not satisfy Section 15(b) reporting obligations. RRP participants must independently assess data and other information in their possession to determine when Section 15(b) reports should be made."

While I am not aware of any formal meetings between CPSC staff and the participating firms regarding the structure of the RRP, prior to the July 2014 letter, CPSC staff received and has considered carefully multiple letters from participants. CPSC staff also maintains constant informal contact with all participants. In addition, CPSC staff conducted a formal meeting with the participants since that letter was distributed. As was explained at that meeting, adherence of RRP participants with Section 15(b) reporting obligations is assessed by CPSC staff case-by-case, based on application of the legal requirements to the specific facts and circumstances. The outcome of the meetings was a commitment by CPSC staff to further analyze the value of the pilot program and suggest options to me regarding the future direction of the pilot program.

Question 7. I understand that one company has withdrawn from the RPP because of concerns about the risk and confusion over 15(b) reporting obligations. What actions are you taking, if any, to ensure that current RRP participants remain in the program?

Answer. Participation in the program has always been entirely cooperative and voluntary. CPSC staff has taken no action to ensure current participants remain in the program; nor has CPSC staff taken any action to encourage participants to leave the program.

Question 8. What specific improvements would you like to make to the RRP?

Answer. If the program is to continue and expand in any form, additional funding will be required to permit the agency to build and maintain additional systems to handle the influx of more data. It is extremely expensive to build, operate and maintain that type of data warehouse.

Question 9. How many retailers and manufacturers have inquired or applied to join the program since it began ten years ago? What, if any, communication has been made between the CPSC and those who are interesting in joining the program?

Answer. Since 2004, CPSC staff is aware of twelve firms that have inquired or applied to join the pilot program. Seven firms were accepted into the pilot. Because we did not have sufficient resources, some firms were told that their request to participate would not be considered until additional CPSC funds became available to expand the pilot program.

Phthalate Alternatives Rulemaking

Chairman Kaye, as you recall the issue of phthalates was a focus of the Subcommittee's prior CPSC oversight hearing in June, and it was mentioned briefly again at the hearing on October 6. Having reviewed your responses to my questions for the record, I wanted to take this opportunity to ask a few additional questions if you would be willing and able to answer.

Question 10. Mr. Chairman, you stated the CHAP cumulative risk assessment (CRA) method was consistent with the recommendations of the National Research Council's 2008 report on the CRA of phthalates. That report was requested by the EPA. Did you consider that, despite the NRC report, the EPA has yet to conduct a CRA for phthalates and rather has recently requested further input on how to conduct such an assessment? Is it your view that the NRC recommendations are sufficiently robust for how to conduct a definitive and quantitative CRA for regulatory purposes?

Answer. The CPSC technical staff considers the NRC [1] recommendations to be sufficiently robust to conduct a CRA. In addition to the 2008 report referenced, CPSC staff notes that the NRC reiterated its recommendation for a phthalates CRA in a report published in 2009.[2] While EPA is still planning a CRA of phthalates, Congress through Section 108 of the CPSIA required CPSC to convene a Chronic Hazard Advisory Panel (CHAP) to conduct a CRA for phthalates within two years, which the agency did.

Question 11. Mr. Chairman, in your responses to the Subcommittee, you noted the Agency for Toxic Substances and Disease Registry (ATSDR)'s work on toxicity of mixtures. ATSDR has evaluated the potential hazard of certain chemical mixtures; however, the Subcommittee could not find an example of where it conducted a CRA. Can you elaborate on what "similar methodology" to which you were referring?

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[1] NRC, 2008. Phthalates and Cumulative Risk Assessment. The Task Ahead. Committee on the Health Risks of Phthalates, National Research Council, National Academy Press, Washington, D.C.

[2] NRC, 2009. Science and Decisions. Advancing Risk Assessment. Committee on Improving Risk Analysis Approaches used by the U.S. EPA, National Research Council, National Academy Press, Washington, D.C.

Answer. According to CPSC staff, ATSDR evaluates the toxicity of selected chemical mixtures that are relevant to Superfund sites; they do not perform complete risk assessments. ATSDR's evaluations [3] are done to support risk assessment performed by others. ATSDR's methods [4] for assessing chemical mixtures are essentially similar to the methods used by EPA [5] and the CHAP. For example, EPA, ATSDR, and the CHAP all consider the weight of the evidence for how the chemicals in a mixture interact. The interactions may be independent, additive, synergistic or antagonistic. They all consider the hazard index as an acceptable method for estimating the risk from a mixture. One difference, however, is that ATSDR and EPA guidelines allow the risk assessor to *assume* that mixtures are additive if the components act on the same target organ or by the same mode of action. The CHAP only calculated cumulative risks when there was *empirical evidence* demonstrating an interaction between the components of the mixture.

Question 12. Mr. Chairman, you referenced the EPA's pesticide CRAs as well. In reviewing the limited number of pesticide CRAs conducted by EPA, it appears the EPA has a robust and thorough approach relative to that of CHAP. Outside of pesticides, EPA's limited use of cumulative risk assessment has been as a risk prioritization or screening tool. Have the CPSC technical and scientific staff evaluated whether the CHAP's CRA is more in the nature of a screening tool, and whether subsequent analysis is required prior to taking a final regulatory action?

Answer. The CPSC staff does not consider the CHAP's CRA to be a screening level risk assessment.

After evaluating the CHAP's cumulative risk assessment, CPSC staff does not believe that additional analysis with respect to cumulative risk assessment is needed before taking regulatory action.

Question 13. Mr. Chairman, you stated the International Program on Chemical Safety has issued CRA guidelines. The citation you provided comes from the report of a 2007 workshop, stating "The principal objective of the workshop was to initiate development of a framework for the risk assessment of combined exposures to multiple chemicals." The language would indicated that this appears to be a preliminary document. Are you aware of any Federal CRA conducted under this framework? If so, was it used as a basis for actual restrictions on any chemicals, or simply as a prioritization tool?

Answer. EPA and ATSDR guidelines for assessing chemical mixtures have been in place for more than a decade, and those agencies generally follow their own guidance documents. The CHAP was guided primarily by the recommendations of the 2008 NRC report on phthalates CRA.[6] That NRC report refers to the EPA and ATSDR guidelines. CPSC staff is not aware of any Federal CRA conducted under the World Health Organization ("WHO") but believes that framework [7] is generally consistent with U.S. methods.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. CORY GARDNER TO HON. ELLIOT F. KAYE

Question. Chairman Kaye, the Commission recently launched an education campaign for furniture and TV-tipovers in an effort to promote safety and prevent child injuries and fatalities. Has the Commission considered launching a similar education campaign for corded window coverings? Do you believe such an education campaign could improve safety surrounding corded window coverings? If not, what do you believe accounts for the difference in effectiveness of an education campaign for furniture and TV-tipovers compared to an education campaign for corded window coverings?

Answer. In 1985, CPSC issued a major consumer safety alert related to the strangulation risk posed by a variety of window coverings: *www.cpsc.gov/en/Newsroom/*

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[3] Interaction Profiles for Toxic Substances. Agency for Toxic Substances and Disease Registry.

[4] Guidance Manual for the Assessment of Joint Toxic Action of Chemical Mixtures. U.S. Department of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry, Division of Toxicology. May 2004.

[5] Guidance on Cumulative Risk Assessment of Pesticide Chemicals That Have a Common Mechanism of Toxicity. Office of Pesticide Programs U.S. Environmental Protection Agency Washington, D.C. 20460 January 14, 2002.

[6] NRC, 2008. Phthalates and Cumulative Risk Assessment. The Task Ahead. Committee on the Health Risks of Phthalates, National Research Council, National Academy Press, Washington, D.C.

[7] Meek, M. E., Boobis, A. R., Crofton, K. M., Heinemeyer, G., Van Raaij, M., & Vickers, C. (2011). Risk assessment of combined exposure to multiple chemicals: A WHO/IPCS framework. Regulatory Toxicology and Pharmacology, 60(2 suppl 1), S1–S14.

News-Releases/1985/CPSC-Warns-of-The-Danger-Of-Children-Strangulation-In-Window-Blind-Or-Drapery-Cords/. Thirty years later and window covering cords are still killing or seriously injuring children at an alarming and unacceptable rate: nearly once a month. This is one of the most serious hidden hazards in the home. For the past decade, CPSC has collaborated with the Window Covering Safety Council each October (Window Covering Safety Month) to educate parents and caregivers. Two of the biggest recalls in CPSC's history have involved recalls managed by the Window Covering Safety Council. Yet, the deaths and life-altering injuries continue. Window covering manufacturers have also allocated substantial funds to marketing and educational efforts geared toward the window covering safety. I appreciate the industry's efforts, but it is not remotely sufficient. Education alone is not saving enough lives. We have decades of deaths that make that point very clear. We are better than this, as a society, to allow these deaths to continue, especially when safe alternatives are economical and available.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO HON. ELLIOT F. KAYE

Question 1. Will the CPSC commit to providing this Committee with semi-annual reports summarizing, by product, the recall effectiveness information provided in Parts 1 and 2 of manufacturer Monthly Progress Reports (MPRs) for Corrective Action Plans (CAPs)?

Answer. Section 6(b) of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2055(b), generally prohibits the public disclosure of information that is provided to the CPSC in carrying out its responsibilities under section 15 of the CPSA, 15 U.S.C. § 2064 (relating to consumer product recalls). I continue to believe strongly that Section 6(b) is an anti-consumer safety and anti-government transparency provision that Congress should repeal. Section 6(b) also prohibits public disclosure of any information that could identify a specific product manufacturer unless the Commission has taken reasonable steps to ensure that it is fair and accurate and has given the manufacturer of the product(s) in question 15 days advance notice (of the information to be disclosed) and an opportunity to comment. The information discussed in this question is submitted by many different manufacturers or retailers. Accordingly, we could not lawfully provide these responses to the general public without going through the onerous section 6(b) notification process. Nevertheless, consistent with our rules implementing section 6(b), 16 C.F.R. § 1101.12(g), and with the expectation that these materials are kept confidential, we are permitted by law to provide that information to the Chairman or Ranking Member of the Committee or subcommittee of jurisdiction acting pursuant to committee business.

However, in addition to other practical concerns such as IT system constraints, we currently lack the resources to collect, collate and transmit this information electronically. We would be pleased to work with the Committee to see what information the Committee would find useful on this point that we might be able to provide in a cost-effective and efficient manner.

Question 2. Will the CPSC commit to posting copies of received manufacturer MPRs for CAPs (with any redactions required by the Consumer Product Safety Act, as amended) in a timely manner on the Freedom of Information Act (FOIA) portion of the Commission's website?

Answer. The CPSC is committed to following the President and Attorney General's guidance for achieving active disclosures and transparency under the FOIA. *See http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf* As a result of a thorough and helpful audit of our FOIA program by the CPSC Inspector General, we are in the process of significantly enhancing our FOIA processes. As part of this effort, we will look at the resource implications of making a discretionary release of this information, which is permissible under a number of FOIA exemptions, whenever appropriate. Of course, in some circumstances it may be appropriate for CPSC to withhold certain records, or portions of records, that are otherwise designated for active disclosure if those records fall within a FOIA exemption, just as is done in response to a FOIA request. For example, the information may be part of an ongoing active enforcement proceeding and release of the information could reasonably expected to interfere with enforcement proceedings.

Question 3. Does CPSC staff conduct any audits of MPRs submitted? If so, what is the audit rate, and how often does the audit result in corrections to the MPR data?

Answer. As part of overall efforts aimed at protecting consumers, CPSC Compliance and Field Operations staff prioritizes review of MPRs associated with the high-

est-priority recalls. We also currently have an employee assigned to review overall data integrity for MPRs while we consider more permanent options within the limits of our resources. It is not common for there to be substantial changes to the MPRs after review, but it should be noted that the agency is largely reliant on the recalling firms to submit accurate and complete data. The agency does not have access to the underlying sources of information to verify the accuracy of the submitted data.

Question 4. Has the CPSC ever given any company participating in the Retailer Reporting Program any form of formal or informal civil penalty "immunity" with respect to information provided under the program? If the answer is yes, please identify each such company, describe the extent of the immunity, and explain the CPSC's authority to grant such immunity.

Answer. Staff is not aware that any participant in the "Retailer Reporting Program" (RRP) has been given any form of formal or informal civil penalty "immunity" with respect to information provided under the program. CPSC staff considers potential section 15(b) violations by non-RRP participants in the same manner that staff considers potential section 15(b) violations by RRP participants. Thus, matters involving RRP participants that merit investigation for potential civil penalties arising out of section 15(b) are investigated and considered based on the specific facts and circumstances, and in the ordinary course just as such matters involving non-RRP participants are investigated and considered. However, the RPP was created a number of years ago under different leadership at the agency. I cannot speak for that leadership and whether or not any type of immunity was intended, contemplated or provided.

Question 5. To date, has information reported under the Retailer Reporting Program ever led to a product recall that would not have otherwise occurred through another channel, such as an independent CPSC staff investigation or a Section 15 report?

Answer. Since 2004, CPSC staff is aware of approximately 23 recalls where an incident report submitted by a retailer participating in the program was the initiating source document. Companies do have a legal requirement to report incidents to the CPSC, so the agency would have ultimately become aware of those incidents, provided that the companies reported as required.

Question 6. Has the CPSC ever taken action based on, or in response to, a low recall remedy rate? If your answer is yes, what is the threshold rate for such an action and is there any provision for such actions in the standard Corrective Action Plan that the Office of Compliance negotiates with companies?

Answer. Yes, we have sought additional corrective action for recalls with low response rates and other reasons. Our corrective action plan letters include language that allows for the modification of a corrective action plan based upon the circumstances, including low response rates or additional deaths and injuries.

Although we do not have a set threshold for seeking additional corrective action, compliance officers monitor the response rates particularly for the highest priority recalls they handle and determine if additional corrective action is appropriate. Additionally, we currently have an employee assigned to review recall response rates associated with certain key recalls and to make recommendations for potential further corrective action.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. RICHARD BLUMENTHAL TO HON. ELLIOT F. KAYE

Question. Will CPSC commit to working with this Committee to provide aggregate data on recall effectiveness?

Answer. Yes, subject to the legal concerns and resources discussed in previous questions, we would be happy to work with the Committee to provide this information.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO HON. ELLIOT F. KAYE

Question 1. In late August, Ikea recalled a children's nightlight because its plastic covering could come off and pose an electrical shock hazard. Yet not a single one of Ikea's 51 Facebook posts or 179 Instagram posts in the past 90 days was about safety recalls—although 1 of its 378 tweets did note the nightlight recall. 71 percent of adults use Facebook. Do you believe that more people would learn about safety

recalls of defective products if companies were required to post recall notices on Facebook and other social media? Why or why not?

Answer. I absolutely do. Companies should robustly use all of their available social media to publicize recalls, since social media in many cases is the ideal medium to reach a large number of consumers simultaneously. The effectiveness of social media's reach as compared with the reach of some of our historic notification methods (such as placing posters in retail locations) is unmatched. Through social media sites, companies are also able to collect and monitor data regarding the reach of their recall message.

Nearly all major companies have an active presence on Facebook for marketing purposes, which should be used to disseminate recall information more widely to consumers. I expect companies to ensure that recall information is featured prominently on their websites and social media sites, instead of making consumers search for this information. Unfortunately, the CPSC itself does not yet have a Facebook presence. Those who support government transparency, genuine recall effectiveness and informing consumers about seasonal and emerging hazards in the home should endorse CPSC's creation of a Facebook account.

Question 2. Over the years, many children died due to defective cribs, some of which had been voluntarily recalled years before the deaths occurred. In some of these cases, the voluntary recall notices did not even acknowledge the risk of death or injury that the defective cribs posed. Do you believe that more people would be likely to learn of and pay attention to safety recalls of defective products if companies were required to accurately describe the defect and whether it had been linked to injuries or deaths when they issued recalls? Why or why not?

Answer. Yes. There is no doubt that prominently noting in the recall announcement that deaths and/or injuries have occurred is more likely to drive media attention that can ultimately capture consumers' attention, rather than not mentioning those facts or burying them in the release. As you note, these notices are voluntary, meaning they are subject to negotiation with recalling companies. It is fair to say that our interests in notifying consumers about the nature and degree of hazards do not always align with the interests of the recalling companies. Our staff does an excellent job of pushing for prominent release of the most useful information relating to the recall of a product. We are continuing to assess how to make our recall process more effective and this topic is one aspect of that review.

Question 3. Do you believe that more people would learn about recalls of defective products like car-seats if the companies had to send letters or e-mails to people who purchased them, much like auto companies are required to do when defective cars are recalled? Why or why not?

Answer. Again, I certainly do. There is no doubt that direct notification is a highly effective means of notifying consumers about recalls. Therefore, we always encourage direct notification for recalls when contact information is available. Many of our recalls involve direct notification via mail, e-mail or text message.

Question 4. When companies issue voluntary recalls, they're also supposed to tell CPSC what they plan to do to remedy the problem. But some companies want the remedy—be it repair or exchange of the product—to *also* be voluntary. Do you believe that companies will be more likely to act to protect consumers if they *have* to comply with their remedy plans, or that it is better for consumers to just let companies do what they think is best on a voluntary basis? Please justify your response.

Answer. Recalling companies propose their preferred remedy to CPSC staff and staff reviews the proposed remedy to determine whether it is adequate to protect consumers. The agreed-upon remedy is then memorialized in both the corrective action plan acceptance letter and the press release. The company must then provide that agreed-upon remedy to every affected consumer. I believe that it is best for customers to be fully informed about the product being recalled and the remedies available under that recall in order to take full advantage of the recall. While I have certainly seen recalling companies come up short in their efforts to publicize their recalls (and we continue to push on this front to change this dynamic), I do not recall instances of companies flat-out choosing not to provide the agreed-upon remedy when contacted by a consumer. If you have information about this concern that you can please share with me, I would certainly look into it.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. CORY GARDNER TO HON. ANN MARIE BUERKLE

Question. Commissioner Buerkle, do you believe the Commission should pursue a nationwide recall of all corded window coverings? Are you aware of efforts by industry to promote improved corded window covering safety? Do you think such efforts could improve corded window covering safety?

Answer. I do not believe the Commission should pursue a nationwide recall of the approximately one billion corded window coverings that are currently in the U.S. marketplace.

The Commission is currently engaged in rulemaking to consider whether to adopt a mandatory Federal standard for window coverings. I am keenly aware of the tragic deaths of young children that occur as a result of corded window coverings, but according to the CPSC staff's most recent analysis, the annual risk of a fatal strangulation from the corded window coverings sold from 1996 to 2010 barely exceeds one in a hundred million units. That risk is already declining as older products are gradually being replaced with the better products that are currently available. It will continue to decline as even better products become available and as safer alternatives become more affordable. For these reasons, I have significant reservations as to whether or not it would be appropriate to adopt a mandatory standard with prospective effect. To pursue a recall of all corded window coverings would be tantamount to retroactive application of a standard that has not even been justified going forward. Any such recall could easily be construed as an end run around meeting the statutory prerequisites for adoption of a Federal standard.

I am aware of many efforts by the industry to promote window covering safety. A crucial point to recognize is what population is at risk from corded window coverings. Nearly all of the deaths and injuries that have occurred as a result of corded window coverings have involved young children. For the large majority of households that do not have young children on a regular basis, corded window coverings pose no risk. The solution to this issue is to make sure that households with young children understand the hazard of a corded window covering so that the hazard can be avoided. To that end, the industry recently launched a certification program called "Best for Kids," which will specifically identify window coverings that are suitable for households with children. I strongly support this program, as well as other education efforts by the industry. In addition, the Window Covering Safety Council, a coalition of major U.S. manufacturers, retailers and importers of window coverings dedicated to educating consumers about window cord safety, has recently partnered with Scholastic Inc., to develop window covering safety materials targeting pediatricians practicing close to military installations. Finally, the industry continues to introduce a wide variety of cordless window products and is developing innovative new designs that would prevent cords from forming a hazardous loop.

Unfortunately, in comparison to other agency safety campaigns, CPSC commits very limited resources to any window covering education campaign. CPSC could do far more to educate parents, caregivers, and community health providers. There are many inter-governmental partnerships that should be considered to address this issue. The goal should be to raise awareness regarding this hazard rather than restrict choices for everyone.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO HON. ANN MARIE BUERKLE

Question. Should voluntary recall notices contain the same types of information that are included in mandatory recall notices? If the answer is no, please explain why voluntary and mandatory notices should contain different types of information.

Answer. Generally, I believe voluntary recall notices should contain the same types of information as mandatory recall notices. Since mandatory recall notices are issued only after a trial-type hearing in which the Commission staff's position is upheld against a company resisting a recall, the position of a firm voluntarily conducting a recall in cooperation with CPSC is quite different, and there may be situations in which information required in a mandatory recall notice should not be required for a voluntary recall. The Commission's proposed voluntary recall rule has the equities backwards, imposing more onerous requirements on firms conducting voluntary recalls than the Consumer Product Safety Act requires for mandatory recall notices.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO HON. ANN MARIE BUERKLE

Question 1. In late August, Ikea recalled a children's nightlight because its plastic covering could come off and pose an electrical shock hazard. Yet not a single one of Ikea's 51 Facebook posts or 179 Instagram posts in the past 90 days was about safety recalls—although 1 of its 378 tweets did note the nightlight recall. 71 percent of adults use Facebook. Do you believe that more people would learn about safety recalls of defective products if companies were required to post recall notices on Facebook and other social media? Why or why not?

Answer. I believe that the use of social media could lead, in some cases, to more people learning about safety recalls. Given the wide variety of media, and the many different approaches taken by different firms, I think that any requirements in this area would have to be highly flexible rather than prescriptive.

Question 2. Over the years, many children died due to defective cribs, some of which had been voluntarily recalled years before the deaths occurred. In some of these cases, the voluntary recall notices did not even acknowledge the risk of death or injury that the defective cribs posed. Do you believe that more people would be likely to learn of and pay attention to safety recalls of defective products if companies were required to accurately describe the defect and whether it had been linked to injuries or deaths when they issued recalls? Why or why not?

Answer. I believe that recall notices should accurately describe the safety problem with a product (it may or may not be a defect that gives rise to a recall) and should include information about injuries or deaths that are related to that problem. This approach has been followed at CPSC for many years.

Question 3. Do you believe that more people would learn about recalls of defective products like car-seats if the companies had to send letters or e-mails to people who purchased them, much like auto companies are required to do when defective cars are recalled? Why or why not?

Answer. I believe that recalling firms should ordinarily provide direct notice to any purchasers whose contact information they have. For durable infant products (including infant carriers), manufacturers are already required to provide postage-prepaid product registration forms so that purchasers can be notified personally in the case of a recall. See Public Law No. 110–314, title I, § 104(d), 15 U.S.C. § 2056a(d); 16 C.F.R. part 1130.

Question 4. When companies issue voluntary recalls, they're also supposed to tell CPSC what they plan to do to remedy the problem. But some companies want the remedy—be it repair or exchange of the product—to *also* be voluntary. Do you believe that companies will be more likely to act to protect consumers if they *have* to comply with their remedy plans, or that it is better for consumers to just let companies do what they think is best on a voluntary basis? Please justify your response.

Answer. Before a company conducts a voluntary recall in cooperation with the CPSC, it must submit a Corrective Action Plan (CAP). The CAP must be approved by the CPSC staff. The vast majority of companies (>99 percent) execute their CAP as agreed. On those rare occasions when a company does not do what it proposed, CPSC is not without recourse. It can take a variety of measures to address the hazard.

I do not think that CPSC should change its approach because of a few rare problems. I believe that consumers would be worse off if we made all CAPs legally binding.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO CHERYL A. FALVEY

Question 1. During the time you served as General Counsel of the CPSC, did you issue any legal opinion addressing the issue of whether the Office of Compliance could promise formal or informal civil penalty "immunity" to companies participating in the Retailer Reporting Program? If your answer is yes, please explain the basis of such opinion. If your answer is no, what incentives do companies have to participate in the Retailer Reporting Program?

Answer. I do not specifically recall whether the Office of General Counsel issued an opinion addressing the issue of whether the Office of Compliance "could promise formal or informal civil penalty 'immunity' to companies participating in the Retailer Reporting Program." The CPSC has the authority to exercise prosecutorial discretion with regard to civil penalty enforcement, but whether the internal delegations of authority extend that authority to the Office of Compliance is the legal issue for consideration. The incentives for retailers to participate in the Retailer Report-

ing Program include, but are not limited to, partnering with the CPSC on a robust compliance program to ensure the sale of safe products and minimizing the risk of civil penalties for failure to report information related to consumer complaints.

Question 2. What is the legal enforceability of Corrective Action Plans that the CPSC negotiates with companies?

Answer. A Corrective Action Plan is a "document, signed by a subject firm, which sets forth the remedial action which a firm will voluntarily undertake to protect the public, but which has no legal binding effect." 16 C.F.R. § 1115.20(a). The Commission has the right to seek broader corrective action if "it becomes aware of new facts or if the corrective action plan does not sufficiently protect the public." *Id.* In addition to being signed by representatives of the subject firm, it acknowledges that the CPSC may monitor the corrective action and can publicize the terms of the corrective action plan to inform the public of the nature and extent of the alleged substantial product hazard and refund, repair or other actions being taken by the firm. *Id.*

A Corrective Action Plan differs from a "Consent Order Agreement" which is also a voluntary agreement but has an "admission of jurisdictional facts" and contains an "acknowledgment that any interested person may bring an action pursuant to section 24 of the CPSA . . . to enforce the order and obtain appropriate injunctive relief." *See* 16 C.F.R. § 1115.20(b). The CPSC can also pursue compulsory remedial actions when voluntary agreements in the form of a Corrective Action Plan or Consent Order Agreement cannot be reached.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO NANCY A. COWLES

Question 1. How would compliance program-related requirements in Corrective Action Plans improve the voluntary recall process?

Answer. Many companies have compliance programs in place. It gives them the opportunity to find and address problems in their process and avoid recalls as well as injuries from an unsafe product. However, absent this focus, we see recalls and injuries from products that better internal controls could have kept off the market. Compliance programs help companies design safer products, catch potential hazards sooner, and respond more quickly when a recall occurs. All of this will improve the voluntary recall process.

At KID, we would also recommend that that internal program extend through completion of a recall—tracking compliance with already announced recalls and putting into place measures that will result in a more complete recall.

Question 2. What, if any, additional information about product recall rates should companies make publicly available?

Answer. In doing our annual report on children's product recalls, we use the Freedom of Information Act (FOIA) process to obtain information on recalled products. The monthly Corrective Action Plan report contains much information that would be helpful to policymakers, consumers and industry in measuring compliance and recall effectiveness. Companies report on recall participation, consumer contact, both incoming and outgoing, and injury and incident reports post recall. All of the information, if available publically would give us a better picture of the effectiveness of individual recalls, but also what measures (such as e-mails to consumers) seem to result in a higher participation rate. That information is most useful in the aggregate for research purposes, but would be helpful to see for individual recalls as well. In the hearing, Commissioner Buerkle mentioned the importance of the death and injury after recall included in these reports. Sharing publically would encourage consumers to look for recalled products in their homes and comply with the steps needed to make the product safe or remove it from use.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. RICHARD BLUMENTHAL TO NANCY A. COWLES

Question. Do you believe that the voluntary recall process is effective in its current form? Are consumers getting notice of recalls? How would the proposed rule help protect consumers and get potentially dangerous and defective products out of the hands of consumers?

Answer. As strong new safety standards, required by the Consumer Product Safety Improvement Act of 2008, go into effect, we are seeing a decrease in recalls. That is a very good thing. However, we are not seeing recalls themselves increase in effectiveness. A recall is meaningless if it does not get the product out of the hands of consumers and alert them to the hazard.

As reported in our report (*A Decade of Data: An In-depth Look at 2014 and a Ten-Year Retrospective on Children's Product Recalls—February 2015*), fewer than 5 percent of children's products in consumers' hands that were recalled in 2013 can be accounted for through the current system CPSC maintains of monthly corrective action reports. That is not good and we need to work together to improve that statistic. We also need greater access to information to see if there have been deaths or injuries after a recall that might warrant a stronger effort to retrieve the item. All that is kept secret from the public. Better research is needed to see if consumers are hearing about recalls. Response rates seem to indicate that even if they are, the messages are not motivating them to take action. Marketing experts at the recalling firm have the information on how many 'touches' a consumer needs with a message before they act. They need to use that same information and same methods to retrieve unsafe products after a recall.

The proposed rule on voluntary recalls and corrective action plans is warranted and will provide a new measure of safety for consumers. In particular, the rule would allow the CPSC to use its years of experience in developing corrective action plans to make them more effective and eliminate delays that currently occur when details that should not be negotiable take days, weeks, or months to negotiate. It would allow the CPSC and recalling firms to more effectively use new tools such as social media to reach consumers. By making the agreements legally binding, CPSC can better ensure that the plan will be carried out in a timely manner and in the manner that was negotiated.

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