

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)

AMAZON.COM, INC.)

Respondent.)

CPSC DOCKET NO.: 21-2

**COMPLAINT COUNSEL’S BRIEF IN SUPPORT OF
AMENDED [PROPOSED] INITIAL ORDER**

Complaint Counsel files this Brief in Support of Amended [Proposed] Initial Order in accordance with this Court’s May 8, 2023 Order on Summary Decision Motions (the “Court’s Order”). As directed by the Court’s Order, this Brief explains the rationale behind each portion of the Amended [Proposed] Initial Order (filed in conjunction with this Brief) and provides implementation mechanisms for the remedial actions ordered by the Court.

More specifically, Complaint Counsel first addresses the portion of Court’s Order that directs Amazon to “immediately cease distribution of the Subject Products,” including how that Order applies to products that vary in size, color, and style but present the same hazards as the Subject Products, and how that Order should be communicated to downstream sellers and distributors.¹ Second, Complaint Counsel addresses the form and content of the notices Amazon must send to consumers, as well as the public notices that should be available through both the U.S. Consumer Product Safety Commission and Amazon.com, Inc. Third, Complaint Counsel addresses depreciation and explains the rationale behind full refunds for the Subject Products in order to incentivize consumers to return or provide proof of destruction of the hazardous products.

¹ Order on Summary Decision Motions, Dkt. No. 109, at 47 (May 8, 2023).

Finally, Complaint Counsel explains the process for consumer confirmation of destruction or return of the products and how the parties would manage reverse logistics and monitor returns and destruction under the proposed order.

I. CEASE DISTRIBUTION ORDER

Pursuant to the Court’s Order at Section VI(D)(1)(a) and Paragraph 1 under “Order,” Paragraph 1 of Complaint Counsel’s Amended [Proposed] Initial Order (“Proposed Order”) states that Amazon must immediately cease distribution of the Subject Products and notify all persons or entities in its distribution chain to cease distribution. Attached as Exhibit A to the Proposed Order is a draft cease distribution notice for Amazon to send to those persons or entities, which reflects the contents required in all recall notices under Section 15(i) of the CPSA, and its regulations at 16 C.F.R. §§ 1115.23-29 as follows: the word “recall” in the heading and text;² a detailed description of each Subject Product, including names, colors and sizes, intended or targeted use population, and identifying information;³ high resolution photographs of each Subject Product;⁴ a description of the actions being taken by Amazon concerning the product;⁵ the number of units;⁶ a description of the substantial product hazard associated with each product, including the risk of death;⁷ an identification of Amazon as the recalling firm;⁸ the dates of sale and sale prices;⁹ and a description of the action requested of the distribution chain.¹⁰

In addition, pursuant to Section VI(D)(1)(b) of the Court’s Order, Paragraph 2 of Complaint

² 16 C.F.R. § 1115.27(a).

³ 16 C.F.R. § 1115.27(c)(1)-(5).

⁴ 15 U.S.C. § 2064(i)(2)(A)(iii); 16 C.F.R. § 1115.27(c)(6).

⁵ 15 U.S.C. § 2064(i)(2)(B); 16 C.F.R. § 1115.27(d). The notices will also include contact details for information about the remedy, which will require Amazon’s input prior to finalization.

⁶ 15 U.S.C. § 2064(i)(2)(C); 16 C.F.R. § 1115.27(e).

⁷ 15 U.S.C. § 2064(i)(2)(D); 16 C.F.R. § 1115.27(f).

⁸ 16 C.F.R. § 1115.27(g).

⁹ 15 U.S.C. § 2064(i)(2)(F); 16 C.F.R. § 1115.27(k)-(l).

¹⁰ *See* 15 U.S.C. § 2064(i)(2)(I); 16 C.F.R. § 1115.27(o).

Counsel’s Proposed Order requires Amazon to cease distribution of all products that vary only by size, color, and style and present the same hazard as the Subject Products, as well as any additional products that Amazon has been informed by CPSC present the same hazard.¹¹

II. NOTICES

a. Direct Notice

Paragraphs 3 and 3(a) of the Proposed Order describe the direct notices Amazon should send to consumers, pursuant to Section VI(D)(2)(d) of this Court’s Order. As this Court has recognized, a direct recall notice “is the most effective form of a recall notice.”¹² In addition, CPSC’s practice is to require two rounds of direct notification.¹³ Therefore, the Proposed Order contemplates a second round of notice, two weeks after the first. The contents of the notices, attached as drafts as Exhibit C to the Proposed Order, reflect the content required by Section 15(i) of the CPSA, and its regulations at 16 C.F.R. §§ 1115.23-.29: the word “recall” in the heading and text;¹⁴ a detailed description of each Subject Product, including names, colors and sizes, intended or targeted use population, and identifying information;¹⁵ high resolution photographs of each Subject Product;¹⁶ a description of the actions being taken by Amazon concerning the product;¹⁷ the number of units;¹⁸ a description of the substantial product hazard associated with each product, including the risk of death;¹⁹ an identification of Amazon as the recalling firm;²⁰ the dates of sale

¹¹ This includes all products referenced by Amazon in Paragraphs 166-179 of Amazon’s Response to Complaint Counsel’s Statement of Undisputed Material Facts, Dkt. No. 92.

¹² Order on Summary Decision Motions, Dkt. No. 109, at 11 (May 8, 2023). Note, however, that direct notice is “less effective with respect to Subject Products that are not in the hands of the original purchasers.” *Id.* at 11-12.

¹³ *See id.* at 25, 34.

¹⁴ 16 C.F.R. § 1115.27(a).

¹⁵ 16 C.F.R. § 1115.27(c)(1)-(5).

¹⁶ 15 U.S.C. § 2064(i)(2)(A)(iii); 16 C.F.R. § 1115.27(c)(6).

¹⁷ 15 U.S.C. § 2064(i)(2)(B); 16 C.F.R. § 1115.27(d). The notices will also include contact details for information about the remedy, which will require Amazon’s input prior to finalization.

¹⁸ 15 U.S.C. § 2064(i)(2)(C); 16 C.F.R. § 1115.27(e).

¹⁹ 15 U.S.C. § 2064(i)(2)(D); 16 C.F.R. § 1115.27(f).

²⁰ 16 C.F.R. § 1115.27(g).

and sale prices;²¹ and a description of the remedy available to consumers.²²

b. Press Release

Paragraphs 3 and 3(a) of Complaint Counsel’s Proposed Order also address the proposed public notification of the recall and of the substantial product hazards present in the Subject Products, in the form of press releases published by the CPSC on its website. These notice remedies correspond to the Court’s discussion in Sections VI(D)(2)(d) and VI(D)(2)(f) of its Order. The proposed contents of the press releases are set forth in Exhibit B to the Proposed Order. Each draft press release reflects the contents specified in CPSA Section 15(i)(2)(A)-(H) and 16 C.F.R. §§ 1115.23-.29, as follows: the word “recall” in the heading and text;²³ a detailed description of each Subject Product, including names, colors and sizes, intended or targeted use population, and identifying information;²⁴ high resolution photographs of each Subject Product;²⁵ a description of the actions being taken by Amazon concerning the product;²⁶ the number of units;²⁷ a description of the substantial product hazard associated with each product, including the risk of death;²⁸ an identification of Amazon as the recalling firm;²⁹ an identification of the product manufacturers;³⁰ the dates of sale and sale prices;³¹ and a description of the remedy available to consumers.³²

Complaint Counsel’s Proposed Order specifies that the CPSC will publish the press release on its own website within 10 days following the issuance of a Final Decision and Order of the

²¹ 15 U.S.C. § 2064(i)(2)(F); 16 C.F.R. § 1115.27(k)-(l).

²² 15 U.S.C. § 2064(i)(2)(H); 16 C.F.R. § 1115.27(n).

²³ 16 C.F.R. § 1115.27(a).

²⁴ 16 C.F.R. § 1115.27(c)(1)-(5).

²⁵ 15 U.S.C. § 2064(i)(2)(A)(iii); 16 C.F.R. § 1115.27(c)(6).

²⁶ 15 U.S.C. § 2064(i)(2)(B); 16 C.F.R. § 1115.27(d). The press releases will also include contact details for information about the remedy, which will require Amazon’s input prior to finalization, pursuant to Paragraph 3(c) of the Proposed Order.

²⁷ 15 U.S.C. § 2064(i)(2)(C); 16 C.F.R. § 1115.27(e).

²⁸ 15 U.S.C. § 2064(i)(2)(D); 16 C.F.R. § 1115.27(f).

²⁹ 16 C.F.R. § 1115.27(g).

³⁰ 16 C.F.R. § 1115.27(h). For those Subject Products for which the identity of the manufacturer is unknown, the country of manufacture (China) is listed instead.

³¹ 15 U.S.C. § 2064(i)(2)(F); 16 C.F.R. § 1115.27(k)-(l).

³² 15 U.S.C. § 2064(i)(2)(H); 16 C.F.R. § 1115.27(n).

Commission³³ in this matter. The process set forth in these Paragraphs is consistent with CPSC’s standard protocol of maintaining recall news releases on its website, which it has done in all 77 recalls of children’s sleepwear garments, hair dryers, and carbon monoxide detectors since 2015.³⁴ These press releases are a crucial remedial component in this case, because they provide a public record of the recall and they serve to notify those in possession of the Subject Products who are not initial purchasers. Under the Proposed Order, the press releases are the only form of public notice that will be published on the CPSC’s website, as the proposed email notices (discussed in Section II.a. above) will only be provided directly to identified purchasers by Amazon.³⁵

c. Internet Notice

Pursuant to Section VI(D)(2)(e) of the Court’s Order, Paragraphs 3(b) and 3(b)(i)-(vii) of Complaint Counsel’s Proposed Order address the public notice that should be published on Amazon’s website and its affiliated social media platforms, as well as the notice that should be provided to second-hand retailers, thrift stores, and online re-sale websites.

i. Website Notice

The Proposed Order contemplates that Amazon will create a new, clear and conspicuous link on its homepage to its “Product Safety and Recalls” site, where it will publish notice that is substantially similar in form and content to the notice published on CPSC’s website, as drafted in Exhibit B to the Proposed Order and discussed in Section II.b. above.

As specified in the Court’s Order, Complaint Counsel’s Proposed Order directs Amazon to publish notice of the Subject Product recalls on the Amazon.com “Your Recalls and Product Safety

³³ See 16 C.F.R. § 1025.52.

³⁴ See Order on Summary Decision Motions, Dkt. No. 109, at 11 (May 8, 2023).

³⁵ The Court referred to the possibility that a public press release on the CPSC website may not be necessary if “the direct notices themselves [] will be posted on Amazon’s website and the CPSC’s.” Order on Summary Decision Motions, Dkt. No. 109, at 37-38 (May 8, 2023). In fact, the Commission’s ordinary practice is not to post the individually targeted direct notice on its website, but rather only to publish the public-facing press release announcing the recall. See *e.g.*, 2021 Recall Handbook, pg. 26. (“The CPSC maintains the agreed-upon news release announcing the recall on the CPSC’s website.”).

Alerts” and “Product Safety and Recalls” pages.³⁶ In their current forms, however, neither page provides the “clear and conspicuous” public notice contemplated by 15 U.S.C. § 2064(c)(1)(D). Specifically, the “Your Recalls and Product Safety Alerts” page is only accessible to individuals signed in to an Amazon account,³⁷ and it therefore does not provide the publicly available notice needed to alert second-hand purchasers and others who may not have received direct notice of the recalls.³⁸ Likewise, although Amazon’s “Product Safety and Recalls” page may be technically accessible to the public, the page does not provide “clear and conspicuous” notice in any practical sense because, unlike most online sellers, Amazon.com has no direct link on its homepage to this recalls page. Instead, Amazon has confirmed that consumers can only locate the page via queries on third-party search engines, by typing the lengthy URL for the page—which is more than 50 characters long—into their Internet browsers, or by browsing to a particular subsection of Amazon’s “Help & Customer Service” site.³⁹ Furthermore, even from the “Help & Customer Service” page, a consumer can only locate “Product Safety and Recalls” by one of two methods, neither of which is likely to be obvious to the average consumer: First, consumers can click on a link for “Other topics & Help sites,” then on a link for “Ordering,” and finally, in a newly opened tab, on a link for “Product Safety and Recalls.” Second, consumers can type a relevant query into Amazon’s “help library” search bar; however, this search function currently returns a link to the “Product Safety and Recalls” page as only the second suggested result following a search for “recall,” “recalls,” or “product safety alerts.”

Accordingly, to ensure that information regarding the recalls of the Subject Products is

³⁶ See Order on Summary Decision Motions, Dkt. No. 109, at 38 (May 8, 2023).

³⁷ See Amazon Letter to Judge Patil (4.6.2023), pgs. 2-3 (describing “Your Recalls and Product Safety Alerts” as a “dedicated and personalized” page available only to “Amazon customers”).

³⁸ See Order on Summary Decision Motions, pg. 31 (noting that Amazon failed to provide public notice on its website as required by 15 U.S.C. § 2064(c)(1)(D)).

³⁹ See Amazon Letter to Judge Patil (4.6.2023), pg. 2.

readily accessible both to consumers searching the Internet and to those using Amazon’s homepage, as contemplated by this Court’s Order, Complaint Counsel’s Proposed Order directs Amazon to create a new, clear and conspicuous link on its homepage for the “Product Safety and Recalls” site. Consistent with CPSC practice,⁴⁰ the notice posted to this page should be maintained for a minimum of 10 years, to ensure that there is a proper record of the recall. Additionally, in accord with Amazon’s current practices,⁴¹ the Proposed Order instructs that Amazon will post a banner on the “Your Orders” page for original purchasers, providing notice of the recall and linking to the “Your Recalls and Product Safety Alerts” page. This banner should remain in place for 120 days, which is the standard period of time CPSC requires firms to maintain a prominent link to recall information on the top of the main landing page of a firm’s website.⁴²

ii. *Social Media Notice*

Pursuant to the Court’s statement on the need to supplement direct notice through action on Amazon’s active social media sites,⁴³ the Proposed Order directs Amazon to provide outreach to social media users on its Facebook, Twitter, and Instagram accounts. Draft social media posts for each social network are set forth in Exhibit D to the Proposed Order. Each proposed social media post includes the product name, a description of the substantial product hazard, and, with the exception of the draft Twitter post (which is subject to a 280-character limit),⁴⁴ a description of the remedy available to consumers. The notice posted to Amazon’s social media accounts should not

⁴⁰ The Corrective Action Plan Template (“CAP Template”), is used “as a summary of the corrective action plan options that could be used in a particular recall.” Amazon’s Response to Complaint Counsel’s Statement of Undisputed Material Facts, Dkt. 92, at ¶118. The CAP Template requires that recalling firms maintain their toll-free number and notice of the recall on their website for a minimum of 10 years. Complaint Counsel’s Statement of Undisputed Material Facts, Dkt. 80, Exhibit 1, Exhibit T, CPSC_AM0012125-12133, at CPSC_AM0012130.

⁴¹ Amazon Letter to Judge Patil (4.6.2023), pg. 3.

⁴² CAP Template, Section 4.b. Complaint Counsel’s Statement of Undisputed Material Facts, Dkt. 80, Exhibit 1, Exhibit T, CPSC_AM0012125-12133, at CPSC_AM0012126.

⁴³ Order on Summary Decisions Motions, Dkt. No. 109, at 38-39 (May 8, 2023).

⁴⁴ See *Counting Characters*, TWITTER, <https://developer.twitter.com/en/docs/counting-characters> (last visited May 16, 2023).

be removed or deleted for a minimum of 10 years after posting.⁴⁵

iii. Notice to Secondary Market

Finally, in light of the Court’s recognition of the existence of a re-sale market for the Subject Products and the need to provide notice of the recall “to any third-party Internet website on which [Amazon] placed the product for sale,”⁴⁶ Complaint Counsel’s Proposed Order instructs Amazon to notify known second-hand retailers, thrift stores, and online re-sale websites (including Facebook Marketplace, Alibaba, Etsy, eBay, Offerup, Alibaba and Craigslist). Drafts of these notifications are set forth in Exhibit E to the Proposed Order.

III. REFUND AND REPLACEMENT

In connection with Section VI(D)(3) of the Court’s Order, Complaint Counsel’s Proposed Order addresses the implementation of a refund or replacement remedy in Paragraphs 4(a)-(d). These paragraphs direct Amazon to instruct consumers to return their product or provide specific photographic evidence of destruction in exchange for a full refund of the purchase price. In the case of carbon monoxide detectors only, the Proposed Order contemplates that Amazon could provide an approved replacement product of equal value rather than a refund.

As this Court has recognized, “Section 15 refunds, conditioned upon return or proof of disposition,”⁴⁷ are an appropriate remedy given the key objectives of a recall of a product that presents a substantial product hazard: “To remove defective products from the distribution chain and from the possession of consumers.”⁴⁸ In light of these important goals, and given that the Court has found that Amazon’s initial issuance of gift cards was “not a Section 15 refund,”⁴⁹

⁴⁵ The CAP Template requires that recalling firms maintain their toll-free number and notice of the recall on their website for a minimum of 10 years. Complaint Counsel’s Statement of Undisputed Material Facts, Dkt. 80, Exhibit 1, Exhibit T, CPSC_AM0012125-12133, at CPSC_AM0012130.

⁴⁶ Order on Summary Decision Motions, Dkt. No. 109, at 38 (May 8, 2023).

⁴⁷ *Id.*, at 42-43.

⁴⁸ *Id.* at 44-45 (citing the 2012 Recall Handbook and 2021 Recall Handbook).

⁴⁹ *Id.* at 42.

Complaint Counsel maintains that the remedy should include full refunds conditioned upon (a) return of the Subject Products to Amazon, or (b) the provision of specific photographic proof of destruction of the Subject Products to Amazon.

In order to maximize consumers' incentive⁵⁰ to facilitate the removal of the Subject Products from the marketplace, the Proposed Order contemplates that the amount of the offered refunds will be the full purchase price and should not be reduced "by a reasonable allowance for use." 15 U.S.C. § 2064(d)(1)(C). Should this Court entertain reducing the refund amount based upon reasonable use, each Subject Product category presents a different analysis.

First, under the applicable statutory provision, the Commission will only consider whether to make a reasonable allowance for use if a product has been in the possession of a consumer for one year or more at the time of public notice. 15 U.S.C. § 2064(d)(1)(C). The public was on notice as to the hazards presented by the Subject Products when Complaint Counsel filed the Complaint on July 14, 2021. However, the delay caused by Amazon's refusal to voluntarily recall the products resulting in this action seeking a mandatory corrective action should not form a basis to diminish the incentive provided to consumers to return or destroy these hazardous Subject Products. Regardless, as of July 2021, both the carbon monoxide detectors (first sale date 2018) and hair dryers (first sale date 2019) would not have materially depreciated: the generally accepted lifespan for a carbon monoxide detector is seven to ten years,⁵¹ and for hair dryers, the product

⁵⁰ Better incentives for participation in recalls help mitigate the risk of low consumer response rates. *See, e.g.*, Blake Rose, *Presentation: Review of Recall Process and Standard Notifications*, Tr. Of CPSC Recall Effectiveness Workshop, July 25, 2017, Declaration of Joshua Gonzalez In Support of Amazon's Motion for Summary Decision, Dkt. 76, Ex. 69, Amazon-CPSC-FBA-00001348 at 01366-37 (noting that a refund to a customer "should be . . . the full purchase price of the product. One of the things we want to do is encourage consumers to participate in the recall and the best way to do that when it comes to a refund is to offer them the full purchase price").

⁵¹ *See, e.g.*, *When Should I Replace My Carbon Monoxide Alarm?*, KIDDE (March 28, 2022), <https://www.kidde.com/home-safety/en/us/support/help-center/browse-articles/articles/what-are-the-end-of-life-warnings-on-a-carbon-monoxide-alarm.html>.

lifespan can range from 600 to 1,000 hours of use (or two to seven years).⁵² Furthermore, for the carbon monoxide detectors, it would not be appropriate to consider a reasonable allowance given that the products have never functioned for their intended use (*i.e.*, the products do not properly detect carbon monoxide). As to the children's sleepwear garments (first sale date 2017), their lifespan varies depending upon the number of times the garments are washed. It is reasonable to assume that the Subject Product sleepwear garments were still within their useful life as of July 2021, particularly given the prevalence of such garments being handed down to younger siblings or other family members. For these reasons, depreciation based upon reasonable use is neither required nor advisable in this case.

Paragraph 4(d) of the Proposed Order specifies that Amazon may alternatively offer a replacement remedy rather than a full refund of the purchase price for Subject Product carbon monoxide detectors. Complaint Counsel supports the availability of a replacement remedy in this instance because carbon monoxide detectors protect consumers and should be installed in every home. However, such a remedy may not be appropriate for children's sleepwear garments or hair dryers, both of which address more personal needs of individual consumers in terms of their unique function, design, or size, and may therefore be difficult to replace with an item of equal value and utility to the consumer. Should the Court proceed with a replacement remedy for the carbon monoxide detectors, CPSC staff would need to inspect and approve the replacement carbon monoxide detectors proposed by Amazon prior to their provision to consumers to ensure that the detectors function as intended.

As to the mechanism of return or proof of destruction, Complaint Counsel sets forth in the Proposed Order that consumers shall have the following options as to each category of Subject

⁵² See, e.g., *How Long Do Hair Dryers Last?*, WWW.WETHEDRYERS.COM (August 28, 2020), <https://wethedryers.com/how-long-do-hair-dryers-last/>.

Product:

- Purchasers of the Subject Product children’s sleepwear garments will be instructed to either return the products or to cut the sleepwear in half vertically and horizontally and provide photographic proof that they have done so.
- Purchasers of the Subject Product carbon monoxide detectors will be instructed to return the products.
 - Only return is feasible for the carbon monoxide detectors because there is no practicable method for consumers to render the product unusable.
- Purchasers of the Subject Product hair dryers will be instructed to either return the products or to cut the cord of the hair dryer and provide photographic proof that they have done so.

IV. PROGRESS REPORTS AND REVERSE LOGISTICS

In light of the Court’s reference, in Section VI(D)(4), to actions calculated to “remove those Subject Products that were not already disposed of” from the hands of consumers as well as the distribution chain, Paragraphs 5 and 5(a)-(e) direct Amazon to take action to quarantine, segregate, and mark as recalled all Subject Products in its possession, in the possession of its distribution chain, or returned by consumers. Consistent with standard CPSC practice,⁵³ these paragraphs instruct Amazon to coordinate retrieval and disposal of the Subject Products and to provide CPSC with notice and certification of product destruction.

Additionally, pursuant to Section VI(D)(5) of the Court’s Order, Paragraphs 6(a)-(i) of Complaint Counsel’s Proposed Order address the proposed process for the submission of monthly progress reports, which allows the parties to track the return and destruction of the Subject Products. As recognized by the Court, this process has been routinized via the CPSC’s online “Monthly Progress Report System” and is supported by the Recall Handbook.⁵⁴

⁵³ See CAP Template, Section 7. Complaint Counsel’s Statement of Undisputed Material Facts, Dkt. 80, Exhibit 1, Exhibit T, CPSC_AM0012125-12133, at CPSC_AM0012130-32.

⁵⁴ Order on Summary Decision Motions, Dkt. No. 109, at 46 (May 8, 2023) (citing the 2012 and 2021 Recall Handbooks). See also Complaint Counsel’s Statement of Undisputed Material Facts, Dkt. 80, Exhibit 1, Exhibit X, CPSC_AM0011544 (Monthly Progress Report Form).

Amazon should provide the information listed in the sub-parts to Paragraph 6 of the Proposed Order (sub-parts a. through i.) each month via the electronic Monthly Progress Report System.⁵⁵ This would allow CPSC staff to monitor the progress of the recall and keep track of how many Subject Products have been returned and destroyed.

Respectfully submitted,



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May 16, 2023

⁵⁵ *Monthly Progress Report System*, U.S. CPSC, www.cpsc.gov/Business--Manufacturing/Recall-Guidance/monthly-progress-report-system (last visited May 16, 2023).

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2023, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

By email to the Secretary:

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