



**Testimony of Ann Marie Buerkle
Commissioner
United States Consumer Product Safety Commission**

Hearing on

“Consumer Product Safety and the Recall Process”

**United States Senate
Committee on Commerce, Science, and Transportation**

**Subcommittee on Consumer Protection, Product Safety,
Insurance, and Data Security**

October 8, 2015

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

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.

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

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).

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 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.