



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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October 1, 2014

Erik Glavich
Director of Legal and Regulatory Policy
National Association of Manufacturers
733 10th Street NW, Suite 700
Washington, DC 20001

Dear Mr. Glavich:

I am in receipt of your July 15, 2014, letter expressing concern with recent revisions to our standard monthly progress reporting form and the inclusion of requests for notification through the use of various social media platforms to announce product safety recalls. Thank you for sharing your members' views with us.

I. Reporting on Social Media Activity

As a result of and in recognition of increased use of certain forms of notification, the Office of Compliance and Field Operations staff undertook a revision to the monthly progress reporting form used by all recalling companies in an effort to streamline and provide clarity as to what needed to be reported. As you may be aware, the previous monthly progress reporting form tracked the use of social media by recalling firms. The revised version merely recognizes the enhanced use of social media platforms (e.g., Twitter, blogs, Facebook) by recalling companies and seeks more details about how these platforms are being employed to provide recall notification.

Voluntary corrective action plans (CAPs) are negotiated between Compliance staff and the firm responsible for the product recall. One key element of the negotiated CAP is the means by which the firm will provide broad and comprehensive notice to likely owners of the recalled product. The specific types of notice used in corrective action plans have evolved over the 40 plus year history of the agency. While the traditional print and broadcast media has always been a key communication channel for the notice issued by the agency and the recalling company, the use of social media has become more prevalent in the U.S., and CPSC staff is encouraging greater use of this newer form of communication. Many companies use social media to market their products and to provide information to their customer base about the use of their products.

Accordingly, we see announcing recalls on social media as a natural extension of a firm's use of social media. We believe the use of social media to notify consumers of a product recall is a logical extension of any notification effort and will prove to be an effective method to reach the owners of a recalled product and prevent product-related injuries and deaths. It is not uncommon for a company involved in a consumer product recall to include some use of social media announcing the product recall and alerting likely owners to the risks presented by the product.

For those recalling companies that utilize social media platforms to announce product safety recalls, we ask them to report the progress on the monthly reporting form. Only those elements that apply to the negotiated corrective action plan would be completed on the form. This is consistent with past practice regarding the monthly reporting on the progress of a recall; recalling firms complete only those portions that apply to the specific elements of the negotiated corrective action plan. Companies routinely respond to only those elements in the progress report that applies to their unique situation. As a result of your letter, we are taking steps to further clarify the progress reporting form to ensure that the recalling firm understands it needs to complete only that portion of the report that was negotiated as part of the corrective action plan.

For every corrective action plan negotiated between the firm and CPSC staff, a Compliance Officer works directly with the recalling company to explain how the plan should be developed and implemented. This includes instructions on the use of the monthly progress report. We will continue to work with Compliance staff to ensure clear guidance is given to every recalling company regarding the requirements of completing the progress report.

II. Monitoring On-line Auction Sites

With respect to the monitoring of on-line auction sites, CPSC has always encouraged recalling companies to do everything in their power to identify likely owners of recalled products to quickly remove defective or violative products from the distribution chain and from the possession of consumers. Companies that undertake a voluntary corrective action plan are also being asked to look for their recalled products that are being sold on-line in auction sites as part of their routine monitoring of a recall program. CPSC monitors many on-line sites and encourages industry to monitor these sites to identify sellers of the recalled product and notify these sellers of the product recall.

Compliance staff has emphasized improved recall notification and monitoring over the past 18 months at various training programs (including previous training sessions held with the International Consumer Product Health and Safety Conference (ICPHSO)). As part of this effort, we expect recalling firms to identify their recalled product being sold and offer the remedy to the seller in an effort to avoid further injuries and deaths from these recalled products. CPSC staff believes these efforts are a prudent and reasonable way to increase the effectiveness of recalls and reduce the potential for serious injury and death from the recalled product.

III. Complying with the Anti-Deficiency Act

Because CAPs are purely voluntary arrangements, Anti-deficiency Act provisions are not implicated. The Commission's form inquiring about the progress of a CAP in no way authorizes or instructs the firm to "act in the capacity of CPSC enforcement officials to monitor on-line auctions and respond to apparent violations of the prohibition on selling a recalled product." A firm's responses to CPSC's inquiries are informational. If, for instance, the CAP does not provide for on-line site monitoring and the firm has not conducted any monitoring, the firm may respond by indicating or by noting that the question about on-line monitoring is "not applicable."

IV. Complying with the Paperwork Reduction Act

Progress reporting forms are negotiated as part of an individual corrective action plan and are the means by which the recalling companies report the progress of the recall to the agency. Where an element of the progress report does not apply to the recalling firm, there is no expectation of reporting that element. Since the beginning of the agency over 40 years ago, the progress reporting form has been the sole document provided by individual recalling companies detailing the status of its negotiated voluntary corrective action plan. These monthly reports, collected during the monitoring phase of the recall, play a critical role in measuring the effectiveness of the voluntary recall undertaken by the recalling firm and are part of staff's investigatory efforts relating to the recalled product. The progress report form has been used to measure the effectiveness of a recalling company's actions since the beginning of the agency.

NAM's correspondence mischaracterizes the applicability of the PRA to the agency's CAP-related inquiries, and it incorrectly concludes that staff's inquiries regarding CAPs are subject to PRA requirements. Specifically, these inquiries fall squarely within what is commonly referred to as the "investigatory exemption," which applies to collections of information "during the conduct of ... an administrative action or investigation involving an agency against specific individuals or entities" (the "investigatory exemption"). 44 U.S.C. § 3518(c)(1)(B)(ii); 5 C.F.R. § 1320.4(a)(2).

Contrary to NAM's assertions, the investigatory exception "is not limited to agency proceedings of a prosecutorial nature but also includes any agency proceeding involving specific adversary parties." S. Rep. No. 96-930, at 56 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6296. The exception applies to administrative matters, Implementing Guidance for OMB Review of Agency Information Collection at 24 (OMB August 16, 1999) (OMB Guidance Document) (available at <http://theere.com/pdf/PRAguidenew.pdf>), such as the specific inquiries at issue. The exemption applies once an investigation commences with respect to a specific party and remains in effect throughout the investigation, and it ends when the conduct of the particular administrative action is over. *Id.* Because staff's investigation of a company's compliance with legal obligations enforced by the CPSC continues

throughout the implementation of a CAP, the investigatory exemption applies to related inquiries.

Thank you again for sharing your members' views. Please feel free to contact me directly at 301-504-7520 if you have any questions or you care to further discuss any of these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc J. Schoem", followed by a horizontal line.

Marc J. Schoem

cc: The Honorable Jay Rockefeller, Chairman, Committee on Commerce, Science and Transportation, United States Senate
The Honorable John Thune, Ranking Member, Committee on Commerce, Science and Transportation, United States Senate
The Honorable Fred Upton, Chairman, Committee on Energy and Commerce, United States House of Representatives
The Honorable Henry Waxman, Ranking Member, Committee on Energy and Commerce, United States House of Representatives
The Honorable Elliot Kaye, Chairman, U.S. Consumer Product Safety Commission
The Honorable Robert Adler, Vice Chairman, U.S. Consumer Product Safety Commission
The Honorable Marietta Robinson, Commissioner, U.S. Consumer Product Safety Commission
The Honorable Anne Marie Buerkle, Commissioner, U.S. Consumer Product Safety Commission
The Honorable Joseph Mohorovic, Commissioner, U.S. Consumer Product Safety Commission

Attachment: Updated CAP Progress Reporting Form (10/2014)