To: Office of the Secretary, Consumer Product Safety Commission
Via email mandatoryrecallnotices@cpsc.gov
From: Colleen McIntyre
Via email Mcintyre.colleen@gmail.com

Re: Section 15(i) NPR

In the March 20, 2009, 16 CFR Part 1115: Notice of proposed rulemaking, the U.S. Consumer Product Safety Commission (the "Commission") generally succeeded in its efforts in setting out guidelines and requirements for recall notices for the purpose of protecting the public under the Consumer Product Safety Improvement Act of 2008 amendments to the Consumer Product Safety Act. However, there a few sections where the Commission did not go far enough to provide the protections Congress seeks. Congress sets out the purposes of the Consumer Product Safety Act in 15 USCA § 2051. The statute states, "The purposes of this chapter are to protect the public against unreasonable risks of injury associated with consumer products; to assist consumers in evaluating the comparative safety of consumer products; to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 USCA § 2051 (b)(1) – (4). The Commission fails to meet these goals in two sections of 16 CFR Part 1115 Notice of proposed rulemaking, specifically 16 CFR § 1115.26 (c) which addresses Language, and 16 CFR § 1115.24 which addresses Applicability.

Language

Under the Consumer Product Safety Act, Substantial Product Hazard Section, "The Commission may require a notice described in paragraph (1) to be distributed to in

a language other than English if the Commission determines that doing so is necessary to adequately protect the public." 15 U.S.C. 2064 (c)(2). In response to this section the Commission proposed "Languages. Where the Commission for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or a U.S. district court for purposes of an order under section 12 of the CPSA (15 U.S.C. 2061), determines that it is necessary or appropriate to adequately inform and protect the public, a recall notice may be required to be in languages in addition to English." 16 CFR § 1115.26 (c). Recognizing that the second most spoken language in the United States is Spanish, and according to the US Census Bureau, in 2007 Spanish was the primary language spoken at home by 34 million in the U.S. 5 years old and older[1], it would be proper for the Commission to determine that all recalls be written in English and in Spanish in order to adequately inform and protect the public. The importance of the Spanish-speaking consumer base to manufactures is evidence by the fact that many manufactures now print labels and inserts in English and in Spanish, advertise in English and in Spanish, and even offer customer services in both languages. Requiring all recalls to be written in English and in Spanish would ensure that the growing Spanish-speaking consumer population in the United States was adequately notified of a substantial product hazard, and thus properly protected under the statute against unreasonable risks of injury associated with consumer products. 15 USCA § 2051 (b)(1). Requiring all recalls to be written in English and in Spanish would also assist Spanish-speaking consumers in evaluating the comparative safety of consumer products and it would develop uniform

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[1] "Selected Social Characteristics in the United States: 2007." United State Census Bureau. Accessed 20 April 2009. http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2007_1YR_G00_DP2&-context=adp&-ds_name=ACS_2007_1YR_G00_&-tree_id=306&-_lang=en&-redoLog=false&-format=.

safety standards for consumer products and minimize conflicting State and local regulations. 15 USCA § 2051 (b)(2)- (3). Under this version, the Commission would still have the ability to require any other additional languages besides English and Spanish where appropriate, for example if a product is targeted to a certain group speaking a language other than English or Spanish. Requiring all recalls to be written in English and in Spanish would not exceed the Commission's authority granted to it by the Statute because the action is necessary to adequately protect the public. If the Commission does not require all recall notices to be written in English and in Spanish, the Commission runs the risk of not protecting the 34 million (and growing) individuals who speak Spanish in this country from a substantial product hazard.

Applicability

Under the Consumer Product Safety Act, Substantial Hazards Section, "Not later than 180 days after August 14, 2008, the Commission shall, by rule, establish guidelines setting forth a uniform class of information to be included in any notice required under an order under subsection (c) or (d) of this section or under section 2061 of this title." 15 U.S.C. 2064 (i)(1). Based on 15 U.S.C. 2064 (i)(1), the proposed rule includes a section that states that the proposed rule is only applicable to mandatory recall notices, stating, "This subpart applies to manufacturers (including importers), retailers, and distributors of consumer products as those terms are defined herein and in the CPSA." 16 CFR 1115.24. While the Commission is required to establish guidelines for information to be included in any mandatory recall pursuant 15 U.S.C. 2064 (i)(1), there is nothing in the statute that prohibits the Commission from establishing guidelines for voluntary recall notices. In

fact, the Commission even recognizes that setting required guidelines for voluntary recall notices may happen in the future stating

> If the Commission decides to extend the requirements to voluntary recalls, it would proceed with a separate rulemaking initiated by a separate notice of proposed rulemaking. Unless and until the Commission issues a rule containing requirements for voluntary recall notices, the proposed rule would serve as a guide for voluntary recall notices.
>
> 16 CFR Part 1115 (D)(2).

This section suggests that the Commission views that the authority from the statute could extend to potential requirements for voluntary recalls. The Commission states that if it were to extend the requirements it would do so in a separate notice of proposed rulemaking, seemingly to distinguish mandatory and voluntary recalls. However, there is no reason why the Commission cannot extend the requirements to voluntary recalls in this notice of proposed rulemaking and still distinguish mandatory and voluntary recalls. In fact, extending the requirement to voluntary recalls would better serve the purpose of the Consumer Product Safety Act for numerous reasons.

The Commission states that in its proposed rule making it has stated principles that are important for recall notices to be effective. As such, there seems no reason then not to extend the requirements to voluntary recall notices, for these notices must be effective as well. Undoubtedly the public will not know the difference between a mandatory and a voluntary recall notice, however the public should be provided with the same information on both to fulfill the purposes of the statute. In order to protect the public against unreasonable risks of injury associated with consumer products, and to assist consumers in evaluating the comparative safety of consumer products, the consumers must have the description of the product, the description of substantial product hazard, the description of action being taken, the identification of significant retailers, the

statement of number of product units, the identification of recalling firm, the identification of manufacturers, the identification of significant retailers, the dates of manufacture and sale, the price, the description of incidents, injuries, and deaths, and the description of remedy and all other information and methods of notifying the Commission has required in this proposed rule-making. The Commission has required this information and specific methods of notifying to ensure the safety of the consumer. There is no reason that just because the method is voluntary or part of a corrective settlement agreement, the public does not need this information. It would actually be harmful to not require other recall notices to have this information. If the public is used to seeing information on mandatory recall notices, for example the information on the description on incidents or injuries, and it is not provided for in a voluntary recall notice, the public may assume there were no such incident or injuries, which may not be the case. In order to protect consumer from substantial product hazard or assist consumers in evaluating the safety of comparative products, the information on *all* recall notices must be standard and in accordance with 16 CFR Part 1115.

Conclusion

In conclusion, the Committee generally succeeded its efforts in setting out guidelines and requirements for recall notices for the purpose of protecting the public in 16 CFR Part 1115: Notice of proposed rulemaking. However based on the foregoing, the Commission should use its authority to require the recall notices to written in English and Spanish, and extend the notice requirements to voluntary recall notices in addition to mandatory recall notices to better serve the purposes of the statute.

BEFORE THE
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

JOINT COMMENTS
OF
AMERICAN HONDA MOTOR CO., INC.,
AMERICAN SUZUKI MOTOR CORPORATION,
ARCTIC CAT INC.,
BOMBARDIER RECREATIONAL PRODUCTS INC.,
KAWASAKI MOTORS CORP., U.S.A.,
POLARIS INDUSTRIES INC., and
YAMAHA MOTOR CORPORATION, U.S.A.

Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking	)	**SECTION 15(i) NPR**
74 Fed. Reg. 11,883 (March 20, 2009)	)	

April 20, 2009

I. INTRODUCTION

American Honda Motor Co., Inc., American Suzuki Motor Corporation, Arctic Cat Inc., Bombardier Recreational Products Inc., Kawasaki Motors Corp., U.S.A., Polaris Industries Inc. and Yamaha Motor Corporation, U.S.A. (the "Companies")[1] submit these comments in response to the Consumer Product Safety Commission's ("CPSC") proposed rule establishing guidelines and requirements for mandatory recall notices. 74 Fed. Reg. 11883 (March 20, 2009). CPSC issued the proposed regulations in response to Section 214 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), which requires that CPSC establish by rule guidelines setting forth a uniform class of information to be included in any mandatory recall notice issued under Sections 12 or 15 of the Consumer Product Safety Act ("CPSA"). Section 214 of the CPSIA also requires that a mandatory recall notice include certain specific information, unless the Commission determines otherwise. The Companies are concerned that several aspects of the proposed regulations may be problematic with regard to the negotiation of voluntary corrective action programs, Web-based recall notices, and maintaining the efficacy of recall notices in communicating necessary information to consumers and other interested parties.

II. COMMENTS ON PROPOSED GUIDELINES AND REQUIREMENTS FOR MANDATORY RECALL NOTICES

A. Applicability to Voluntary Recall Notices

Consistent with Section 214 of the CPSIA, the proposed rule would apply only to mandatory recall notices issued pursuant to an order of the Commission under Section 15 of the CPSA or pursuant to a court order under Section 12 of the CPSA. The preamble to the proposed rule thus properly acknowledges that the proposal would not contain any requirements for recalls

[1] The Companies are manufacturers, importers and/or distributors of all-terrain vehicles ("ATVs") and other off-highway recreational vehicles.

and recall notices that are voluntary and result from corrective action settlement agreements with the Commission staff. The preamble further acknowledges that in order to extend these proposed requirements to voluntary recalls, CPSC would need to proceed with a separate rulemaking applicable to such notices.

However, the preamble goes on to state that in the absence of any such final rule establishing requirements for voluntary recall notices, the proposed rule for mandatory recall notices "would serve as a guide for voluntary recall notices." Id. The Companies are concerned that in practice, this position that the rule governing mandatory recall notices will serve as a "guide" rather than "requirements" for voluntary recall notices may come to represent a distinction without a difference. In particular, the content and form of voluntary recall notices are negotiated as part of the voluntary corrective action program between CPSC staff and a product manufacturer, importer or distributor. In addition to stating that the terms of the final rule on mandatory recall notices will only serve as a "guide" for voluntary notices, CPSC should explicitly acknowledge in the preamble to the final rule that a proposed voluntary recall notice will not be required to meet all guidelines and requirements for mandatory notices in order to be approved as part of a voluntary corrective action program.

B. Web Site Recall Notices

Proposed Section 1115.26(b)(3) provides that a Web site recall notice shall be posted on the site's first entry point, such as a home page. Many manufacturers and distributors currently post Web site recall notices in other locations on the site which have by now become familiar to consumers and are where consumers will go to look for information regarding future recalls. CPSC should therefore not adopt a "one size fits all" home page location requirement for Web site recall notices. Instead, the location of a Web site recall notice should remain a matter to be

determined based on the circumstances in each particular situation. In addition, this proposed provision goes beyond the mandates of Section 214 of the CPSIA, which does not set forth any specific requirements for Web site recall notices.

Proposed Section 1115.26(b)(3) also requires that Web site recall notices be "interactive" and permit consumers and other persons to "request a remedy directly on the Web site." While such a requirement may be appropriate where a corrective action program involves direct refund or replacement of the product by the manufacturer, importer or distributor, it does not make sense with respect to recalls of products, such as a ATVs or other recreational vehicles, where the corrective action involves bringing the product to an independent dealer for repair. Here again, Section 214 of the CPSIA does not include any such requirement. The proposed specification that the Web site recall notice allow consumers to request a remedy directly on the Web site should accordingly be deleted.

C. Description of Incidents, Injuries and Deaths

Proposed Section 1115.27(l) provides that a recall notice must contain "a clear and concise summary description of all incidents (including, but not limited to, property damage) injuries, and deaths associated with the product, conditions or circumstances giving rise to the recall," as well as the "ages of all persons injured or killed." In the event that CPSC staff in practice interprets this provision as requiring individual descriptions of each incident and/or injury, in situations where there have been multiple events, it could turn recall notices into multi-page documents and defeat their key purpose of efficiently and effectively identifying the product, explaining the potential hazard and communicating the remedy to consumers. Indeed, proposed Section 1115.23(b) makes clear that CPSC's purpose in proposing these regulations is to insure that every recall notice effectively communicates this information to consumers and

other interested persons. CPSC should make clear in the final rule that such summary descriptions in recall notices can include a discussion of incidents and injuries associated with the product hazard in the aggregate so as to enable consumers to readily understand the nature and extent of the injuries and hazard without making the recall notice so lengthy that consumers fail to read it.

III. CONCLUSION

The Companies appreciate the opportunity to submit these comments and look forward to working with CPSC in the establishment and implementation of guidelines and requirements for mandatory recall notices, and in the continued determination of the appropriate from and content of voluntary recall notices through individual negotiations with manufacturers, importers and distributors as part of approved voluntary corrective action programs.

Respectfully submitted,

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Stevenson, Todd

From: MWiegard@eckertseamans.com
Sent: Monday, April 20, 2009 4:43 PM
To: Mandatory Recall Notices
Cc: Falvey, Cheryl; Mullan, John
Subject: Section 15(i) NPR
Attachments: JOINT COMMENTS (N0097950).PDF

Attached are comments on the Commission's Notice of Proposed Rulemaking on guidelines and requirements for mandatory recall notices, 74 Fed. Reg. 11,883 (March 20, 2009).

(See attached file: JOINT COMMENTS (N0097950).PDF)

James Gillis
P.O. Box 13515
Philadelphia, PA 19101

April 20, 2009

Office of the Secretary
Consumer Product Safety Commission
Rom 502
4330 East West Highway
Bethesda, MD 20814

Re: Section 15(i) NPR

Ladies and Gentlemen:

I write this letter in response to the notice of proposed rulemaking ("NPR") promulgated by the Commission pursuant to Section 15(i) of the Consumer Product Safety Improvement Act of 2008. Thank you in advance for your time and effort in reviewing this letter.

After reviewing the NPR and the applicable statutes, I respectfully submit that the Commission revise proposed 16 C.F.R. § 1115.26 in the following ways:

(1) Direct recall notice in all cases where a firm has the requisite consumer contact information should be mandatory, with the exception contained in number (3).
(2) Web site recall notice should be mandatory in all cases, with the exception contained in number (3).
(3) Firms subject to an order should be given the opportunity to persuade a decision-maker that direct recall notice or web site recall notice will not be more effective (and therefore would be duplicative of) other types of recall notice in a particular case.
(4) Information and language requirements for orders, which are contained in paragraphs (a)(1) and (a)(2), should be mandatory.

In the text that follows, I offer justifications as to why the Commission should adopt these proposed revisions, explanations of the intended effects of the revisions, and responses to anticipated criticisms. A black line of these proposed revisions against the Commission's version published in the NPR is appended to this letter.

The primary purpose of recall notices is to inform consumers that the product they are currently using may harm them. To the extent that such consumers are notified, unnecessary injuries are avoided. Notification itself is therefore the prerequisite to the actual content of the notification. A consumer who does not know about a product recall obviously cannot begin to decipher its contents.

In fact, notice is so important that a decision-maker is not required to engage in a cost-benefit analysis when fashioning a product recall order. 15 U.S.C. §§ 2061(g) and 2064(h). The Commission explicitly recognizes the importance of directly notifying consumers several times throughout the NPR. For example, proposed § 1115.26(a)(4) states that "direct recall notice is the most effective form of recall notice." However, recognition of this policy standing alone has no teeth and imposes no substantive requirements on firms or decision-makers. To underscore this point, paragraph (b)(2), which follows shortly after paragraph (a)(4), merely suggests that firms having direct contact information for affected consumers "should" contact them directly. Decision-makers crafting orders will undoubtedly make

reference to this paragraph when fashioning orders, but they will not be bound by anything contained within it.

The Commission should take a stronger stance and make direct recall notice mandatory in all cases where a firm actually possesses a consumer's personal contact information, as that term is used in paragraph (b)(2). This mechanical fix can be accomplished by substituting "shall" for the word "should," at all places the latter term appears in paragraph (b)(2).

As noted above, making direct recall notice mandatory would have the positive effect of ensuring that the maximum number of consumers are given actual notice of a product hazard. The Commission formally observes that direct recall notice is the most effective type of notice. Congress intended for the Commission to account for notice only, not the cost that such notice will impose on affected firms. It stands to reason, therefore, that where firms possess a consumer's contact information, they should have to directly contact that consumer by mail, electronic mail or telephone. Such notice will effectuate the intent of Congress and the policy of the Commission squarely and without reservation. One major criticism that could be levied against a policy of requiring direct recall notices in all cases is that such a policy would unnecessarily tie judicial hands. This is not necessarily the case. Making direct recall notices mandatory will necessarily constrain adjudicatory discretion. But such restraint is not suffocating, and actually would serve to further Commission policy as compared to if such discretion were given to the decision-makers.

Even if the Commission were to make direct recall notice a requirement, adjudicatory flexibility and discretion are retained in four ways. Under this scheme, decision-makers (i) retain the ability to select from and include other forms of recall notice illustrated in paragraph (b)(1); (ii) can only require firms to send direct recall notices to those consumers for whom such firms have certain types of contact information under paragraph (b)(2); (iii) can select the method of direct recall notice under paragraph (b)(2); and (iv) have the discretion to waive the direct recall notice requirement where firms carry the requisite burden of persuasion under proposed paragraph (b)(4). As this list of discretionary items makes clear, requiring direct recall notice does not tie adjudicatory hands, but merely guides them in a certain direction. Point (i) recognizes that a decision-maker has many forms of recall notice from which to choose. In fact, the list in the proposed rule is not exhaustive but merely illustrative. Point (ii) makes the observation that firms subject to an order are not required to directly contact consumers that the firm cannot physically contact due to a lack of information. Point (iii) emphasizes that the form that a direct recall notice takes – whether mail, electronic mail or telephone call – is still within an adjudicatory body's discretion. However, it is the last point that is most critical in retaining flexibility.

By including proposed paragraph (b)(4), the Commission would effectively create a two-step discretionary process in the place of giving broad discretion to decision-makers. If a firm persuades a decision-maker that a direct recall notice is unnecessary because it will not add to the effectiveness of an order, then the decision-maker may, in its discretion, waive the direct recall notice requirement. Therefore, the real change lies only in the level of discretion given to decision-makers in this area. Decision-makers would not have the ability to waive direct recall notices where firms cannot carry their burden of persuasion. On the other hand, even if such firms were successful in "proving" that direct recall notice would not augment a particular order, the decision-maker would still be free to order direct recall notice notwithstanding this proof.

Under the proposed rule in the NPR, a judge or an ALJ has total discretion as to whether direct recall notice is appropriate in a certain case. The Commission policy that direct recall notice is the most effective would hang there in the balance, but the rules as now drafted do not require this policy to be followed. Requiring direct recall notice with evidentiary and adjudicatory hurdles serves to ensure that

the policy of actually notifying consumers is effectuated. Proposed paragraph (b)(4) provides this type of safeguard.

The standard of proof under proposed paragraph (b)(4) is the familiar "more likely than not" employed in civil cases. This standard is not a reflection of the seriousness of the matter, but rather of the nature of what is being proved. A firm, in order to be successful in persuading a decision-maker to drop mandatory direct recall notice from an order, must prove that such direct recall notice will not be more effective than another form of notice. This requirement makes sense since the purpose of the recall notice is actual notice. If it is more likely than not that direct recall notice will not be more effective than another form of notice, then it should not be required. However, the proposed language still leaves the decision-maker free to require direct notice and another form of notice, even if a firm meets the burden of persuasion. This is accomplished by using the word "may" rather than "shall." Thus, adjudicatory discretion is retained so that decision-making in this area is not suffocated and turned into a mechanical exercise.

Besides ensuring that affected consumers receive the most effective form of notice, making direct recall notice a requirement will provide firms with a strong negative economic incentive to make sure that their products are safer. Direct recall notice, besides being the most effective form of notice, is also likely to be the most costly. Mailing letters to each consumer or setting up call centers is an expensive and distracting undertaking for firms. However, under 15 U.S.C. §§ 2061(g) and 2064(h), a decision-maker is not required to conduct a cost-benefit analysis in fashioning a remedy. The reason behind this seeming contradiction is simple: the remedy is designed to prevent injury, not to allocate the costs of a recall between innocent consumers and firms that have produced, distributed or otherwise placed in the stream of commerce a hazardous product. However, firms undoubtedly conduct cost-benefit analyses all the time. They juxtapose the costs of testing and additional safety measures against the expected prices and resulting profit margins when developing and releasing a product. By making the cost of error more expensive, the Commission will effectively provide firms with more incentive to make products safer.

Paragraph (b)(2) should be modified to add a telephone number as included in the class "direct contact information" and a decisional hierarchy as to the mode of direct recall notice should be added. The intended effect is to rank the form of required direct recall notice in order to effectiveness, with a preference towards written notice. Therefore, mail is preferred first where the firm has a mailing address, email is second, with telephone notice being given last priority. It is also logical to note here that direct recall notice is still only required where firms have actual knowledge of a consumer's contact information. Fears that this policy will be circumvented by firms by their purposefully destroying such information are alleviated with the knowledge that such information is highly valuable to these same firms for many purposes. At the same time, firms are not burdened with keeping track of this information solely for the purpose of issuing recall notices.

Finally, the suggestive language in paragraphs (a)(1) and (a)(2) should be firmed up and made mandatory. This is said with the observation that these paragraphs are, for the most part, apparitional and have little bite on appeal. They set forth the contents of a recall notice without delving into particular requirements. Changing "should" to "shall" in this context will not have an overwhelming substantive effect. However, it may have a more subtle effect on orders issued under these proposed rules. In fact, requiring recall notices to have certain "meta-attributes" may have the effect of creating categories for adjudicatory precedent attempting to galvanize and give content to these categories. Such solidification may further refine the purpose sought, namely notifying consumers they are in potential positions of danger. At the very least, making these recall notice attributes mandatory sets the Commission's policy more firmly and makes its voice clearer for reviewing judges and congress and the American people.

In sum, the changes I suggest to proposed 16 C.F.R. § 1115.26 are designed to effect the Commission's policy of actual consumer notice by requiring at least one form of direct recall notice and web site recall notice be part of most orders described by these proposed rules. These changes restrict and guide discretion but do not destroy it. On the contrary, the burden is properly placed on firms subject to these recall notice order to prove that these (now) mandatory forms of direct recall notice will not be effective. Rather than tie judicial hands, these proposed revisions serve mainly to firmly solidify Commission policy and congressional intent. I submit these proposed revisions respectfully for the Commission's consideration and ultimate judgment.

Thank you for your time and attention.

Sincerely,

James Gillis

Proposed Revisions to Proposed 16 C.F.R. § 1115.26 Guidelines and policies.

§ 1115.26 Guidelines and policies.

(a) *General.*

(1) A recall notice shall ~~should~~ provide sufficient information and motivation for consumers and other persons to identify the product and its actual or potential hazards, and to respond and take the stated action. A recall notice shall ~~should~~ clearly and concisely state the potential for injury or death.

(2) A recall notice shall ~~should~~ be written in language designed for, and readily understood by, the targeted consumers or other persons. The language shall ~~should~~ be simple and should avoid or minimize the use of highly technical or legal terminology.

(3) Firms should use recall notices targeted and tailored to the specific product and circumstances. In determining the form and content of a recall notice, firms should consider the manner in which the product was advertised and marketed.

(4) A direct recall notice is the most effective form of a recall notice.

(b) *Form of recall notice—*

(1) *Possible forms.* A recall notice may be written, electronic, audio, visual, or in any other form ordered by the Commission in an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or by a U.S. district court under section 12 of the CPSA (15 U.S.C. 2061). The forms of, and means for communicating, recall notices include, but are not limited to:

(i) Letter, Web site posting, electronic mail, RSS feed, or text message;

(ii) Computer, radio, television, or other electronic transmission or medium;

(iii) Video news release, press release, recall alert, Web stream, or other form of news release;

(iv) Newspaper, magazine, catalog, or other publication; and

(v) Advertisement, newsletter, and service bulletin.

(2) *Direct recall notice.* A direct recall notice shall ~~should~~ be used for each consumer for whom a firm has direct contact information. Direct contact information includes, but is not limited to, name and address, ~~and~~ electronic mail address, and telephone number. Forms of direct recall notice include~~, but are not limited to,~~ United States mail, electronic mail, and telephone calls. United States mail is preferred over electronic mail and electronic mail is preferred over telephone calls. A direct recall notice shall ~~should~~ prominently show its importance over other consumer notices or mail by including ''Safety Recall'' or other appropriate terms in an electronic mail subject line, and, in large bold red typeface, on the front of an envelope and in the body of a recall notice.

(3) *Web site recall notice.* A Web site recall notice shall ~~should~~ be on a Web site's first entry point such as a home page, shall ~~should~~ be clear and prominent, and shall ~~should~~ be interactive by permitting consumers and other persons to obtain recall information and request a remedy directly on the Web site.

(4) *Direct recall notice required.* The requirements of paragraphs (2) or (3) of this subsection may be waived in whole or in part if a firm subject to an order under this Subpart C proves by a preponderance of the evidence that giving direct recall notice or web site recall notice will not provide consumers and other persons with more notice of a recall than if such forms of notice were not provided.

(c) *Languages.* Where the Commission for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or a U.S. district court for purposes of an order under section 12 of the CPSA (15 U.S.C. 2061), determines that it is necessary or appropriate to adequately inform and protect the public, a recall notice may be required to be in languages in addition to English.

Stevenson, Todd

From: James Gillis [jamesgillis1@gmail.com]
Sent: Monday, April 20, 2009 4:46 PM
To: Mandatory Recall Notices
Subject: Section 15(i) NPR
Attachments: Section 15(i) NPR_James Gillis (final).docx; Section 15(i) NPR_James Gillis (final).pdf

To Whom It May Concern:

I attach a 2007 Microsoft Word copy and a signed pdf copy of comments in response to the NPR published at 74 FR 11883.

Thank you.

Sincerely,

James Gillis

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National Retail Federation®
The Voice of Retail Worldwide

April 20, 2009

Todd A. Stevenson
Secretary
Consumer Product Safety Commission
4330 East-West Highway
Room 502
Bethesda, MD 20814

RE: Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking

Dear Mr. Stevenson:

The following comments are submitted on behalf of the National Retail Federation (NRF) in response to the Consumer Product Safety Commission's (CPSC) Notice of Proposed Rulemaking (NPRM) on Guidelines and Requirements for Mandatory Recall Notices under Section 214 of the Consumer Product Safety Improvement Act (CPSIA).

NRF believes the CPSC needs to provide additional guidance and clarification with regards to mandatory recalls. While the purpose of the recall notice is to provide the consumer with the information *necessary* to identify the specific product being recalled, to understand the hazard the recall notice identifies, and to understand the available remedy, we believe the NPRM goes well beyond this and includes information requirements that will not only be of no benefit to the consumer, but will be very difficult for the retailer to provide and maintain. NRF will address specific comments below.

By way of background, NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 24 million employees - about one in five American workers - and 2008 sales of $4.6 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

Proposed § 1115.24 Applicability

NRF is very concerned with the CPSC's statement, "*Unless and until the Commission issues a rule containing requirements for voluntary recall notices, the*

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proposed rule would serve as a guide for voluntary recall notices." NRF believes this statement creates unnecessary confusion and urges the CPSC to withdraw it and not disrupt the voluntary recall process. For voluntary recall notices, the CPSC and the company involved with the recall are able to draft a recall notice and agree on procedures that enable the consumer to identify the recalled product and applicable remedy. The CPSC should reserve the requirement of direct recall notices for mandatory recalls that involve a significant and imminent health and safety risk to consumers. Reserving a direct recall notice for such matters is appropriate for two reasons. First, to ensure that "over warning" does not desensitize consumers. If they received a lot of notices, they may start to pay less attention to them. By limiting direct notice to truly significant and imminent risks, those recalls will get the notice and attention warranted. Second, as discussed below, direct notice is not easy or without expense, so it should be reserved for those matters where warranted. Indeed, Sec. 15 of the CPSA recognizes that the appropriate notification depends on the varying degree of risk by requiring the Commission to afford interested parties an opportunity for a hearing before the Commission may order a number of actions.

As the NPRM itself states, "*If the Commission decides to extend the requirements to voluntary recalls, it would proceed with a separate rulemaking initiated by a separate notice of proposed rulemaking.*" There is no reason to use the proposed mandatory recall notice guidelines in any fashion with respect to voluntary recalls unless and until the Commission institutes a separate rulemaking.

Proposed § 1115.26 Guidelines and Policies

While a direct recall notice might be the most effective form of a recall notice, there are many issues with such a notice. First and foremost, what are the standards for when a firm "has" direct contact information? Large firms have literally millions of bits of information regarding their customers and even when they do have contact information in their own systems, the retrieval of that information for an individual related to the purchase of a specific recalled item is both time consuming and costly. In addition, while a retailer may have certain information about a transaction, such as a bank card number, it may not have actual contact information about the customer in its systems. That information may be available from the bank card issuer, but, once again, a retailer trying to obtain it from the third party will face a costly and time consuming project. If the Commission wishes to retain the direct recall notice for mandatory recalls, the Rule should state that it applies only when accurate and up-to-date contact information is readily and practically available and is, in fact, in the possession of the firm itself.

Proposed § 1115.27 Recall Notice Content Requirements

NRF believes that the content requirements for mandatory recalls are too expansive and will not help the consumer to identify recalled products or corrective actions. There are several areas where we have specific concerns. These include:

§ 1115.27(h) Identification of manufacturers – NRF agrees that the manufacturer name and country of manufacture need to be on the recall notice. We are concerned with requiring that the city and state/country of the headquarters location also appear on the notice. We do not understand the added benefit to the consumer or "other party" that is gained from this information. There are also issues of business confidentiality that need to be taken into consideration.

§ 1115.27(i) Identification of significant retailers – NRF is concerned with the lack of definition of (2) "regionally located" and (4) "a significant number of the total manufactured, imported, or distributed units of the product." How will the CPSC make this judgment? What criteria with the CPSC use to determine what a "significant number" is? What happens in the situation where a retailer is named as a "significant retailer" but does not carry a "significant number" of the recalled product? Will they be forced to comply with the recall? Is there recourse for a retailer who is not a "significant retailer" of the recalled product but is named by a manufacturer anyway? It is unfair to expect any retailer – large or small – to accept more recalled products than it sold simply because it was determined to be a "significant retailer" due to the retailer's size, number of stores, locations, etc. In a situation where a large retailer sold only a handful of units and where most units were distributed to many smaller retailers, which cumulatively sold more than the one large retailer, it would be unfair to prominently feature the retailer with the name recognition, and thus signal customers to inundate that retailer with refund requests. Where possible, the recall burden must be managed by the manufacturer.

§ 1115.27(m) Description of remedy – The remedy offered in the mandatory recall notice must be implementable by all parties. There have been several instances when a remedy offered by a manufacturer, such as a voucher or coupon, does not work because the retailers systems are not able to recognize the voucher, coupon or other remedy. The coding on the voucher/coupon might not match up with the coding that the retailer has in their system. There needs to be consideration for the difference in these systems.

Effective Date

As the NPRM states, the Administrative Procedures Act generally requires that the effective date of a new rule be at least 30 days after publication of the final rule. According to the NPRM, these guidelines and requirements will become effective on the date of publication of the final rule. While the statutory requirements for the content for the mandatory recalls are dictated by the CPSIA, we believe the CPSC should still allow for the effective date to occur 30 days after publication of the final rule. With the clarifications that we believe are required, it will be important for companies to have time to adjust once the final rule is published. Making the rule effective upon publication will not give companies time to adjust adequately.

Conclusion

NRF welcomes the opportunity to share our thoughts on the CPSC's NPRM on Guidelines and Requirements for Mandatory Recall Notices. If you have any questions, please contact Jonathan Gold (goldj@nrf.com), NRF's Vice President, Supply Chain and Customs Policy.

Sincerely,

Steve Pfister
Senior Vice President
Government Relations

Stevenson, Todd

From: Gold, Jon [GoldJ@NRF.com]
Sent: Monday, April 20, 2009 5:00 PM
To: Mandatory Recall Notices
Subject: Section 15(i) NPR
Attachments: NRF Final Comments on Section 214 Mandatory Recalls 042009.pdf

Attached please find comments from the National Retail Federation on the Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking. If you need any additional information, please let me know.

<<NRF Final Comments on Section 214 Mandatory Recalls 042009.pdf>>

Jonathan E. Gold
Vice President, Supply Chain and Customs Policy
National Retail Federation
325 7th Street, NW Suite 1100
Washington, DC 20004
Direct: (202) 626-8193 Fax: (866) 235-1938
www.nrf.com

April 20, 2009

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD 20814

To Whom It May Concern:

I am writing to comment on the proposed rule 16 CFR 1115 pending before the commission for installment regarding the guidelines and requirements for mandatory recall notices under the Consumer Product Safety Improvement Act of 2008. There are portions of the proposed rules I agree with, and other areas which I feel need improvement or modification before the final rules are officially established. The following paragraphs outline the portions of the proposed rules I wish to address at this time.

First, the overall purpose of the proposed rules is definitely one that is within the scope of the commission's authority and worthy of attention. At a time when companies are becoming increasingly consolidated and arguably more powerful, there is also a rising concern for the protection of everyday American consumers who purchase various products in the market. As companies expand, merge, and move offshore, a situation arises whereby consumers can become more vulnerable to the powerful companies who sometimes monopolize certain areas of the market. Since consumer products are a vast area of everyday life, it is absolutely within the scope of the government's authority to establish agencies and laws that regulate and monitor the actions of those businesses that engage in transactions with millions of Americans. Mandatory recall notices are one area

in which I feel the government acts within the scope of its authority by requiring companies to comply by certain standards.

Specifically, § 1115.26 sets the proper tone of the proposed rules by establishing that *direct* recall notices are the most effective form of a recall notice. Oftentimes when a broad recall notice is issued, there are a significant number of members in the affected class of consumers who remain unaware that a recall notice has been issued. Certain products that change hands often such as vehicles will present problems in achieving direct notification, and even relatively low cost daily household items can also cause complications because most individuals do not opt to register their products following purchase. Despite this reality, it cannot serve as an excuse for companies to feel that a broadly-disseminated recall is sufficient in all instances. I think it is important that this area of the proposed rules acknowledges that direct recall notices are the most effective means of combating product safety issues, but I also feel that there should be an even stronger push to increase pressure on companies to ensure that they are always able to conduct direct recalls whenever possible. By pressuring companies and businesses to comply, and rewarding those companies that establish effective direct recall procedures, there will be a mutual advantage to both companies and consumers.

The next area of the proposed rules I would like to address concerns the recall notice content requirements listed in § 1115.27. While I applaud the requirement contained in § 1115.27(a) that a recall notice state the word "recall" in the text heading, I think consumers and companies would be better served if the required text heading contained the phrase, "Safety Recall." The purpose of such a requirement would be twofold. First, it would alert consumers that there is a personal safety matter at issue and

they might be more inclined to pay attention to the notice. Secondly, this required heading would serve as a constant reminder to companies that the safety of the consumer is of utmost importance, and it would establish a theme of awareness and responsiveness to safety at all times. By having a strong safety theme present in all aspects of consumer production and marketing, companies will make every effort to produce the most effective and safest products possible, and in doing so will create less mistakes in production planning.

The final area I would like to address is § 1115.29 which concerns the final determinations regarding the form and content of recall notices. I feel this area of the proposed rules is too vague and allows excessive discretion to the commission by allowing them to determine whatever form and content of the recall notices they please. While I do not dispute that the commission has the authority to make determinations relating to specific form and content requirements, I believe there should be some more specificity in this section in order to establish stronger uniformity. By allowing the commission to make content and form calls on a case-by-case basis, there is a large degree of fluctuation and difference that can occur in each recall instance. Such fluctuations weaken the strength of the law and make it more difficult to predict how recall notices should be drafted, processed, and eventually enforced. Instead, the commission should establish its discretion in the form of a rule containing an exception which allows the commission to amend recall notices in certain isolated instances, but as long as companies meet the basic benchmark requirements, the commission should not step in to modify or change.

There are many practical reasons for having the commission regulate this area of consumer products, and I fully support the commission's goals in strengthening the requirements and the need for mandatory recall notices. Although, in order to be effective, the commission must also balance this duty with practical means by which to implement the rules governing product recalls. By creating rules that allow the government too much discretion, the commission will tend to get bogged down in minutia and technicalities, and will then run the risk of weakness or irrelevancy. However, the commission was right to step into this area of consumer protection, as product recalls have been an area where companies have failed miserably, and the government has failed in regulating and enforcing these recalls. As a whole, I think the new proposed rules make great strides in placing more stringent guidelines on companies, as we should, but also balances these guidelines against the interests of all parties involved in consumer transactions.

I appreciate your consideration of my comments, and I look forward to reading the final version of the rules that will govern this commission's future enforcement of this act as we strive to create a safer consumer environment for all individuals.

Sincerely,

Michael J. Connolly

3925 Walnut St.
Apt. 1015
Philadelphia, PA 19104

Stevenson, Todd

From: Michael Connolly [mjc75@drexel.edu]
Sent: Monday, April 20, 2009 5:03 PM
To: Mandatory Recall Notices
Subject: Written Comments Re: 16 CFR Part 1115
Attachments: NPR Proposed Rules - Comment.doc

To whom it may concern:

I have attached my written comments concerning the proposed rules under 16 CFR 1115 pertaining to he Consumer Product Safety Improvement Act of 2008.

Thank you,

Michael J. Connolly

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland
20814

RE: Section 15(i) NPR

I am writing to submit comments in response to the notice posted on the website of the U.S. Consumer Product Safety Commission ("CPSC") regarding Mandatory Recall Notices under Section 214 of the Consumer Products Safety Improvement Act ("CPSIA") which amends section 15 of the Consumer Product Safety Act (''CPSA'') to add a new subsection (i).

General Comments

The basic overview of the Proposed Rule is to provide guidance for the issuance of recall notices by manufacturers and importers. The new provisions as stated now do achieve that purpose to some ends, but at the same time make the requirements less clear and could potentially create confusion and unnecessary cost on the manufacturers and importers. Stating the requirements less no so open-ended would help to alleviate this. There are other areas where setting more specific guidelines or additional guidelines would help to protect the consumers. These additions could help to expedite recalls or provide faster notice of recalls.

Comments to Aid Manufacturers

16 CFR § 1115.29(c) – Commission Approval

The final approval provision as written is sufficient to an extent. However, in conjunction with the final approval of a notice, there should be a provision to require the posting of that notice within a certain after its approval.

Another provision that could aid manufacturers would be a provision to set forth the formatting requirements to the Commission (Electronic/Paper/Etc). This could aid manufacturers in having a "Recall Template" ready with all the required information readily enterable. This would expedite the approval process with little burden on either side.

Once a notice has been approved it should be required to immediately be posted on the CPSC website. While this will reach fewer targeted consumers than the manufacturer releasing it in a timely manner, the CPSC has the first access to the approved notice and should be obligated to begin dissemination of that information. This would aid consumers who are actively looking for information on a product they feel may be defective or possibly in need of recall.

16 CFR 1115.27(k) – Content Requirements – Price

This should be expanded upon to include, the Manufacturer's Suggested Retail price, prices known to the manufacturer at which the product was sold (and if possible where it was sold at those prices), and the highest and lowest retail price of the product that are known to the manufacturer. This provides a bit more detail to the manufacturers so they can attempt to catalog price data to be included in notices in the future and they have a bit more assurance as to what is sufficient to satisfy this section. That would expedite the approval of the final notice as well.

Comments to Aid Consumers

16 CFR § 1115.26(a)(2) Guidelines and Policies – Language Requirements. In this section the policy states that the notice should be in language designed for and readily understood by the targeted consumers or other persons. This requirement should

be stated with a bit more specificity using language such as: "Must be in both English and Spanish as well as any other language which may be required to reach the targeted consumers. The specific requirement of English and Spanish will provide assurance that two of the most common languages spoken in the United States will be represented on the recall notice. This is addressed to an extent later in 1115.26(c) with English being required, but as a default Spanish should be as well, even without the requirement of a determination by the Commission or Court.

16 CFR 1115.27(k) – Content Requirements

Region. A section detailing the geographic region the product was available in would be useful here. If the product was only sold in certain states then that should be listed in this section. If that manufacturer sold it by a national retailer, but only in certain regions, that information should be included as well. This could help to alleviate confusion by consumers as to whether or not their national retailer carried the product.

Internet. Included with this Region requirement should be information on whether or not the product was made available for online sale that would have the ability to be shipped outside the region it was made available in stores. Also, in a separate section for retailers, there should be a list of Internet distributors. Many times these distributors do not sell the same volume as traditional retailers, but they should be included none-the-less. There would be little burden for the manufacturer to search online to see if the product is for sale online. There should be a list included of any major online retailers and any the manufacturer has located up to the date of the issuance of the notice.

If the manufacturer knows, they should include information whether the product has ever been sold online. Even if it is not through an online retailer it may have been

sold on websites such as ebay. It will be little burden to perform a quick search and include this information. It would protect second hand purchasers of the product to have this information.

Conclusion

While these are just a few ideas, some may be useful in expediting the recall procedure as well as providing better notice to both consumers and manufacturers.

Thank you for considering them,

-Patrick Rhine

patrickrhine@mac.com

Stevenson, Todd

From: Patrick Rhine [patrickrhine@mac.com]
Sent: Monday, April 20, 2009 6:09 PM
To: Mandatory Recall Notices
Cc: NEILWISE@CAMDEN.RUTGERS.EDU
Subject: Section 15(i) NPR
Attachments: Section 15(i) NPR.doc; ATT00001.txt

To Whom It May Concern:

As a project for my Administrative Law class at Drexel University Earle Mack School of Law we wrote comments on a NPR. I wished to submit my comments for your consideration.

Thank you,
-Patrick Rhine

John L. Dougherty
Philadelphia, PA
JLDougherty@gmail.com

April 20, 2009

United States Consumer Product Safety Commission
Washington, DC
via E-Mail

Re: NPR – Guidelines and Requirements for Recall Notices

To Whom It May Concern:

I am writing to comment on the proposed rule regarding recall notices. The need for a uniform and easily understandable way of notifying consumers about product recalls is immense; this proposed rule would be another step in achieving a much safer marketplace. The current lack of a uniform notification system is an accident waiting to happen. With no one set way to issue a recall; companies and retailers are left to weigh the balance of consumer safety with more selfish motives of avoiding the negative publicity that comes with product recalls. Consumers deserve better. The Consumer Product Safety Commission would be doing both consumers and corporations a great service by providing a uniform structure and system for notifications around recalls.

The standardization of recall notices would also likely improve the effectiveness of said notices. A more standardized way of notifying consumers would ensure that the necessary information is being released and available to consumers for them to make a well informed decision on how they should proceed with the potentially hazardous product. It is also appropriate that the proposed rule only mandates this notification

guideline to non-voluntary recalls; this helps to ensure that consumers will recognize the heightened level of importance associate with these types of recalls when they see the standardized recall notifications proposed in the rule.

An important part of the proposed notification is that proposed in §1115.7 which requires the recall notice to list injuries and deaths associated with this product. This bit of information will assist consumers in assessing the danger associated with the product make the decision to follow the Commission's recommended course of action in how they should deal with the product in question.

Mandating the standardization of format and content of recall notices will save lives. Consumers will be more likely to pay attention to familiar notices and will know to look for the pertinent information regarding the products. The standardization is likely to improve the ease of retailers and manufacturers providing these notices to consumers and consumers should be more apt to read a notice knowing that the information it contains will be critical. One area of caution would be to ensure that the information in the notices is easy to read, notice, and understand as well as specific guidelines are followed in regards to the posting, distributing and notification of these notices to consumers.

The Consumer Product Safety Commission would benefit greatly from this proposed rule change – I strongly urge that the rule be adopted in order to allow the Commission to utilize the proposed notification system to help achieve its goal of

protecting American consumers from the risks that are created by unreasonably dangerous products. Thank you for your time and consideration for reading these comments.

Sincerely,

John L. Dougherty
JLDougherty@gmail.com

Stevenson, Todd

From: John L. Dougherty [jldougherty@gmail.com]
Sent: Monday, April 20, 2009 6:18 PM
To: Mandatory Recall Notices
Subject: Comments on NPR - Recall Notices
Attachments: NPR- Recall Notices.docx

Please see attached comments in support of the NPR regarding Recall Notices

Thank you!

Stevenson, Todd

From: matthew sherlock [sherlock.matthew@gmail.com]
Sent: Monday, April 20, 2009 7:13 PM
To: Mandatory Recall Notices
Subject: Section 15(i) NPR
Attachments: NPR section 15i.doc

Mr Schoem:

Thank you for the opportunity to comment on proposed rule Section 15(i). I am writing to urge the Commission to review and amend the content requirements of a recall notice under proposed rule Part 1115, and specifically §1115.27.

The best way to effectively convey a recall notice to consumers, so that they understand which product is being recalled and the importance of adhering to the recall notice, is to relay only key information to the consumer in a concise way. The information that does not help to identify the product, hazard, or remedy may distract the intended audience, or worse, deter the consumer from ever reading the recall notice at all. While many of the requirements listed in proposed §1115.27 would be helpful in informing consumers about a product recall, other requirements are not helpful in identifying the product, hazard, or remedy associated with the recall.

First, proposed §1115.27(h) is not particularly helpful in identifying the product, hazard, or remedy associated with a recall. Admittedly, the name of the manufacturer does help to identify the product that is being recalled in many instances. However, including the country of manufacture seems to me to be unnecessary. Inclusion of this information will distract the consumer away from the important information in the recall notice, decreasing the effectiveness of the recall notice. Further, requiring a recall notice to include the country of manufacture may cause confusion among consumers, who could believe certain products manufactured in the same country as the recalled product were equally dangerous.

Secondly, proposed §1115.27(i) does not help to identify the product, hazard, or remedy associated with the recall. By identifying "significant retailers" recall notices would be singling out certain retailers. Further, this does not help to identify the product, and I am concerned that the Commission, by adopting this part of the rule, would be drifting away from the original intent of the rule. The purpose of the recall notice should be to inform

a consumer that they have a defective product, why the product is defective, and how to remedy the situation. While it would make sense to inform the consumer of the retailer if part of the remedy is to return the product to that particular retailer, or if the product is solely available at one retailer, for any other purpose identifying the retailer does not fit into the purpose of the rule. Identifying a specific retailer while leaving others out could create confusion among consumers who could believe that their product is not being recalled because they purchased it at a retailer other than the significant retailer. Additionally, the name of a significant retailer would not give the consumer any additional information. When a consumer reads the recall notice they will be alerted to the recall by the description of the product. For instance, say a recall notice states that Sunbeam Mixers sold at Sears are being recalled. The consumer would be alerted to the recall and check to see if they had a Sunbeam Mixer regardless of the additional information "sold at Sears" was included in the recall notice. However, by including this information, the Commission runs the risk of a consumer reading the recall notice and disregarding it because, although they have a Sunbeam Mixer, they bought it at the local appliance shop, which is not a significant retailer. Thus, the consumer would not be alerted to the recall although a product in their possession was actually being recalled.

I would include the name of the retailer only when that retailer is the sole retailer of the product that is being recalled. By including the retailer name in the recall notice only when it is the sole retailer the Commission would eliminate the possibility of any confusion among consumers.

Finally, I would amend §1115.27(k) to include the approximate price range or retail price of the recalled product, only when the remedy of the recall was a refund of the price paid. The only time that information regarding the price is relevant in a recall notice is if the remedy is a full refund. Price does not help to identify either the product or the hazard involved with the product. Absent the possibility of a refund as the remedy, the price does not help determine the remedy either. Price information simply serves to clutter the recall notice, making it less appealing for the consumer to read.

Although I agree substantially with the guidelines proposed by the Commission, I have suggested these changes with the hope that the Commission will keep in mind the importance of including only vital information in mandatory recall notices. When too much information is included in a recall notice there is a

risk that the message will be lost on the consumer. Thank you for considering my comment regarding this proposed rule.

Respectfully,

Matthew Sherlock

Mr Schoem:

Thank you for the opportunity to comment on proposed rule Section 15(i). I am writing to urge the Commission to review and amend the content requirements of a recall notice under proposed rule Part 1115, and specifically §1115.27.

The best way to effectively convey a recall notice to consumers, so that they understand which product is being recalled and the importance of adhering to the recall notice, is to relay only key information to the consumer in a concise way. The information that does not help to identify the product, hazard, or remedy may distract the intended audience, or worse, deter the consumer from ever reading the recall notice at all. While many of the requirements listed in proposed §1115.27 would be helpful in informing consumers about a product recall, other requirements are not helpful in identifying the product, hazard, or remedy associated with the recall.

First, proposed §1115.27(h) is not particularly helpful in identifying the product, hazard, or remedy associated with a recall. Admittedly, the name of the manufacturer does help to identify the product that is being recalled in many instances. However, including the country of manufacture seems to me to be unnecessary. Inclusion of this information will distract the consumer away from the important information in the recall notice, decreasing the effectiveness of the recall notice. Further, requiring a recall notice to include the country of manufacture may cause confusion among consumers, who could believe certain products manufactured in the same country as the recalled product were equally dangerous.

Secondly, proposed §1115.27(i) does not help to identify the product, hazard, or remedy associated with the recall. By identifying "significant retailers" recall notices

would be singling out certain retailers. Further, this does not help to identify the product, and I am concerned that the Commission, by adopting this part of the rule, would be drifting away from the original intent of the rule. The purpose of the recall notice should be to inform a consumer that they have a defective product, why the product is defective, and how to remedy the situation. While it would make sense to inform the consumer of the retailer if part of the remedy is to return the product to that particular retailer, or if the product is solely available at one retailer, for any other purpose identifying the retailer does not fit into the purpose of the rule. Identifying a specific retailer while leaving others out could create confusion among consumers who could believe that their product is not being recalled because they purchased it at a retailer other than the significant retailer. Additionally, the name of a significant retailer would not give the consumer any additional information. When a consumer reads the recall notice they will be alerted to the recall by the description of the product. For instance, say a recall notice states that Sunbeam Mixers sold at Sears are being recalled. The consumer would be alerted to the recall and check to see if they had a Sunbeam Mixer regardless of the additional information "sold at Sears" was included in the recall notice. However, by including this information, the Commission runs the risk of a consumer reading the recall notice and disregarding it because, although they have a Sunbeam Mixer, they bought it at the local appliance shop, which is not a significant retailer. Thus, the consumer would not be alerted to the recall although a product in their possession was actually being recalled.

I would include the name of the retailer only when that retailer is the sole retailer of the product that is being recalled. By including the retailer name in the recall notice

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Although I agree substantially with the guidelines proposed by the Commission, I have suggested these changes with the hope that the Commission will keep in mind the importance of including only vital information in mandatory recall notices. When too much information is included in a recall notice there is a risk that the message will be lost on the consumer. Thank you for considering my comment regarding this proposed rule.

Respectfully,

Matthew Sherlock

38

Stevenson, Todd

From: Jaimee Moore [jaimeel.moore@gmail.com]
Sent: Monday, April 20, 2009 8:48 PM
To: Mandatory Recall Notices
Subject: Written Comment for Proposed subpart C for 16 C.F.R. 1115
Attachments: Proposed subpart C.doc

Comment by: Jaimee Moore

Proposed subpart C (§1115.23-§1115.29) to 16 C.F.R. §1115 sets forth the guidelines and requirements for mandatory recall notices, pursuant to CPSA §12, §15 (c) or §15 (d). This proposed rule requires manufactures of recalled products to distribute notices to consumers, and the public informing them of the hazards presented by the recalled products. The recall notice must include: the description of the recalled product(s) (§1115.27(c)); the description of the substantial product hazard (1115.27(f)); manufacturer and retailer information (§§1115.27(h)(i)); dates of manufacture and sale (1115.27(j)); and dates of release, issuance, posting, or posting (1115.27(b)). In the face of these notice content requirements, there has been an enforcement oversight. There are no provisions in this proposed rule to make sure that manufactures follow the requirements in this rule within a timely fashion. Timeliness is just as important as the information in the notice to the safety of the consumers.

There are not incentives in this rule for manufactures to comply with these standards in a timely fashion, nor are there penalties for manufactures who do not comply with this rule in a timely fashion. The governing sections do not give any enforcement guidance either (see CPSA §12, §15(c) or §15(d)). The Commission has done an excellent job in outlining the details oriented notice requirements (including requiring the notice to include the color of the product (115.27(c) (3)), but without some type of time constraint this proposed rule will lack effectiveness. The Commission could follow the guidelines for civil penalties from CSPA §2069(a). This section could be a guide for determining the monetary penalty the responsible party must pay for every incident involving the recalled product that takes place after the deadline for submitting the recall notice. Without a deadline or timeline for submission this rule will not be able to aid the public in gathering timely information about harmful products.

Comment by: Jaimee Moore

Proposed subpart C (§1115.23-§1115.29) to 16 C.F.R. §1115 sets forth the guidelines and requirements for mandatory recall notices, pursuant to CPSA §12, §15 (c) or §15 (d). This proposed rule requires manufactures of recalled products to distribute notices to consumers, and the public informing them of the hazards presented by the recalled products. The recall notice must include: the description of the recalled product(s) (§1115.27(c)); the description of the substantial product hazard (1115.27(f)); manufacturer and retailer information (§§1115.27(h)(i)); dates of manufacture and sale (1115.27(j)); and dates of release, issuance, posting, or posting (1115.27(b)). In the face of these notice content requirements, there has been an enforcement oversight. There are no provisions in this proposed rule to make sure that manufactures follow the requirements in this rule within a timely fashion. Timeliness is just as important as the information in the notice to the safety of the consumers.

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notice. Without a deadline or timeline for submission this rule will not be able to aid the public in gathering timely information about harmful products.

39

Tara Ann Rabenold
Tar28@drexel.edu
(610) 462-2784

TO: Consumer Product Safety Commission
FROM: Tara Ann Rabenold
RE: Section 15(i) NPR
DATE: April 20, 2009

I am writing to comment on the proposed regulations under the Consumer Product Safety Improvement Act (CPSIA). I am a third year law student at the Drexel University Earle Mack School of Law. I am learning about regulations in my Administrative Law class. I believe that the proposed regulations will be extremely helpful. Specifically, my comments will address the proposed sections 1115.26 and 1115.27 concerning the content and form of recall notice.

16 C.F.R. 1115.26. Guidelines and Procedures.

The guidelines provide many detailed ways to ensure that recall notices are received by the proper people. However, the guidelines should still be more specific. It is very important that consumers with possibly defective or harmful products receive adequate notice as soon as possible. The problem with the guidelines it that there is really no extra effort required on the part of the firm to ensure that the notice has been received. Since it would certainly be time consuming to check on each targeted consumer to make sure notice was received, I have a few suggestions that should give the comsumers the best chance of reading the recall notice instead of dismissing it as "spam" or "junk mail."

16 CFR 1115.26(b)(1). Form of Direct Notice

This section is well written in that it provides many ways for providing recall notice. The problem is that a simple list is not enough. It would be more effective to require firms to notify consumers through more than one, or even all of the suggested mediums. The way subsections (b)(1) and (2) are written makes it seem like the firm can choose any one medium provided that the information is available. It would be better if the firm was required to use multiple mediums. For example, perhaps one form of written notice and one form or electronic notice; or one form of audio notice and one form of advertisement notice, etc. This would better ensure that people who do not check e-mail or assume all unknown numbers are from telemarketers, do not miss the notice.

16 CFR 1115.26(b)(2-3). Advertisement of Notice

It would be very helpful if more than "Safety Recall" was required in the subject headings of e-mail or in red bold letters on an envelope. If the name of the recalled product was included with "Safety Recall," it may trigger the consumers' recognition that the recall may actually pertain to them or at least someone they know. Even so, there will be people that miss the information. That is why I also suggest that the website recall notice in subsection (b)(3) be made mandatory provided that a website is available. The firm should also be required to alert the national (or regional) media and not just assume a recall will trigger media interest. This should hopefully get the attention of anyone else that did not receive notice through the other mediums.

16 CFR §1115.27. Recall Notice Content Requirements.

16 CFR §1115.27(c). Description of Product

There is a good amount of information required to be included in the recall notice. However, as with the guidelines, it would be more effective to explicitly require a manufacturer include all the information in subsections (c)(1-6). As it is written, it seems as if the firm is only required to include a concise statement for consumers to accurately identify the product. It does not seem to require all the information in subsections (1-6). For example, §1115.27(c)(3) reads, "the product's colors and sizes." However, §1115.27(6) reads, "A firm must provide photographs." This seems to suggest that the information is only specifically required if the word "must" is used. Though this may have been the intent, it would be more effective to expressly require all the information listed in section (c) to be included in the recall notice to ensure that the consumer understands exactly what product is being recalled.

16 CFR §1115.27. Form of the Description

It would be more efficient to include a form to be used when creating the recall notice. The form would include sections for all the required information in §1115.27 as well as a section dedicated to any other relevant information that would help a consumer in identifying the recalled product. This would also save time and resources. A firm could essentially fill in the applicable or required blanks instead of taking the time to create an entirely new notice. This

would allow the firm to get the notice to the consumers faster. It would also create an easy to read template for the consumer. Finally, it would allow the Commission to quickly and easily review the form for approval under §1115.29(c).

16 CFR §1115.22. Prohibited Acts and Sanctions.

Though this section is included in Part B of the CPSIA regulations and not the proposed Part C, an amendment should be added. The amendment should create sanctions specifically for non-compliance with Part C of the CPSIA. Alternatively, it could be as simple as adding a section at the end of Part C reconciling it with §1115.22. For example, there should be a sanction if a firm does not get Commission approval as required under 16 CFR §1115.29(c).

The amended Part C is a great inclusion to the CPSIA regulations. I hope that my suggestions will be helpful in formulating the final language of the proposed amendments to the regulations.

Sincerely,

Tara Ann Rabenold

Stevenson, Todd

From: Tara Rabenold [tar28@drexel.edu]
Sent: Monday, April 20, 2009 9:41 PM
To: Mandatory Recall Notices
Cc: NeilWise@camden.rutgers.edu
Subject: Section 15(i) NPR
Attachments: Section 15i NPR - Rabenold Comment.docx

I have attached my comment to Section 15(i) NPR. Thank you for your consideration.

Sincerely,

Tara Ann Rabenold

Comments on Consumer Product Safety Commission Proposal for Mandatory Recall Notices ("Section 15(i) NPR)

The stated goals of the Consumer Product Safety Commission as delegated by the statute, albeit noble, are excessively enforced by the proposed rule for mandatory recall notices issued under the authority of Consumer Product Safety Act of 2008. There are two implications of the rules that suggest impermissible Constitutional issues and unwarranted results that are contradictory to public policy.

First, the mandatory recall notices as required by a ruling of the Commission could require corporations to implicate themselves criminally or civilly in violation of the protections of the 5th Amendment of the United States Constitution. By requiring a manufacturer, retailer, or distributor to provide a list of the number of injuries and description of injuries and deaths associated with the product, the Commission is requiring these entities to expose themselves to liability for acts that have not been proven in court to be causally linked to the products. In addition, the requirement is superfluous. There is more than enough information for consumers or "other persons" to identify the specific product, the risk involved, and the possible remedies that accompany the recall. For instance, the requirements of direct recall when possible, many other expeditious forms of recall notice, differing language notices, detailed descriptions of the product, a list of the actions being taken, the number of units recalled, the defect, the type of risk, the identification of the recalling firm, the identification of the manufacturer and the price all make it nearly impossible for any affected party to go without notice. In addition, the rule also beneficially requires a description of substantial product hazard that could result that would "enable consumers… to readily identify and understand the

risks and potential injuries or deaths associated with the product conditions and circumstances giving rise to the recall." This is an important and beneficial requirement that, along with these other requirements, meets the stated goals of the statute without giving rise to unwanted due process implications.

Second, the definition of "significant retailers" that the Commission assigns is overly broad and could result in a standard of irreparably harming retailers that are listed as sellers of a hazardous product in question. The requirement and definition would not be problematic if its only implication was to give further notice to consumers about the hazards of a particular product. Unfortunately, in the forum of public opinion a retailer selling a hazardous product, even if unaware of the risks that it poses, may be stigmatized along with the manufacturer. When Congress wrote that "significant" retailers must be identified, it surely did not intend that any retailer might be required to be listed if the products it sells were found to be defective. Perhaps they intended to list retailers who could survive damaged public opinion due to their size. Under the definition given to "significant retailers" under the proposed rule, however, any retailer might be named if its "identification… is in the public interest." It is easy to imagine that with the broad brush that the Commission gives itself situations will arise where its stroke leaves retailers unfairly painted as wrongdoers, even if it means economic devastation their business. This result would be counterintuitive to the free enterprise principles that our government is meant to protect. In addition, the requirement does little to meet the goals of the statute. It is hard to imagine a scenario where the hazard may be alleviated, or that notice might be given effectively only through the listing of the retailer. Even if the

possibility exists, it is too remote to allow a standard that could affect businesses so detrimentally.

For these reasons, the rule should be amended with these comments in mind. Thank you.

David C. Gannone

Stevenson, Todd

From: shadrach39@gmail.com on behalf of David Gannone [dcg32@drexel.edu]
Sent: Monday, April 20, 2009 10:36 PM
To: Mandatory Recall Notices
Cc: NEILWISE@camden.rutgers.edu
Subject: Comments on Section 15(i) NPR
Attachments: Comments on Consumer Product Safety Commission Proposal for Mandatory Recall Notices.doc

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ANTHONY H. CHWASTYK
233 Southview Drive, Delran NJ 08075, (856) 905-7178, chwasta1@yahoo.com

April 20, 2009

Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland 20814
mandatoryrecallnotices@cpsc.gov

SENT VIA EMAIL

Re: Notice of Proposed Rulemaking—Product Recall Notice Information

To Whom It May Concern:

I recently reviewed the notice of proposed rulemaking regarding the proposed regulation mandating specific information for a recall notice. 74 Fed. Reg. 11883 (March 20, 2009). As a preliminary note, I would like to commend your organization for its work in protecting the American consumer. I feel this regulation supports the public interest by providing a comprehensive list of necessary information needed to properly warn a consumer as to whether or not they have purchased a particular product as well as the proper methods of relief for afflicted customers. 74 Fed. Reg. 11883, 11886-88 (March 20, 2009). This comment seeks to address a concern I have regarding the treatment of retailers in the upcoming regulation.

Retailers are not manufacturers. Rather they provide the consumer with the product created at the manufacturer's factory. *Id.* at 11887 (defining "retailer"). Indeed, manufacturing defects are not necessarily the retailer's responsibility absent some knowledge of the defect. *See Topliff v. Wal-Mart Stores E., L.P.*, 6:04-CV-0297 (GHL), 2007 U.S. Dist. LEXIS 20533, *113 & n.175 (N.D.N.Y. March 22, 2007) (citing Rest. (Second) Torts §§ 388 & cmt., 401 (1965)) (stating that retailers are not liable for failure to warn of a defect unless the retailer knew or had reason to know that product was or was likely to be dangerous). One cannot be certain that retailers test every batch of product that arrives in the store, nor should one assume that a manager at a store has the specific, required expertise to determine a defect. *See generally N.R.D.C. v. Consumer Prod. Safety Comm'n*, 597 F. Supp. 2d 370 (S.D.N.Y. 2009) (discussing adverse effects of phthalates). However, despite the fact that a retailer presumably does not know of every defect in its inventory, consumers likely associate a product with the store they purchase the product from. Thus, my major concern is that the proposed regulations put retailers in the position to lose their customer base.

The proposed regulation, 16 C.F.R. § 1115.27(i), states that "[a] recall notice must identify each significant retailer of the product." 74 Fed. Reg. at 11887. The determination of whether a retailer is significant rests in the Commission "on information

and belief," at the sole discretion of the Commission when an order is pursuant to 15 U.S.C. § 2064(c), (d)[1], or at the sole discretion of the District court when the order is made pursuant to 15 U.S.C. § 2061.[2] *Id.*

After "information and belief," the Commission may exercise discretion when the following aspects are present: (1) "[t]he retailer was the exclusive retailer of the product"; (2) "[t]he retailer was an importer of the product"; (3) "[t]he retailer has stores nationwide or regionally-located"; (4) "[t]he retailer sold, or held for purposes of sale or distribution in commerce, a significant number of the total manufactured, imported, or distributed units of the product"; and (5) "[i]dentification of the retailer is in the public interest." *Id.* The intent behind this provision is apparent—"help[ing] consumers determine whether or not they shopped at the identified retailer." *Id.* at 11885. This particular provision is helpful in that it may be easier to determine if the consumer shopped at a particular establishment rather than digging through discarded packages or old receipts to see if the consumer purchased the particular product. *See id.* at 11884-85

Furthermore, subsections (1) and (2) make sense because they are objective. If no one else sold the product, then the retailer can be considered significant, and if the retailer imported the product, then it is likely significant. *Id.* at 11885. These criteria are useful because they are predictable—a retailer knows what to expect when they conform to these provisions. Similarly subsection (3), though not as precise as (1) and (2), still provides a relatively objective standard. National brands are easily discernible, and regional brands are also measurable in their discrete locality. *See id.* The remaining sections are less precise.

Subsections (4) and (5), taken together with the "sole discretion" of the Commission or the district courts present a possible problem for retailers. *See id.* at 11887. For example, what information leads to the conclusion that a "significant" number of stock has been acquired or whether identification is in the "public interest?" *Id.* Obviously, the theory behind these two sections are natural. Those retailers with significant inventory are more likely to have sold the defective product, and recalls require flexibility, and section five certainly accomplishes that. *Id.* at 11885. Yet what makes a particular amount of inventory "significant" or a matter of "public interest" is a subjective criteria.

My biggest concern is that these criteria, meant to be a shield for the consumer, will become a sword against the retailer. For example, two competing retailers may sell the same defective product. Under the current model, one of those two retailers could have its name attached to a defective product through subsection (5), and the other could then

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[1] § 2064(c) discusses what notice the Commission may compel an entity to perform in the event of substantial product hazards, and § 2064(d) provides for actions for which the Commission may compel an entity in the event of substantial product hazards. 15 U.S.C.S. § 2064 (Lexis, LexisNexis through PL 111-12 March 30, 2009).

[2] § 2061 deals with imminent hazards and the procedures through which the Commission can get relief from the District Courts. 15 U.S.C.S. § 2061 (Lexis, LexisNexis through PL 111-12 March 30, 2009).

gain a distinct market advantage. *Id.* Also, under subsection (4) what constitutes significant amounts of inventory could also put a retailer at a disadvantage to a local competitor. *Id.*

My primary concern is not a minute market advantage gained by Wal-Mart over Target. My concern is that Barber A selling hair products that Barber B sells less of will suffer because he sold a typically reliable product that in this one instance failed. Smaller retailers have much more at stake when they must tell the public that they inadvertently sold defective products from a formerly trusted supplier. Conventional wisdom dictates that customer relationships can be fragile things. At a time when big corporations choke out community retailers, certain protections are required. Consumers do not need an excuse to switch their patronage over to larger, cheaper companies.

In fact, adding an objective threshold to determine whether a company's stock is significant or adverse to public interest furthers the legislature's command to issue rules with consideration of "any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety." 15 U.S.C.S. § 2058(f)(1)(D) (Lexis, LexisNexis through PL 111-12 March 30, 2009).

I am not arguing that a small business that happened to buy 100% of a manufacturer's defective output should not be listed on a recall. Such a move would efficiently warn the consumer as to whether she purchased the defective chattel. However, the last two subsections may allow a little more discretion than needed. In theory, a single defective product could warrant a list on a recall, provided a justification can be purported that this single unit was in the public interest or constituted a significant amount of stock to warrant being listed on the recall. *See* 74 Fed. Reg. at 11885. In fact, by including extra safeguards in the determination of " 'significant retailer[s]' " the Commission itself seems to understand that this piece of information deserves attention before inclusion. *Id.* at 11884. As such, an objective threshold in units or percentage of the market share would likely mitigate the damaging effects a listing on a recall notice could have on the local businessperson. Obviously, the number need not be precise, but terms more precise than "significant" and "public interest" which under the right lens can apply to any retailer. *Id.* at 11885.

Thank you once again for your consideration in this matter. I wholeheartedly appreciate your review of my comment. Once again, I want to applaud your efforts in protecting the American consumer.

Sincerely,

Anthony H. Chwastyk

Anthony H. Chwastyk

Stevenson, Todd

From: Anthony Chwastyk [ac464@drexel.edu]
Sent: Monday, April 20, 2009 11:20 PM
To: Mandatory Recall Notices
Subject: Comment--NPR "Section 15(i)"
Attachments: NPRCOMMENTCPSC.doc

To Whom It May Concern,

Attached please find my comment to your recent notice of proposed rulemaking pursuant to "Section 15(i)." The format is .doc.

Please feel free to contact me with any questions you may have.

Sincerely,

Anthony Chwastyk

Consumers Union * Consumer Federation of America
*** Kids In Danger * Public Citizen * National Research Center for Women & Families * U.S. Public Interest Research Group ***

April 21, 2009

Office of the Secretary
Consumer Product Safety Commission
4330 East-West Highway, Room 502
Bethesda, Maryland 20814
Via e-mail: mandatoryrecallnotices@cpsc.gov

Comments of Consumers Union, Consumer Federation of America, Kids In Danger, Public Citizen, National Research Center for Women & Families, and U.S. Public Interest Research Group to the U.S. Consumer Product Safety Commission on Section 15(i) NPR

Consumers Union of U.S., Inc. (CU), Consumer Federation of America (CFA), Kids In Danger, Public Citizen, National Research Center for Women & Families and the U.S. Public Interest Research Group (jointly "We") submit the following comments in response to the U.S. Consumer Product Safety Commission ("CPSC" or "Commission") in the above-referenced matter, "Section 15(i) NPR" ("recall notices").[1]

Section 214 of the CPSIA amends section 15 of the Consumer Product Safety Act (''CPSA'') to add a new subsection (i). This section requires that, ''not later than 180 days after the date of enactment of the CPSIA, the Commission shall, by rule, establish guidelines setting forth a uniform class of information to be included in any notice required by an order under'' sections 12, 15(c), or 15(d) of the CPSA (15 U.S.C. 2061, 2064(c), or 2064(d)). Public Law 110–314, section 214(c), 122 Stat. 3016 (August 14, 2008). The guidelines must include information that would be helpful in identifying the product, hazard, and remedy associated with a recall. See 15 U.S.C. 2064, as amended by CPSIA § 214. Section 214 of the CPSIA also requires that a recall notice include certain specific information, unless the Commission determines otherwise. This information includes, but is not limited to, descriptions of the product, hazard, injuries, deaths, action being taken, and remedy; identification of the manufacturer and retailers; identification of relevant dates; and any other information the Commission deems appropriate.

[1] See "Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking," 74 Fed. Reg. 11883 (March 20, 2009), http://cpsc.gov/businfo/frnotices/fr09/mandatoryrecalls.pdf.

We strongly support these requirements for mandatory recalls and urge CPSC to also consider and apply them to voluntary recalls. Our specific comment and recommendations are as follows:

Section 1115.24: Applicability.
While these rules apply only to mandatory recalls, we strongly recommend that CPSC use this template as a standard format for announcing voluntary recalls, which comprise the vast majority of recalls. We urge CPSC to undertake the separate rulemaking as mentioned in the notice to extend these guidelines and requirements to voluntary recalls as well.

Section 1115.26: Guidelines and Policies.
We support CPSC's view that the information included in recall notices is vital not only for the end consumer, but for the many consumer organizations, public health entities and others that work to disseminate this information more broadly. We also agree with the general principles of 1115.26 (a)(1) through (a)(4) regarding the form and content of recall notices.

Section 1115.26(b)(1): Possible forms.
We agree with CPSC's listing of the wide variety of ways that companies can disseminate recall information. Unfortunately, too often companies rely solely on a single press release and notice to retailers. We strongly urge CPSC to require companies to use multiple means to distribute the recall notice. In cases where injuries or deaths have already occurred, CPSC should require paid advertisements and the use of broad distribution methods.

Section 1115.26(b)(2): Direct recall notice.
We strongly support the requirement that when contact information is available to firms, recall notices should be sent directly to consumers. Retailers can also be encouraged to forward notice of the recall to end consumers. This requirement has been the law in Illinois since 2006[2] and has worked effectively.

Section 1115.26(b)(3): Web Site Recall Notice.
As described above, mandatory Web site recall notices have been the law in Illinois since 2006[3] and most major retailers and manufacturers have been compliant. Parents who hear of a recall must be able to easily find the information online. If it is buried too deep in a Web site, they may stop seeking additional information, and continue to use the dangerous product.

---

[2] 430 ICLS 125/17 (a)(3) and 430 ICLS 125/17 (b)(3).
[3] 430 ICLS 125/17 (a)(2) and 430 ICLS 125/17 (b)(2).

Section 1115.26 (c): Languages.
Under the CPSIA, CPSC may direct that recall notices be published in languages in addition to English. We strongly urge the Commission to consider possible languages used by likely affected consumers when reviewing and approving recall notices. In addition, recall hotlines and on-line consumer forms for implementing recalls should also be available in additional languages when the product likely has been purchased by non-English speaking consumers.

Section 1115.27: Recall Notice Content Requirements.
We support all the requirements listed for content requirements. The more information available to consumers, as well as public health groups, consumer advocates and other information-disseminating organizations, the more likely the consumer will learn of and act on the recall. We especially support the use of the word "recall" in both the title and text of the announcements. Consumers can be educated to as to the importance of recall information and recall notices only if they are consistently called a "recall" and not merely an "alert" or "warning."

Section 1115.27(l): Description of incidents, injuries, and deaths.
We agree that the recall notice should state the dates or range of dates on which the Commission received information about the injuries or deaths. However, we also believe that the recall notice should state the dates or range of dates on which the recalling firm (manufacturer, retailer, and/or distributor) received information about the injuries or deaths. This requirement would be consistent with Sec. 15(b) of the CPSA which requires manufacturers, distributors and retailers of consumer products to *immediately inform* the Commission of a consumer product's failure to comply with consumer product standards, of product defects, or of unreasonable risks of serious injury or death, unless either of them have actual knowledge that the Commission has been adequately informed.

Section 1115.27 (m)(1): Remedies:
We agree that the recall notice must provide a clear description of the available remedies to the consumer, such as providing a full refund, a replacement product or part, etc. Except in rare circumstances, such as where a product is of nominal value, we believe that the manufacturers' or distributors' use of a remedy that consists solely of instructing consumers to discard the product should be limited to cases where the business is defunct and is unable to provide another remedy. In addition, in order to enhance recall effectiveness, as part of the notice template we recommend that each recall notice contain a section titled "incentive" or "reward" (or another term to be used consistently that is designed to generate consumer interest and action) to inform consumers about any additional incentives for return of the product, or state "none" in that section where no additional incentive is available.

Section 1115.29: Final Determination Regarding Form and Content.
We strongly support this change enabling CPSC to have final authority over the form and content of recall notices. For too long, companies have had an unreasonable level of influence when negotiating recall notice language, a situation that severely weakened the Commission's efforts to inform and protect consumers about dangerous products.

We urge the Commission to adopt the foregoing recommendations in its implementation of section 214 of the CPSIA.

Respectfully submitted,

Nancy Cowles
Executive Director
Kids In Danger
312.595.0649

Rachel Weintraub
Director of Product Safety and Senior Counsel
Consumer Federation of America
(202) 387-6121

Janell Mayo Duncan
Senior Counsel
Consumers Union
(202) 462-6262

Donald L. Mays
Senior Director of Product Safety
Consumers Union
(914) 378-2346

Diana Zuckerman, PhD
President
National Research Center for Women & Families
(202) 223-4000

David Arkush
Director, Congress Watch
Public Citizen
(202) 454-5130

Ed Meirzwinski
Federal Consumer Program Director
U.S. PIRG
(202) 546-9707

Elizabeth Hitchcock
Public Health Advocate
U.S. PIRG
(202) 546-9707

Stevenson, Todd

From: Nancy A. Cowles [nancy@kidsindanger.org]
Sent: Monday, April 20, 2009 4:34 PM
To: Mandatory Recall Notices
Subject: Section 15(i) NPR.
Attachments: Consumer Organizations Comments on Mandatory Recall Notices.pdf

Below and attached in PDF format, please find the comments of Consumers Union, Consumer Federation of America, Kids In Danger,
Public Citizen, National Research Center for Women & Families and the US PIRG.

April 21, 2009

Office of the Secretary
Consumer Product Safety Commission
4330 East-West Highway, Room 502
Bethesda, Maryland 20814
Via e-mail: mandatoryrecallnotices@cpsc.gov

Consumers Union of U.S., Inc. (CU), Consumer Federation of America (CFA), Kids In Danger, Public Citizen, National Research Center for Women & Families and the U.S. Public Interest Research Group (jointly "We") submit the following comments in response to the U.S. Consumer Product Safety Commission ("CPSC" or "Commission") in the above-referenced matter, "Section 15(i) NPR" ("recall notices").[1]

Section 214 of the CPSIA amends section 15 of the Consumer Product Safety Act (''CPSA'') to add a new subsection (i). This section requires that, ''not later than 180 days after the date of enactment of the CPSIA, the Commission shall, by rule, establish guidelines setting forth a uniform class of information to be included in any notice required by an order under'' sections 12, 15(c), or 15(d) of the CPSA (15 U.S.C. 2061, 2064(c), or 2064(d)). Public Law 110–314, section 214(c), 122 Stat. 3016 (August 14, 2008). The guidelines must include information that would be helpful in identifying the product, hazard, and remedy associated with a recall. See 15 U.S.C. 2064, as amended by CPSIA § 214. Section 214 of the CPSIA also requires that a recall notice include certain specific information, unless the Commission determines otherwise. This information includes, but is not limited to, descriptions of the product, hazard, injuries, deaths, action being taken, and remedy; identification of the manufacturer and retailers; identification of relevant dates; and any other information the Commission deems appropriate.

We strongly support these requirements for mandatory recalls and urge CPSC to also consider and apply them to voluntary recalls. Our specific comment and recommendations are as follows:

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While these rules apply only to mandatory recalls, we strongly recommend that CPSC use this template as a standard format for announcing voluntary recalls, which comprise the vast majority of recalls. We urge CPSC to undertake the separate rulemaking as mentioned in the notice to extend these guidelines and requirements to voluntary recalls as well.

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Respectfully submitted,

Nancy Cowles
Executive Director
Kids In Danger
312.595.0649

Rachel Weintraub
Director of Product Safety and Senior Counsel
Consumer Federation of America
(202) 387-6121

Janell Mayo Duncan
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Ed Meirzwinski
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(202) 546-9707

Elizabeth Hitchcock
Public Health Advocate
U.S. PIRG
(202) 546-9707

[1] See "Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking," 74 Fed. Reg. 11883 (March 20, 2009), http://cpsc.gov/businfo/frnotices/fr09/mandatoryrecalls.pdf.
[2] 430 ICLS 125/17 (a)(3) and 430 ICLS 125/17 (b)(3).
[3] 430 ICLS 125/17 (a)(2) and 430 ICLS 125/17 (b)(2).

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To: Office of the Secretary,
Consumer Product Safety Commission
(mandatoryrecallnotices@cpsc.gov)
From: Briana Elzey,
Drexel University Earle Mack School of Law
(b_elzey@hotmail.com)

Re: Section 15(i) NPR

15 U.S.C.A. §2064 appears to give the commission full discretion on developing guidelines that are as broad as the statute or as specific as the Commission believes is necessary to produce an effective Recall notice. This delegation should be used by the Commission to produce more detailed and specific requirements with regard to the extent manufacturers and significant retailers are expected to provide notice to potential customers. The internet has significantly expanded the clientele of many products to include persons and areas of persons that may have not been an intended consumer target, but none-the-less have had access to, and purchased, products that could later turn out hazardous. These customers reside throughout different parts of the United States and consist of different cultures within the U.S.; therefore, it is important that the Commission require a more extensive basic language requirement. Although English is a language shared by the majority, there are large enough minority groups within the consumer scope to necessitate the mandatory use of other languages when issuing recall notices.

In the notice of proposed rulemaking, under 1115.26 Guidelines and policies (a)(2) "A recall notice should be written in language designed for, and readily understood by, the targeted consumers or other persons. The language should be simple and should avoid or minimize the use of highly technical or legal terminology". According the discussion within the notice of proposed rulemaking, the term "other persons" would include, but would not be

limited to, consumer safety advocacy organizations, public interest groups, trade associations, other State, local and federal government agencies, and the media. On a side note, this should be added in the definition portion of the rule, as it is not included in the statute. Pertaining to the issue of language, the rules, as promulgated by the CPSC, should specify the mandatory languages of recall notices to include not only English, but the more widely used languages of the "other persons" that are included as a part of the scope of the notice. This is especially important since the Commission itself expressed the importance of the use of such entities to spread the news of a recall to a wider range of communities.

The U.S. Census lists the top 50 languages spoken within the U.S. as Spanish and English. (U.S. Census Bureau, 1990: http://www.census.gov/apsd/cqc/cqc16.pdf). At the very least, the Commission should require recall notices to be distributed in the top two or three languages of consumers in the U.S. and, when applicable, in the language of the hazardous product. (For example: imports from Japan that are sold in predominately Asian communities in the U.S. where the packaging has not been translated to English but remains Japanese- those recall notices should not only be in English and Spanish, but in Japanese as well).

In part (c) titled "Languages", the notice says "where the Commission for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or a U.S. district court for purposes of an order under section 12 of the CPSA (15 U.S.C. 2061), determines that it is necessary or appropriate to adequately inform and protect the public, a recall notice may be required to be in languages in addition to English." While this broadly covers the Commission's discretion to require an additional language, by requiring a widely-used additional language

such as Spanish, the Commission would provide a more detailed set of guidelines for those who participate in Voluntary Recalls.

Additionally, as stated in the notice, the proposed rule would not contain *requirements* for recalls and recall notices that are *voluntary*. It further specifies that "if the Commission decides to extend the requirements to voluntary recalls, it would proceed with a separate rulemaking initiated by a separate notice of proposed rulemaking. Unless and until the Commission issues a rule containing requirements for voluntary recall notices, the proposed rule would serve as a guide for voluntary recall notices." The statute expressed the mandatory nature of recalling ultra-hazardous products. However, an ultra-hazardous product can be voluntarily recalled and as such should be guided under the same rules as the established mandatory recalls. As it is, if the proposed rule is suppose to serve as a guide for voluntary recalls and as a mandate for involuntary ones it should include a larger and more stringent range of requirements to encourage those who voluntarily recall their products to take steps above and beyond what is required by both the statute and the minimum specifications as illustrated by the Commission.

In summary, because "other persons" have been included in the rule then there needs to be a more specific explanation as to the minimum standard of languages. The CPSC should require the major languages in the U.S. (English, Spanish and French are the top three languages) and then, if necessary (or appropriate) require whatever specific language the Commission believes is necessary in order for the recall notice to be effective within the different, and widespread consumer communities. And finally, the CPSC is attempting to go beyond the scope of the statute by separating voluntary and mandatory recall notices, and

therefore should not separate the requirements to promote proper and thorough recalls throughout the retail industry.

Stevenson, Todd

From: Briana Elzey [b_elzey@hotmail.com]
Sent: Tuesday, April 21, 2009 12:24 AM
To: Mandatory Recall Notices
Cc: neilwise@camden.rutgers.edu
Subject: Section 15(i) NPR
Attachments: Assignment- CPSC thoughts.doc

Please see the attached document for my comments on the proposed rules of section 15(i).

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JPMA

April 21, 2009

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: CPSIA Section 214 Guidelines and Requirements for Mandatory Recall Notices

Dear Mr. Stevenson:

The Consumer Product Safety Commission ("Commission" or "CPSC") invited comments on 16 CFR Part 1115 of the Consumer Product Safety Act and Section 214 of the Consumer Product Safety Improvement Act (CPSIA), which directs the Commission to issue a regulation on "mandatory" recall notification (NPR dated March 20, 2009). In response to the request of the Commission's staff, the Juvenile Products Manufacturers Association submits these comments on the requirements of section 214 of the CPSIA.

The Juvenile Products Manufacturers Association (JPMA) is a national trade organization of more than 300 companies in the United States, Canada and Mexico. JPMA exists to advance the interests, growth and well-being of North American prenatal to preschool product manufacturers, importers, and distributors marketing under their own brands to consumers. It does so through advocacy, public relations, information sharing, product performance certification, and business development assistance conducted with appreciation for the needs of parents, children, and retailers.

JPMA notes that 214 of the CPSIA and existing CPSC practice provides sufficient detail for most of the elements of a mandatory recall notification with *necessary information* to identify the specific product being recalled, the hazard involved with the recall notice and the available remedy or course of action to be taken.

Extraneous Information Unrelated to the Nature of the Hazard Should be Avoided

The proposed rules adds requirements pertaining to the *"dates on which the Commission received information about such injuries or death,"* and states that a *"recall notice must state the ages of all persons injured and killed."* This information is irrelevant to the recall notice and has little bearing on a consumer's decision to participate in the recall. Furthermore such information is generally unrelated to the relative risk of a product. Information pertaining to injuries and incidents that occur on particular dates may be unrelated to when they were reported and how accurately they were characterized. In addition without adequate definition of exactly what constitutes a "substantial injury," minor injuries such as superficial bruises may mischaracterize the hazard. Criteria are needed to insure that reports of "injuries" will be consistent in all recall notices.

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Retailer References Are Not Always Appropriate

The proposed Rule requires a retailer's name to be included in a recall notice where the retailer was the exclusive retailer of the product or where the retailer was the importer of the product. This is appropriate to the extent reasonably available. However, a rule that requires a retailer to be named in a recall notice, when the retailer sold a "significant number of products" or has "stores nationwide" may result in small number of national retailers being named on virtually every recall notice, thus, diluting the importance of this information.

All large retailers in particular, will be considered to have sold a "significant number" of the recalled products simply by virtue of the fact that they have sold proportionally more products, overall. Therefore, it is suggested that the language of the proposed Rule be changed to require that a retailer's name be included in the recall notice only if it sold most of the total manufactured, imported or distributed units of a product. Only under such circumstances would identifying such retailer likely assist consumers.

We believe the current practice of including a statement to generally reflect where the recalled product was sold (i.e., at "department and retail stores" or "independent specialty retailers" nationwide) is appropriate. This practice generally provides accurate information that is understood by consumers and is preferable to targeting larger retailers, simply because they sold more products than other retailers.

References to Products Should be Limited to Those Sold to Consumers

The proposed Rule provides that a recall notice "must state the approximate number of product units covered by the recall, including all product units manufactured, reported and/or distributed in Commerce." This language should be clarified to apply accurately to products actually sold to consumers so as to avoid including products still in possession of the manufacturer which may never actually be imported into the United States and sold, but would otherwise inadvertently be included in the "number of units covered by the recall." Products that remain in the hands of the importer or the manufacturer, which have never been sold or distributed, are not products that are subject to recall action and these products should not be included.

Since the statute and proposed rule states that the purpose of the recall notice is to assist *consumers* to identify the product, to understand the hazard and to understand the remedy available *to consumers*, including the number of products that by definition have never been in the hands of consumers would be inappropriate in a recall notice. Proposed § 1115.27 adds complexity beyond what is necessary for an effective recall. The requirement under CPSIA is only for information *necessary* to identify the specific product being recalled, to understand the hazard the recall notice identifies with a description of the available remedy. Products that have never been sold or distributed in commerce (and not in the possession of consumers), should be excluded so as not to distort the actual number of products that are subject to the recall.

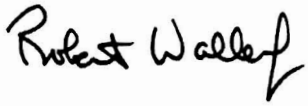
Foreign Manufacturers May Constitute Proprietary and Confidential Information

Section 214(c)(2)(E) of the CPSIA states that the recall notice must provide: *"An identification of the manufacturers and significant retailers of the product,"* while Section 1115.27(h) of the proposed Rule states that: *"If a product has been manufactured outside the U.S., a recall notice must identify the foreign manufacturer and the U.S. importer. A recall notice must identify the manufacturer by stating the manufacturer's legal name and the city and state of its headquarters or, if a foreign manufacturer, city and country of its headquarters."*

The CPSC has traditionally recognized that the identity of its foreign suppliers of consumer goods may be proprietary, confidential information that is not ordinarily disclosed to competitors. Requiring that details of a foreign manufacturer be included in the recall notice may unfairly suggest fault on the part of foreign manufacturer or strip companies of a competitive advantage by allowing customers to bypass the manufacturer (as defined under the CPSA). The current CPSC practice, which treats an importer as a "manufacturer" for the purpose of the CPSA, would avoid disclosure of proprietary information in naming a foreign manufacturer or a supplier. The Commission's current practice of including the country of manufacture of the product in the recall notices is adequate and complies with mandate of Section 214 of the CPSIA. We believe this is consistent with the reasonable interpretation afforded under the underlying CPSA.[1]

With any such newly imposed requirements, it is important that there be adequate advanced notice of any such additional requirements. We also believe that it is necessary for CPSC to make it clear that the regulation is not retroactive. We encourage the Commission to provide adequate advanced notice of any change in Notice requirements and to clearly indicate that these are prospective requirements only applicable to goods actually "manufactured" after August 14, 2009.

Respectfully submitted,



Robert Waller, Jr., CAE
President
(856) 642-4402

[1] Section 214 (c)(i)(2) (E) of the CPSIA states that the notice shall include merely "an identification of the manufacturers and significant retailers of the product." But, in §1115.27 (h) of the proposed rule, the CPSC indicates that a mandatory recall notice must identify "each manufacturer (including importer) of the product and the country of manufacture. Under the definition in section 3(a)(11) of the CPSA (15 U.S.C. 2052(a)(11)), a manufacturer means 'any person who manufactures or imports a consumer product.'

Stevenson, Todd

From: Yarissa Reyes [yreyes@ahint.com]
Sent: Tuesday, April 21, 2009 2:38 PM
To: Mandatory Recall Notices
Subject: Section 15(i) NPR
Attachments: CPSIA Section 214 Comments-Mandatory Recall Notices.pdf

To Whom It May Concern:

The Consumer Product Safety Commission invited comments on 16 CFR Part 1115 of the Consumer Product Safety Act and Section 214 of the Consumer Product Safety Improvement Act (CPSIA), which directs the Commission to issue a regulation on "mandatory" recall notification (NPR dated March 20, 2009). In response to the request of the Commission's staff, the Juvenile Products Manufacturers Association submits these comments on the requirements of section 214 of the CPSIA.

Respectfully submitted,

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