



TESTIMONY OF  
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BEFORE THE UNITED STATES SENATE COMMITTEE  
ON COMMERCE, SCIENCE AND TRANSPORTATION  
SUBCOMMITTEE ON  
CONSUMER PROTECTION, PRODUCT SAFETY, INSURANCE AND DATA  
SECURITY

HEARING ON  
“CONSUMER PRODUCT SAFETY AND THE RECALL PROCESS”

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Mr. Chairman and distinguished Senators:

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

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

NRF has also had a proud history of engaging with the Consumer Product Safety Commission, particularly since the enactment of the landmark Consumer Product Safety Improvement Act of 2008. While we have had a number of issues with that law and its implementation and interpretation by the agency, we have always sought to positively interact with the CPSC via the submission of numerous public comments, participation in working groups, roundtable discussions, and through other avenues. And we have always done this with the viewpoint and objective of ensuring that the products our members sell are safe for American families. Indeed, it has been the retail community that has spearheaded many product safety initiatives and efforts that go well beyond legal and regulatory requirements. By continuing to work in partnership with the CPSC we can help focus on the issues of greatest concern, while using the agency’s limited resources to go after the truly bad actors.

With this spirit of partnership and product safety in mind, it is with some hesitance that I testify today questioning the manner in which the CPSC has approached the key issues of the Voluntary Recall Rule proposal; inaction to date on expanding and appropriately implementing

the Retailer Reporting Program; and what has been generally observed to be a reduction in the agency's Fast Track Recall Program.

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

### **Proposed Voluntary Recall Rule**

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

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

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

### **Retailer Reporting Program**

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

We recently communicated with the Commissioners, asking not only for that progress to move forward but perhaps, more importantly, calling into question the position of the agency’s General Counsel, without apparent explanation, that participation in the Retailer Reporting Program does not and can never constitute compliance with a company’s reporting obligations under Section 15(b) of the Consumer Product Safety Act. If in fact this is the position of the General Counsel and the Commission as a whole, then we not only question the factual accuracy of that statement but its legal and logical soundness. This has not been an issue in the program

previously and we wonder why it has now become one, and this may dissuade potential participants in the program from ever considering it in the future.

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

### **Fast Track Program**

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

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

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

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