

Written Statement for the Record of the Retail Industry Leaders Association

“Industry Perspectives on the Consumer Product Safety Commission”

February 10, 2016

Subcommittee on Commerce, Manufacturing, and Trade

Committee on Energy and Commerce

U.S. House of Representatives

Chairman Burgess, Ranking Member Schakowsky, and distinguished members of the Subcommittee, thank you for the opportunity to submit this statement for the record on behalf of the Retail Industry Leaders Association (“RILA”). RILA appreciates the opportunity to provide the perspective of its members regarding the activities of the U.S. Consumer Product Safety Commission (“CPSC”).

RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry (retailers, product manufacturers, and service providers), which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad. RILA members are also among the largest U.S. importers.

RILA offers this statement for the record in the spirit of collaboration on product safety issues with the goal of ensuring all consumer products sold in the United States meet the highest safety standards and that CPSC’s rulemaking and enforcement actions support this goal while also facilitating legitimate trade. This Subcommittee could assist retailers to advance these ends by considering the following three CPSC-related RILA priorities.

- *First*, the scope of any new CPSC import e-filing requirements should be limited to high risk products and importers and only include those data elements proven to be critical to enhancing CPSC’s risk-based import surveillance. Additionally, as surveillance of

imports is part of the CPSC's core mission of ensuring the safety of consumer products distributed and sold in U.S. commerce, funding for the CPSC's import surveillance activities should come from the agency's operating budget not user fees.

- *Second*, the CPSC should continue taking a leadership role on product safety issues and expand its position as a data driven agency by formalizing and expanding the current Retailer Reporting Program pilot and committing the necessary budget and personnel to conduct a recall communications effectiveness study. Any final rule related to voluntary recalls should incorporate and be based upon the results of the scientific study.
- *Third*, RILA and other stakeholders have called for the CPSC to establish a permanent advisory committee in order to enable the CPSC to be proactive on emerging safety issues and to better inform the CPSC's decision making and rulemaking process. At a minimum, the CPSC should develop a consistent practice of establishing informal working groups to proactively address specific safety-related issues.

Each of these issues is discussed in more detail below.

I. Import Surveillance

The CPSC has sole and shared jurisdiction over a wide range of millions of consumer products that are imported into the United States annually. RILA's members fully support the CPSC's mission of product safety and consumer protection and its efforts to advance its import surveillance activities through enhancement of its Risk Assessment Methodology ("RAM") and targeting of potentially unsafe and non-compliant products prior to importation. Any new CPSC-related data element e-filing requirements for importers of consumer products should be designed to attain maximum safety benefits while placing the least burden on legitimate trade through risk prioritization of products and importers subject to the e-filing requirements and the use of data elements that have been clearly demonstrated to improve risk-based import surveillance targeting. In order to maximize and leverage the agency's limited resources, RILA has consistently urged the agency to develop a robust Trusted Trader program that provides significant trade benefits for those low-risk importers willing to subject their product safety and import processes and supply chains to CPSC scrutiny. Finally, there are significant legal and operational issues related to the implementation of the CPSC's user fee proposal, and RILA

recommends that Congress fund a nationalized import surveillance program through the normal appropriations process rather than granting statutory authority for the CPSC to collect user fees.

A. *Any New CPSC E-Filing Requirements Should Target High Risk Product and Importers and not unduly Burden Legitimate Trade*

President Obama's Executive Order 13659 – Streamlining the Export/Import Process for America's Business ("EO 13659")¹ establishes a "single window" at the border and calls for the reduction of "unnecessary procedural requirements that add costs to both agencies and industry and undermine our Nation's economic competitiveness." With respect to CPSC's recent e-filing proposal and Alpha Pilot, RILA believes two conditions are necessary in order for the agency to achieve a result consistent with EO 13659: (1) the selection of specific e-filing data elements proven to provide useful information for precise targeting of violative products; and (2) the imposition of such e-filing requirements on only higher-risk product categories and high risk importers.

RILA recognizes and appreciates that the CPSC has already responded to overwhelming stakeholder concerns and input and moved in a direction more consistent with EO 13659 by abandoning its original "certificate e-filing" proposal, and instead, focusing on the e-filing of five specific data elements for certain imported products. Additionally, the agency is conducting an "Alpha Pilot" with companies who have volunteered to develop and test the IT systems and processes that the CPSC is creating for importers to file the required data elements.

However, because the costs for implementing, maintaining, and operating an e-filing capability will be significant and mostly borne by companies, including retailers, who are following the rules and importing compliant products, it is essential that the agency show that each of the five Alpha Pilot data elements enhances CPSC's targeting of noncompliant products. The five data elements include: 1) product identification – model number, UPC code; 2) manufacturer – name and address; 3) a listing of all of the CPSC regulations that apply to the product; 4) the name, address and contact information for all the testing labs or in-house facilities where the product was tested; and 5) where applicable, an attestation to the existence of a certificate of compliance for the product. The costs associated with the new CPSC e-filing requirements are primarily driven by the later three data elements that require new internal

¹ 79 Fed. Reg. 10657-60.

company systems to manage the complex job of matching a particular import line entry with the corresponding data from the appropriate certificate of compliance. RILA members annually import millions of products with a corresponding large number of related certificates of compliance. The systems necessary to tie the required data elements to an individual line entry on an import entry do not currently exist and the significant cost of building and maintaining them cannot be overstated. This is especially true when those costs are aggregated across millions of different products being imported by thousands of individual companies.

Given the significant costs associated with the use of these data elements, it is absolutely essential that each data element be proven as critical to the agency's efforts to effectively target noncompliant products. To date, no such empirical evidence regarding the value of these three data elements to enhance CPSC's import surveillance targeting has been put forward by the CPSC.

Adding to RILA's concern about the lack of information regarding the value of these data elements is the fact that the CPSC has not put forward a transparent plan that clearly articulates how the agency will assess and measure whether each of the proposed individual data elements currently part of the CPSC's e-filing Alpha Pilot would advance the agency's import surveillance targeting efforts. CPSC Commissioner Ann Marie Buerkle has cast doubt on whether the Alpha Pilot will yield useful data in this regard, stating "the pilot, as designed, will shed no light on the usefulness of [the data elements] or any of the information collected because one of the criteria for eligibility to participate in the pilot is that an applicant '[h]ave a history of compliance with CPSC requirements.'" Commissioner Buerkle's statement goes on to point out that this conclusion is supported by a statement by CPSC Chairman Elliot Kaye that the pilot "is not primarily intended to reach conclusions about each data element."

Additionally, the agency's current proposal takes a scatter shot approach and envisions e-filing of data elements for *all* regulated products imported to the U.S. (and some products subject to CPSC's Section 15(j) rules) without regard for the relative risk of different product categories. This broad-brush approach fails to leverage and focus the agency's limited resources and fails to take into consideration that some products are not only more likely to be noncompliant than others, but different products also present greater risks to consumers. Imposing e-filing requirements on a product just because it is regulated where the benefits to consumer safety are very low and the corresponding burden for importers is extremely high (*e.g.*, adult clothing

subject to the CPSC’s general wearing apparel requirements), would, in fact, create “unnecessary procedural requirements that add costs to both agencies and industry and undermine our Nation’s economic competitiveness.” Instead, the agency should conduct a risk-based analysis to determine which products present sufficient risk such that e-filing requirements directly improve consumer product safety and not merely impose paperwork burdens on importers.

RILA hopes to build on its past constructive dialogue with the CPSC to help develop a framework that will ensure the agency’s e-filing approach is risk based and cost-benefit justified prior to the implementation of any new requirements. RILA urges Subcommittee to inquire about the CPSC’s plan to implement e-filing requirements in a manner consistent with EO 13659 and to continue its oversight and monitoring of this issue to ensure the CPSC e-filing requirements directly advance product safety while not unduly burdening importers.

B. Development of a Robust Trusted Trader Program is Critical to Effective Import Surveillance

RILA members strongly support the development of a robust Trusted Trader program as part of the CPSC’s overall import surveillance program. Currently, the CPSC and Customs and Border Protection (“CBP”) operate a joint government/industry partnership program entitled Importer Self-Assessment-Product Safety (“ISA-PS”) pilot program. In order to become a member of the ISA-PS program, an importer’s product safety and import compliance programs, processes, controls and oversight are subject to CPSC and CBP scrutiny. Additionally, ISA-PS participants are required to report incidents, issues and any changes made in program processes or procedures to the CPSC on an annual basis. Despite CPSC’s efforts, importer participation in the ISA-PS program has been low primarily because of the perceived lack of enhanced benefits for importers who are already classified as low-risk importers.

Last year, the CPSC allocated significant staff resources to move from the current ISA-PS pilot program, to a full-scale Trusted Trader program. RILA supports this initiative and recommends that any new Trusted Trader program include those companies that currently participate in the ISA-PS program. Trusted Traders should also be exempted from any future e-filing requirements in recognition of having passed CPSC’s scrutiny of their product safety and import processes and demonstrated the reliability of their supply chains. An exemption from future e-filing requirements would be a significant benefit to low risk importers and will drive

participation in a Trusted Trader program while allowing the CPSC to focus its limited resources on higher risk importers.

In CPSC's draft 2016-2020 Strategic Plan, the agency envisions the finalization of a Trusted Trader program that would facilitate legitimate trade and confer faster time-to-market benefits to program participants. In CPSC's FY 2016 Operating Plan, however, it is unclear what work is being done and what goals will be accomplished with respect to the development of a Trusted Trader program this year. RILA believes greater emphasis should be placed on the development of a robust Trusted Trader program. Although RILA appreciates CPSC's inclusion of the Trusted Trader program in its 2016 Operating Plan and 2016-2020 Strategic Plan, the agency should articulate more specifics on what activities will take place in 2016 and outline a more detailed roadmap for its plans to engage stakeholders on the development and implementation of a robust Trusted Trader program.

C. CPSC's Import Surveillance Activities Should be Funded Through the Normal Appropriation Process Rather Than User Fee Authority

The CPSC in its Fiscal Year 2015 and most recently in its Fiscal Year 2016 budget request has requested that Congress grant statutory authority to the CPSC to allow it to promulgate user fees to fund the nationalization of its import surveillance RAM program. RILA members strongly support the CPSC's efforts to strengthen and expand its import surveillance program and have actively engaged with the CPSC to accomplish this goal; however, there are significant legal and operational issues related to the implementation of the CPSC's proposal to impose user fees on importers of consumer product generally.

RILA believes the only appropriate mechanism to fund a nationalized RAM program is through the normal congressional appropriations and oversight process. In order for a user fee program to be consistent with U.S. international obligations, the user fee must be connected to some service or benefit accorded to the user. However, the RAM program and import surveillance are core CPSC enforcement functions that render no tangible benefit or "service" to the "users" or importers who would pay the fee. The CPSC's proposal to "tax" all importers of consumer products is unlike legitimate user fee programs where other agencies charge user fees for special programs that confer specific benefits or services on the company paying the fee (such as FDA's user fee program related to the processing of medical device and prescription

drug applications). Because a nationalized import surveillance program is a core agency function, the only proper funding source is the CPSC's operating budget as appropriated and overseen by Congress. To date, Congress has not entertained legislation that would grant the CPSC user fee authority and RILA urges the members of this Subcommittee not to support any future legislative efforts to confer such authority to the CPSC.

II. Product Recalls

RILA and its members have always supported efforts by the CPSC to improve its ability to quickly identify emerging product safety hazards. RILA has repeatedly called for the formalization of CPSC's Retailer Reporting Program ("RRP") pilot into one that more effectively feeds the CPSC information from retailers and manufacturers to allow the agency to quickly detect and take timely action on new emerging product safety hazards. RILA also shares CPSC's goal of improving recall effectiveness but firmly believes any changes to the current recall process must be thoughtful and effective in identifying level of risk to consumers. Methods of communicating recalls to consumers should be based on a formal CPSC commissioned study and analysis of the issue. Additionally, RILA believes the Notice of Proposed Rulemaking to Amend 16 CFR 1115 (Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices) ("Voluntary Recalls Rule"), which was first proposed in 2013 and garnered significant stakeholder opposition, should not be finalized as originally proposed and that the agency should accurately reflect in its Regulatory Agenda and Operating Plan documents whether it actually intends to finalize this rule.

A. CPSC Should Engage with All Interested Stakeholders on Formalizing and Enhancing the Retailer Reporting Program Pilot

Over the past ten years, the CPSC has worked with several retailer and manufacturers on a pilot program entitled the Retailer Reporting Program or RRP whereby participants, in return for specified benefits, provide the CPSC, on a weekly or bi-weekly basis, information regarding product safety incidents along with related detailed product specific information. The CPSC is able to aggregate this information along with other information received from other sources, including saferproducts.gov and National Electronic Incident Surveillance System (NEISS) data, to conduct data analytics and identify new and emerging safety hazards. At the height of the

pilot program, there were five retailer and two manufacturer participants, with an additional half a dozen companies with pending applications to participate in the program. However, the CPSC has not allowed any new participants for the last several years, pending an internal review of the efficacy of the RRP and a determination of whether to move forward and formalize the program with broadened participation or to discontinue the pilot. The uncertainty surrounding the status of the program and previously promised benefits has caused one participant to withdraw from the program with the unfortunate result of eliminating a major source of valuable product specific safety incident information for the CPSC.

RILA has repeatedly offered to engage directly with the CPSC on enhancing the current RRP and is hopeful that the agency will make the effort to improve the program rather than discontinuing the current pilot or continuing it in a way that lessens the incentives for retailers to provide these reports to the agency. Given the value of the data that retailers possess, RILA believes it would be a mistake to do anything other than to expand and formalize the program.

Retailers have a unique relationship with their customers and in the normal course of their business gather a large amount of data about customers' interactions with the products that they sell. In many instances, retailers serve as part of the "front line" with respect to consumer feedback regarding product safety. Customers report their experiences with products, including experiences that may involve a potential safety issue, to the retailer where the item was purchased rather than to the product manufacturer. Customers communicate product-related information through product reviews, stated reasons for product returns, complaints to a company's customer service department, [saferproducts.gov](https://www.saferproducts.gov), insurance claims, and product liability cases. The RRP was meant to capitalize on the fact that information quickly submitted to the Commission from retailers concerning safety issues with products may be among some of the first reports the agency receives—making the RRP an important way for the agency to get ahead of emerging hazards.

To date, the agency has based its review of the usefulness of the data received through the *pilot* RRP, which was not standardized, and instead, operated through multiple independent agreements with the participating companies. RILA believes that the usefulness of the safety-related data received through the RRP would be more properly evaluated if the Commission explored what the program could look like and how it would function if it were formalized. Due to the nature and magnitude of the question, RILA believes CPSC staff should engage with

current and potential future RRP participants through a public workshop and then make a formal recommendation on the future of the RRP to the full Commission during 2016. This type of stakeholder meeting will ensure both stakeholders and the CPSC benefit from the opportunity to have a full dialogue and exchange of information concerning the RRP. A formal briefing package and Commission vote will also ensure full transparency to CPSC's stakeholders, including Congress, on the staff's and Commission's rationales underlying such a major agency decision.

B. CPSC Budgetary and Resource Commitment to a Recall Effectiveness Study

The CPSC, consumer advocates, manufacturers, retailers and consumers all share the common goals of timely and effectively informing consumers about product recalls and quickly removing potentially unsafe and noncompliant products from the marketplace and consumers' homes. All stakeholders in the consumer products arena would like to see recall effectiveness improved and the development of a new system for clearly communicating level of risk to consumers. The CPSC's current classification of all "full product" recalls and "repair only" corrective actions as "Recalls" regardless of the level of risk to consumers fails to provide consumers with the information they need to truly understand the risk identified in the specific product recall. We urge the CPSC to explore whether a tiered recall classification system, similar to how the Food and Drug Administration handles food safety issues, would better inform consumers of product safety risks. In addition, some methods currently used to communicate recalls, including mandated in-store recall posters are outdated. Recall information should be communicated to consumers using those methods of communication that consumers have identified as how they want to receive product recall information. RILA believes that such a complex issue is deserving of a comprehensive and empirically-based study on how to improve recall effectiveness and communication of recall information to consumers. Accordingly, RILA believes the CPSC should designate an appropriate amount of resources to conduct a formal study into these questions.

RILA has previously called on the CPSC to dedicate resources to take a more scientific approach in determining the best ways to achieve greater recall effectiveness. Despite these requests from RILA and other stakeholders, including consumer advocates, the agency has not dedicated resources to a formal study or hosting a stakeholder workshop on this issue. Instead,

the agency has made repeated blanket criticisms of the regulated community for “not doing enough” and attempted to improve recall effectiveness on an ad-hoc basis through seemingly random application of new, unproven, requirements on companies conducting recalls. While RILA shares the goal of enhancing recall effectiveness, this type of ad-hoc approach is not ideal because the new requirements are used by the agency on an inconsistent basis and not based on empirical data and stakeholder input.

A more effective approach to improving recall effectiveness and a much easier path to gaining industry cooperation would be for the CPSC to conduct studies and/or consumer surveys on recall awareness trends to determine the most effective methods of communicating product recall information to consumers.

C. *The CPSC Should the Change “Final Rule” Designation for Voluntary Recalls Rule to Reflect its Non-Priority Status*

RILA submitted extensive comments concerning many of the serious issues its members have with this rule, including the needless formalization of corrective action plans by making them legally binding.² RILA’s primary concern is that the proposed rule would gut the current successful Fast Track Recall Program and slow the process for quickly removing potentially unsafe and noncompliant goods from the U.S. market. We will not repeat the litany of concerns that RILA and other stakeholders share concerning this proposed rule because the CPSC’s Chairman has repeatedly stated that this proposed rule is not among his priorities and it appears that a majority of the Commission still correctly believes this “process-focused” rule does not warrant the use of resources at the expense of the Commission’s other “product safety-focused” priorities. However, the CPSC’s 2016 Operating Plan, which states the rule will be finalized this year, does not reflect this prioritization. The discrepancy between the public statements by the CPSC Chairman and the most recent Operating Plan creates significant uncertainty for potentially impacted stakeholders. RILA believes the agency should provide predictability to the regulated community by accurately reflecting the status of this rule in its 2016 Operating Plan and similar documents by clearly stating the agency’s intention not to move forward with a final rule. Such action would be consistent with how the CPSC has treated other non-prioritized

² Comments of the Retail Industry Leaders Association on the CPSC Proposed Amendments to Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices (CPCS Docket Number 2013-0040).

pending rulemakings (*e.g.*, pending rulemakings on Firepots and Fuel Gels or VGB Public Accommodations), which do not appear in the CPSC's Operating Plan as a final rule.

III. The CPSC Should Take Proactive Steps to Advance Stakeholder Engagement

RILA recognizes that the CPSC, through the Chairman's efforts, has increased engagement with the stakeholder community. While these efforts are greatly appreciated, they have often taken place in an ad-hoc and reactive manner as certain issues arise rather than on an on-going proactive basis. Whether through a Federal Advisory Committee Act ("FACA") compliant stakeholder advisory group or the continued use of public workshops for complicated issues, RILA believes the agency should formally plan for and utilize these types of stakeholder forums in order to help inform and shape the agency's policies and decision making in a more proactive and constructive manner.

A. Establishment of a Permanent FACA Compliant Stakeholder Workgroup

Various government agencies (*e.g.*, Consumer Financial Protection Bureau and CBP) have established FACA advisory groups for the purpose of direct and proactive stakeholder engagement on ongoing issues. The CPSC already has yielded the benefits of participating in CBP's Advisory Committee on Commercial Operations during the development of its e-filing Alpha Pilot. However, the CPSC has consistently avoided the formation of any type of permanent stakeholder advisory group by citing the time and resources needed to comply with FACA. While RILA understands that CPSC's satisfaction of the FACA requirements could take up to a year, at least two years have already elapsed since RILA and other stakeholders first recommended formation of such a group to the CPSC. In addition, the resources necessary to facilitate such a group are already being expended to some extent on more informal forums for stakeholder input. Any additional resources necessary to support such a group would be justified by the benefits of establishing this type of forum for the agency and its stakeholders to jointly collaborate and better inform CPSC's policy development, rulemaking, and engagement work in a proactive manner rather than the current ad-hoc and reactive approach.

B. Continued and Increased Use of Stakeholder Meetings and Workshops

RILA believes the CPSC and its stakeholders have benefitted greatly from the agency's use of public meetings and workshops and encourages their continued use for significant and

complex issues. While RILA believes CPSC should take the steps necessary to form a permanent FACA advisory workgroup, this does not mean the agency should discontinue the use of public meetings and forums targeting specific issues even after such a group is established. These types of stakeholder workshops have been useful in dealing with the complex issues associated with proposed e-filing requirements and could also be used to assist with other complicated rulemakings such as the proposed Voluntary Recall or 6(b) rules. RILA appreciates the CPSC's past use of these types of forums and encourages the CPSC's continued and increased utilization of these mechanisms for gathering valuable stakeholder input prior to moving forward on important rulemakings and other agency initiatives.

Thank you again for the opportunity to provide comments to the Subcommittee on retailers' product safety priorities and CPSC's current engagement with stakeholders. RILA shares the Subcommittee's and CPSC's commitment to improving consumer product safety and the effectiveness of product recall communications looks forward to working with the Subcommittee and the agency to take steps to reach these goals.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen McGuigan".

Kathleen McGuigan

Senior Vice President, Legal & Regulatory Affairs