



March 30, 2022

Alberta E. Mills
Division of the Secretariat
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: Agenda and Priorities FY 2023 and/or 2024

Dear Secretary Mills:

The National Retail Federation (NRF) appreciates the opportunity to supply written comments to the CPSC with regard to the virtual hearing on the agency's agenda and priorities for FY 2023 and/or FY 2024.

NRF, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail thrive. From its headquarters in Washington, D.C., NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing \$3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

NRF has appreciated its close working relationship over the years with both the Commission and CPSC staff on a wide variety of issues and matters as we mutually seek to make our collective efforts toward consumer product safety as effective and efficient as possible. Our nation's retailers are committed to the safety of their customers across the country and across all product categories. And it is in that spirit that we suggest the following for the activities, agenda and priorities of the CPSC now and for the coming federal fiscal year(s):

Permanent Stakeholder Advisory Group

First, for over a decade, NRF has been advocating for the establishment of a **permanent** stakeholder advisory group that would meet regularly and otherwise engage with at minimum senior CPSC staff. Collectively, such a group would discuss solutions to many of the CPSC's most pressing and evolving missions, specifically those related to import surveillance and compliance activities, especially port procedures and policies, recall requirements and expectations, and civil penalty policies and procedures, among others.

There has been significant resistance among some at the agency who feel that the establishment and maintenance of such a group would be overly burdensome to agency staff and other resources and would require utilization of the Federal Advisory Committee Act (FACA). We respectfully disagree on both points. In our view, such a group would not be required to

operate under FACA and could merely be a regular but informal consultation with stakeholders. This occurs regularly at the agency now, typically as “one-off” discussions where conclusions and commitments are few and concrete follow-up is rare.

Various import policies have been developed in the recent past at the CPSC, among them initial e-filing plans (and fees), testing and certification requirements — including what constitutes a “reasonable testing plan” — as well as numerous other policies that have been proposed and even finalized but then effectively abandoned or indefinitely delayed. Such spinning of the regulatory wheels is a far greater drain on agency resources than would be essentially no-cost live or virtual meetings and other information sharing among such a group, to be selected by the CPSC in consultation with agency stakeholders from various sectors with expertise on imports, compliance, emerging technologies and hazards, consumer outreach, etc.

Our members and other stakeholders, e.g., testing labs, have vast, collective understanding of and many innovative and concrete suggestions about how best to address these issues. This expertise is currently underutilized by the agency. For example, many of our members participate in the CBP Trusted Trader Program and can help inform the agency on how it can maximize the benefits of this win-win federal import program. The agency simply does not have the resources to have full understanding of all issues and matters, and the public comment period for proposed regulations is very often too little too late to have a significant impact on agency outcomes.

We therefore strongly urge the Commission to direct staff to begin to establish such an advisory group. NRF stands ready and willing to assist in this process in any way possible.

Retailer Reporting Program

NRF continues to be concerned about the status of the CPSC’s Retailer Reporting Program (RRP). We strongly encourage the CPSC to reopen the program to new participants and that reports under the program be considered to be at least preliminary (“initial”) reports under Section 15(b) of the Consumer Product Safety Act. This program has provided a number of retailers and other companies the ability to regularly report to the agency product safety incidents and other product safety information about which the program participants become aware, even if those participants may not reasonably believe that such information is required to be reported to the CPSC under Section 15(b).

We believe the RRP represents a true win-win-win for consumers, the agency and program participants alike. It provides to the agency incident and other information about which the CPSC might not otherwise become aware, and in so doing enables the agency to make faster and more complete determinations about whether certain products should be subject to a recall or other corrective action; enhances the agency’s overall understanding of product hazard trends; and removes the inherent uncertainty all companies sometimes experience about whether certain incidents are required to be reported under Section 15(b).

Unfortunately, for many years now, the CPSC has considered the RRP to be “closed” to new entrants, as the agency apparently continues to undertake a “review” of the program, its requirements and its implications for participants, especially with regard to 15(b). To date, no information has been forthcoming about when or under what conditions the RRP will be reopened to new entrants, if ever.

We request that the Commission direct agency staff to complete the program review, including soliciting public input on the program, and to reopen the program to new participants as quickly as practicable. We would request that the agency reexamine any position that reports under the RRP cannot satisfy the 15(b) reporting obligation.

Corrective Action Plan/Other Agency “Mission Creep”

NRF also reiterates its growing concern over what has generally been a steady increase in extra-regulatory agency expectations regarding corrective action plans (CAPs, especially recalls) — expectations that for all practical purposes are really agency demands, with the inherent threat of more formal legal, unilateral media or other actions by the agency if these demands are not met. While several existing CPSC regulation guidance documents have for many years set forth specific actions and information disclosures that are expected to be undertaken by voluntarily reporting and recalling companies, including what is required for a “full” 15(b) report, these documents have been greatly eclipsed by ever-changing and expanding staff demands, including in areas such as information and document disclosures to the agency, hazard remedies, direct consumer contact and social media outreach. NRF will address social media demands in separate correspondence to the Commission shortly.

In addition, for years it has been an open secret that the agency personnel tasked with overseeing a CAP and the political and media forces at play on a given potential product safety issue or hazard is at least as important to the recalling firm and CAP outcome as the underlying facts of any given matter. And rumors constantly circulate among stakeholders that essentially secret new policies are being hatched and (often inconsistently) implemented regularly at the CPSC with regard to compliance matters of all kinds. This is simply not the way to undertake transparent, consistent, fair and efficient recalls and other CAPs, let alone civil penalty investigations and settlements or, as mentioned, import policies and procedures. “Enforcement discretion,” as is so often asserted by agency staff as the basis for this status quo, is simply not a sufficient excuse. All stakeholders, including consumers themselves, deserve to know what the agency expects of and commits to them.

Part and parcel of addressing this admittedly complex and difficult overall issue is the need for the CPSC to finally establish different requirements and expectations, including recall actions, directly depending on the level of hazard a particular product poses, from A to D level hazards. Such is often done as a matter of agency staff practice, but not as a formalized matter of agency policy, as it should. Nominally establishing the same requirements for a low-hazard product recall as for a high-hazard product is unnecessary, often unfair and needlessly burdensome on the recalling company, and is known to lead to consumer recall fatigue and a concomitant reduction in recall effectiveness.

Another key issue in this regard is continuing to make the CPSC's highly acclaimed "Fast Track" recall program as fast and efficient as possible. To our knowledge, too many senior agency staff must approve all Fast Track recalls, which often turns them into regular recall programs. That defeats the intent to remove potentially hazardous product from the market as efficiently as possible. This, coupled with the cumbersome nature of the now-required online Fast Track reporting forms (without, we would note, public notice or comment) and other factors, has tied numerous anchors around what was once a highly effective and efficient program.

NRF therefore again urges the Commission to have a fulsome exposition of all extant and planned general compliance policy procedures and expectations, especially regarding recalls, and then to formalize those in its regulations (after full public notice, comment and other engagement, e.g., consultation with a stakeholder advisory group). Good government and the ultimate safety of consumer products and consumers demand nothing less.

Product Safety Regulations

The CPSC is now considering public comments on a number of important, pending new product safety standards. NRF congratulates the Commission for working across party lines to move forward important issues like window coverings, clothing storage units, rare earth magnets, and crib and play yard mattresses, among others. Whether or not our members decide to submit collective comments on these individual proposed regulations, NRF requests the agency take all substantive public comments on such regulations seriously and not summarily dismiss them, as some of our members perceive can be the case. Comments that are substantive in nature and offer valid objections and/or reasonable alternatives to what agency staff may have proposed should be well considered and addressed, as is required by law in any case. Again, we believe that a competent and disciplinarily diverse permanent advisory group may be very valuable to the agency in this regard.

Thank you very much for considering this input in connection to your upcoming, annual Priorities Hearing. We look forward to a continued and highly valued relationship with the Consumer Product Safety Commission.

Sincerely,



David French
Senior Vice President
Government Relations