**Testimony of**
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**Before the**
**Energy and Commerce Subcommittee on Consumer Protection and Commerce**
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# Keeping Kids and Consumers Safe from Dangerous Products

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# Putting the "Fast" Back Into Fast-Track Recalls

Chairwoman Schakowsky, Ranking Member McMorris Rodgers and members of the Subcommittee, thank you for the opportunity to testify about revitalizing the important Consumer Product Safety Commission's (CPSC, the Commission, or the Agency) Fast-Track recall program.

I am Chuck Samuels and for 35 years in private practice I have represented numerous manufacturers, importers, distributors, retailers and associations on individual CPSC compliance matters and regulatory and legislative issues. The work of this small agency is critical to the safety and well-being of millions of Americans. It is an agency admired globally as a governmental leader in its field. In my experience the vast majority of CPSC-regulated entities—"industry"—rightfully consider product safety a critical and preeminent value and CPSC as their top regulatory relationship. Companies of all types in the United States and around the world design, evaluate and build products recognizing the criticality that these products must be as safe as they are useful. Sometimes their best efforts fail and, when appropriate, voluntary recalls must be put into place.

That is why I am pleased to testify here today and thank Representative McMorris Rodgers for introducing HR 3169, a thoughtful approach to starting a conversation in the Congress and among stakeholders in the safety ecosystem on how to improve the critical CPSC Fast-Track program. My testimony is limited to this very important CPSC program which has, over the years, incentivized and created a regulatory environment for companies to be able to quickly move to remove or remediate unsafe products from the marketplace and in consumer's homes.

The Fast-Track program was based on great insights and experiences of longtime career CPSC employees and is justifiably recognized as a significant procedural innovation. Unfortunately, like many regulatory programs, it has become ossified and stultified over time. But it should not be allowed to languish; it should be revitalized so for those firms prepared to use it, it allows for faster recalls. H.R. 3169 provides a good launching point for a bipartisan and stakeholder dialogue on recognizing this program and giving it the tools and authority to be even more effective.

## The Fast-Track Recall Program

Businesses in a position to remove potentially unsafe consumer products quickly from the marketplace are encouraged to participate in the Fast-Track recall program. The program helps consumers by removing potentially hazardous products from the marketplace as quickly as possible and benefits businesses that act quickly. To participate in this program, a business must be prepared to implement a corrective action plan—including a consumer-level recall (refund, repair, or replacement) within 20 working days of submitting an initial report to CPSC. *See* 62 Fed. Reg. 39827 (July 24, 1998) (detailing the requirements for the Fast-Track recall program). In addition, the firm must immediately stop sale and distribution of the product. *Id.* Over time, I understand that about one-third of the corrective actions have been done under this program. *See* OFFICE OF INSPECTOR GENERAL, U.S. CONSUMER PROD. SAFETY COMM'N, AUDIT OF THE FAST TRACK RECALL PROGRAM 9 (Sept. 19, 2017).

This program was introduced as a pilot program in 1995 and became permanent in 1997 pursuant to the Commission's authority and the reporting obligations under section 15(b) of the Consumer Product Safety Act, 15 USC 2064(b), as well as the requirements to protect children under the Federal Hazardous Substances Act, 15 USC section 1274. *See* 62 Fed. Reg. at 39827 (creating the permanent program); 60 Fed. Reg. 42848 (Aug. 17, 1995) (initiating the "No PD" pilot program).

Obviously, the faster consumers are notified and products are removed or remediated, the safer consumers are. Thus, the program also provides benefits to firms who participate in the program:

- By removing the product from commerce quickly, the potential for incidents and injuries to consumers from potentially harmful products may be reduced. Most importantly, this benefits consumers, but it also may reduce the occurrence of product liability claims or lawsuits. *See* U.S. CONSUMER PROD. SAFETY COMM'N, 3 CONSUMER PROD. SAFETY REVIEW 1 (1998) (noting the Fast-Track program "saves industry and government both time and money, and reduces the potential for injuries and deaths to public").

- An efficiently and expeditiously implemented Fast-Track recall allows good communications, sequencing and coordination for manufacturers and retailers to their recall/reverse logistics vendors, wholesale, retail and consumer customers. This also gets dangerous products off of store shelves and out of homes faster. *Id.* at 3 ("[T]he fast-track program allows [CPSC] to get dangerous products out of the marketplace and out of people's homes faster.").

- When a firm avails itself of the Fast-Track program, CPSC will not make a Preliminary Determination (PD) that the product contains a defect that creates a substantial product hazard, which should expedite the recall process and is beneficial in the event of a product liability or other lawsuit. *See* AUDIT OF THE FAST TRACK RECALL PROGRAM, *supra*, 8.

Companies seeking a Fast-Track recall typically do so in their first contact with the CPSC but that is not always the case and sometimes after an initial report is filed it is recognized that it is desirable, even necessary, to move ahead quickly with Fast-Track. As part of the report to the CPSC, the Fast-Track program requires the development and submission of an acceptable corrective action plan that is ready to be implemented, generally within 20 working days and includes:

- A CPSC-approved remedy (either a refund, fully tested replacement or repair supported by technical documentation at the company's option);
- a joint news release with CPSC;
- other customer level communications which increasingly use online resources;
- communications to the distribution chain; and
- a CPSC approved reverse logistics plan.

*See* 16 C.F.R. § 1115.13(d); 62 Fed. Reg. at 39827-28. This is a significant amount of work and material and requires major planning by the affected company and others. It also requires—and here is the present hang up—quick review and approval by the CPSC to move forward expeditiously. If that is not forthcoming, then all the components of a corrective action languish, and the Fast-Track recall is no longer fast. What I have seen over the years is that the process slows down considerably because of unnecessary, prolonged Commission examination and unnecessary back-and-forth—both internal and between staff and firms—regarding the components of the corrective action plan, and especially the press release or other communications, emphasizing formalism and one-size-fits-all over the need for speed of information to the marketplace.

**The Fast-Track Program Is No Longer Fast**

As a result, because the Fast-Track process is no longer fast and, in fact, is rather cumbersome, companies often are bypassing it and opting for the conventional approach. Because, when using the more conventional approach, compliance staff is more experienced in certain product types, as opposed to the compliance staff that works on Fast-Track, which must work across all product categories, some firms find they are able to work with compliance officers that have more experience working with their particular product category. This can be beneficial when reviewing the corrective action plan and, for some firms, outweighs the benefits of the less agile Fast-Track program.

Some companies are relying on the usually simpler Canadian process, through Health Canada, effectively to announce a North American corrective action. And some companies who are anxious to communicate quickly with their customers are simply unilaterally announcing a recall, as they are entitled to do under the law, with little or no notice to the CPSC. This sometimes can work well but it also can mean that the power of CPSC-led communications are not used. If the corrective action plan is inadequately put together, it may then require a subsequent CPSC press release, which is confusing and counterproductive.

This situation is not the fault of any particular CPSC administration or the excellent career staff, but rather the natural bureaucratization over time of a process and the understandable concern of the Agency that it not be criticized if what it approves is less-than-perfect. Some of these concerns undoubtedly are due to the fact that the Fast-Track program is not statutorily recognized.

Nor do delays come only from the government side. Sometimes companies are not prepared to act quickly—perhaps because of the complexity of a remedy or the time it takes to source repair or replacement parts—and CPSC resources are wasted waiting for and assisting them in getting organized.

There are unnecessary delays and issues that could be remedied by putting the “fast” back in Fast-Track. For example, I have seen and been told about delays due to CPSC staff reviews of remedies and data and non-substantive back-and-forth about press releases and other communications. Companies unanimously report that the longest delays involve approval of the press release. Whether through lack of resources or internal sign off requirements, this can take

weeks. CPSC often is looking to package one company's corrective action along with others or not make announcements on what are considered to be poor media days. These changes—which can happen with no or little notice—make internal preparation and coordination by companies with their suppliers, customers, recall vendors and public relations/communications resources more difficult. And most importantly, the result is a delay in the recall information being provided to consumers.

I have also experienced significant delays in the recall announcement due to additional information requests and customer notification letter revisions which were not substantive. In addition, the staff's Corrective Action Plan approval letter arrives after the recall announcement (often three weeks or more after the announcement) and it sometimes contains terms and actions not previously discussed or agreed. This reduces trust between firms and the Agency, which is a disincentive to participating in a Fast-Track recall.

Additional reports I have received, although anecdotal, are illustrative:

- A company asked for Fast-Track treatment and reported the matter to Health Canada shortly after reporting to CPSC. A copy of the draft press release (identical except for sales information) was sent to both CPSC and Health Canada at about the same time. Health Canada approved it the same day. It took almost two weeks to get CPSC approval due to CPSC staff seeking non-substantive changes not related to advancing safety.

- Compliance officers have sometimes taken the position that unless the firm offers a refund, approving a repair solution will take too long to get Fast-Track treatment. But the remedy for any recall—Fast-Track or otherwise—can be a refund, repair or replacement, and is at the option of the firm.

- A Fast-Track recall was delayed for weeks because CPSC staff insisted that the firm provide a manned toll-free number, even though, especially for smaller companies, that is now an increasingly obsolete (and resource-intensive) approach given the use of online reporting.

- A company experienced delay in announcing a Fast-Track recall because the compliance officer insisted on language for social media postings that was not consistent with the approved press release.

Whatever the merits, none of these minor disagreements are worth lengthy delays.

**Solutions to Put the "Fast" Back in Fast-Track**

We need to speed things up. H.R. 3169 takes a first step to deal with this by codifying the Fast-Track recall program, which is appropriate after its extensive use for so many years. It provides that if a manufacturer, distributor or retailer notifies the Commission of its intention to carry out a Fast-Track through repairs, replacement or refunds the Commission shall promptly post the

notice on the Commission's website. The language states the information that companies must submit consistent with Commission guidelines over the years.

Importantly, the language states that the Commission shall not delay the posting of the public notice of the Fast-Track recall for any reason related to reviewing the adequacy of the remedy or the public notice content and format as long as the specific information required has been supplied. This directly targets the issues firms have seen with non-safety related tinkering with remedies and press releases. In turn, the practice of not issuing a preliminary determination will be maintained.

A caution is that we must make sure that this revised language doesn't result in the premature public posting of information about a recall before the company and its vendors, suppliers and sellers are ready to launch the corrective action. It is frustrating and creates anxiety among consumers to learn about a recall, perhaps reach out to the company, and then have to wait for lengthy periods before they can receive appropriate relief.

The draft language appropriately provides safeguards. If the Commission obtains information that the remedy provided in a Fast-Track recall plan is inadequate to address the potential product hazard, then the usual investigation may ensue. Of course, this should be the very rare case because companies have a vested interest in ensuring the success of their recalls. Safety of consumers is paramount for any business selling consumer products and if a remedy does not correct a safety concern, not only will a manufacturer have to repeat the complex and resource-intensive recall process, but consumers may not return to the brand. Moreover, if an initial Fast-Track recall is second-guessed through Monday-morning quarterbacking on a regular basis, companies will not undertake a Fast-Track if they potentially will have to do it again. Per the bill language, the Commission also would be authorized—in what should be extraordinary cases—to accelerate the time period for the remedy.

Again, as discussion and review of this legislation and proffered amendments proceed, we need to make sure that we are not providing the Commission such great discretion that companies will fear that they will have to undertake multiple recalls. This would freeze the program as a practical matter.

The thrust of H.R. 3169 is that the necessary information can get out to consumers and others as quickly as reasonably possible and, in most cases, consumers can take actions as part of the recall or even on their own to protect themselves and their families.[1] If the company has proposed a remedy, such as a repair, or component replacement, or a new product that is unsafe, then of course the Commission must have the authority to act to protect the public.

[1] Recall effectiveness calculations do not presently, but should account for actions consumers may take to respond to a recall other than the remedy provided by the recall notice. For example, sometimes consumers learning of a recall simply dispose of the product or take some other form of self-help. Similarly, if a recalled product is no longer in use or is out of circulation, consumers will not respond to the recall and the effectiveness calculation should account for the likely quantity of a recalled product that is no longer in use or circulation. Factors such as a product's size, cost, and average lifetime should be considered in determining the likely quantity of a product no longer in use at the time of the recall or disposed of in response to the recall notice.

This legislation is wisely informed by and its approach is similar to firm initiated recalls under the jurisdiction of the Food and Drug Administration. It is explicitly stated in FDA regulations that though certain information is required: "pending this review, the firm need not delay initiation of its product removal or correction." 21 C.F.R. § 7.46. The FDA does not micromanage recalls and its approach has been successful.

The legislation also reflects the experience at the National Highway Traffic Safety Administration (NHTSA), which administers the federal law that governs safety recalls of motor vehicles and motor vehicle equipment (like child restraints or brake fluid). NHTSA law is similar to CPSC law in that it requires a manufacturer to report any safety-related defect or noncompliance with an applicable safety standard in its vehicles or item of equipment. *See* 49 U.S.C. § 30118(c).

NHTSA also does not micromanage the manufacturer's recall process. It has established the parameters by regulation that specify the information that must be provided to NHTSA, including a description of the remedy and a schedule for the recall launch. *See* 49 U.S.C. § 30119(a); *see also* 49 C.F.R. Parts 573 and 577. NHTSA does not review or approve the remedy in advance, nor does it review or approve most of the manufacturer's public notices about the recall. *See* 49 U.S.C. § 30120(a)(1) (authorizing manufacturers to select a remedy). Only the customer notification letter is reviewed by NHTSA, and that draft ordinarily is approved within a few days. The statute provides NHTSA with the authority to review and determine the adequacy of the remedy after the fact, and empowers NHTSA to order a different remedy if the initial remedy is inadequate, but in practice that rarely happens. *See* 49 U.S.C. § 30120(e). The statute also authorizes NHTSA to accelerate the schedule of a recall if NHTSA determines that public safety so requires. *See* 49 U.S.C. § 30120(c)(3). NHTSA has exercised this authority once, in connection with the Takata air bag inflator recall. Like CPSC, NHTSA supervises hundreds of recalls per year. And the NHTSA-supervised recalls are launched successfully without reducing product safety and without extensive government involvement in the non-substantive details. Accordingly, a similar process should be successful for CPSC.

## Conclusion

I thank Representative McMorris Rodgers for introducing H.R. 3169. I hope that all the members of the Subcommittee and the Committee will use it as a first step basis for consideration and engagement with the many stakeholders in the product safety ecosystem. Undoubtedly, as this review ensues and stakeholders review the legislation more fully and as the Subcommittee and the Committee move forward, alternative language or amendments may be offered which we will need to consider. We want to ensure that we are enacting a process that provides flexibility because every case is different. Moreover, the process should minimize unnecessary paperwork to the extent possible. Most importantly, we want to speed up recall announcements when the time is appropriate and more quickly provide information to consumers.

Chairwoman Schakowsky and members of the Subcommittee, thank you for providing this opportunity to testify and for your interest in improving the Fast-Track program to maximize its utility for consumers. I think there is a potential for a win-win for all stakeholders. I respectfully

request that my written statement be included as part of the hearing record. I would be pleased to answer any questions you may have regarding the Fast-Track program.