

## **Additional Questions for the Record**

**Subcommittee on Consumer Protection and Commerce**  
**Hearing on**  
**“Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission**  
**Fulfilling Its Mission?”**  
**April 9, 2019**

**Mr. Mike Gentine, Counsel, Schiff Hardin LLP**

**The Honorable Cathy McMorris Rodgers:**

1. Mr. Gentine, in your experience, does product price effect overall recall completion rate? How should data about recall completion rates be reported to note for how consumers treat products depending on their cost? Please explain.

*First, I believe far too little reliable, scientific-quality research has been done regarding consumer recall response behavior. This leaves all stakeholders to rely on anecdotal observation and inhibits companies' ability to tailor recall approaches to maximize recall remedy adoption. I believe all could benefit from CPSC's partnering with an entity experienced in such research – such as the White House Office of Science & Technology Policy – to broaden understanding of consumer behavior.*

*Drawing primarily from such anecdotal observation (supplemented by some quantitative analysis of recall responses) CPSC has observed that product price is a significant driver of observed recall completion rate. This observation is consistent with my experience, and I believe product price is second only to hazard severity in motivation consumers to act in some fashion. Further, I believe it is the most important factor in consumers' decision to avail themselves of the remedy prescribed by the recall. Even for a severe hazard, an inexpensive product is more likely to be simply discarded. While this frustrates companies' and CPSC's efforts to track recall effectiveness, it is entirely rational consumer behavior.*

*Unfortunately, tracking this rational behavior is likely impossible. For example, consumers who do not feel that returning a recalled product for a replacement is worth their time are unlikely to take the time to return confirmation cards.*

2. Mr. Gentine, are any stakeholders, including consumer groups, able to engage in the voluntary standard process? If so, what has your experience been with various stakeholders engaging with the standards setting process?

*All stakeholders, including consumer groups, are able to engage in the voluntary standard process. In my experience, not only are consumer groups able to participate, they are ably represented by some of the same people who shared the witness table with me.*

- a. Are the voluntary standard setting bodies comprised of representatives from various stakeholder groups?

*These bodies are comprised of representatives from all stakeholder groups and make significant efforts to continue that representation. Not only are consumer groups and CPSC staff are not only represented, but their opinions are given significant weight.*

3. Mr. Gentine, in your testimony you state that voluntary standards are a vital force multiplier. Please explain why.

*CPSC's total staff hovers around 550 or less. While many of these slots are allocated to engineers and human factors experts – among the most vital contributors to standards-setting exercise – others must be comprised of a variety of other skillsets in order for CPSC to pursue its safety mission or even keep the lights on. As such, CPSC cannot conceivably work directly to monitor trends among all of the 15,000-plus product categories within its jurisdiction, much less spend the time necessary to advance safety standards in each of them all the time. Moreover, a CPSC massive enough for such direct, resource-intensive involvement would be both far costlier and a much greater burden on the American economy, with scant return on those investments – very few product categories merit this level of activity at any given moment, and that number continues to diminish as the collaborative efforts of CPSC, consumer groups, manufacturers, retailers, and other stakeholders continues to advance overall consumer safety. By working with and through the voluntary, consensus standards bodies, CPSC can leverage the expertise and the time of experts from many disciplines and all stakeholders. It is the standards-setting version of cloud computing.*

4. Mr. Gentine, please explain the ways companies are incentivized to follow voluntary standards for product safety?

*First, CPSC staff use compliance or (particularly) non-compliance with applicable voluntary, consensus standards as factors in making defect determinations under Section 15 of the Consumer Product Safety Act (CPSA) (15 U.S.C. § 2064). Thus, companies who comply with such standards are less likely to face requests that they recall their products. CPSC should ensure that its use of this factor never approaches establishing a de facto rule and exposes the agency to criticisms of backdoor rulemaking, but consideration of compliance with voluntary, consensus standards is an appropriate means of leveraging the work of these bodies to enhance CPSC's ability to protect consumers.*

*Second, the CPSC identifies an industry's general rate of compliance with its relevant voluntary, consensus standards as a factor in the use of several of CPSC's authorities, including establishing mandatory rules (15 U.S.C. § 2058(a)) and designating readily identifiable characteristics of non-compliance with a voluntary, consensus standard whose presence or absence necessarily creates a substantial product hazard (15 U.S.C. § 2064(j)). Where all but a few members of an industry comply with a voluntary, consensus standard, that industry may ask CPSC to formally rely on the standard under Section 9 of the CPSC (15 U.S.C. § 2058(b)(2)(B)), creating an obligation for non-complying companies to identify themselves by reporting to the CPSC, which agency staff can then use in defect determinations as described above.*

*Third, non-CPSC actors create incentives for compliance with voluntary, consensus standards. Of these, the most notable are retailers and litigation. Many retailers require compliance with and certification to relevant voluntary, consensus standards before they will stock products on their shelves, while juries may consider a product's compliance or non-compliance in determining whether its manufacturer is liability for a litigant's alleged injuries associated with a product.*

5. Mr. Gentine, I understand recall completion rates vary drastically depending on the product and the recall. Why is relying solely on a recall completion rate potentially misleading when evaluating whether the Commission is fulfilling its safety mission? Do you have any suggestions to improve the data reporting on this issue?

*Reported recall completion rates do vary significantly. However, those rates can be dramatically misleading. Particularly for simple, inexpensive products, consumers may opt to simply discard a product rather than return it for a refund or a replacement or obtain a repair. This inclination to discard is also related directly to the age of the product and inversely to the consumer's perception of the hazard; these factors are linked to each other, as a consumer who has used and enjoyed a product for years without experiencing the potential hazard is less likely to view that hazard as compelling, particularly if the remedy is a refund upon surrender of a product the consumer enjoys and wants to keep.*

*Additionally, the fulfillment of CPSC's safety mission extends well beyond recalls. As CPSC, consumer advocates, manufacturers, retailers, and other stakeholders have labored over decades to improve the overall safety of consumer products, many potential sources of defects and hazards – and thus recalls – have been either eliminated or dramatically reduced. Thus, even with an infallible means of capturing recall response, those data could only be a measure of recalls, not of CPSC's broader mission success.*

*Finally, CPSC's use of the term "recall" to encompass purported remedies beyond what the CPSC contemplates – repair, replacement, and refund – further*

*complicates any attempt to understand true recall effectiveness rates. Not only is there no mechanism for consumers to report, for example, that they have been duly warned by a “recall to warn,” but these non-statutory remedies are frequently perceived as relating to less-serious hazards, eroding consumers’ motivation to respond not only to that recall but to the word “recall” as a whole.*

*Perfecting data reporting on recall effectiveness will likely always prove a high hurdle, as the incentives for consumers to either self-remedy in a way that cannot be captured (such as discarding a product) or to fail to act altogether likely cannot be offset or overcome. Thus, a significant portion of consumer behavior in any particular will remain beyond CPSC’s knowledge. As such, CPSC should focus its efforts not on collecting recall responses in the moment, but on better understanding consumer decision-making and then tailoring recalls to that understanding. The implicit assumption that informing consumers of the existence of a possible hazard is sufficient to motivate not only behavior but behavior in precisely the manner CPSC desires has been proven faulty.*

6. Mr. Gentine, in your written testimony, you highlight that standards bodies are made up of product-specific experts which help develop voluntary standards. How important do you believe having experts involved in the standard setting development is to the process? Please explain.

*CPSC technical staff – including its engineers, epidemiologists, and human factors professionals – are talented, dedicated public servants, and their role in advancing safety – including through voluntary, consensus standards bodies – is vital. However, given the mismatch between their number and the scope of the agency’s jurisdiction, they must be generalists in their field. A mechanical engineer may work on trash cans one day and portable generators the next.*

*By contrast, other members of voluntary, consensus standards bodies – including both industry representatives and consumer advocates – are in daily contact with the function of the particular products covered by any given standard. Many have devoted decades-long careers to a single, narrow product category. This provides them more intuitive insight into the operation of that product category than CPSC staff have the luxury to develop.*

*Further, those experts understand not only the products, but how consumers use – or misuse – those products. This better enables them to predict how consumers will respond to safety-minded changes and identify potential negative unintended consequences, such as consumers disabling or circumventing safety features.*