February 4, 2014

Mr. Robert Adler  
Acting Chairman  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

Re: Docket No. CPSC-2013-0040, Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices

Dear Chairman Adler:

The Air-Conditioning, Heating, and Refrigeration Institute (AHRI) is the trade association representing heating, cooling, refrigeration, and water heating manufacturers. Our member companies account for more than 90 percent of the residential HVAC and water heating equipment and components sold in the U.S. We have reviewed CPSC’s November 21, 2013 proposal to establish guidelines for voluntary recalls. We are concerned that the proposed guidelines will not improve the voluntary remedial action process but, in fact, will have the opposite result from that which CPSC intended.

The current regulations under the Consumer Product Safety Act (“CPSA”), allow the Consumer Product Safety Commission (CPSC) to engage with companies in a cooperative manner by encouraging them to conduct voluntary remedial actions. Current regulations provide the CPSC the authority to bring legal action to address “imminently hazardous consumer products.” These aspects of the regulations are very explicit, and the degree to which CPSC dictates a course of action is commensurate with the nature of the action (i.e. voluntary or mandated). This proposal blurs that distinction and diminishes the aspects of voluntary remedial actions that encourage companies to implement them.

The regulations regarding voluntary remedial actions provide the following two mechanisms:

§ 1115.20(a) Corrective action plans. A corrective action plan is a document, signed by a subject firm, which sets forth the remedial action which the firm will voluntarily undertake to protect the public, but which has no legally binding effect. The Commission reserves the right to seek broader corrective action if it
becomes aware of new facts or if the corrective action plan does not sufficiently protect the public.

§ 1115.20(b) Consent order agreements under section 15 of CPSA. The consent order agreement (agreement) is a document executed by a subject firm (Consenting Party) and a Commission staff representative which incorporates both a proposed complaint setting forth the staff's charges and a proposed order by which such charges are resolved.

The rationale provided for the proposal to make voluntary corrective action plans (CAP) legally binding is that the Commission is “prohibited from enforcing the terms of a corrective action plan if a recalcitrant firm violates the terms of its corrective action plan.” We do not agree that this concern justifies the change. Section 1115.20(a)(3) requires either that a CAP will be approved by the Commission or a complaint will be issued. Also, as noted above, “The Commission reserves the right to seek broader corrective action if it becomes aware of new facts or if the corrective action plan does not sufficiently protect the public.” The authority identified in the current regulations already provides CPSC with powerful, punitive tools to deal with a recalcitrant firm violating the terms of its corrective action plan.

Since June 2010, there have been over 1,000 voluntary corrective actions. It is acknowledged that the vast majority of companies fulfilled their obligations under the agreed-upon CAP. The notice states that CPSC has “encountered firms that have deliberately and unnecessarily delayed the timely implementation of the provisions of their corrective action plans.” However no information is provided on the firms involved, how frequently this has occurred, or the consequences of such delay. Thus, it is not clear that the proposed changes are necessary.

The number of voluntary corrective actions implemented since 2010 is a testimony to the effectiveness and value of the current regulations. The regulations encourage manufacturers to implement corrective actions without conducting a full defect analysis or even confirming definitively the existence of a defect. Since the CAP is not legally binding and it does protect confidential product information, manufacturers have been willing to implement voluntary corrective actions at the slightest hint of a potential product hazard. This benefits consumers.

It is an unfortunate fact that when U.S. manufacturers consider initiating voluntary corrective actions they must consider how such actions position the company with regard to potential product liability litigation, regardless of whether a hazard actually exists. The proposal to make voluntary corrective action plans legally binding jeopardizes the confidential nature of the plans under the CPSA. Currently, CPSA § 6(b)(5) restricts the CPSC from publicly disclosing any information that a manufacturer submits pursuant to CPSA § 15(b) unless one of four things happens: (i) the Commission has sued the firm in an administrative action; (ii) the Commission has accepted “in writing a remedial settlement agreement dealing with such product;” (iii) the
submitter has agreed to its disclosure; or (iv) the Commission publishes a finding that the public
health and safety requires public disclosure. If the net effect of a new binding agreement is that
information submitted to the agency will be subject to disclosure, it will eliminate one of the key
protections and benefits of the voluntary program under Section 6(b). If information shared
during the process is subject to public disclosure, manufacturers will be deterred from taking
action based on preliminary or incomplete indications of a potential issue. As a consequence, the
value of the “early-action” aspect of conducting a voluntary recall or other corrective action will
be significantly diminished for manufacturers. This will not benefit consumers.

The notice specifically indicated that “The Commission believes that an interpretive rule setting
forth the Commission’s principles and guidelines regarding the content of voluntary recall
notices will result in: (1) greater efficiencies during recall negotiations, (2) greater predictability
for the regulated community in working with the agency to develop voluntary recall notice
content, and (3) timelier issuance of recall announcements to the public.” Our concerns as
related to each of these intended improvements are described below.

(1) Greater Efficiencies During Recall Negotiations

The proposed rule will likely increase the period during which the recall is negotiated; reducing
the efficiency of those negotiations. The proposal to restructure voluntary Corrective Action
Plans as legally binding documents adds a level of formality and significance to such plans
without changing the plans themselves. Furthermore, as legally binding documents,
manufacturers will have to analyze the CAP to consider the ramifications – intended and
unintended – on aspects of the manufacturer’s business not directly related to implementing a
successful CAP. This process will take more time and will complicate recall negotiations. The
inclusion of additional elements to the CAP such as CPSC-mandated requirements, quantitative
data on recalled products, and mutually agreeable admissions, are all items that will need to be
addressed in the negotiations preceding the implementation of the CAP. Adding items to any
type of discussion between manufacturers and CPSC does not result in shorter discussions. We
cannot foresee how this aspect of the proposal will result in CAPs being implemented more
quickly and easily.

(2) Greater Predictability For The Regulated Community In Working With The
Agency To Develop Voluntary Recall Notice Content

To the extent that AHRI members have implemented voluntary remedial actions, we are not
aware of any requests for greater predictability and clarity on the content of voluntary recalls.
The current regulations describe the content requirements for mandatory product recalls. If a
firm is considering a voluntary recall as its remedial action, logic indicates that the requirements
for mandatory recalls could be used as guidance to develop the voluntary recall. However, the
current regulations allow the flexibility to alter a voluntary recall to fit the circumstances of the specific issue that is of concern. The proposed content guidelines for voluntary recalls are nearly identical to the content requirements for mandatory product recalls. In some cases the voluntary recall guidelines have added requirements. The end result is that voluntary recalls look very much like mandatory recalls. This further diminishes the “voluntary” aspects of voluntary remedial plans and increases the mandatory aspects of such plans. It must be remembered that either a CAP is approved by the Commission or CPSC rejects the CAP and issues a complaint. This process has worked satisfactorily for the large majority of voluntary corrective actions that have been initiated since 2010. There does appear to be a problem that requires changes to provide greater predictability.

(3) Timelier Issuance Of Recall Announcements To The Public

The proposed rule will delay recalls. The current approach to voluntary Corrective Action Plans (CAPs) under §1115.20(a) has been effective even though they have “no legally binding effect.” Under the proposed rule, a CAP would be transformed into a new, different type of legally binding document. This will result in more extensive and more detailed reviews by industry and CPSC staff. There will be more communication between the parties during the negotiations. The CAPs, being binding agreements, will be inflexible to changing conditions. This may be to the detriment of consumer safety as this loss of flexibility may impede the implementation of CAPs that are effective in practice as opposed to the negotiated plan on paper. The current CPSC regulation allows the Commission and the company the flexibility to amend a CAP quickly and efficiently to make it more effective without unnecessary delays.

In addition to the comments on the basic concepts of this notice we have the following comments on the specific sections noted.

Section 1115.20(a).

We do not support the changes to this section. Our concerns about proposing to make a CAP be a legally binding document have been noted. Furthermore, the proposal to identify preferred remedies while imposing new requirements for justifying other remedies is unnecessary. The proposal improperly places the burden proof on a firm that proposes to use remedies other than refunds, repairs and replacements. No evidence has been provided to suggest that this provision is necessary. Moreover, there is no guidance as to how a firm must demonstrate “that those alternatives will be as effective as the preferred remedies.” This provision would not provide create greater predictability but rather confusion and further delay as companies will be forced into a dialogue over the relative merits of proposed corrective action. The present system works well where refund, repair and replacement are often the cornerstone of voluntary corrective
action plans, but the Commission staff has the flexibility to consider alternatives without imposing the proposed novel burden of proof on a firm.

Sub-section (xiii).

We do not support the changes to this subsection. The proposed text requires CPSC agreement to the inclusion of a statement that the CAP does not constitute an admission by the firm that either reportable information or a substantial product hazard exists. This modification is unnecessary. A CAP must be approved by the Commission. If the CAP contains such a statement and CPSC has reason to believe that the statement is inaccurate, the CAP can be rejected. Recognizing that voluntary remedial actions often are taken without conducting a full defect analysis or even confirming definitively the existence of a defect, it is appropriate and reasonable that a firm would want to state formally that its actions are not an admission that the information was reportable or that a substantial product hazard exists.

Section 1115.20(b).

We do not support the addition of this section. This section appears to be needed to compliment the proposed change making CAPs legally binding. Since we oppose that change, this new section is not needed. Adding these details for developing a voluntary compliance programs will significantly slow the process and delay voluntary remedial actions.

Section 1115.20(c)(1) subsection (xii).

We do not support the changes to this subsection. The proposed text requires CPSC agreement to the inclusion of a statement that the signing of a consent order agreement does not constitute an admission by the firm that either reportable information or a substantial product hazard exists. This modification is unnecessary. A consent order agreement must be approved by the Commission. If the agreement contains such a statement and CPSC has reason to believe that the statement is inaccurate, the Commission can decide not to sign the consent order agreement.

Subpart D – Voluntary Recall Notices

This subpart is unnecessary. The proposed principles and guidelines are nearly identical to that of mandatory recalls in terms of the content of the recall. The practical result of this change is that voluntary recalls are as rigorous as mandatory recalls; they become voluntary in name only.

For the reasons noted, we believe that the proposed guidelines will diminish the effectiveness of the current process and are an unnecessary burden to a system that has already proven its worth. The current process allows the Commission and the company involved to quickly and efficiently
take action of potentially hazardous products in the marketplace under a fast-track program, which provides a way for products to be voluntarily recalled without an adversarial regulatory process. If promulgated, the proposed rule will undermine the flexibility of the program. As noted, the Commission already has the authority to take action against firms that are noncompliant, including the right to bring legal action to require mandatory recalls of unsafe products. On balance, the proposed rule will negatively affect not only the companies involved, but also consumers.

AHRI appreciates the opportunity to provide these comments. If you have any questions regarding this submission, please do not hesitate to contact me.

Respectfully submitted,

[Signature]

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