



United States
Consumer Product Safety Commission

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Administrative Law Judge Jason S. Patil (via U.S. Consumer Product Safety Commission
Secretary Alberta A. Mills)
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: *In the Matter of Amazon.com, Inc.*, CPSC Docket No. 21-2

Dear Judge Patil:

As requested in your March 30, 2023 Order, we are writing to provide authority to order “refund remedies exceeding the purchase price of the refunded product.” As discussed more fully below, you have the authority to order Amazon to refund consumers beyond the purchase price they paid to Amazon, notwithstanding Amazon’s issuance of a unilateral gift card, for several reasons: First, Amazon’s unilateral gift card does not constitute a remedy under Section 15(d) and thus does not limit the Commission’s authority to order a full refund in this case. Second, even if Amazon’s gift card were a Section 15 refund, the CPSA in no way restricts the cost of a remedy imposed on a respondent to the value of the recalled products or the revenues derived by a firm from distribution. Indeed, remedial expenses in excess of the price paid by consumers are common in both mandatory and voluntary corrective actions. Finally, the CPSA recognizes that consumers may receive value in connection with incentives to remove a dangerous product from commerce in an amount greater than the amount paid for the product. Therefore, an order requiring Amazon to offer a full refund, conditioned on product return or proof of destruction, is fully within the Commission’s statutory authority and is in the public interest given the ongoing hazard presented by the Subject Products.

First, Amazon’s unilateral business decision to provide a gift card to valid Amazon accounts of original purchasers does not constitute a Section 15 refund remedy, and in fact it does not remedy the ongoing hazard presented by the more than 400,000 Subject Products Amazon distributed into commerce because it fails to incentivize consumers to return or destroy those products. Indeed, the Commission has previously described refunds that were not conditioned on product tender as “inconsistent with the statutory intent” of the CPSA, given the “obvious statutory purpose of section 15, to protect the public by encouraging removal of dangerous products from the marketplace and consumers’ homes.”¹ Moreover, the only corrective actions recognized as valid statutory actions under the CPSA are those undertaken “in

¹ *In The Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order, at 4, 6 (CPSC 1976) (attached as Ex. EE to the Sept. 23, 2022 Declaration of John Eustice).

consultation with the Commission” or “subject to an order issued” by the Commission. *See* 15 U.S.C. § 2068(a)(2)(B)-(C). Amazon’s unilateral actions were, by definition, not undertaken in conjunction with the agency or pursuant to an order, and therefore do not constitute a statutory remedy. And in other contexts, at least one federal court has expressly rejected arguments that a recalling firm’s voluntary remedial actions precluded either the Commission or consumers from seeking additional remedies.² Accordingly, Amazon’s business decision to issue a gift card to its customers in no way limits the Commission’s ability to seek full statutory remedies to address the ongoing risk to consumers, including a refund conditioned on the return or proof of destruction of the hazardous product.

Furthermore, even if Amazon’s gift card to original purchasers could be considered a refund under the CPSA, the Commission still has the authority to order an additional Section 15 remedy in excess of the amount paid by consumers, to provide an incentive to consumers to return or destroy the Subject Products. First, Congress drafted Section 15(d) in the conjunctive, authorizing the Commission to order “any one or more” of the following actions: repair a product, replace a product, and provide a refund. 15 U.S.C. § 2064(d)(1). Given that multiple remedies are available, Congress fully expected that the cost to a firm of implementing a mandatory corrective action may exceed the cost of any one Section 15(d) remedy. Second, Section 15(e) specifies that a consumer who takes advantage of a remedy must be reimbursed “for any reasonable and foreseeable expenses incurred [] in availing himself of such a remedy,” and that a firm may need to reimburse other entities in the distribution chain for “such other person’s expenses in connection with carrying out the order.” 15 U.S.C. § 2064(e). These provisions clearly reflect an expectation that recalling firms will be responsible for additional expenses associated with implementing a Section 15 remedy, above and beyond the cost of refund, thus recognizing that remedial costs are not capped at the amount received by the firm from distribution or sale. This may include, for example, costs associated with common elements of effective recall programs as described in the Recall Handbook, like providing pre-paid packaging for the return of a recalled product, quarantining and correcting returned products, providing recall-response training for employees, paying for advertising, or setting up a toll-free hotline.³ Finally, Congress also empowered the Commission to revisit corrective actions that have been ineffective and “amend, or require amendment of, the action plan.” 15 U.S.C. § 2064(d)(3)(B). This demonstrates the Commission’s authority to seek further Section 15 remedies—which may impose further costs—when the initial actions taken, including a

² *See In re Mattel, Inc.*, 588 F.Supp.2d 1111, 1116 (C.D. Cal. 2008) (reasoning that, because “the CPSC has the right to seek additional remedies beyond those voluntarily provided if it believes that the voluntary plan did not provide an adequate remedy for the problem,” a firm’s voluntary replacement action did not preclude consumers from seeking a refund under state law).

³ *See* Sept. 23, 2022 Declaration of John Eustice, Ex. S, Recall Handbook at 15-16, 28-29; *see also* 16 C.F.R. § 1115.26(b) (listing possible forms of required recall notice, including television, newspaper, and magazine advertisements); 16 C.F.R. § 1115.27(n) (providing examples of common remedies that may be listed in a recall notice, including “rebates, coupons, gifts, premiums, and other incentives,” for “removing the product from use, discarding the product, returning part or all of the product, or removing or disabling part of the product”); *id.* (referring to consumers obtaining recall information via a toll-free telephone number).

refund, have not successfully corrected the Substantial Product Hazard. In sum, the CPSC makes clear Congress recognized that a firm's remedial expenses would often exceed the price paid by consumers for a recalled product.

In fact, in several prior mandatory recall actions under Section 15, the Commission has ordered remedies with costs to the firm that were significantly greater than the value of the product at issue. For example, in *In The Matter of Zen Magnets, LLC*, CPSC Dkt. No. 12-2,⁴ the Commission ordered the firm not only to provide a refund, but also to "cover all shipping costs associated with returns, including any costs exceeding first-class package service by the U.S. Postal Service" and to "ensure proper quarantine [and] complete destruction" of products in the distribution chain. In other cases, millions of dollars in administration and implementation costs have been required to remedy a Substantial Product Hazard, as in *In The Matter of Central Sprinkler Corp.*, CPSC Dkt. No. 98-2,⁵ where, in addition to providing a replacement product, the respondent firm agreed to pay \$8.8 million into an irrevocable trust account "to defray the cost to owners of Omega fire sprinklers of removing and replacing those sprinklers." The Commission also approved the use of a Recall Trust in *In The Matter of Maxfield And Oberton Holdings, LLC, and Craig Zucker*, CPSC Dkt. No. 12-1,⁶ to which the firm allocated just \$25,000 for the purpose of "refunds to consumers and pay[ing] administrative costs," while setting aside the much larger sum of \$75,000 "to publicize the recall to consumers and retailers."

Similarly, in recognition of the Commission's authority to order costs in excess of the monies paid by consumers for a hazardous product, numerous firms have agreed, in voluntary corrective actions, to pay monetary incentives well in excess of the purchase price of a recalled product, in order to ensure removal of the product from the hands of consumers.⁷ For example, firms have offered consumers bounties as part of efforts to facilitate the return of low-priced items, or even promotional items that were given away free of charge.⁸ Additionally, in some instances where an original corrective action plan proved insufficient to remedy the product hazard, firms have re-announced recalls⁹ with new incentives for product return, sometimes far exceeding the original value of the product.¹⁰ Moreover, the costs of implementing voluntary

⁴ Opinion and Order Approving Public Notification And Action Plan, at 15, 2017 WL 11672451 (CPSC 2017).

⁵ Consent Agreement, 1998 WL 35166928 (CPSC 1998).

⁶ Consent Agreement, 2014 WL 12975552 (CPSC 2014).

⁷ See, e.g., *H&M Reannounces Recall of Children's Water Bottles Due to Choking Hazard*, CPSC.Gov (May 29, 2013) ("a full refund plus a \$25 H&M gift card" in exchange for return of water bottles sold for between \$1.50 and \$5) <https://www.cpsc.gov/id/Recalls/2013/hm-reannounces-recall-of-childrens-water-bottles>.

⁸ See, e.g., *4 Sizzle Recalls Promotional Charcoal Grills Due to Fire Hazard*, CPSC.Gov (Dec. 22, 2016) ("a \$200 incentive or a full refund" in exchange for return of a charcoal grill provided to retail, liquor, and convenience stores as a promotional giveaway) <https://www.cpsc.gov/Recalls/2017/4-Sizzle-Recalls-Promotional-Charcoal-Grills>.

⁹ See 16 C.F.R. § 1115.20(a) (noting that in voluntary corrective actions, 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").

¹⁰ See, e.g., *Bernzomatic Offers \$250 Bounty For Old Propane Heaters*, CPSC.Gov (Oct. 3, 1994) (recall originally performed in 1966 re-announced in 1994 with a new offer of \$250 to incentivize return of propane heaters that originally sold for \$30-35) <https://www.cpsc.gov/Recalls/1994/bernzomatic-offers-250-bounty-for-old-propane-heaters>.

replacement or repair remedies also regularly exceed the purchase price, such as where firms have paid for professional technicians to facilitate product removal.¹¹ In short, although this case presents the highly unusual scenario where a firm has issued a gift card in the amount of the purchase price unilaterally, it is far from being the first recall action where a remedy exceeding a product's original purchase price has been executed in the public interest.

That said, the Commission's discretion to order a firm to pay remedial costs is not unfettered. The Commission may not act in an arbitrary or capricious manner and may not seek to promote the general public welfare in areas beyond its statutory purview.¹² Moreover, in certain cases, a given statutory remedy may be inappropriate if it will not eliminate or correct the Substantial Product Hazard,¹³ or where a firm lacks the resources to implement the remedy effectively.¹⁴ Here, however, it is undisputed that Amazon is capable of administering a full Section 15 remedy in addition to its unilateral gift card to incentivize consumers to return or destroy the hazardous Subject Products.

Finally, the statute recognizes that consumers may receive value in connection with incentives to return or destroy recalled products that exceeds the price they paid for those products. Importantly, the purpose of a mandatory recall action under Section 15 is not only to compensate the purchasers of a hazardous product, but primarily to protect all consumers from the substantial risk of injury that persists so long as the product remains in commerce. For this reason, Congress's intention was that the Commission correct a recalled product by providing refunds not only to "first purchasers," but also to "present owners,"¹⁵ some of whom may have paid nothing for the product. In *In The Matter of Zen Magnets, LLC*, for example, the Commission expressly ordered that the firm provide a refund to any consumers who "did not purchase the Subject Products on Respondent's website, through third party Internet Retailers, or through retail outlets (e.g., received them as a gift)."¹⁶ Thus, a Section 15 refund can be in the public interest and is not an unlawful "windfall," even when consumers receiving such refund paid little or nothing for the product, such as when the product is purchased at a discount on a secondary market or received free as a gift. Here, by unilaterally issuing a gift card, Amazon has, in effect, rendered *all* of the Subject Products a gift, provided to first purchasers free of

¹¹ See, e.g., *Crate and Barrel Recalls Finley Hanging Pendant Lamps Due to Fire and Shock Hazards*, CPSC.Gov (Oct. 24, 2013) (a "full refund, including shipping and \$100 reimbursement for charges incurred in removing and replacing [by] a licensed electrician," for hanging pendant lamps that sold for between \$149 and \$249) <https://www.cpsc.gov/Recalls/2014/Crate-and-Barrel-Recalls-Finley-Hanging-Pendant-Lamps>.

¹² See *National Ass'n for Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669 (1976).

¹³ See, e.g., *In the Matter of Dye and Dye*, Opinion And Order, CPSC Dkt. No 88-1, 1989 WL 435534, at *22 (CPSC 1991) (finding that neither a repair nor a replacement program would be in the public interest where "there has been no suggestion of a way to repair or replace the worm probes . . . that would eliminate the substantial product hazard").

¹⁴ See, e.g., *id.* (finding that, because the recalling firm was bankrupt and "lack[ed] the resources to give refunds under any reasonably effective refund program," a refund remedy was not in the public interest).

¹⁵ See H. Rpt. 92-1153 at 43 (1972).

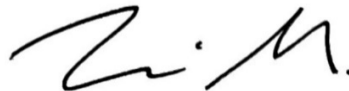
¹⁶ Opinion And Order Approving Public Notification And Action Plan CPSC Dkt. No. 12-2, at 15, 2017 WL 11672451 (CPSC 2017).

charge. But Amazon's unconditional gift card fails to effectuate a Section 15 remedy facilitating the removal of those hazardous products from the hands of consumers.

For these reasons, an Order directing Amazon to offer a full refund, conditioned on product return or proof of destruction, is authorized by law and is in the public interest. *See* 15 U.S.C. § 2064(d)(1).

Thank you for your consideration.

Sincerely,



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