

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of Amazon.com, Inc., Respondent.

CPSC Docket No. 21-2

Hon. James E. Grimes
Presiding Officer

**AMAZON’S APPLICATION FOR THE ISSUANCE OF A SUBPOENA
TO THE GOVERNMENT ACCOUNTABILITY OFFICE**

Pursuant to 16 C.F.R. § 1025.38, Respondent Amazon.com, Inc. (“Amazon”) respectfully requests that the Presiding Officer forward, and the U.S. Consumer Product Safety Commission (“CPSC” or “Commission”) issue, a subpoena to the Government Accountability Office (“GAO”) seeking production of certain documents related to a performance audit (the “Audit”) of the CPSC’s hazard determination and recall processes conducted between November 2019 and November 2020. The Audit resulted in the publication of a GAO report entitled *Consumer Product Safety Commission: Actions Needed to Improve Processes for Addressing Product Defect Cases* (GAO-21-56), available at <https://www.gao.gov/assets/gao-21-56.pdf> (the “Report”).

As explained in detail below, documents related to the Report and Audit are highly relevant to the core key factual and legal issues in the case, including Complaint Counsel’s allegations with respect to remedy and the Complaint’s prayer for relief. The Audit assessed CPSC’s practices and policies related to hazard determinations and corrective actions, and is thus highly relevant to whether the remedial actions sought by Complaint Counsel in this case are required in order to adequately protect the public and whether any additional remedies—beyond the notifications and refunds already issued by Amazon—are in the public interest, the standard under the CPSA. Moreover, the documents underlying and related to the Audit are relevant to Amazon’s Administrative Procedure Act (“APA”) and due process arguments and defenses. This includes determination of whether the Commission would act in an arbitrary and capricious manner if it ordered certain remedies sought by Complaint Counsel, and whether the procedures Complaint Counsel followed in bringing this case exceeded constitutional bounds.

GAO Audit and Report

In its Report, GAO made the following findings relevant to this case:

- CPSC used the same time-frame and performance goals for all product defect cases, failing to account for variability among cases (pp. 11–14).

- CPSC failed to follow the processes described in its Section 15 manual for prioritizing product defect and noncompliance cases based on potential safety risk to consumers (pp. 14–15).
- CPSC failed to provide specific instructions for compliance officers on the proper number of recall effectiveness checks, meaning that compliance officers did not consistently assign more checks to higher-risk recalls (pp. 21–25).
- CPSC failed to systemically or effectively track the submission of monthly progress reports (“MPRs”) by recalling companies (pp. 25–27).
- CPSC primarily relied on a single “correction rate” metric (*i.e.*, “the total number of recalled products corrected divided by total number of products recalled”) to measure recall effectiveness, but this metric “may not fully reflect a recall’s success at mitigating product hazards.” (pp. 27–28).

Based on the findings in its Report, GAO made five recommendations to the CPSC, all of which are listed as “Open” (unresolved) by the GAO:

- Recommendation 1: CPSC should “establish a policy or procedure that sets forth specific steps CPSC staff should take to manage timeliness for product defect cases with varying characteristics.” Status: “Open.”
- Recommendation 2: CPSC should “develop and follow a documented policy or procedure for prioritizing resources based on case-specific factors, such as the potential risk to consumer safety associated with a product.” Status: “Open.”
- Recommendation 3: CPSC should “develop procedures for how compliance officers should determine how many recall effectiveness checks to assign to recalls based on risk factors, such as product volume and injuries.” Status: “Open.”
- Recommendation 4: CPSC should “systematically track the global submission of recalling firms’ monthly progress reports.” Status: “Open.”
- Recommendation 5: CPSC should “explore measures of recall effectiveness to use in addition to correction rate, which could provide for a more comprehensive assessment of the effectiveness of recalls.” Status: “Open.”

Recommendations for Executive Action, GAO-21-56, <https://www.gao.gov/products/gao-21-56>.

Relevance of Documents Relating to GAO Report and Audit

Amazon’s subpoena seeks documents and data relating to the Report and Audit, which Amazon believes will help it to develop its defenses to the Complaint. This category

includes, but is not limited to, documents or data submitted by the CPSC or generated by GAO in the preparation of the Report or in the formation of GAO's findings, conclusions, or recommendations; interview notes, data summaries, and other analyses or compilations prepared by GAO in connection with the Report or Audit.

As a presiding officer recently noted in denying a motion to quash a third-party subpoena in a different pending CPSC adjudication, "[r]elevance is . . . an extremely broad concept." *In the Matter of ThyssenKrupp Access Corp.*, CPSC Docket No. 21-1 (Doc. No. 81) (Mar. 1, 2022); *see also Int'l Resource Recovery, Inc. v. United States*, 59 Fed. Cl. 537, 542-53 (2004) (evidence that government was "deviating from a past practice" was relevant and discoverable, especially where company is alleging "arbitrary and capricious conduct" by agency). Here, the information held by GAO is directly relevant to this adjudication for at least two reasons.

First, the documents sought from GAO are focused on and highly relevant to the CPSC's practices and policies related to defect, non-compliance, and hazard determinations, recalls and other corrective actions, such as notifications to consumers, remedial relief such as consumer refunds, recall effectiveness rates and related assessment methodologies, and post-recall monthly reporting collection and review practices. GAO's review of the CPSC's practices, based on data collected from the CPSC and perhaps other sources, is relevant to the key factual and legal issues in this case, including whether the remedial order sought by Complaint Counsel is "required in order to adequately protect the public from . . . substantial product hazard[s]," 15 U.S.C. § 2064(c)(1), and whether any additional remedy sought by Complaint Counsel is "in the public interest," *id.* § 2064(d)(1).

Second, documents underlying and related to the Audit are relevant to Amazon's APA and due process arguments and defenses. For example, information that reflects the CPSC's variations in practice and deviations from its own policies, as well as best practices relating to recalls, may support the contention that the CPSC has acted (or would act) in an arbitrary, capricious, and unreasonable manner in this case. Information related to such variations and deviations may also support the contention that the CPSC has abused its discretion by pursuing certain additional remedial action through an enforcement action solely against Amazon, rather than conducting an industry-wide rulemaking applicable to all online marketplaces, fulfillers, or logistics providers.

While some of the documents and information sought by the subpoena may be available through discovery of CPSC, Amazon believes some documents and information may be available only from GAO (or may be obtained more efficiently through GAO). For example, GAO summaries and analysis of CPSC data may provide an efficient and reliable way for Amazon to provide information to the CPSC. Amazon is prepared to discuss with GAO representatives ways to avoid duplication of effort and to reduce GAO's burden, if any, in responding to the subpoena.

Pursuant to GAO's regulations, the subpoena is directed to the Comptroller General of the United States, the Honorable Gene Dodaro, and will be served upon GAO's Records Management and Services Officer, Office of Information Systems and Services. 4 C.F.R. § 82.1(a).

Accordingly, Amazon requests, pursuant to 16 C.F.R. § 1025.38(c)(1), that the Presiding Officer forward this Application, and the concurrently filed Subpoena, to the Commission for review and issuance of the Subpoena.

Dated: March 7, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021, I hereby certify that on the date indicated below, a true and correct copy of the foregoing document was:

- filed by email to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at amills@cpsc.gov, with a copy to the Presiding Officer at alj@sec.gov and to all counsel of record; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, and sanand@cpsc.gov.

Dated: March 7, 2022

Respectfully submitted,



Sarah L. Wilson