Consumer Federation of America

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Office of the Secretary
Consumer Product Safety Commission
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Comments of Consumer Federation of American to the U.S. Consumer Product Safety Commission on "Information Disclosure Under Section 6(b) of the Consumer Product Safety Act," Docket No. CPSC-2014-0005

I. Introduction

The Consumer Federation of America (CFA) is an association of more than 250 nonprofit consumer organizations established in 1968 to advance the consumer interest through research, advocacy, and education.[1] CFA submits the following comments to the U.S. Consumer Product Safety Commission (referred to hereafter as CPSC or Commission) in the above-referenced matter.[2]

Section 6(b) of the Consumer Product Safety Act (CPSA) has long delayed and hindered the flow of critical safety information to consumers. While CPSC's proposed changes will not resolve the underlying restrictions of section 6(b) that work against transparency, the modest changes will streamline and modernize the regulation. Below, CFA provides comments in support of the proposed changes, as well as suggestions for improvement in limited areas.

[1] *See* https://consumerfed.org/.
[2] Supplemental Notice of Proposed Rulemaking on Information Disclosure Under Section 6(b) of the Consumer Product Safety Act, Federal Register Vol. No. 88, Page 10432 (Feb. 17, 2023).

II. Background

a. The CPSC and Section 6(b)

The Consumer Product Safety Act (CPSA) was enacted in 1972 and created the CPSC.[3] The CPSC's mandate is enormous – that is, to "protect the public from unreasonable risks of injuries and deaths associated with some *15,000* types of consumer products."[4] In this way, CPSC serves a similar role as other health and safety agencies, such as the Food and Drug Administration (FDA)[5] and National Highway Traffic Safety Administration (NHTSA)[6], which is to provide critical safety-related information.

Unfortunately, however, the CPSC cannot provide consumers with critical safety-related information because current law favors secrecy over transparency. Section 6(b) restricts the CPSC from disclosing critical, timely information about hazards because it requires CPSC to notify a manufacturer of its intent to disclose before the information is released to the public.[7] While the ostensible purpose of Section 6(b) is to guarantee the disclosure of accurate information, in practice the process between the CPSC and manufacturers or private labelers often takes many years before the information can be disclosed to the public. Consumers continue to use the product without any information about its hazards or the risk of injury and/or death. Under section 6(b), the CPSC must almost always withhold critical product safety information from consumers. Additionally, lawsuit records and settlements are often sealed.

The Consumer Product Safety Improvement Act (CPSIA) made modest changes, including decreasing the time by which the CPSC could release information and creating the SaferProducts.gov web database.[8] The CPSIA, however, did not repeal section 6(b) of the CPSA, continuing to prevent the Commission from providing critical information to consumers and robustly protecting the public from unreasonable harm. The CPSC is the only regulatory agency of its kind that is restricted by a provision like section 6(b). Whereas the FDA, for example, is not required to seek permission from a company before it discloses the company's name in connection with an alert or recall, section 6(b) hinders the CPSC with delay and secrecy.

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[3] 15 U.S.C. §§ 2051–2089.; *see also Who We Are – What We Do For You*, U.S. CONSUMER PROD. SAFETY COMM'N, https://www.cpsc.gov/Safety-Education/Safety-Guides/General-Information/Who-We-Are---What-We-Do-for-You (last visited April 3, 2023).

[4] Emphasis added. *Guide to Public Information*, U.S. CONSUMER PROD. SAFETY COMM'N, https://www.cpsc.gov/Newsroom/FOIA/Guide-to-Public-Information (last visited April 3, 2023).

[5] *See What We Do*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/about-fda/what-we-do (last visited April 3, 2023).

[6] *See About Us*, NAT'L HIGHWAY TRAFFIC & SAFETY ADMIN., https://www.nhtsa.gov/about-nhtsa (last visited April 3, 2023).

[7] 15 U.S.C. § 2055(b)(1).

[8] Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).

Therefore, the CPSC is unable to effectively perform an important part of its mission: to inform the public about product hazards.[9]

b. Recent History Illustrating the Need for Repeal of Section 6(b)[10]

A troubling incident demonstrating how section 6(b) favors secrecy over transparency, even when society's most vulnerable are involved, is the Rock 'n Play infant sleeper.

The Fisher Price Rock n' Play infant sleeper was introduced to the market in 2009.[11] In 2019 Consumer Reports published findings that Fisher Price knew of at least 32 infant deaths associated with the Rock n' Play.[12] Four days after Consumer Reports published its findings, Fisher Price recalled *4.7 million* sleepers.[13] Before Consumer Reports' findings and Fisher Price's recall, the CPSC knew for several years that the Rock n' Play was linked to infant deaths and issued an alert in May 2018 regarding "infant deaths associated with inclined sleep products," but did not identify specific products in a way that was helpful for most caregivers.[14]

Since the recall, additional fatalities have been reported, and *100* infant deaths are now tied to the Rock n' Play.[15] The Rock n' Play example demonstrates how the CPSC and industry can know about dangers for months or years while the public is continuingly exposed to hazards. Because section 6(b) restricted the CPSC from quickly and transparently providing critical safety information, infants died.

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[9] U.S. CONSUMER PROD. SAFETY COMM'N, *supra* note 4.

[10] *See* Rachel Weintraub's April 28, 2014 public comments on behalf of CFA to the CPSC on "Notice of Proposed Rulemaking on Information Disclosure Under Section 6(b) of the Consumer Product Safety Act," Docket No. CPSC– 2014-0005, which provide detailed analysis of the Stand n' Seal issue and elevators. This section will update those comments with more tragic examples of section 6(b)'s fatal impact.

[11] *See* Jenny Gross, *100 Infant Deaths Linked to Recalled Fisher-Price Sleeper*, THE NEW YORK TIMES (Jan. 10, 2023) https://www.nytimes.com/2023/01/10/business/fisher-price-rocker-recall.html.

[12] Rachel Rabkin Peachman, *Fisher-Price Rock 'n Play Sleeper Should Be Recalled, Consumer Reports Says*, CONSUMER REPORTS (April 8, 2019), https://www.consumerreports.org/recalls/fisher-price-rock-n-play-sleeper-should-be-recalled-consumer-reports-says/; *See also* Rachel Rabkin Peachman, *Decades-Old Law Hides Dangerous Products and Impedes Recalls*, CONSUMER REPORTS (Apr. 30, 2019), https://www.consumerreports.org/product-safety/decades-old-law-hides-dangerous-productsand-impedes-recalls/.
(Apr. 30, 2019), https://www.consumerreports.org/product-safety/decades-old-law-hides-dangerous-productsand-impedes-recalls/.

[13] *Id.*

[14] *Id.*

[15] *Fisher-Price Reannounces Recall of 4.7 Million Rock 'n Play Sleepers; At Least Eight Deaths Occurred After Recall*, U.S. CONSUMER PROD. SAFETY COMM'N, https://www.cpsc.gov/Recalls/2023/Fisher-Price-Reannounces-Recall-of-4-7-Million-Rock-n-Play-Sleepers-At-Least-Eight-Deaths-Occurred-After-Recall (last visited April 3, 2023).

III. Supplemental Notice of Proposed Rulemaking on Information Disclosure Under Section 6(b)

The regulation interpreting section 6(b) has not been updated since its original adoption in 1983. The CPSC issued a notice or proposed rulemaking (NPR) in 2014, which proposed changes that would streamline and modernize the regulation. CFA submitted public comments in support of the modest improvements but also acknowledged that section 6(b)'s restrictions would continue the information imbalance.[16] Importantly, the NPR did not propose the elimination of a company's ability to institute a court proceeding to enjoin the release of the information; CFA pointed out in 2014 that this failure meant the threat of lengthy and resource-intensive litigation would continue to compel the CPSC to delay the disclosure of critical safety information.

The CPSC has now issued a Supplemental NPR (SNPR), which considers public comments on the 2014 NPR and proposes additional changes to update the regulation interpreting section 6(b). Like the 2014 NPR, the SNPR does not in any way repeal or significantly alter the main restrictions of section 6(b), but proposed changes will streamline and modernize the regulation interpreting the statute. The changes will also promote transparency while saving government resources and time.

IV. Comments Regarding SNPR's Proposed Changes

CFA supports the proposed changes in the SNPR with suggestions explained in further detail below.

a. Information Subject to Notice and Comment Provisions of Section 6(b)(1)

The 2014 NPR proposed modifying § 1101.11(a)(2) to reflect "the information must be obtained under the acts the Commission administers, or be disclosed to the public in connection therewith." The SNPR proposes redesignating § 1101.11(a)(2) to §1101.11(a)(3) and states, "The information must be obtained, generated or received under the Acts, or be disclosed to the public in connection therewith."

CFA supports the following change: "The information must be obtained, ~~generated or received~~ under the Acts, or be disclosed to the public in connection therewith." One of the stated goals of the SNPR is to conform the regulation to the statute's language for clarity and consistency. "Generated" and "received" are not in the statute, and both words have a different common and legal understanding than "obtained." This language adds another hurdle for the CPSC and consumers.

b. Categories of Information <u>Not</u> Subject to Notice and Analysis Provisions of Section 6(b)

The 2014 NPR proposed changes to Section 1101.11, adding three categories of information not subject to 6(b) restrictions: (1) a report of harm posted on SaferProducts.gov, as

[16] Weintraub, *supra* note 10.

indicated by the language in the CPSIA forming the database; (2) information that is publicly available; and (3) information that is substantially the same as information that the Commission previously disclosed through section 6(b). At that time, CFA strongly supported the additions because the changes clarified that the CPSC should not spend resources hiding information that has already been disclosed or is available elsewhere.

The SNPR proposes the same three categories of information that are not subject to section 6(b).

- *Reports of harm*. CFA strongly supports the changes adding reports of harm to the categories of information not subject to section 6(b) restrictions. The addition is consistent with section 6A(f)(1) of the CPSA, which specifically excludes reports of harm that are published on SaferProducts.gov from section 6(b) requirements.

- *Information that is publicly available.* The current proposed rule deviates from the 2014 NPR, which proposed modifying section 1101.11(b) to reflect: "Information that is publicly available or that has been disseminated in a manner intended to reach the public in general, such as news reports; articles in academic and scientific journals; press releases distributed through news or wire services; or information that is available on the Internet." The current SNPR proposes the following: "Information that has already been made available to the public through sources other than the Commission, provided the Commission clearly indicates the source of the information and the Commission's use of the information is accurate and not misleading." There is a clear difference between the two versions.

  CFA supports the following change: "Information that has already been made available to the public through sources other than the Commission, <u>provided the Commission clearly indicates the source of the information</u>." This change would allow the CPSC to fairly balance the safety of consumers against business reputational interests because it requires the source material to be clearly identifiable. The addition of "accurate" and "not misleading" creates new burdens, tips the balance against the interests of consumers, and unduly wastes precious government resources.

- *Information that is substantially the same as information that the Commission previously disclosed.* The SNPR proposes the following change: "Information, not previously disclosed, that in context does not disclose materially more or materially different information about the consumer product than what the Commission previously disclosed in accordance with the law." The proposed change saves the CPSC time and resources, while also responding to industry's 2014 public comments. The current wording, however, is confusing. The CPSC could use clearer language, as follows: "Information, not previously disclosed,

that ~~in context~~ does not disclose ~~materially more or~~ materially different information about the consumer product than what the Commission previously disclosed in accordance with the law."

c. Procedure for Providing Notice and Opportunity to Comment under Section 6(b)(1)

CFA supports the proposed changes regarding the procedure for providing notice and opportunity to comment under section 6(b)(1).

1. Electronic Notifications and Transmissions

The SNPR proposes that the CPSC will use electronic transmission, when practicable, to avoid delays inherent in other delivery systems. CFA supports the change because it accounts for significant improvements in technology and promotes efficiency.

2. Manufacturers or Private Labeler's Ability to Request Comments Withheld from Disclosure

The SNPR proposes to delete section 1101.21(b)(4) and add a revision at section 1101.24, requiring a manufacturer or private labeler to explain the basis for requesting that the CPSC exercise its discretion not to disclose the comments. CFA supports this change and agrees that a blanket policy always allowing a firm to have its comments withheld, even when the comments are not confidential, commercial or trade information, conflicts with the public interest in transparency.

At section 1101.21(b)(7), the SNPR proposes the following change: "A statement that no further request for comment will be sought by the Commission if the Commission intends to disclose information, not previously disclosed, that in context does not disclose materially more or materially different information about the consumer product than what the Commission previously disclosed in accordance with the law." In this way, for example, the CPSC would not need to provide another 6(b) notice before restating the contents of the CPSC news release that was issued after a notice and comment process under section 6(b). CFA supports this change, but notes that the wording is confusing. The CPSC can use clearer language, such as: "A statement that no further request for comment will be sought by the Commission if the Commission intends to disclose information, not previously disclosed, that ~~in context~~ does not disclose ~~materially more or~~ materially different information about the consumer product than what the Commission previously disclosed in accordance with the law."

CFA also requests a clarifying change to the proposed section 1101.24(c), which is underlined below:

> (c) Requests for nondisclosure of comments. If a manufacturer or private labeler objects to disclosure of its comments or a portion thereof, it must notify the Commission at the time ~~it~~ manufacturer or private labeler submits its comments <u>and provide a clear and compelling</u> basis for its

request. If the firm objects to the disclosure of a portion of its comments, it must identify those portions which should be withheld.

This change is reasonable and provides clarity. It also promotes transparency, balance, and government efficiency because, while firms should be entitled to submit clear and compelling requests, it is not in the public interest that the CPSC staff process unnecessary requests.

3. Timing; Request for Time Extensions (§ 1101.22)

The proposed change to section 1101.22 appropriately conforms to the statute and reflects that, absent a request from the manufacturer or private labeler, the CPSC generally will not provide additional time to comment on information proposed for disclosure. Proposed changes to sections 1102.22(b)(1) and 1101.22(c) reflect that the CPSC expects manufacturers and private labelers to submit comments by the deadline and provide a reasonable timeframe by which firms can submit extension requests. Further, the changes at section 1101.22(c) appropriately reflect that the underlying statute does not require the CPSC to respond promptly to extension requests, even when the CPSC attempts to do so. These proposed changes provide clarity regarding the CPSC's exceptions when manufacturers and private labelers request an extension to comment. The changes are reasonable, clear, prevent unnecessary delay, and account for the CPSC's need to process and track such requests.

One modification that will provide further transparency is if the regulation indicates that the CPSC will provide the shortest period of time for an extension. Section 1101.22 (c)(2) should include a clarifying statement like the one underlined here: "It is the policy of the Commission to respond promptly to requests for extension of time. <u>The CPSC may grant requests for time extensions and provide the shortest time necessary for companies to submit comments</u>." This is a fair and reasonable addition that supports the balance between the transparent flow of information to consumers and a business' reputational interest.

4. Examples When Notice and Opportunity Is Not Practicable

In section 1101.26, the proposed rule will add examples of circumstances in which notice and opportunity to comment are not practicable. While these examples are not an exhaustive list of such circumstances, the examples provide all parties with more clarity if the CPSC staff is unable, despite diligent efforts, to provide notice.

d. Reasonable Steps the CPSC Will Take to Assure Public Disclosure of Information is Accurate, and That Disclosure is Fair in the Circumstances and Reasonably Related to Effectuating the Purposes of the Acts It Administers

CFA supports the SNPR proposed changes to Subpart D. The proposed changes will promote transparency, clarity, and government efficiency. For example, the change to section 1101.31(d), which will be redesignated as section 1101.31(c), reflects that the CPSC is not obligated to take additional steps to assure accuracy without cause when the CPSC is disclosing certain information. The provision appropriately reflects that, when the notice and comment process has already occurred for a proposed disclosure, repeating the process again does not

advance the purpose of section 6(b). Another example of a positive change is section 1101.32, which provides reasonable steps to assure the accuracy of information with a statement under oath and enforcement under penalty of perjury. Both businesses and consumers have a vested interest in all parties taking reasonable steps to assure accurate information.

In the interest of consistency and clarity the CPSC should add "clear and compelling" to section 1101.33(b)(3). CFA's suggested change is underlined here: "(3) Disclosure of a manufacturer's or private labeler's comments or other information or a summary thereof submitted under section 6(b)(1), when the Commission deems the firm has provided a ~~sufficient~~ clear and compelling basis for why the comments should not be disclosed." This change will promote transparency because, as discussed above, the basis for such a request needs to be clear and compelling so as to balance the interests of businesses and consumers.

e. Statutory Exceptions to Section 6(b)(4)

In its explanation of the SNPR proposed changes, the CPSC specifically seeks comment on whether sections 6(b)(2) and (b)(3) apply where there has been a public health and safety finding under section 6(b)(5)(D) of the CPSA. Sections 6(b)(2) and (b)(2) do not apply because there is an exception for a public health and safety finding under section 6(b)(5)(d). Further the legislative history demonstrates that "section 6(b)(3) of CPSA, which allows the affected company to seek an injunction against the release of information in Federal court, does not apply to section 6(b)(5) and the new health and safety exception."[17]

f. Annual Report on Implementation of Section 6(b)

In their comments to this SNPR, former CPSC Commissioners R. David Pittle (1973-1982) and Robert S. Adler (2009-2011) urge the CPSC to add a subpart that will require the CPSC to prepare an annual report regarding the Commission's experience in implementing provisions of section 6(b). Specifically, such a report would include the time and resources spent, which would provide the Commission, Congress, and consumers with invaluable information regarding section 6(b). CFA strongly agrees that the CPSC should add Commissioners Pittle and Adler's suggested subpart.

V. Conclusion

Absent its repeal, section 6(b) will continue to hinder and delay the flow of critical safety information to consumers. However, the SNPR's proposed changes are positive and will promote transparency and government efficiency. With the amendments described in detail above, CFA strongly supports the modest changes in the SNPR, which streamline and modernize the regulations.

[17] H.R. Rep. No. 110-501, Consumer Product Safety Modernization Act (Dec. 19, 2007).

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