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Delay and Secrecy

How Section 6(b) of the Consumer Product Safety Act
Keeps Consumers in the Dark

Acknowledgments

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Contents

Executive Summary.....	4
Introduction	5
A “Landmark” Agency—The Consumer Product Safety Commission	6
Section 6(b) of the Consumer Product Safety Act	7
The “New” 6(b): Delay and Obfuscation.....	8
Time Lost Is Lives Lost	11
Big Business Uses Section 6(b) to Delay the Release of Safety Information, Not to Correct Inaccuracies	13
Exceptions to Section 6(b)’s Public Disclosure Requirements	15
Conclusion	16
Recommendations to Congress	17

Executive Summary

The Consumer Product Safety Act (CPSA) was enacted in 1972 to protect the public against injury from a wide range of consumer products, and also created the U.S. Consumer Product Safety Commission (CPSC), the nation's chief consumer product safety agency.

When the CPSC seeks to release information about product safety hazards in which the public can readily identify the product's manufacturer, it must first notify the company and allow it to agree to the release of that information. This process, detailed in Section 6(b) of the CPSA, is laborious and time-consuming for the agency. More importantly, it delays the release of critical safety information to consumers. No other health and safety federal regulator has a similar process that gives companies an effective veto on the information the regulator releases.

Recent events have shown that Section 6(b) has contributed to a delay in releasing information that has unfortunately resulted in injury and death. The CPSC cannot effectively carry out its mission as the nation's chief product safety watchdog with Section 6(b)'s constraints.

Public Citizen is formally calling for the repeal of Section 6(b).

“People die because of Section 6(b). It is that simple.”¹

-CPSC Commissioner Elliot F. Kaye

Introduction

Imagine that you just bought a Fisher-Price Rock ‘n Play Sleeper for your newborn. A few weeks later, you hear a warning on television or the radio urging parents to refrain from allowing babies to sleep in “inclined sleep products” because they pose a serious risk of injury to them. You ask yourself, “What is an inclined sleep product? And is that what I just bought?” You go online in order to find out more information. There, you find the website of the Consumer Product Safety Commission (CPSC), the nation’s chief consumer product safety agency. But the information found on the website is unhelpful because it’s full of vague statements with no specific information about the sleepers.

Unfortunately, this hypothetical is real. Fisher-Price’s sleepers were very much on the mind of the CPSC when it issued its generic warning because the agency *knew* that the product had been linked to numerous infant fatalities.² However, the CPSC likely refrained from mentioning the product by name because of a little-known provision in the law, Section 6(b) of the Consumer Product Safety Act (CPSA).³ Before the CPSC can release information to the public that would allow consumers to identify a product or manufacturer, the agency must first notify the company that it intends to release the information and give the company an opportunity to respond to the accuracy and fairness of that information. And if the company vetoes the CPSC’s attempt to mention the product by name, which they are likely to do, the agency has to undertake lengthy and expensive litigation to overcome the company’s objection. The CPSC’s default workaround for this provision is simply to issue vague statements, as it did in the case of the inclined sleeper warning.

The Rock ‘n Play episode included an irony that lays bare the flaws of Section 6(b). The only reason we know the details of the dangerous product is because CPSC staff accidentally disclosed unredacted data in response to an information request by *Consumer Reports*, the consumer advocacy periodical, that revealed the spate of deaths due to the Rock ‘n Play sleeper.⁴

Consumer Reports was able to determine from the data it received from the agency that the CPSC was aware of at least 19 fatalities connected with the Rock ‘n Play. The publication independently

¹ *Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission Fulfilling Its Mission?: Hearing Before the Subcomm. on Consumer Prot. & Commerce of the H. Comm. on Energy & Commerce*, 116 Cong. 3 (2019) (statement of Elliot F. Kaye, Comm’r, Consumer Prod. Safety Comm’n), available at <https://docs.house.gov/meetings/IF/IF17/20190409/109316/HHRG-116-IF17-Bio-KayeE-20190409.pdf>.

² See 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-products-and-impedes-recalls/>.

³ Consumer Product Safety Act, 15 U.S.C. §§ 2051–2089 (2019).

⁴ The CPSC has several avenues under the law for releasing information to the public. See, e.g., *Guide to Public Information*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/Newsroom/FOIA/Guide-to-Public-Information/> (last visited June 12, 2019).

identified other fatalities linked to the Rock ‘n Play, bringing the total to at least 50. *Consumer Reports* notified the CPSC of its findings, and one day before it published its exposé, the CPSC and Fisher-Price finally disclosed the Rock ‘n Play by name. Four days after the article was published, Fisher-Price recalled the product.⁵

This episode confirmed the longstanding view of consumer advocates that Section 6(b) creates an unnecessary hurdle that prevents the agency from doing its job, a key aspect of which is to quickly warn the public about product safety hazards. Moreover, because Section 6(b)’s restrictions also apply to requests made under the Freedom of Information Act (FOIA), it also prevents journalists, consumer advocates, and government watchdogs from obtaining information about the agency’s continual failures to get dangerous products out of our homes. In this case, only an error by the CPSC staff allowed the public to learn of the dangers that the CPSC and Fisher-Price were hiding.

On its face, Section 6(b)’s purpose is to ensure that information disclosed to the public about hazardous products is accurate, and to provide companies with the opportunity to inform the CPSC about potentially unsafe products without that information immediately becoming public. But in practice, the provision slows the flow of vital information to consumers because it is used to insulate companies from scrutiny. The role of the CPSC, like that of other federal health and safety regulators such as the Food and Drug Administration (FDA) and the National Highway Traffic Safety Administration (NHTSA), is to inform the public about defective products before additional people are injured or killed. But no other federal health and safety regulator is required to undertake a laborious process like the one prescribed in Section 6(b) before it can “name names” to inform the public about a potentially unsafe product.

As a result, Public Citizen is formally calling on Congress to repeal Section 6(b).

A “Landmark” Agency: The Consumer Product Safety Commission

Congress passed a series of key consumer protection laws in the 1970s – so much so that the time was called the “consumer decade.”⁶ When the CPSA⁷ was enacted in 1972, it was called “landmark legislation,” creating the “most powerful Federal regulatory agency ever created.”⁸ The law was designed to protect the public from unreasonable risk of injury associated with consumer products including toys, power tools, bicycles and bicycle helmets, and household products such as cribs and hair dryers.⁹ The CPSA also created the CPSC. According to current CPSC Commissioner Robert Adler,

⁵ See Peachman, *supra* note 2. See also Rachel Rabkin Peachman, *Inclined Sleeper Deaths Rise to 50 as Industry Continues to Sell the Products*, CONSUMER REPORTS (June 20, 2019), <https://www.consumerreports.org/child-safety/inclined-sleeper-deaths-rise-to-50-as-industry-continues-to-sell-the-products/>.

⁶ Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 Admin. L. Rev. 61, 63 (1989).

⁷ 15 U.S.C. §§ 2051–2089.

⁸ Adler, *supra* note 6, at 62.

⁹ See *About CPSC*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/About-CPSC> (last visited June 10, 2019); *Regulations, Mandatory Standards and Bans*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/Regulations-Laws--Standards/Regulations-Mandatory-Standards-Bans/> (last visited June 10, 2019).

who served as an attorney-advisor during the Commission's early days, "[i]n order to make the CPSC a model of regulatory reform, Congress wanted the agency to have strong regulatory authority, generous funding, broad participation (especially by consumers) in decision-making, widespread openness, and substantial independence from White House influence."¹⁰

The CPSC's "jurisdictional sweep is extremely broad,"¹¹ and it regulates approximately "15,000 types of consumer products."¹²

The CPSC's key responsibilities are to:

- Order manufacturers to repair, replace, or give consumers a refund for hazardous products;¹³
- Seek court-ordered relief against imminently hazardous products;¹⁴
- Impose fines for wrongdoing, such as selling, manufacturing, or importing banned products into the United States;¹⁵
- Collect data on product-related deaths and injuries;¹⁶ and
- Monitor industries' compliance with voluntary safety rules and, when necessary, write mandatory safety rules.¹⁷

Section 6(b) of the Consumer Product Safety Act

Section 6(b), as originally enacted, required the CPSC to notify a manufacturer¹⁸ at least 30 days before it planned to release information if a person could ascertain the identity of the company to which the information referred. The agency was required to send the information it sought to disclose to the company to ensure that it was accurate, fair, and in furtherance of the laws that the CPSC enforces.

The statute also required the agency to give the company a "reasonable opportunity"¹⁹ to submit comments regarding the information at issue. If the agency determined that it disclosed "inaccurate or misleading" information, the law required the CPSC to issue a retraction in a manner similar to how it released the original information.²⁰ Although the CPSC's implementing regulations address the meaning of "fair" and "reasonably related to effectuating the purposes of" the statutes that the

¹⁰ Adler, *supra* note 6, at 68.

¹¹ *Id.* at 65.

¹² *Guide to Public Information*, U.S. CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/Newsroom/FOIA/Guide-to-Public-Information> (last visited June 10, 2019).

¹³ See 15 U.S.C. § 2064(d).

¹⁴ See 15 U.S.C. § 2061.

¹⁵ See 15 U.S.C. §§ 2068–2069.

¹⁶ See 15 U.S.C. §§ 2054(a)–(b).

¹⁷ See 15 U.S.C. § 2056(a).

¹⁸ This report uses the words "manufacturer" and "company" interchangeably.

¹⁹ 15 U.S.C. § 2055(b)(1).

²⁰ 15 U.S.C. § 2055(b)(7).

CPSC enforces, they provide little helpful guidance.²¹ Courts, moreover, have not shed much light on this issue.

The “New” 6(b): Delay and Obfuscation

Almost immediately upon taking office, officials in the Reagan administration “sought to abolish the agency” or, at the very least, “dramatically” cut[] the agency’s budget and staff.²² In 1981, Congress significantly amended Section 6(b) to give manufacturers a veto over the release of information. The amendment was reportedly a compromise with the new administration.²³

The amended Section 6(b) still requires the agency, before it releases any type of agency communication in which the identity of a manufacturer can be named, to provide the company with a “summary”²⁴ of information that it plans to release.²⁵ Now, however, Section 6(b) gives companies greater control over the flow of information that is released by:

- Allowing the company to add supplementary comments to any information that the CPSC intends to disclose, and to object to the release of information that it says is inaccurate or unfair;²⁶
- Requiring the CPSC to notify the company if it nevertheless intends to release the disputed information;²⁷ and
- Giving the company the ability to go to federal court to stop the disputed information’s release over its objection.²⁸

²¹ See generally Consumer Product Safety Act Regulations, 16 C.F.R. §§ 1101.31–.34 (2018).

²² Adler, *supra* note 6, at 68.

²³ See Peachman, *supra* note 2 (“Section 6(b) as it exists today was born out of a compromise in the early 1980s between members of Congress who felt the CPSC was overreaching its authority and those who felt the agency’s power should be strengthened.” According to Pamela Gilbert, the CPSC’s former executive director, “[t]he Reagan administration ‘wanted to abolish the Consumer Product Safety Commission, and there was a backlash to that’ So, she says, critics of the agency weakened it ‘with a number of amendments, most of which we live with today. 6(b) was one of those.’”). Another one of the amendments added required the CPSC to rely on voluntary standards to regulate products. If and only if the industry did not comply with a voluntary standard could the CPSC develop mandatory industry standards. See Commission Participation and Commission Employee Involvement in Voluntary Standards Activities, 16 C.F.R. § 1031.2(b) (2018).

²⁴ The Consumer Product Safety Improvement Act trimmed the time period for advance notice of disclosure to manufacturers from 30 to 15 days. See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 211(2), 122 Stat. 3016, 3047 (2008).

²⁵ 15 U.S.C. § 2055(b)(1).

²⁶ *Id.*

²⁷ 15 U.S.C. § 2055(b)(2) (noting also that the Commission may “provide a lesser period of notice of intent to disclose if [it] publishes a finding that the public health and safety requires a lesser period of notice”).

²⁸ 15 U.S.C. § 2055(b)(3)(A).

Because neither the statute nor its implementing regulations have been updated in decades, the CPSC primarily communicates with companies through the mail, rather than via phone or email.²⁹

The public expects that all information that the federal government releases is accurate and fair, so imposing extra requirements on one specific agency, especially an agency that is responsible for quickly informing the public about a product safety hazard, is onerous and unnecessary.

Section 6(b) is problematic for two reasons. First, it hinders the CPSC's ability to quickly inform the public about a product safety hazard that may be sitting in American homes because companies have a virtual veto on the information that is being released. Second, the U.S. Supreme Court has said that before the CPSC can release records under FOIA, the nation's public disclosure law, the CPSC must comply with Section 6(b)'s requirements.³⁰ As a result, so little product-specific information is released that it is difficult for journalists, watchdog groups, or the public to determine if the agency is effectively carrying out its mission of safeguarding the public against product safety hazards.

By requiring that the CPSC provide a product manufacturer with advanced notice and opportunity to comment on information which the Commission seeks to release, Section 6(b) forces the agency to delay warning the public about potentially hazardous products. "[T]he CPSC is the *only* health and safety agency that operates with substantial restrictions on information disclosure."³¹ Not even agencies such as the FDA, with oversight over a wide swath of products including food, drugs, medical devices, and tobacco products,³² or NHTSA, which oversees "motor vehicles and related equipment,"³³ are constrained by such onerous procedures.³⁴ According to former acting NHTSA Administrator David Friedman, "[t]he gag that 6(b) places on the CPSC is a dangerous anomaly among federal safety agencies At NHTSA, we were able to call for the recall of millions of deadly Takata airbags because we had the freedom to share what we knew. But the CPSC can't do that."³⁵ The CPSC works within the constraints of the law, namely, by issuing generic statements about potentially dangerous consumer products that do not "name names." This tactic, however, does not help consumers receive timely *and* relevant information that could prevent disasters in their homes.

²⁹ See Information Disclosure Under Section 6(b) of the Consumer Product Safety Act, 79 Fed. Reg. 10712, 10715 (proposed Feb. 26, 2014) (to be codified at 16 C.F.R. pt. 1101) (noting that "the Commission continues to provide 6(b) notice to firms via U.S. mail, a more time-consuming practice that incurs unnecessary costs, particularly from printing and mailing the relevant documents. In addition, staff resources are dedicated to preparing these paper mailings."), available at <https://www.govinfo.gov/content/pkg/FR-2014-02-26/pdf/2014-03600.pdf>.

³⁰ See *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

³¹ Adler, *supra* note 6, at 107.

³² See *What Does FDA Regulate?*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/fda-basics/what-does-fda-regulate> (last visited June 10, 2019).

³³ *Laws and Regulations*, NAT'L HIGHWAY TRAFFIC & SAFETY ADMIN., <https://www.nhtsa.gov/laws-regulations> (last visited June 10, 2019).

³⁴ See Adler, *supra* note 6, at 107 n.258 (citing a congressional hearing noting that in comparison with the ten other major health and safety regulators, the CPSC was the only agency that "operated with restrictions other than the normal restrictions on releasing trade secrets and confidential business information").

³⁵ Peachman, *supra* note 2.

When the CPSA was originally passed, Section 6(b)'s requirements did not extend to documents released through FOIA. FOIA was intended "to establish a general philosophy of full agency disclosure" and close "loopholes which allow agencies to deny legitimate information to the public."³⁶ But the U.S. Supreme Court has interpreted Section 6(b) to apply to a request submitted under FOIA.³⁷ FOIA, however, already permits federal agencies to withhold public release of information related to a business's trade secrets and confidential information.³⁸ So Section 6(b)'s *additional* requirements are overkill. Rather, Section 6(b) delays, and sometimes denies, the release of information to the public that FOIA would otherwise allow it to obtain. In agency documents, the CPSC has admitted that Section 6(b) slows its ability to release information and is a taxing requirement for the small agency.

According to the CPSC's 2017 Chief FOIA Officer Report, which details "the steps taken by [an] agency to improve FOIA compliance and transparency,"³⁹ one of the challenges the agency faces in proactively disclosing information is ensuring that the agency complies with Section 6(b):

"When notified, many manufacturers submit extensive comments, claims and objections about the information to be disclosed. The FOIA office must review and respond to the comments and claims and renotify the firms if we disagree with any claims. The regulation also allows firms to request that the CPSC re-notify them for every release of the same information. In short, CPSC cannot post or otherwise make publicly available information subject to 6(b) without following time-consuming and cumbersome procedures."⁴⁰

This complaint is not new. The agency's 2015 Chief FOIA Officer Report noted that "[m]anufacturers and retailers may not be prompt in responding to these section 6(b) notices, further impairing the agency's ability to process the related FOIA requests expeditiously."⁴¹ And according to the agency's 2014 annual FOIA report, the CPSC notified manufacturers of proposed disclosures of information that identified them 6,639 times in that year alone. In 203 instances, the agency re-notified companies that claimed information was inaccurate in order to inform them that they were overruling the claim. These communications are almost all done by mail, ensuring a laborious, time-consuming, and expensive process that no other health and safety agency must endure.

An illustration is useful. If an individual requests safety information in a document that lists 20 companies, the CPSC sends out copies of those documents to each of the 20 companies. For each company, the agency will redact the names and information that readily identifies the other 19 companies. Then it must wait for each company to respond. If companies take issue with the release

³⁶ S. REP. NO. 89-813, at 3 (1965), *available at* <https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/07/senarept-813-1965.pdf>.

³⁷ *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

³⁸ *See* Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2019) (providing FOIA exception for "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential").

³⁹ *Reports*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/oip/reports-1#s2> (last visited June 12, 2019).

⁴⁰ U.S. CONSUMER PROD. SAFETY COMM'N, CHIEF FOIA OFFICER REPORT FOR 2017, at 6 (2017), *available at* <https://www.cpsc.gov/s3fs-public/Chief%20FOIA%20Officer%27s%20Report%20for%202017%20031417%20OIP%20Rev%203-16-17%20FINAL.pdf>.

⁴¹ U.S. CONSUMER PROD. SAFETY COMM'N, CHIEF FOIA OFFICER REPORT FOR 2015, at 17 (2015), *available at* https://www.cpsc.gov/s3fs-public/pdfs/foia_ChefFOIAReportFY2015.pdf.

of the information, the agency must negotiate with them as described above, or risk being taken to court over the release. This process is time-consuming and wastes money that could be spent on substantive programs and enforcement to keep consumers safe.

Time Lost Is Lives Lost

On its face, Section 6(b)'s purpose is to ensure that information disclosed to the public about hazardous products is accurate, as well as to provide companies with the opportunity to inform the CPSC about potentially unsafe products without that information immediately becoming public. In practice, the provision slows the flow of vital information to consumers because it is used to insulate companies from scrutiny. Nancy Cowles, executive director of Kids In Danger, an advocacy group dedicated to protecting children from unsafe products, explained:

Simply put, 6(b) is a gag order – restricting CPSC's ability to warn the public about product hazards and keeping consumers in the dark about dangerous products they have in their homes and use daily with their families. . . . Parents should not have to wait until a full recall effort is complete before learning their child is sleeping in a deadly crib, playing with a lead-tainted toy, or riding in a stroller prone to losing a wheel.⁴²

Unfortunately, the full impact of Section 6(b) sometimes becomes clear only after a major safety incident.

Take the recent example of the Fisher-Price Rock 'n Play Sleeper and similar products referred to in the introduction of this report. A recent investigation by *Consumer Reports* found that the CPSC knew that specific Fischer-Price sleepers were linked to fatalities for several years before the company finally recalled 4.7 million Rock 'n Play Sleepers in April 2019.⁴³ Two weeks later, almost 700,000 inclined sleepers manufactured by Kids II were also recalled when additional infant deaths were reported.⁴⁴ Even though consumer advocates and medical professionals have long warned against allowing babies to sleep in inclined products, manufacturers continued to market them as safe for such use.⁴⁵ In May 2018, the CPSC issued a "consumer alert" – essentially a press release – that cautioned parents against the hazards of allowing babies to sleep unrestrained in "inclined sleep

⁴² *Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission Fulfilling Its Mission?: Hearing Before the Subcomm. on Consumer Prot. & Commerce of the H. Comm. on Energy & Commerce*, 116 Cong. 3–4 (2019) (statement of Nancy A. Cowles, Executive Director, Kids in Danger), available at <https://docs.house.gov/meetings/IF/IF17/20190409/109318/HHRG-116-IF17-Wstate-CowlesN-20190409.pdf>.

⁴³ Peachman, *supra* note 2.

⁴⁴ *Kids II Recalls All Rocking Sleepers Due to Reports of Deaths*, CONSUMER PROD. SAFETY COMM'N, <https://cpsc.gov/Recalls/2019/Kids-II-Recalls-All-Rocking-Sleepers-Due-to-Reports-of-Deaths> (last visited June 10, 2019).

⁴⁵ Craig Canapari, *Some Babies Sleep Better in Car Seats and Swings, but Are They Safe?*, N.Y. TIMES (May 24, 2019), <https://parenting.nytimes.com/sleep/baby-sleep-dangerous?module=article-group&topic=Baby&rank=4&position=4>; Peachman, *supra* note 2.

products.”⁴⁶ Although the agency was “aware of infant deaths associated with inclined sleep products,”⁴⁷ the consumer alert did not name specific products.

The phrase “inclined sleeper” is an industry term. It is an understatement to say that few busy, sleep-deprived parents would realize that such a generic term refers to a *specific* product that may already be in their homes. It would be akin to the FDA putting out a warning regarding a “smooth, peanut-based spread” and requiring consumers to know the type and brand of peanut butter to which it refers. Yet, because of Section 6(b)’s requirements, and the CPSC’s inability to quickly release important safety information, using such generic, unrecognizable terms is a familiar tactic for the agency.⁴⁸

Now, let’s look at another example – the recall of more than 17 million MALM dressers made by IKEA. The CPSC warned parents as early as 2009 to secure furniture against tip-overs.⁴⁹ In 2011, the agency noted that “349 consumers (84 percent of them were children younger than age 9) were killed between 2000 and 2011, when TVs, furniture or appliances toppled over onto them,” and that a majority of those tip overs were the result of *furniture* tipping over.⁵⁰ However, the agency did not name a specific company or type of furniture. In 2015, the CPSC launched its “Anchor It!” campaign, a “national public education campaign to prevent furniture and TV tip-overs from killing and seriously injuring children.”⁵¹ Again, the CPSC did not name a specific model of furniture or television that was prone to tipping. In July 2015, the CPSC and IKEA announced a “repair program” that gave out free anchoring kits to owners of MALM dressers after it was confirmed that two children had died

⁴⁶ U.S. Consumer Prod. Safety Comm’n, CPSC Consumer Alert: Caregivers Urged To Use Restraints With Inclined Sleep Products (May 31, 2018), *available at* <https://www.cpsc.gov/content/cpsc-consumer-alert-caregivers-urged-to-use-restraints-with-inclined-sleep-products>.

⁴⁷ *Id.*

⁴⁸ *See generally* U.S. Consumer Prod. Safety Comm’n, CPSC Safety Alert: Ingested Magnets Can Cause Serious Intestinal Injuries (Apr. 2007), *available at* <https://cpsc.gov/s3fs-public/5221.pdf>; U.S. Consumer Prod. Safety Comm’n, CPSC Safety Alert: BB Guns Can Kill (Jan. 2012), *available at* <https://cpsc.gov/s3fs-public/5089.pdf>; U.S. Consumer Prod. Safety Comm’n, CPSC Safety Alert: Hoverboard Safety Alert (Apr. 2018), *available at* <https://cpsc.gov/s3fs-public/CPSC-Hoverboard-Safety-Alert.pdf?NaDiKrW4fd88yJaKh1o90Q.nNHrgLMnv>.

⁴⁹ U.S. Consumer Prod. Safety Comm’n, The Tipping Point: CPSC Urges Parents to Inspect and Secure TVs, Furniture, and Appliances to Prevent Tip-Over Deaths and Injuries (Sept. 22, 2009), *available at* <https://www.cpsc.gov/Newsroom/News-Releases/2009/The-Tipping-Point-CPSC-Urges-Parents-to-Inspect-and-Secure-TVs-Furniture-and-Appliances-to-Prevent-Tip-Over-Deaths-and-Injuries>.

⁵⁰ U.S. Consumer Prod. Safety Comm’n, The Tipping Point: Highest Number of TV and Furniture Tip-Over Death Recorded by CPSC in 2011 (Dec. 13, 2012), *available at* <https://www.cpsc.gov/Newsroom/News-Releases/2013/The-Tipping-Point-Highest-Number-of-TV-and-Furniture-Tip-Over-Deaths-Recorded-By-CPSC-in-2011>.

⁵¹ U.S. Consumer Prod. Safety Comm’n, Anchor It!: CPSC Launches Nation’s Largest Campaign to Prevent Furniture and TV Tip-Over Deaths and Injuries (June 4, 2015), *available at* <https://www.cpsc.gov/Newsroom/News-Releases/2015/Anchor-It-CPSC-Launches-Nations-Largest-Campaign-to-Prevent-Furniture-and-TV-Tip-Over-Deaths-and-Injuries>.

as a result of being crushed by them and four other individuals had been injured.⁵² Finally, in June 2016 – after more children died – IKEA announced a recall of the dressers.⁵³

IKEA's MALM dressers are not the only dressers to have been recalled by the CPSC throughout the years, so the agency's warnings about securing furniture was an important general safety announcement. However, the sheer volume of IKEA dressers in the market – more than 17 million – suggests that the agency's attempt to reach the public was an attempt to reach consumers *specifically* about the hazards that IKEA dressers pose. Despite this, it took years before the CPSC actually “named names” and informed consumers about the safety hazard posed by IKEA dressers.

In short, as CPSC Commissioner Elliot Kaye noted at a recent congressional hearing, “[p]eople die because of Section 6(b).”⁵⁴

Big Business Uses Section 6(b) to Delay the Release of Safety Information, Not to Correct Inaccuracies

Big business argues that Section 6(b) is essential for ensuring that the CPSC does not release inaccurate information that could cause businesses reputational harm.⁵⁵ However, case law addressing Section 6(b) shows that courts have generally found that when the CPSC has been challenged by businesses for releasing or attempting to release information over a company's objection, the information in question complied with Section 6(b)'s requirement that it be accurate and fair. Yet, while these cases made their way through the court system, important safety information was delayed from being released. Here are a few examples:⁵⁶

In *Danara International, Ltd. v. Consumer Product Safety Commission*,⁵⁷ a manufacturer sued to prevent the CPSC from publishing a press release indicating that four of the company's products

⁵² U.S. Consumer Prod. Safety Comm'n, *IKEA Offers Free Wall Anchoring Repair Kit for Chests and Dressers Due to Tip-over Hazard After Two Children Died* (July 22, 2015), available at <https://www.cpsc.gov/Newsroom/News-Releases/2015/IKEA-Offers-Free-Wall-Anchoring-Repair-Kit-for-Chests-and-Dressers>.

⁵³ See *Following an Additional Child Fatality, IKEA Recalls 29 Million MALM and Other Models of Chests and Dressers Due to Serious Tip-Over Hazard; Consumers Urged to Anchor Chests and Dressers or Return for Refund*, U.S. CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/Recalls/2016/following-an-additional-child-fatality-ikea-recalls-29-million-malm-and-other-models-of> (last visited June 10, 2019) (The announcement stated that “[s]ubsequent to the July 2015 announcement, CPSC and IKEA learned of additional tip-over incidents, including a February 2016 incident in which a 22-month-old boy from Apple Valley, Minn. died when a MALM 6-drawer chest fell on top of him. Most recently, CPSC has identified and provided to IKEA a fourth report of a fatality that reportedly occurred in September 2011. A 2-year-old boy from Woodbridge, Va. died after an unanchored MALM 3-drawer chest tipped over, and trapped the child between the dresser drawers.”).

⁵⁴ See *Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission Fulfilling Its Mission?: Hearing Before the Subcomm. on Consumer Prot. & Commerce of the H. Comm. on Energy & Commerce*, *supra* note 2, at 3.

⁵⁵ See, e.g., *Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission Fulfilling Its Mission?: Hearing Before the Subcomm. on Consumer Prot. & Commerce of the H. Comm. on Energy & Commerce*, 116 Cong. (2019) (statement of S. Mike Gentine), available at <https://docs.house.gov/meetings/IF/IF17/20190409/109316/HHRG-116-IF17-Wstate-GentineM-20190409.pdf>.

⁵⁶ While the universe of Section 6(b) case law was reviewed, only relevant cases are included in the report.

⁵⁷ *Danara Intern., Ltd. v. U.S. Consumer Prod. Safety Comm'n*, 549 F. Supp. 367 (D.N.J. 1982).

could present a choking hazard for children. Upon learning of the death of four infants who choked on squeeze toys, the CPSC inspected toys “for those which were similar to, in terms of size and shape, the squeeze toys involved in the infant deaths.”⁵⁸ After the manufacturer refused to take corrective measures that the agency recommended to make the toys less hazardous, the CPSC sought to issue a press release informing the public of the potential threat of injury that the four products posed.

The company asked a federal district court to stop the CPSC from issuing the press release, arguing that the agency violated Section 6(b) procedures because it did not give the company an opportunity to have a hearing to contest the release’s veracity. The court found that the information was fair and accurate and that Section 6(b) did not require the CPSC to hold a hearing.⁵⁹ The court also concluded that the public interest in releasing vital safety information regarding a potential unsafe product outweighed the manufacturer’s interest in delaying the press release. In denying the application for a temporary restraining order, the court said, “[d]ealing as we are with dissemination of information which may preserve an infant’s life . . . it is clear to me that the Commission here serving the public interest that I have just defined, has by far the better of it in the matter of balancing [the manufacturer’s interest versus the public interest].”⁶⁰

In *C.P. Chemical Co. v. Stevenson*,⁶¹ a company sought a preliminary injunction to stop the CPSC from releasing documents through FOIA. The company did “not dispute that the [CPSC] procedurally complied with the Act and the Commission’s regulations.”⁶² Instead, its concern hinged on the possibility that the public would associate its product with another form of foam insulation that had been banned from the market. The court found that this concern was “not a basis for the Commission to withhold the documents.”⁶³ The court concluded that the “Commission [took] reasonable steps to assure that the disclosure [was] accurate, fair in the circumstances and reasonably related to effectuating the purpose of the Act.”⁶⁴

In another FOIA case, *Daisy Manufacturing Co. v. Consumer Product Safety Commission*,⁶⁵ the company filed suit and moved for a preliminary injunction to block the agency from releasing records requested by a third party. After reviewing the records, the district court upheld the CPSC’s decision to release the requested records. Affirming the district court, the court of appeals ruled that “the Commission took reasonable steps to assure accuracy and fairness in disclosing the information.”⁶⁶ The court noted that “the Commission did not violate section 6(b) of the Product Safety Act. On several occasions, the Commission carefully reviewed the documents to assure that it would not release any documents submitted by Daisy [that should not be publicly released].”⁶⁷

⁵⁸ *Id.* at 372.

⁵⁹ *Id.* at 375.

⁶⁰ *Id.* at 375–76.

⁶¹ *C.P. Chem. Co., Inc. v. Stevenson*, 732 F. Supp. 119 (D.D.C. 1989).

⁶² *Id.* at 122.

⁶³ *Id.*

⁶⁴ *Id.* at 121.

⁶⁵ *Daisy Mfg. Co., Inc. v. Consumer Prods. Safety Comm’n*, 133 F.3d 1081 (8th Cir. 1998).

⁶⁶ *Id.* at 1083.

⁶⁷ *Id.* at 1083–84.

In *United States v. 52,823 Children's Dolls, More or Less*,⁶⁸ the company sought the retraction of a Commission press release identifying the company's dolls as a banned hazardous substance. The company claimed, among other things, reputational harm due to the "wide-spread broadcasting" of the press release.⁶⁹ The court noted that the company was "given ample opportunity by the Commission to issue a joint press release which would have included Claimants' input" and that the company knew "that failure to proceed with corrective action could result in alternative regulatory action, including a unilateral press release."⁷⁰ Although the court found that the issuance of the press release by the agency violated Section 6(b)'s requirements, it nevertheless found that "the press release . . . did not contain inaccurate or misleading statements" and denied the company's request for a retraction.⁷¹

Exceptions to Section 6(b)'s Public Disclosure Requirements

There are limited times when the agency can release information without going through the Section 6(b) process.

The Commission "Acts": Section 12 of the Consumer Product Safety Act

The Commission *may* release certain safety information to the public without a company's consent by asking a federal court to declare a product "imminently hazardous."⁷² However, the bar for "imminently hazardous" is incredibly high – defined in statute as a product "which presents imminent and unreasonable risk of death, serious illness, or severe personal injury"⁷³ – and getting a specific product designated as such would likely require the agency to divert resources from its small budget to litigate the matter in court.⁷⁴

A Manufacturer "Acts": Section 15 of the Consumer Product Safety Act

The Commission may not generally release certain safety information to the public when a company alerts the CPSC that the product may fail to comply with an applicable law, regulation, or safety standard that "creates an unreasonable risk of serious injury or death."⁷⁵ A company does that by filing a "Section 15 report."⁷⁶ Once a company files its report, and the CPSC determines that the product poses a "substantial product hazard," it can force the manufacturer to, among other things, recall the product or inform consumers about a product defect.⁷⁷ The additional limited instances in

⁶⁸ *United States v. 52,823 Children's Dolls, More or Less*, No. 89 CIV. 4643 (JFK), 1989 WL 140250 (S.D.N.Y. Nov. 13, 1989).

⁶⁹ *Id.* at *7.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 15 U.S.C. § 2061(a).

⁷³ *Id.*

⁷⁴ See 15 U.S.C. § 2061(e) ("Notwithstanding any other provision of law, in any action under this section, the Commission may direct attorneys employed by it to appear and represent it.").

⁷⁵ 15 U.S.C. § 2064(b).

⁷⁶ See *How to Report Under Section 15 Online Guide*, U.S. CONSUMER PROD. SAFETY COMM'N, https://www.cpsc.gov/s3fs-public/Online_Report_Guide_final.pdf?_60_mCupzy7hmQcZ5ZZJ3KATDuQ1MSBg (last visited June 12, 2019).

⁷⁷ See generally 15 U.S.C. § 2064.

which the CPSC can publicly release information provided by the manufacturer include cases in which:

- The agency reaches a “remedial settlement agreement” with a manufacturer regarding a product defect;
- A company agrees to the public disclosure of such information; or
- The “Commission publishes a finding that the public health and safety requires public disclosure” of the information in a shorter timeframe than required under Section 6(b).⁷⁸

The release of *any* information under this section, however, is dependent on the *manufacturer* coming forward. Even then, when the company and the CPSC agree to jointly disclose information, every detail requires painstaking negotiations between them, which further delays the release of important safety information.

Conclusion

In 2008, Congress passed the Consumer Product Safety Improvement Act (CPSIA).⁷⁹ The law enacted stricter testing requirements for toys and infant products and banned toxic substances from children’s products.⁸⁰ It also created the saferproducts.gov website as a way to quickly deliver consumer product safety information to the public.⁸¹ However, it is clear after a decade that neither minor changes to Section 6(b) nor saferproducts.gov does enough to protect consumers from unsafe products.

Section 6(b) delays the release of critical safety information in a variety of ways. At times, rather than undergo laborious negotiations with companies in order to release *any* information in which the company is mentioned, the agency instead releases generic information that can be confusing to consumers. This very act diminishes the efficacy of the notification and makes a mockery of the agency’s mission to robustly protect consumers from unreasonable injury or death. Other times, the agency undertakes protracted negotiations with a company to, say, direct consumers to return or repair a defective product, but these negotiations delay the release of critical safety information.

Section 6(b) also hinders the release of information that should be accessible to the public consistent with FOIA and the agency’s other information disclosure requirements. Even the CPSC concedes how time-consuming and burdensome that process can be, and this statutory requirement redirects limited resources to processes that have little to do with ensuring accurate disclosures or fulfilling the agency’s mandate. Finally, CPSC’s mission is severely hampered in a way that *no other* federal

⁷⁸ 15 U.S.C. 2055(b)(5)(A)–(D).

⁷⁹ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).

⁸⁰ §§ 101–02, 122 Stat. at 3017–28.

⁸¹ And trimmed the time period for advance notice of disclosure to manufacturers from 30 to 15 days. See § 211(2), 122 Stat. at 3047.

regulator is stymied. This outlier in onerous obligations alone should be a reason for Congress to seriously consider scrapping 6(b).

Some have urged continuation of the status quo or tweaks around the edges. But when it comes to information that consumers should know in order to protect their families, tweaks are not enough, especially since “any timidity in pursuing dramatic and timely warnings of product hazards may be directly traceable to 6(b).”⁸²

Recommendations to Congress

A. Congress should direct the General Accountability Office to Study Section 6(b).

Removing the most problematic provisions of Section 6(b) from law will face massive resistance from big business, which is united in its opposition to reform. The U.S. House of Representatives Committee on Energy and Commerce and/or the U.S. Senate Committee on Commerce, Science, and Transportation should direct the U.S. General Accountability Office (GAO) to undertake a study into whether Section 6(b) delays the release of critical health and safety information to the detriment of its mission. GAO should provide Congress with recommendations to fix any problems it finds. One idea would be to charge companies fees for processing Section 6(b) requirements such as a sliding scale based on the number of documents and companies involved.⁸³

B. Congress should repeal Section 6(b).

Ultimately, however, the solution is already clear. At its core, Section 6(b) requires the Commission to prioritize a manufacturer’s interests over public safety, putting it at odds with its mission. Although the original intent behind Section 6(b) was to ensure that information disclosed to the public was accurate, today it merely prevents the timely release of product safety information.

⁸² Adler, *supra* note 6, at 115.

⁸³ *Cf.* Merger Enforcement Improvement Act, S. 306, 116th Cong. (2019) (proposing to increase a company’s premerger filing fees for a potential antitrust merger based on the size of the merger), *available at* <https://www.congress.gov/116/bills/s306/BILLS-116s306is.pdf>.