



April 3, 2023

The Honorable Alexander Hoehn-Saric  
Chair  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

**RE: Comment on Information Disclosure Under Section 6(b) of the Consumer Product Safety Act**  
(Docket Number CPSC 2023-03021, CPSC-2014-0005)

This letter is being submitted pursuant to the Supplemental Notice of Proposed Rulemaking (SNPR) on behalf of The Toy Association and its 800+ members – representing manufacturers, importers, designers, retailers, inventors, and toy safety testing labs, all working to ensure safe and fun play for families. Toy safety is the number one priority for the industry, as evidenced by the fact that the industry and The Toy Association have been global leaders in toy safety for decades.

The Toy Association supports the modernization of the processing of information in relation to Section 6(b) data but opposes some of the proposed amendments to existing regulation as written to the extent they will substantively reduce the statutorily mandated safeguards on data.

Section 6(b)<sup>1</sup> of the Consumer Safety Protection Act (CPSA) governs information disclosure by the U.S. Consumer Product Safety Commission (“CPSC” or “the Commission”) to the public. When disclosing information, the Commission, to the extent practicable, is required to notify each manufacturer or private labeler of information to be disclosed that “pertains” to a consumer product, if the information “*will permit the public to ascertain readily the identity of [the] manufacturer or private labeler*” of the product<sup>2</sup> (emphasis added). Section 6(b)(1) also requires the Commission to “take reasonable steps to assure” that the information to be disclosed “*is accurate, and that [its] disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the CPSA]*”<sup>3</sup> (emphasis added). Such provision requires the Commission, prior to the disclosure of any such information to offer such manufacturer an opportunity to object to its release and have such information marked and treated as confidential information barred from disclosure within 15 calendar days. This provision is specifically present as a safety measure to avoid the publication of inaccurate information.

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<sup>1</sup> 15 U.S.C. § 2055(b)

<sup>2</sup> Id.

<sup>3</sup> 15 U.S.C. § 2055(b)(1)

On December 29, 1983, the Commission published a final rule interpreting section 6(b) of the CPSA. The rule, 16 CFR 1101, describes its procedures for providing manufacturers and private labelers with advance notice and “a reasonable opportunity to submit comments” to the Commission on proposed disclosures of product-specific information. The rule also explains the “reasonable steps” that the CPSC will take pursuant to section 6(b) to assure, prior to public disclosure of product-specific information, that (1) the information is accurate; (2) disclosure of the information is fair in the circumstances; and (3) disclosure of the information is reasonably related to effectuating the purposes of the statutes the Commission administers.

Since then, the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110-314, 122 Stat. 3016, enacted August 14, 2008, amended section 6 of the CPSA. The amendments shortened the time periods from 30 to 15 days for manufacturers and private labelers to receive advance notice and have an opportunity to comment on any disclosure to the public of product-specific information, and eliminated the requirement that the Commission publish a Federal Register notice when the Commission makes a finding that the public health and safety necessitates public disclosure within a lesser period of notice than required by section 6(b)(1). The amendments also broadened the statutory exceptions to section 6(b), for example, excluding from section 6(b) the public disclosure of information with respect to a consumer product which the Commission has reasonable cause to believe is in violation of any consumer product safety rule or provision under the CPSA or similar rule or provision of any other Act enforced by the Commission. Public releases on imminent hazards or determinations of violations upon a vote of the Commission have, up until recently, been rare. Nevertheless, the Commission has such authority to exercise as needed, and has increasingly been doing so. Under the circumstances, the Commission cannot claim that the existing section 6(b) rules prevent it from being able to act in the public interest, when merited. While the CPSIA changes streamlined the Commission’s ability to act under such circumstances, in all material respects such Act did not substantively change the language and safeguard requirements of section 6(b) and on November 28, 2008, the Commission published a final rule to reflect only these statutory amendments.<sup>4</sup>

Additionally, rather than repeat verbatim the well-founded facts raised by Mr. Alan Schoem (formerly CPSC Director of Compliance) in his letter “Section 6(b) Myths and Facts”<sup>5</sup>, The Toy Association requests the Commission to include consideration of the matters raised therein as a part of the 2023 SNPR review & comment, and supporting the statements listed in the preceding paragraph.

Further, both the 2014 NPR and the 2023 SNPR cite eliminating agency burdens as among the principles the proposed changes are aimed to address, yet the Supreme Court expressly addressed and flatly rejected this rationale with the statement that “...our interpretation of the language and legislative history of section 6(b)(1) reveals that any increased burdens imposed on the Commission as a result of its compliance with section 6(b)(1) were intended by Congress in striking an appropriate balance between the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the Commission.”<sup>6</sup> It is of note that the 2023 SNPR selectively cites this same Supreme Court Ruling for other matters, e.g., FOIA coverage under 6(b)<sup>7</sup>, without also recognizing the above statement.

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<sup>4</sup> 73 FR 72335

<sup>5</sup> Regulations.gov Document CPSC-2014-0005-0029

<sup>6</sup> Consumer Product Safety Commission v. GTE Sylvania, Inc., v. GTE Sylvania, Inc., 447 U.S. 102 (1980)

<sup>7</sup> 88 FR 10432

While it is factually correct that section 6(b) is unique to CPSC among federal agencies, it is disingenuous at best to omit the equally salient fact that *so is section 15(b)*, and the parameters of section 6(b) directly address and provide a counterbalance to the onerous mandatory reporting requirements laid down in section 15(b) that do not permit manufacturers to ensure the accuracy of potential issues before the immediate notification has to be made. CPSC appears to be perfectly happy to continue to receive potentially wrong or incomplete information under section 15(b) reporting requirements, while actively working to remove the application of the statutory checks and balances that exist under section 6(b) to ensure a fair and accurate dataset exists to support a notice of hazard. The existing section 6(b), if properly implemented, is a well-balanced set of requirements that allows the Commission to act quickly while also requiring that a reasonable level of basic provisions for accuracy and fairness are maintained. As such, it is evident from the most cursory objective examination that section 6(b) is not a ‘gag-rule’, as it has often been labeled.

In addition to the comments provided previously by The Toy Association<sup>8</sup> in response to the 2014 Notification of Proposed Rulemaking (NPR) Docket Number CPSC-2014-0005<sup>9</sup>, we urge the Commission to recognize and address the following comments and concerns relating to the recently published SNPR.

### Journalistic Integrity

The proposal in the 2014 NPR to exempt from section 6(b) the statement “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.”<sup>10</sup> was identified as a concern of note by commenters at that time and recognized by the Commission as being potentially inconsistent with the intent of section 6<sup>11</sup>. The proposed revision in the 2023 SNPR to revise the scope of exemption to “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.”<sup>12</sup> remains inherently flawed and of serious concern.

It is disingenuous to infer that a notice by the Commission relating to information obtained from publicly available sources *even though* the Commission “...does not characterize the publicly available information or relay new information.”<sup>13</sup> would be sufficient to satisfy Congress’ intent for accuracy and fairness to be maintained. *Any* notice by the Commission will be perceived to have been reviewed, verified and endorsed by the Commission. Furthermore, the stated rationale in the 2023 SNPR adds a nebulous inference toward a minimal (or base) level of accuracy on an attribution “...of integrity to the source of the information (e.g., the newspaper follows journalistic standards)...”<sup>14</sup>, along with a stated condition that the “...Commission’s description of the newspaper’s report is accurate and not misleading.”<sup>15</sup>, which is wholly unreliable as a basis for a presumption of either accuracy or fact. The proposed exemption for publicly available information continues to run directly counter to the stated intent of section

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<sup>8</sup> Previously filed under the name of the Toy Industry Association

<sup>9</sup> TIA Comments Docker Number CPSC-2014-0005-0024

<sup>10</sup> 79 FR 10714

<sup>11</sup> 88 FR 10435

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

6(b). All journalistic sources, even those deemed to follow 'journalistic standards' have biases and can and do cite, reference or rely/expound on contested information, whether scientific or not. This is compounded by the fact that 'clickbait' or sensationalist headlines or statements are an integral part of the journalistic milieu. Just because something is 'publicly reported' does not mean it is true, publicly supported, or even reflective of any, let alone the majority, of experts in an area. The proposed change ignores this consideration by only (barely) looking at the outlet, report or author, greatly increasing the potential for damaging misinformation to be magnified by what is in effect a poorly founded and arbitrary assumption in the proposal.

While the above matters were already of significant concern during the 2014 NPR review period, this concern has only been amplified in the near decade since they were raised. The increasingly prevalent and pervasive presence of deliberate and malicious 'deepfakes' has resulted in either intentional misinformation or unintentional reliance on unreliable or outright false information by sites that would otherwise be considered to be 'following journalistic standards'. The recent explosion of AI-generated false and malicious information cannot be ignored, and The Toy Association strongly urges the Commission to recognize the inherent weaknesses raised by the proposed revision. In the stated goal for the Commission to be a trusted household name, it is only that more imperative that the information used to support the Commission's outreach as a basis for the protection of consumers be properly confirmed, assessed and determined to be accurate. Congress recognized that importance long before the culture of mainstream misinformation became so entrenched, and that importance has only increased exponentially since then, since the new reality is that anyone with a keyboard or a phone can manufacture 'publicly available' information in an instant. Proceeding with this exemption will result in the Commission adding to the misinformation assaulting consumers and society as a whole, resulting in a reduction of trust in the Commission's reliability and integrity, as well as damaging the protection of consumers and to the viability and survival of the businesses that support them.

#### Saferproducts.gov

Related to the concerns raised regarding publicly available information, the proposal in the 2023 SNPR to expressly allow 'reports of harm' from the saferproducts.gov database is of significant concern since it is evident that the simple presence of a report, in and of itself, is being treated by the Commission as an actual (and by inference, factual) instance of an incident determined to have been caused by a product. All reports of harm on the database need to be investigated for veracity, actuality and to ensure that the product(s) in question did in fact cause an incident. The Commission recognizes that the information provided on the saferproducts.gov database is not reliable *prima facie*<sup>16</sup>, yet even knowing it not to be the case, it is proposing to rely on it as an actionable incident simply by its mere presence on the database.

The Saferproducts.gov database allows unrestricted access to public comment, and even when a manufacturer or private labeler is identified they have limited recourse to attempt to follow up in order to verify the facts associated with the report other than to request that the reporter contacts the company directly. In addition, multiple reports may be entered for the same alleged incident, and there is no mechanism to address or to prevent malicious reports, such as those with an intent to misinform so as to damage or destroy. It is unclear how the Commission would be able to ensure accuracy or fairness without the involvement of the manufacturer or private

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<sup>16</sup> "Disclaimer: CPSC does not guarantee the accuracy, completeness, or adequacy of the contents of the Publicly Available Consumer Product Safety Information Database on SaferProducts.gov, particularly with respect to information submitted by people outside of CPSC." [www.saferproducts.gov](http://www.saferproducts.gov)

labeler to provide necessary considerations, including any relevant test reports & whether or not the specific product in question was actually provided for sale by the manufacturer or private labeler, or was a counterfeit item (which, while it may resemble a manufacturer's product, is not). In the instance of a counterfeit ('fake') product, any notification by the Commission identifying the item with a manufacturer of a genuine product would result in misinformation to the consumer and irreparable damage to the manufacturer *who had no relation to the fake item in the first place*. The Commission cannot be sure of the accuracy of their information without confirming the necessary facts, and the simple presence of a report of harm, without a proper and accurate assessment, cannot and should not be used as presented in any subsequent Commission notice or action.

Additionally, the 2014 NPR and 2023 SNPR do not provide consideration for what would and would not be considered to be a 'report of harm'. For example, a report that a product 'might' cause harm may or may not be factually correct. As such, the scope for 'report of harm' should not automatically include those reports that describe a concern with a perceived potential for harm, as opposed to reported occurrences, and once again, any report needs to be verified for accuracy, actuality and causality. Otherwise it is a report only, not an expression of actual fact.

#### Information not previously disclosed

The 2014 NPR originally proposed including "Information that is substantially the same as information that the Commission previously disclosed in accordance with section 6(b)(1), except as specified in § 1101.31(d)."<sup>17</sup> to the list of information not subject to section 6(b)(1). The Commission, in response to concerns that the proposal was "...vague and difficult to apply..."<sup>18</sup>, proposed the following modified text as exempt from section 6(b); "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."<sup>19</sup>, but the new text carries the same ambiguity as the previous proposal, since in practical terms 'in context' is no different than 'substantially the same'. As an example, and following the previously stated concerns regarding a 'report of harm', another 'report of harm' on the same alleged product as had been subject to a previous notice could be construed as not being materially different (i.e., 'substantially the same') since it would be seen as being related to the same product even though the circumstances may or may not relate to (a) actual fact, (b) causation as opposed to association or (c) other different underlying but relevant factors, any of which could lead to an incorrect assumption of substantial similarity.

#### Proposed changes to § 1101.13

The 2023 SNPR proposal for the insertion of two new sentences "(1) information about categories of consumer products, provided such information will not permit the public to ascertain readily the identity of the products' manufacturers or private labelers, and (2) information about manufacturers or private labelers, provided such information does not designate or describe a consumer product."<sup>20</sup> contradicts the asserted exclusion from the scope of section 6(b) because information about a category of consumer products affects *all* products in the category from *all* manufacturers or private labelers within the category. As such, each and

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<sup>17</sup> 79 FR 10715

<sup>18</sup> 88 FR 10435

<sup>19</sup> Id.

<sup>20</sup> 88 FR 10436

every manufacturer with products in that category would be affected without regard to section 6(b), contrary to the stated restriction listed in section 6(b)(1) that "...the Commission shall, to the extent practicable, notify and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information."<sup>21</sup>. In addition, instead of proposing to exclude entire product categories from section 6(b)(1), since all manufacturers and their products would be readily ascertained to be identified by the public, the Commission would need ensure that the requirement that "...information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act."<sup>22</sup> is addressed under section 6(b) for *each and every* affected manufacturer or private labeler and their products. It is also important to bear in mind that a notice relating to an entire category leads to the public having to determine what products and manufacturers may or may not be included, leading to the potential for the public to incorrectly conclude a manufacturer to be producing a product in the category, resulting in further potential for misinformation. The Toy Association requests the Commission to review and withdraw the proposed insertion of these two new points from the SNPR.

#### Proposed Changes to § 1101.21

The proposed changes ignore the fact that communication may be made between the commission staff and a manufacturer, either to ascertain fact or challenge/query the content or text of the commission's notice. This internal correspondence relating to section 6(b) does not and should not constitute public-facing comments by the manufacturer, and is in effect being used as means to stifle communication by the affected manufacturer or private labeler – resulting in an *actual* instance of a 'gag rule' - by, as per the proposed change, threatening that any and all communication, including objections to disclosure relating to the section 6(b) process will be disclosed unless expressly requested otherwise, along with a requirement for justification (apparently then also published in lieu of the text requested to be withheld). This concern is exacerbated by the proposal to remove § 1101.21(b)(5) in its entirety<sup>23</sup>, as the current rule at § 1101.21(b)(5) explicitly states that "A statement that a request that comments be withheld from disclosure will be honored."<sup>24</sup>.

The automatic release of all communication between a manufacturer or private labeler and the commission as part of a section 6(b) notice should not be used as a threat or dampener on the necessary discourse resulting from the process. Only the statement/summary that a company or private labeler has requested to be included in the section 6(b) notice should be considered for inclusion in the notice. The SNPR needs to clearly differentiate between responses to the Commission as part of the section 6(b) process, and the actual 'comments' to be disclosed.

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<sup>21</sup> 15 U.S.C. 2055(b)(1)

<sup>22</sup> Id.

<sup>23</sup> 88 FR 10437

<sup>24</sup> 16 CFR 1101.21

### Proposed Changes to § 1101.33

The 2023 SNPR proposes to amend § 1101.33(a)(1) to require that "...requests regarding the disclosure of a manufacturer's or private labeler's comments to be in writing"<sup>25</sup>, however, if this is to be implemented, the requirement should clearly state that 'in writing' allows electronic communication as an option for the manufacturer or private labeler.

The decision by the Commission to revise § 1101.33(b) to no longer recognize the protections for information subject to attorney/client privilege will unnecessarily impede the section 6(b) process, since confidential privileged attorney work product and analysis may provide pertinent information that would not otherwise be available; whereas continuing to recognize and respect this information as privileged can expedite investigations and assist in resolving disputed or incorrect information quicker. The information commonly under privilege is often highly technical and highly relevant to any investigation and should not be demanded by such a blunt dismissal of the attorney/client privilege provisions. Conversely, a reverse requirement of disclosure of any expert analysis, along with test data, carried out by CPSC staff should be disclosed to the manufacturer, subject to confidentiality, to allow a full review of information for veracity and accuracy and to allow a more meaningful review of all available data in order to arrive at a correct and accurate assessment as expeditiously as possible.

### Proposed Changes to § 1101.61

The proposal in the 2023 SNPR to require that a submitting firm is expressly required to identify both section 15(b) and 16 CFR 1115.13 in order for the Commission to recognize safeguards under section 6(b)<sup>26</sup> is unnecessarily restrictive & burdensome, and ignores Congress' clear intent for information submitted under section 15(b) to be protected regardless of reference to other rules or regulations. Reference to 16 CFR 1115.13 notwithstanding, the requirement of section 15(b) is and should be protected. The proposed change introduces a potential for the Commission to ignore or deny section 6(b) safeguards if only section 15(b) is referenced, again running counter to the language and intent of section 6(b) consideration of section 15(b).

The proposal in the 2023 SNPR to remove the second sentence of § 1101.61(b) which states that "Section 6(b)(5) also applies to information voluntarily submitted after a firm's initial report to assist the Commission in its evaluation of the section 15 report."<sup>27</sup> contradicts Congress' intent as well as the Supreme Court's determination that "Section 6(b)(1) by its terms applies to the public disclosure of *any information obtained by the Commission pursuant to its authority under the CPSA*, and to any information to be disclosed to the public in connection therewith."<sup>28</sup> (emphasis added). The information provided subsequent to a section 15(b) initial report should continue to be considered part of section 15(b) and should not be excluded from section 6(b) safeguards. Additionally, the proposed removal of the sentence would introduce a potential for any repeat of the initial information submitted under section 15(b) to become removed from section 6(b) safeguards for the sole reason that it happened to be present in the additional information.

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<sup>25</sup> 88 FR 10441

<sup>26</sup> 88 FR 10444

<sup>27</sup> Id.

<sup>28</sup> Consumer Product Safety Commission v. GTE Sylvania, Inc., at p.109

The 2023 SNPR proposal to amend § 1101.61(b) in order to add a reference to include section 6(a) in the section 15(b) disclosure parameters<sup>29</sup> should not be applied as proposed since the inclusion of a reference to section 6(a) applies only to § 1101.61(b)(3) in the 2023 SNPR<sup>30</sup> and only if the person who submitted the information under section 15(b) agrees to its public disclosure (based on the rationale presented in the 2023 SNPR). The inclusion of section 6(a) does not apply to the circumstances in 1101.61(b)(1), (2) or (4), and as such, should not be present in § 1101.61(b).

### Proposed Changes to § 1101.63

The proposed revision from the 2014 NPR, further amended in the 2023 SNPR to add ‘publicly available’<sup>31</sup> or ‘available to the public’<sup>32</sup> information to the list of exemptions to section 6(b)(5) can and will lead to information used and notified by the Commission to be misleading, false and/or inaccurate. This does not serve the public interest or meet the Commission’s duty to ensure that information used is accurate and not misleading, as has been presented earlier in this document.

### Conclusion

The statements made by the Commission that section 6(b) is a ‘gag rule’ are simply not true. The Commission can, and does, already have the ability to act swiftly when the circumstances arise. What should not be supported is swift action in the absence of accuracy, due diligence and fairness.

The changes proposed in the 2014 NPR were shown to introduce significant areas of concern that weakened the provisions and framework as set forth by Congress, and the added amendments proposed in the 2023 SNPR serve to weaken those safeguards further by either re-wording without addressing the concerns raised, or by introducing new and unreliable amendments that create additional potential for misinformation to affect and determine the actions of the Commission. These changes, if implemented, will result in erosion of consumer trust in the messaging of the Commission, and will damage companies and their employees (who are at their very core, are consumers as well) by removing the ability of those entities to be aware of potential Commission activity or to be able to correct or assist in ensuring the accuracy of the information used. Furthermore, section 15(b) and section 6(b) are intended by Congress to work together; an absence or reduction of the safeguards established by Congress under section 6(b) will have a negative effect on section 15(b) reporting as well – and most importantly, will result in reduced protections for the consumer.

The Toy Association urges the Commission to recognize the potential for damage from these ill-considered changes to U.S. consumers as well as the companies that manufacture consumer products, and to amend the SNPR accordingly to continue to ensure that the disclosure of information identifying a specific product, manufacturer or private labeler is accurate and fair in the circumstances, and reasonably related to effectuating the purpose of the statute.

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<sup>29</sup> 88 FR 10445

<sup>30</sup> 88 FR 10444

<sup>31</sup> 79 FR 10721

<sup>32</sup> 88 FR 10445



We thank you for your attention to our comments. If you would like to further discuss any of the issues raised, please let us know.

Regards,

A handwritten signature in black ink, appearing to read "Steve Pasierb". The signature is fluid and cursive, with the first letter "S" being particularly large and stylized.

Steve Pasierb  
President & CEO  
The Toy Association