Consumer Product Safety Act, Section 6(b): Myth versus Fact

Background

The self-reporting requirements of CPSA section 15b, 15 U.S.C.2064(b)—which require companies to report potentially defective or unsafe products—and the information disclosure procedures in section 6(b) (15 U.S.C. 2055(b)) work together to strike a balance between important, competing interests. They 1) assure that, through reporting, CPSC has access to information it needs to make good compliance and regulatory decisions; 2) assure the public that the information the government discloses is reasonably accurate and; 3) encourage reporting by easing company concerns that their reports will result in reputational harm from inaccurate or misleading disclosure.

Section 6 requires CPSC to take reasonable steps to assure that disclosure of information identifying a specific product, manufacturer or private labeler is: 1) accurate; 2) fair in the circumstances; and 3) reasonably related to effectuating the purpose of the CPSA and related laws. There is an expeditious process to ensure these requirements are met:

Based on information available to it, perhaps through information reported under section 15(b), **the Commission determines it may be required to release information** related to a company.

Prior to public disclosure,the CPSC notifies the product manufacturer of the potential disclosure, provides a summary of what it intends to disclose, and under normal circumstances gives the manufacturer at least 15 days to respond. **This 15 day period may be shortened if the agency finds that the public health and safety so requires.**

The Commission decides whether to release the information, possibly in a limited or redacted fashion. The Commission evaluates the validity of the company comments based on the specificity, completeness, and credibility of the comments and any supporting documentation.

If the Commission decides to release the information, it provides the company at least five days prior notice. This too can be shortened if required by public health and safety.

Although very rarely done, a manufacturer may bring an action in federal court to enjoin disclosure, but the agency may seek expedited treatment of this action if public health and safety requires.

These requirements do not apply to information about a product that is subject to a rulemaking or adjudicatory proceeding. Further, under section 6(b)(5), 15 USC 2055(b)(5), the CPSC may not disclose information submitted to it under section 15 unless the company enters into a voluntary recall; the Commission has begun an administrative proceeding for a mandatory recall; the company agrees; the Commission finds the public health and safety requires disclosure; or the Commission reasonably believes that the product is in violation of the act. If the Commission discloses inaccurate or misleading information it must correct the information.

Unfortunately, some stakeholders have vilified and grossly distorted the realities of the intent and effect of section 6(b). This document outlines the myths regarding the adoption and effect of section 6(b).

Myth	Reality
Section 6(b) has prevented and/or delayed the CPSC's ability to inform the public about unsafe products, causing injuries and, possibly, deaths.	There is no evidence to support the claim that CPSC has been prevented by law or outside company action from disclosing important information about unsafe products. CPSC has every ability under existing law to disclose accurate,verified information and to do so quickly—it need only decide to do so and, when needed, use the law's acceleration and emergency authorities. In instances where the Commission has chosen not to disclose information or has not acted quickly, it is the fault of the agency's internal investigative process or its administration, not the statutory requirements.
All information reported to CPSC needs to be publicly released to the public.	Many CPSC investigations do not result in a finding that a product presents a hazard. Warning the public about products that are not defective and do not in fact pose an unreasonable risk does not advance public safety. And it is unnecessarily destructive to product and company reputation, thus strongly deterring disclosure of information to the Commission and the critical cooperation needed between the regulated sector and CPSC.
Section 6(b) grants companies a veto over information disclosure.	All decision making on what information to release is done by the Commission. The statute requires the Commission to give the company a summary of what will be disclosed and to consider the company's comments concerning accuracy and fairness. After this consideration, the agency decides whether or not to disclose.
Section 6(b) allows companies to delay public disclosure of critical safety information.	The Commission has full discretion over the time companies have to provide comments on a potential disclosure. That amount of time can be as short as 15 days—or even shorter if the Commission determines that public health and safety so require.
Section 6(b) was adopted by Congress to block truthful and important safety information from reaching consumers.	On a bipartisan basis, in 1972, Congress gave the CPSC broad information-gathering authorities, including the self-reporting requirement in section 15(b). The provision is broad and encourages companies to take an "if in doubt, report" approach. Companies must report if they receive information that a product COULD be defective and create a substantial risk of injury to consumers—often this is proven not to be the case. Congress at the time knew of examples demonstrating the damage possible from release by government agencies of inaccurate information. Thus, it included section 6(b) as a counterweight to the broad information-gathering authorities. Companies are required and encouraged to provide even preliminary and speculative information to the agency with the assurance that the information will not be inappropriately released.
There is no reason to restrict the release of information beyond the provisions of the Freedom of Information Act (FOIA)	FOIA protects the disclosure of confidential business information and certain personal information, but it does not prevent the release of inaccurate and misleading information. There have been examples at the FTC, FDA, and even CPSC where disclosure of erroneous and inflammatory information destroyed the market for a product and endangered the viability of a company, particularly smaller ones. With amendments in 1981, Congress specifically responded to complaints that CPSC was "regulating by press release." The amendments gave companies the ability to challenge the agency's determinations in court. Subsequent amendments have allowed CPSC to accelerate the comment process when necessary, shortened company time for comments, and authorized expedited litigation.
Because of the threat of expensive and burdensome litigation, CPSC caves into manufacturers' demands.	It is rare for companies to challenge CPSC in court on section 6(b) disclosure. On the rare occasion where this has happened, there were mixed results for the companies. And the litigation itself inevitably requires the disclosure of the very information the company is trying to prevent—any victory for the company would be a pyrrhic one at best. The Federal government has more resources to engage in litigation than any single company. Companies must depend on the integrity and the rule of law being administered by the court.