



UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

MINUTES OF COMMISSION MEETING

Decisional Matter: Supplemental NPR to Update 16 CFR Part 1101 **(Briefing package dated January 11, 2023)**

February 8, 2023

Chair Alex Hoehn-Saric convened the February 8, 2023 meeting of the U.S. Consumer Product Safety Commission in open session at 10:00 a.m. The meeting was held remotely. Commissioners Peter A. Feldman, Richard Trumka Jr., and Mary T. Boyle were in attendance. The Chair made welcoming remarks, and summarized the agenda item for the meeting.

Chair Hoehn-Saric introduced the decisional matter pending before the Commission and introduced staff that was present to address questions from the Commission: Austin Schlick, General Counsel; Melissa Hampshire, Assistant General Counsel; Amy Colvin, Attorney, Office of the General Counsel, and Jason Levine, Executive Director.

Chair Hoehn-Saric advised that each Commissioner would have five minutes to ask questions of staff, followed by consideration of amendments. Before the questioning session, the Chair stated that it was not appropriate to discuss legal advice given to the Commission by the Office of the General Counsel outside of Executive Session.

Chair Hoehn-Saric called for any questions for staff. The Commissioners did not have questions for staff. The Chair excused staff and commenced consideration of the Supplemental Notice of Proposed Rulemaking (SNPR) to update 16 CFR part 1101, as proposed by staff, as well as any amendments to the SNPR.

Chair Hoehn-Saric did not have any amendments and recognized Commissioner Feldman for an amendment. The Chair advised that Commissioner Feldman could have three minutes to describe his amendment. Commissioner Feldman described and explained the rationale for his amendment, which would add two additional questions to the SNPR, and seek public comment on: 1) the best practices for Commission evaluation of the sources for information deemed publicly releasable under the proposed rule, and 2) whether periodic releases of information from SaferProducts.gov could be utilized by the Commission as a transparent and neutral mode of information sharing with the public (the proposed amendment is attached).

Chair Hoehn-Saric called for a second, and seconded the motion. The Chair recognized each Commissioner in order of seniority for questions, and the Commissioners discussed their respective positions on the amendment. Hearing no further discussion or questions, the Chair called for a vote on Commissioner Feldman's amendment. The Commission voted 2-2, a majority was not reached, and the amendment was not

adopted. Chair Hoehn-Saric and Commissioner Feldman voted to approve the amendment. Commissioners Trumka and Boyle voted to not approve the amendment.

The Chair called for any other amendments and hearing none, moved for approval of staff's draft SNPR to update 16 CFR part 1101, and publication of the same in the *Federal Register*. The Chair called for a second and Commissioner Boyle seconded the motion. The Commission voted (3-1) to approve the draft SNPR, and to publish the same in the *Federal Register*. Chair Hoehn-Saric, Commissioners Feldman and Boyle voted to approve the draft SNPR. Commissioner Trumka voted to not approve the draft SNPR.

Chair Hoehn-Saric stated that each Commissioner would have up to 10 minutes for closing remarks. The Chair provided his closing remarks and then recognized each Commissioner for closing remarks. In his closing remarks, Commissioner Feldman referenced two articles¹ in connection with information disclosure at the Commission; the articles have been associated with the docket for this proceeding.

There being no other business, Chair Hoehn-Saric adjourned the meeting at 10:19 a.m.

For the Commission:

Alberta E. Mills

Attachments: Proposed Amendment by Commissioner Feldman (not adopted by the Commission)
Statement by Chair Hoehn-Saric
Statement by Commissioner Feldman
Statement by Commissioner Trumka
Statement by Commissioner Boyle

¹ *Section 6(b) Myths and Facts* by Alan Schoem, May 14, 2021, and *CPSC Enforcement Trend: Unilateral Press Releases* by Matthew Cohen, October 13, 2022.

Section 6(b) Amendment

COPF Amendment 1: Request for Additional Comment

On page OS 70, immediately before subheading “vi,” insert the following:

The proposed rule requires the Commission, when releasing information that has already been made available to the public, to clearly indicate the source of the information and to ensure that the use of the information is accurate and not misleading. We seek comment whether this would require the Commission to assess specific publications, and if so, whether there are best practices the Commission should consider or criteria the Commission should use?

On page OS 67, immediately before the paragraph beginning “JPMA’s argument,” insert the following:

Currently, reports of harm are available to the public by searching on SaferProducts.gov. We request comment whether periodically (e.g., once a week or a month) identifying what was newly reported on SaferProducts.gov, or similar practices, could provide the Commission alternatives that make it unnecessary to highlight specific information from SaferProducts.gov.



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

CHAIR ALEXANDER D. HOEHN-SARIC

Statement of Chair Alexander Hoehn-Saric on Passage of the Supplemental Notice of Proposed Rulemaking Interpreting Section 6(b)

February 8, 2023

Today the CPSC has taken a big step towards improving our rules implementing Section 6(b) of the Consumer Product Safety Act (CPSA). This is long overdue as our current rules, which are more restrictive than the statute requires, were adopted almost forty years ago, and have remained essentially unchanged since that time. Section 6(b) often prevents the CPSC from issuing timely warnings about dangerous consumer products when the Commission must negotiate with the manufacturer to make any relevant information public. When the CPSC is delayed in releasing information on product-related deaths and injuries, additional deaths or serious injuries can occur.

CPSC is the only federal safety agency with this statutory restriction. As long as 6(b) remains in law, the CPSC cannot adequately inform the public of unreasonable risk of injury associated with products that are often already in consumers' homes. That is why moving forward with the Supplemental Notice of Proposed Rulemaking today is so critical – the CPSC can and should provide as much detailed safety information as possible under our statute so that consumers can make informed decisions for themselves and their families.

Through this proceeding, I hope to align our rules with the statutory limitations of the CPSA and enable the agency to better function in the world we are living in today – where information can be shared at the click of a button. By taking responsible steps to prioritize the safety interests of the American people over protecting corporations in our section 6(b) rules, the Commission can better satisfy its mandate and protect the public against unreasonable risk of death or injury caused by dangerous products. I look forward to receiving public comment on the proposal and will continue to work with my colleagues to move forward on this important issue.



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814
COMMISSIONER PETER A. FELDMAN

**STATEMENT OF COMMISSIONER PETER A. FELDMAN
REQUESTING COMMENT ON INFORMATION DISCLOSURE UNDER 6(b)
FEBRUARY 8, 2023**

Today, the U.S. Consumer Product Safety Commission (CPSC) voted to issue a supplemental notice of proposed rulemaking (SNPR) on the Commission's procedures for disclosing information to the public. I voted in favor of issuing the notice because public input is a crucial part of our decision-making process. I believe we need more information on the potential effects of this proposed rule, and I am disappointed that a majority of my colleagues did not support my amendment to add two specific questions for comment.

Under this proposal, the Commission may endorse existing third-party information, such as news reports. In doing so, CPSC must decide whether information is accurate and not misleading. My amendment sought comment on how the Commission should evaluate this information for release. This process would involve an assessment of the credibility of individual outlets, reports, or authors, as well as determinations about bias, journalistic standards, and other factors. My amendment asked the threshold question of whether the Commission should engage in this sort of content selection, and if so, what standards and safeguards should apply.

The proposed rule also would give the Commission additional flexibility to publish information from SaferProducts.gov. My amendment asked if it would better serve the public interest to release this information regularly rather than selecting specific items to release occasionally. I am interested in learning if periodic and routine information sharing would provide for more neutral and transparent dissemination.

Our public information sharing must provide consumers with timely, actionable information about safety. At the same time, our process must ensure accuracy and fairness. I hope that the final rule will strike the appropriate balance between these two objectives. I have concerns about this SNPR but voted to publish it to facilitate public comment.

While my amendment was not adopted, I nevertheless urge the public to comment on the following two issues to provide a complete record to inform our next steps:

1. The proposed rule would allow CPSC to publish third-party content. Inherent in such activity, CPSC would need to engage in a content selection process to decide which publications are appropriate for release and which are not. Should the Commission engage in this sort of content selection? If so, what standards and safeguards should the Commission apply?

2. Currently, reports of harm are available to the public on SaferProducts.gov. Would the routine release (e.g., weekly or monthly) of new reports provide an opportunity for greater transparency? Would periodic releases allow CPSC to disseminate this information in a more neutral manner? What standards and safeguards should apply?



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER RICH TRUMKA JR.

CPSC MUST FIX GAG RULE REGULATIONS SO CONSUMERS CAN PROTECT THEIR FAMILIES

FEBRUARY 8, 2023

Every American deserves the opportunity to protect themselves and to keep their families safe. As a CPSC Commissioner, I should be able to warn you when I know about a dangerous product so you can use that information to protect your family.

The Gag Rule¹ is, undoubtedly, an anti-consumer hurdle to transparency. It makes it hard, and sometimes impossible, for me to share critical safety information with you. But this agency also willingly raised the hurdle even higher for itself, starting in 1983, when it passed a regulation tacking on additional burdens that prevented us from informing consumers without extensive and time-consuming negotiations with regulated companies. As a result, historically, this agency has rarely communicated about product safety without corporate consent.

Against that history, our duty to the public is clear: we must strip away all burdens to information-sharing that are not required by law. That is what I expected an SNPR concerning the Gag Rule to do. The SNPR that came to the Commission for today's vote does not meet this test.

I voted "no" because I do not support the direction this proposal takes. It fails to improve our ability to communicate important safety information to the public as rapidly and completely as the statute allows. It does not embrace the pro-consumer and pro-transparency approach that Americans have every right to expect.

Almost a decade ago, in 2014, this agency published an NPR that, while very modest, had one clear benefit for transparency: it allowed the Commission to comment on information that was already public. But the SNPR walks backwards from that position. Though the SNPR acknowledges that the Gag Rule only applies to disclosures, and that sharing information that is already public cannot possibly be a "disclosure," it still adds unnecessary burdens to our ability to share information. It adds ambiguous language that could impose new constraints on our ability to "characterize" accurate, and already-public information. The proposal would open new

¹ 15 U.S.C. § 2055.

doors for outside interests to censor our speech and hide safety information from consumers. The SNPR unjustifiably abandons the modest improvements CPSC proposed in 2014.

This SNPR is also a missed opportunity to bring sunlight to product safety under two important exclusions to the Gag Rule:

First, our statute anticipates that we will warn the public immediately when risks are serious and imminent, connecting public health and safety to the concept of practicability. 15 U.S.C. § 2055(b)(1). This proposal fails to provide meaningful examples of how we could use our full authority to quickly warn the public of danger when notifying a manufacturer and waiting for a response is not practicable.

Second, our statute provides that information is subject to corporate preclearance only if that information was obtained under CPSC's unique information-gathering powers, granted by the specified Act,² or is disclosed to the public in connection with information specifically obtained that way. A unanimous Supreme Court has clarified that the purpose of corporate preclearance under the Gag Rule is to protect manufacturers' reputations from our disclosure of sensitive, private information that we gather under our vast statutory information-gathering powers. *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 111-12 (1980) (Rehnquist, J.). Information that we come across in different ways—for example, information that we generate through our own research on products or information that we gather using public sources—was never intended to go through the Gag Rule's elaborate corporate censorship process. This proposal gives no content to that statutory exclusion.

Rather than open critical safety information to the sunlight, this SNPR would draw a new maze through the darkness. I cannot think of any practical examples where this proposal would allow us to share new, important information with the public, or increase the speed at which we share it. This maze of new procedures gets us nowhere.

Now that the SNPR will be published, the role of consumer commenters is very important. I expect you to urge us to correct the shortfalls of this SNPR. I expect you to tell us how we can best get you as much information at the law allows. When you do that, I am confident that our final rule briefing package will take a significantly different approach. At the final rule stage, we need to think about how we can get the most information to consumers as quickly as possible. Where the Gag Rule stops us . . . so be it. But there is no room for us to *stop ourselves* from doing the right thing. We owe consumers more than that.

² 15 U.S.C. § 2055(b)(1), (d)(1).



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY BETHESDA, MD 20814
COMMISSIONER MARY T. BOYLE

Commissioner Mary T. Boyle's Statement on SNPR to Update Information Disclosure Regulations under CPSA Section 6b: Aiming for Transparency that Protects Consumers

February 8, 2023

CPSC's health and safety mission requires that we tell the public when we have actionable information about unsafe products. Lives and livelihoods are at stake. CPSC makes every effort within our authority to publicize hazards widely in order to prevent needless tragedies, but the law—in the form of Section 6(b) of the Consumer Product Safety Act—places restrictions on how the agency shares that information. Although most consumers are unaware of 6(b), those restrictions affect the flow of safety information to the public.

As the Commission takes a fresh look at rules governing the way we provide safety information to consumers and educate the public about known hazards, I plan to stay focused on making sure that consumers' rights to make informed choices are given their due. To that end, I also call on industry—those who make and sell consumer products—to take a fresh look at their responsibility to share information to prevent potential harms caused by their products. Consumers deserve timely information and education about potential hazards, and as the experts in their products, companies should make good on the commitment to safety. Even if companies *can* use Section 6 as a means to limit or delay disclosure, I am challenging them to consider a different question: *should* they instead be forthcoming with information to help consumers avoid harm? For me, the answer of course is yes.

The information ecosystem in which consumers, manufacturers, and the CPSC operate in 2023 is significantly different than the one in 2008, when this rule was last updated. Now more than ever, the public expects transparency—from government and also from the businesses they patronize and the companies where they work. What counts is our common commitment to safety, and surely that should take precedence over parsing the requirements of section 6(b).

I look forward to reviewing comments from stakeholders and to advancing the goal of sharing information widely to promote safety.