UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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Memorandum

Date: February 4, 2014

TO : The Commission
Todd A. Stevenson, Secretary

FROM : Stephanie Tsacoumis, General Counsel
Melissa V. Hampshire, Assistant General Counsel
Amy S. Colvin, Attorney, Division of Enforcement and Information, OGC
Alberta E. Mills, Freedom of Information Officer

SUBJECT : Responses to Commissioner Buerkle's Questions Regarding Staff's Proposed Amendments to 16 C.F.R. part 1101

On January 17, 2014, Commissioner Buerkle provided to staff questions regarding staff's proposed changes to 16 C.F.R. part 1101, "Information Disclosure Under Section 6(b) of the Consumer Product Safety Act." Commissioner Buerkle posed some of these questions to staff at the briefing on January 24, 2014 and staff responded. Following the briefing, Commissioner Buerkle requested that staff provide responses to the questions in writing. Commissioner Buerkle's questions and staff's responses appear below.

QUESTION: On p. 3 of the table of staff recommendations, in §1101.11(a)(1) the phrase "which is designated or described in a manner which permits its identity to be ascertained readily by the public" is proposed to be deleted. To better understand the effect of the proposed deletion, please give several examples of information that would be subject to §6(b) under our current regulations with this language but would not be subject to §6(b) if the proposed deletion were made. What will be the impact to §6(b) as a result of this change?

RESPONSE: Staff did not intend this change to be substantive. The proposed deletion amends the regulatory language to more accurately reflect statutory requirements and should not result in any change to either existing practice or policy.

Under the statute, the public must be able to ascertain readily the identity of the manufacturer or private labeler from the information proposed for release. 15 U.S.C. § 2055(b)(1) (notification required "if the manner in which such consumer product is to be designated or described . . . will permit the public to ascertain readily the identity of

such manufacturer or private labeler" (emphasis supplied)). This statutory requirement is echoed in 16 C.F.R. § 1101.11(a)(4).

The statute does not require that the public must be able to ascertain readily the identity of the product from the information proposed for release. Consistent with the statute, existing practice does not require consideration of, or a determination with respect to, whether the public may ascertain readily the identity of the product. Because the statutory requirement currently is addressed in the regulation and the referenced phrase in 16 C.F.R. § 1101.11(a)(1) has not been implemented as a separate substantive requirement, staff views the referenced proposed amendment as a change to conform to the statute as well as to existing practice.

QUESTION: On p. 27 of the Preamble, concerning re-notification, there are several observations made concerning the actions of firms that receive re-notifications. Assuming these comments are based on a review of re-notification procedures in a recent calendar year, please provide our office the opportunity to see the data that substantiates those comments (copies are not necessary).

RESPONSE: As referenced on page 11 of the draft Preamble, during calendar year 2012, of the 461 firms receiving an initial 6(b) notice, 114 firms, or approximately 25%, requested renotification.

As also noted in the Preamble, staff's experience is that renotification does not result in new substantive information from the firm. As a result, for the majority of responses to renotifications (26 out of 33 responses) that occurred during calendar year 2012, the disclosure result following renotification was identical to that following the initial notice. In other words, agency resources and staff time were expended in an effort that yielded no new information and no different result. For the remaining 7 responses, staff modified the disclosures slightly to account for firms' additional claims of confidentiality and claims that the material proposed to be released was not responsive to the subsequent request. In short, the renotification effort proved duplicative of the initial notification process.

QUESTION: On page 31 of the Preamble in the discussion of changes to 1101.33(b) (3) (attorney-client privilege) there is reference to the review of 459 notices processed by our FOIA office in FY2012. The findings of this review are the rationale being used for change to 1101.33(b)(3). Please provide our office with the review of this information and the details concerning the dozen examples of where this privilege was cited and why.

RESPONSE: As noted, of the 459 section 6(b) notices processed by staff in FY2012, 12 responses included claims of attorney/client privilege or work product doctrine. Of these 12 responses, only seven (or approximately 1.5%) appear to be unique (a number of the

responses were from the same firm or the same law firm). For instance, one firm claimed attorney-client privilege protection, along with other claims, in four separate responses using parallel language in each. In none of the 12 responses was attorney-client privilege or work product doctrine protection relied upon solely; in each, a litany of protections against disclosure was asserted.

QUESTION: Is there concern on the part of staff that the suggested change to this rule will negatively impact the manner in which firms currently share information with CPSC? Have any 'chilling' effect on the sharing of information?

RESPONSE: Staff has no basis for believing that removal from the rule of the example relating to attorney-client privilege will have a negative impact on the manner in which firms currently share information with the Commission. As noted above and in the Preamble based on a review of FY2012 experience, firms rarely assert attorney-client privilege or attorney work product, and also do not assert the protections independently of other claims.

Indeed, applicable law, which would deem these legal protections waived when firms provide information to the Commission, would explain the dearth of references to attorney-client or work product protections in this context. Because attorney-client and work product protections are lost when information is submitted to the Commission, any related claim would – by definition – be unavailing. Removal of the referenced example not only accurately reflects applicable law, but also removes an example that staff believes could be misleading.

Staff notes that many effective claims for confidential business information protection are made in the 6(b) context; those protections will be unchanged and will continue to exist in accordance with the statute and the rule.

QUESTION: On p. 26 of the Preamble, staff proposes deleting the word "some" from the phrase "some reason," stating "reason" provides the staff with a more definitive standard for when staff will take additional steps to assure accuracy. Please explain further. Does staff view 'reason' as a higher standard than 'some reason' because it is "more definitive"?

RESPONSE: Staff's concern was that "some reason" was vague and imprecise, potentially encompassing a spurious or false claim that could unnecessarily require staff to take the additional steps referenced in the regulatory language. As an alternative, staff considered use of phrases such as "reasonable basis," "rational basis," "legitimate reason" or "compelling reason." Ultimately, staff rejected such alternatives as potentially establishing a different standard, and concluded that a simple reference to "reason" adequately covered the intent and did not imply that a false or spurious reason triggered further procedures. In short, staff's proposed change was in the nature of eliminating

unintended connotations. Staff thus does not view "reason" necessarily as a higher standard than "some reason."

QUESTION: On p. 26 of the Preamble, staff argues that the current regulation requires the Commission to provide §6(b) notice for subsequent disclosures of information that may differ only slightly, without any impact on accuracy, from the information the Commission initially released in accordance with §6(b). Staff then cites examples of the use of different fonts or layouts, or the insertion of a comma, as enough to trigger this re-notification.

Has such a minor issue of font type or comma triggered re-notification in the years of agency action under §6(b)? With what frequency?

RESPONSE: Staff proposed this change because the existing regulation explicitly requires renotification unless the "identical information" is disclosed again "in the same format." 16 C.F.R. § 1101.31(d). Thus, under a strict reading of 16 C.F.R. §1101.31(d), a change in font type or the insertion of a comma would trigger renotification.

Although staff made a number of inquiries in an effort to secure information that might suggest whether and to what extent non-substantive or immaterial changes resulted in renotification since 1983, staff understands that such information does not exist, applicable records must be requested from the National Archives and Records Administration, or additional analysis would require a time- and resource-intensive individualized review of files. Based on staff's inquiries, however, staff is not aware of a specific renotification that was triggered by such a change.

QUESTION: Is the proposed change to 'substantially' meant to allow for only small differences such as font changes or commas, or would 'substantially' possibly allow for larger differences to exist and yet not requirement re-notification? Please give examples of differences that would be allowed beyond font size, layout, or comma placement.

RESPONSE: As proposed by staff, renotification would not be required for disclosures of "substantially the same" information as previously disclosed in accordance with section 6(b)(1). The "substantially the same" phrase is one that the Commission and staff has implemented or addressed in other regulatory contexts under the CPSA, *see, e.g.*, 15 U.S.C. § 2056a(b)(1)(B)(i) ("substantially the same"), § 2078(f)(1)(B)(i) ("substantially similar"), § 2089(e)(2)("substantially similar"), and that is commonly used by other regulatory agencies, *see, e.g.*, 17 C.F.R. § 249.308, Form 8-K, General Instruction B.3 ("substantially the same information"); Item 6.05, Instruction ("substantially the same information").

Depending on the facts and circumstances, the "substantially the same" language could allow for differences beyond font changes without renotification. Staff would need to

assess relevant aspects of a particular situation in determining whether "substantially the same" information was previously disclosed after complying with section 6(b) protections. As an example – and depending on the specific facts and circumstances – staff may conclude that a summary of a previously-vetted press release that does not convey any new substantive information could be released without renotification.

QUESTION: On pp. 4 and 14 in the table of staff recommendations there is reference to the use of information that is publically available or disseminated.

Can our use of public data in this manner without §6(b) review ever be seen as a direct or indirect endorsement by the agency of said information?

RESPONSE: We do not believe that our use of public data in this manner without section 6(b) review would be seen as a direct or indirect endorsement by the agency of the information just as we do not necessarily endorse, directly or indirectly, information that is released pursuant to the requirements of section 6(b).

QUESTION: How do the Standards of Conduct address this?

RESPONSE: The general rule prohibiting endorsements, 5 C.F.R. § 2635.702(c), addresses an employee's use of official position, title or authority to endorse any product, service or enterprise. In particular, we are mindful that the standards of conduct require analysis of agency statements that could be construed as an endorsement of particular manufacturers or entities that are regulated by the Commission. We do not believe an information release of publicly available information in response to a FOIA request would violate these standards any more than the release of nonpublic information in Commission files.

We note that the prohibition on endorsements does not apply to "authorized agency actions; rather, the prohibition generally is focused on the personal, unauthorized conduct of individual employees who abuse their position to make endorsements." Office of Government Ethics, Memorandum to Designated Agency Ethics Officials from Robert I. Cusick, Director, DAEO-Gram DO-06-023 (Aug. 9, 2006) ("OGE Memo"). Thus, a CPSC Commissioner may not appear in a television commercial in which the Commissioner endorses an appliance produced by a former employer, stating that the product has been found by the CPSC to be safe for residential use. 5 C.F.R. § 2635.702(c) Example 1. On the other hand, "authorized agency actions" (including communication of facts and data) are not subject to the prohibition. *See id*. Example 3 (EPA Administrator may state that oil company refining operations are in compliance with EPA requirements even if company includes statement in TV commercials); OGE Memo ("simple factual statement" permissible).

Release of information in response to a FOIA request is an action that is authorized and required by applicable law. As an "authorized agency action," such releases under FOIA would not be considered "endorsements" under 5 C.F.R. § 2635.702(c).

QUESTION: On p. 5 of the table of staff recommendations, the last sentence of §1101.13 is proposed for deletion: "The Commission will provide the advance notice and opportunity to comment if there is a question whether the public could readily ascertain the identity of a manufacturer or private labeler." The reasoning given on pp. 13-14 of the Preamble is: i) that there exists a 'reasonable person' standard; ii) this sentence was adopted by the Commission in 1983 in response to comments; iii) it is vague; and iv) it is inconsistent with the 'reasonable person' standard. The fact that this was adopted by the Commission in response to comments is a normal procedure the agency takes in rulemaking.

Please clarify how the current regulation sentence proposed for deletion is 'vague', especially since it is a precautionary approach to situations where if there is a question whether or not to proceed with §6(b) notice, i.e. whether or not the reasonable person standard is always workable, it clearly states the agency should follow §6(b) notice and opportunity for comment.

Please comment also on whether this precautionary approach helps serve the purpose of saving the agency from violating the statute concerning §6(b).

RESPONSE: Section 1101.13 provides that the notice provisions of section 6(b) apply when a "reasonable person" receiving the information can readily ascertain the identity of the manufacturer or private labeler. The "reasonable person" standard is well established generally and with respect to CPSC requirements. *See, e.g.*, 16 C.F.R. § 1115.6(b); *U.S. v. Mirama Enterprises, Inc.*, 185 F. Supp.2d 1148, 1159 (S.D. Cal. 2002), *aff'd* 387 F.3d 983 (9th Cir. 2004) (reasonable person standard is not a reasonable expert standard). In practice, staff's implementation of the "reasonable person" standard in section 1101.13 errs in favor of providing notice.

What is not well established is the relationship between the "reasonable person" standard and the ensuing language in section 1101.13 referring to situations involving a "question" whether the public could readily ascertain the identity of a manufacturer or private labeler. Neither the plain language of section 1101.13 nor the related regulatory history provides assistance. Facts and circumstances may clearly or strongly compel a conclusion that a "reasonable person" can readily identify the manufacturer or labeler, yet a question may exist. Further, any question appears to trigger the requirement, no matter how trivial, inconsequential or irrelevant.

Because the statute does not require notice and opportunity to comment if a question exists regarding ascertaining the identity of a manufacturer or private labeler, because this "question" language creates interpretative issues and because the "reasonable person"

standard is well established and equitable, staff proposed deletion of the sentence imposing requirements if a question exists.

QUESTION: On p. 6 of the table of staff recommendations, staff proposes the requirement that a manufacturer or private labeler who objects to disclosure of its comments or a portion thereof, must provide the Commission with a rationale based on 'applicable statutory or regulatory basis or provision.' Since current regulation provides an objective criterion (i.e. if a request is made that comments be withheld from disclosure, it will be honored) and the proposal now provides for a subjective criterion ("evaluation by the Commission', p. 10), please give a list of examples of applicable statutory or regulatory provisions that would qualify as basis to not disclose aforesaid comments.

RESPONSE: Staff's proposed revision is intended to address the cases where a firm includes in its comments either:

(1) a blanket statement that the firm has no comments on the information proposed for release, or

(2) a statement that the firm does not object to the release of the information, but that the Commission cannot release the firm's "no objection" comment.

In these situations, staff is not provided with any basis for withholding comments from disclosure. Without any articulated reason to withhold comments from disclosure, staff's ability to assess the fairness of disclosure of comments, as required by section 6(b)(1), is severely compromised. Staff thus is placed in the position of either uniformly withholding comments from disclosure without basis or allowing disclosure without any information on which the requisite statutory determinations can be made.

To achieve a reasonable balance between the public interest in transparency and the rights of identified firms, *see* 48 Fed. Reg. 57406 (Dec. 29, 1983)(seeking to balance rights of public and rights of firms), and to fulfill the statutory obligation to assess whether disclosure is fair under the circumstances, staff believes that firms should articulate a rationale supporting a request not to disclose comments.

Staff's proposal does not require that a firm's rationale take any particular form, nor does staff's proposal require inclusion of a specific statutory or regulatory basis or provision. A statutory or regulatory provision may serve as the basis for a rationale supporting nondisclosure of comments and is offered in the proposed language as an example of how a rationale for nondisclosure might be substantiated. Although staff expects that many firms will argue for nondisclosure of comments based on confidential business

information prohibited from disclosure under applicable statutes and regulations, we expect that a firm's rationale will depend on, and be unique to, each proposed disclosure.

QUESTION: Since the same issue is raised on pp.8, 9, and 11 of the table of staff recommendations, affects multiple sections §§1101.21, 1101.24, 1101.31, and 1101.33, and the preamble addressing this issue on pp. 15-16 , 19-20, 23-24, and 29-30 does not provide examples that would justify not disclosing comments, it would be very beneficial to provide specific examples here.

RESPONSE: Because section 6(b)(1) requires subjective assessments such as "reasonable steps" to assure accuracy and the "fairness" of disclosure, *see* 16 C.F.R. § 1101.1(b), the disclosure (or nondisclosure) of comments necessarily will involve a facts and circumstances assessment. Conclusions could vary depending on the situation and the applicable context.

As noted, staff anticipates that various confidentiality-related arguments could support nondisclosure of comments. For instance, when commenting on an In-Depth Investigation (IDI) report, a firm may submit a confidential test report concerning the product that was the subject of the IDI. The firm's comments on the IDI report may refer to information in the test report. Conceivably, the discussion of the test report information in the firm's comments could be claimed to be confidential and the firm would therefore provide a confidentiality rationale as the basis for objecting to the disclosure of its comments.