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CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER ANNE M. NORTHUP

**STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE SMALL BATCH
REGISTRATION PROCEDURES**

December 22, 2011

Under administrative authority and without agreement from the Commission, the Consumer Product Safety Commission has implemented procedures under which small batch manufacturers can register to utilize an alternative testing requirement or exemption from third party testing and certification pursuant to 15 U.S.C § 2063(d)(4)(B). In doing so, the agency has inappropriately made a unilateral policy decision to publish the business name, city and state of any small batch registrant who cannot provide CPSC with “written notification pursuant to section 6 of the Consumer Product Safety Act” within fifteen calendar days of registering. I believe requiring section 6 notifications in the absence of a Freedom of Information Act (FOIA) request is a policy decision that should not have been made without the support of a majority of Commissioners. This unreasonable requirement undermines the relief Congress sought to provide to small batch manufacturers and bypasses the FOIA request protocol that provides important transparency.

Congressional Intent

The small batch manufacturer provisions of Pub. Law No. 112-28 are intended to reduce the costs of third-party testing for those manufacturers least able to bear them. Because the costs of third-party testing are so high and frequently require the destruction of the products tested, many low volume products cannot be tested in sufficient numbers to satisfy the “high degree or assurance” standard set forth in our regulations and still be price competitive. In an effort to prevent small business closures and the accompanying financial hardship to business owners and their employees likely to be caused by the imposition of the CPSIA’s third party testing requirements on small batch manufacturers, Congress directed the CPSC to provide small batch manufacturers either alternative testing requirements or a complete exemption from third party testing and certification. 15 U.S.C § 2063(d)(4)(A). It is impossible to imagine that Congress meant to imperil small batch manufacturers who take advantage of this avenue of relief. A small batch exemption was in every single proposal before Congress to improve the original bill and in every case it was touted as a way of protecting small, precarious enterprises.

A Policy Decision Requires Commission Approval

In order to facilitate the CPSC's administration of the alternative testing requirements or exemption, the law requires small batch manufacturers to "register with the Commission prior to using such alternative requirements or exemptions pursuant to any guidelines issued by the Commission to carry out this requirement." 15 U.S.C. § 2063(d)(4)(B). The "guidelines" issued by the Commission pursuant to § 2063(d)(4)(B) take the form of the small batch manufacturer registration portal, which went "live" on CPSC.gov today. The registration portal was designed and implemented over the objection of the Republican Commissioners and was not subject to a vote by the Commission. I believe the decision to make the small batch manufacturer's list public is a policy decision because making the list public was not required by the law, and therefore it required Commission approval. I recognize that this is inconvenient to members of a former majority not accustomed to compromise, but with the current two-two political party split on the Commission, this decision would have been a good place to begin finding the middle ground that has been missing at the Commission. But that opportunity was lost, and the resulting unilateral creation of a small batch manufacturer registration portal was a usurpation of the Commission's authority to make policy decisions.

First, Congress's directive that the agency issue small batch registration "guidelines" indicates it's recognition that issues of policy might arise in connection with the implementation of the registration system. This is because historically, guidelines implementing regulatory authority have been issued by Commission vote, as was the case when the Commission issued its chronic hazard guidelines as required by 15 U.S.C. § 1277(d)(1).

More importantly, the decision to treat registration as a CPSC § 6 triggering event is so fraught with policy implications that it cannot reasonably be characterized as merely an administrative function. Section 6 requires that before disclosing information about an identified manufacturer of a consumer product, the Commission must give the manufacturer 15 days within which to designate the information as confidential. 15 U.S.C. § 2055(a)(3). Information subject to 5 U.S.C. § 552(b)(4) – "trade secrets and commercial or financial information obtained from a person and privileged or confidential" – is deemed "confidential" under § 6. 15 U.S.C. § 2055(a)(2). If the Commission determines that information designated by a manufacturer as confidential is not barred from disclosure, it must provide the manufacturer with 10 days notice of its intent to disclose the information. 15 U.S.C. § 2055(a)(5). A manufacturer receiving such notification can then prevent disclosure by bringing an action in United States District Court. 15 U.S.C. § 2055(a)(6). In other words, under CPSC § 6, the right to prevent disclosure of confidential information by the CPSC is well established and safeguarded by limits that the CPSC must first recognize and respect: the right of manufacturers to act in response to a known pending release of information, and access to an appeal in the courts. The decision to make the list public without any triggering event, such as a FOIA request or other public request or need to know, unless a small batch manufacturer initiates an action, gets the existing protections under CPSC § 6 completely backwards.

A Real Burden on Small Batch Manufacturers

In order to register as a small batch manufacturer under Pub. Law No. 112-28, a business must make no more than \$1 million in total gross revenues from the sale of all consumer products, and must make no more than 7,500 units of the registered product. 15 U.S.C. § 2063(d)(4)(E). Given the low profit margins of manufacturing concerns,¹ even the largest are likely to have *net* annual income around \$50,000, and many will be much smaller micro-businesses operating out of their owner's homes. It is unrealistic to expect unsophisticated small business owners to possess the legal knowledge necessary to marshal evidence and argument establishing the confidentiality under 5 U.S.C. § 552(b)(4) of their revenue and production data. They will obviously also be unable to afford expert legal advice to assist them, or, in the event of an adverse determination by the Commission, the cost of litigation in federal court. Requiring small batch manufacturers to prove the confidentiality of the information in order to prevent its public release is therefore tantamount to the Commission's mandating the publication of the information without recourse.

Moreover, notwithstanding the practical difficulty small batch manufacturers will have establishing that publication of their identity would reveal protected confidential information, it is likely that the facts would support such a finding in many cases. It is inferable from a manufacturer's registration as a "small batch manufacturer" of a "covered product" under 15 U.S.C. § 2063(d)(4)(E), that the company has gross revenue of no more than \$1 million and manufactures no more than 7,500 units of a product. Such information could well be confidential business information exempt from disclosure under 5 U.S.C. § 552(b)(4).

The Complexities of Establishing a Claim of Confidentiality

In order to demonstrate the complexities of making the required showing to establish a claim of confidentiality, I will briefly explain the governing principals. To establish that business information is "confidential" under FOIA exemption 4, a company must show that disclosure of the information is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained."² Facts relevant to whether disclosure would cause competitive harm include whether the information "would customarily not be released to the public"³ Evidence that information is treated as confidential would support a finding that its release could cause competitive harm. Evidence showing that information is treated as confidential might include an affidavit attesting that the information is not disclosed to the public or to competitors, that it is treated as confidential under internal information sharing policies or when disclosed

¹ CPSC's economists have concluded that "a typical profit rate is about five percent of revenue." 76 FR 69532 (November 8, 2011).

² *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

³ 498 F.2d at 770. See also *Inner City Press/Cnty. on the Move v. Bd of Governors of the Fed. Reserve Sys.*, No. 98-4608, 1998 WL 690371, at *5 (S.D.N.Y. 1998), *aff'd*, 182 F.3d 900 (2^d Cir. 1999).

pursuant to contract, and detailing any other measures taken to protect the confidentiality of the information.

On the other hand, because financial information changes over time and not always in the direction management might wish, a claim of competitive harm can be sustained even where similar information may have been disclosed in the past.⁴ Limited disclosures, such as to suppliers or employees, also do not preclude protection under Exemption 4, as those disclosures are not made to the general public.⁵ Similarly, a small batch manufacturer that discloses its gross revenue or unit production data to a retailer may still be protected under Exemption 4. A stronger case could be made if the retailer was asked to maintain the confidentiality of the information.

With respect to direct evidence of competitive harm, courts recognize that revenue and other financial information, such as assets, liabilities and net worth, can be confidential, pursuant to FOIA exemption 4.⁶ The legislative history of FOIA indicates that the exception for financial information was intended to be construed broadly: “Specifically, [exemption 4] would include *any* commercial, technical and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.”⁷ The legislative history of FOIA also reflects the concern that knowledge of a company’s weak financial condition “might give competitors unfair advantage.”⁸ This is particularly relevant in the context of the disclosure required to register as a small batch manufacturer. Competitors will learn that registered businesses have very low net revenue and that they are therefore vulnerable to lower cost competition by larger businesses or are potential takeover targets.⁹ Information that a firm makes no more than 7500 units of a product could also be deemed confidential because it reveals information about a firm’s sales volume.¹⁰

CPSC § 6(a)(1)¹¹ also provides that the Commission is not required to release any information described by 5 U.S.C. § 552(b). That section includes another FOIA disclosure exemption that may apply to small batch manufacturers. FOIA exemption 6 protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” 5 U.S.C. § 552(b)(6). Moreover, “Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and the records would necessarily reveal

⁴ *Nat’l Parks and Conservation Ass’n v. Kleppe*, 547 F.2d 673, 678 n. 16 (D.C. Cir. 1976).

⁵ *Ctr. For Auto Safety v. Nat’l Highway Traffic Admin.*, 93 F. Supp. 2d 1, 17-18 (D.D.C. 2000) (citing *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992)).

⁶ See *Nat’l Parks and Conservation Ass’n*, 547 F.2d at 687; *Inner City Press/Cnty. on the Move*, 1998 WL 690371, at *5.

⁷ S. Rep. No 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added).

⁸ *Nat’l Parks and Conservation Ass’n*, 498 F.2d at 768 (quoting Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Session. at 102 (1964)).

⁹ See *Nat’l Parks and Conservation Ass’n*, 547 F.2d at 684 (including as grounds for finding financial information to be confidential the fact that its disclosure could facilitate “possible take-over bids”).

¹⁰ See *Sharkey v. Food and Drug Admin.*, 250 Fed. Appx. 284, 289090 (11th Cir. 2007); *Lion Raisons Inc. v. U.S. Dept. of Agric.*, 354 F.3d 1072, 1081 (9th Cir. 2004).

¹¹ 15 U.S.C. § 2055(a)(1).

at least a portion of the owner's personal finances."¹² Courts have held that even information revealing only a portion of a closely held company's gross receipts can qualify for protection.¹³ Under these cases, the CPSC's file containing the names and addresses of closely held or sole proprietorship small batch manufacturers who self-identified as having gross revenue of less than \$1 million could well be deemed a "similar file" whose disclosure would implicate a substantial privacy interest of the individual owner under FOIA Exemption 6, because it would reveal "at least a portion of the owner's finances." If so, the information could be disclosed only if the Commission determines that the public interest in understanding the operations or activities of government outweighs the individual's privacy interest.¹⁴

The Proper Procedure Is To Await A FOIA Request

No event, such as a FOIA request, has triggered the Commission's decision to require small batch manufacturers to respond to the 15-day Section 6 notice as a condition of registering for an alternative testing requirement or exemption. Perhaps some have reason to believe – unknown to me – that a FOIA request is forthcoming. But preempting the FOIA process in this fashion defeats the transparency that accompanies a FOIA request by obscuring from the public the identity of the party seeking the information. One cannot make an anonymous FOIA request; yet, the actions of the Commission have, in effect, allowed it. Moreover, a company whose confidential business information is subject to potential disclosure under FOIA cannot fully evaluate the risk to its business without knowing first who has sought the information.

In the absence of a FOIA request for the information, publicly identifying any small batch manufacturer who cannot establish that the financial and commercial information inferable from its self-registration is confidential is purely a discretionary choice made administratively. I suspect that within the Commission, some concluded that it is in the public's interest to know which companies do and do not third-party test their children's products. That would be consistent with other publicly stated views that third-party testing is necessary to ensure that children's products conform to CPSC standards, and the touting of the requirement as a boon for consumer safety.

While one is entitled to take that position as a matter of policy, it should be recognized that adverse policy consequences can also result from requiring the public disclosure of registered small batch manufacturers. Such companies could be subject to potential negative advertising from larger competitors claiming that the failure to third-party test makes the products less reliably safe. In addition, the same consumer groups who have long pushed for third-party testing may also wish to more widely disseminate the names of manufacturers whose products are not third-party tested, to their competitive disadvantage. Smaller companies can also have greater difficulty placing their products with retailers; so exposing a business' low revenue threshold could reduce its sales

¹² *Multi AG Media LLC v. Department of Agriculture*, 515 F.3d 1224, 1228-29 (D.C. Cir. 2008).

¹³ *See Consumer Checkbook, Center for the Study of Services v. United States Department of Health and Human Services*, 554 F.3d 1046, 1050-51 (D.C. Cir. 2009).

¹⁴ *Multi AG Media LLC*, 515 F.3d at 1228.

opportunities. Finally, a small company with a successful product may not wish potential competitors to know that its size makes it an easy target for lower cost competition or a hostile takeover. Companies' aware of these issues could well choose not to register in order to avoid the competitive harm that may result.

In conclusion, I believe the Commission has made a discretionary decision to disclose the identity of small batch manufacturers in the absence of a FOIA request or other triggering event, and that its doing so has erected obstacles to small batch manufacturers' chance to grow and thrive and will discourage manufacturers from participating in the relief Congress intended. As such, the decision was a policy choice that should not have been made a condition of participating in the small batch registry system without the support of a majority of Commissioners.