

CLIENT ALERT

New Bills Seek to Repeal Controversial Provision of Product Safety Act

Apr. 28, 2021

Could the end of Section 6(b) of the Consumer Product Safety Act (CPSA) actually be near? Time will tell. But last week's development on Capitol Hill in the saga of "Section 6(b)" is noteworthy, and, one day in the not-so-distant future, may be recognized as the beginning of the end for this controversial provision of the law.

On April 22, Senator Richard Blumenthal (D-CT) and Representatives Jan Schakowsky (D-IL) and Bobby Rush (D-IL) introduced legislation—the Sunshine in Product Safety Act—to *fully repeal* Section 6(b) of the CPSA. This is the first time in recent memory that Members of Congress have introduced legislation to do away with Section 6(b) altogether. For example, in the last Congress, Representative Rush introduced the "SHARE Act," which sought primarily to scale back one of Section 6(b)'s most important protections for firms—allowing a company to judicially challenge the U.S. Consumer Product Safety Commission's ("CPSC" or "the Commission") decision to release information about a firm, or one of its products, prior to its disclosure. But that legislation left the rest of Section 6(b)'s procedures and protections intact. This current bill, therefore, is much more ambitious, and stakeholders should take note.

By way of background, Section 6(b) requires the CPSC to engage in certain procedural steps before publicly disclosing information from which the identity of a manufacturer of a product can be readily ascertained. Those include taking reasonable steps to ensure that the information to be disclosed publicly is fair, accurate, and reasonable related to effectuating the purpose of the product safety laws. Practically speaking, this means notifying the manufacturer of the potential disclosure, providing either a summary of what the agency intends to disclose, or the actual disclosure itself, and providing the company with the opportunity to comment, typically 15 days, though that time period can be shortened by the CPSC with a "public health and safety finding." Other regulators, like FDA and NHTSA, do not have similar statutory constraints on the release of product information nor do they have due process protections around data release, whether those be adverse events or vehicle accidents.

The CPSC could likely release much more information related to deaths and injuries now if it followed its Section 6(b) processes more frequently. Moreover, CPSC can always release data on a product category or an anonymized basis. Historically, the agency has released data on deaths and injuries from products to voluntary standards committees on an anonymized basis to support the development of safety standards.

Since its enactment in 1981, the agency, lawmakers, the regulated community, and consumer advocates have debated whether Section 6(b) is good public policy. Traditionally, industry stakeholders have claimed that it provides essential due process safeguards before the nation's chief consumer product safety authority discloses information to the public about a company's product that could have both immediate and lasting consequences on a business. On the other hand, many consumer advocates, as well as Democratic commissioners of the agency, have asserted that Section 6(b) prevents disclosure of meaningful information on the safety of products and is responsible for consumer deaths.

The current Acting Chairman of the Commission, Robert Adler, supports the repeal of Section 6(b), as does Democratic Commissioner Elliot Kaye. At this year's annual ICPHSO product safety conference, Adler stated that "the agency needs to be 'unshackled' from the 'information muzzle' found in Section 6(b) of the CPSA," and that "it's the public that suffers from limits on sharing safety information." Commissioner Kaye has gone as far as stating that "people die" as a result of Section 6(b). And we expect a third Democratic Commissioner, likely to be nominated in the not-so-distant future, to hold similar beliefs. Thus, there is an appetite at the highest levels of the agency to see a Democratic Congress and Administration repeal Section 6(b) once and for all, and there can be little doubt that the Sunshine in Product Safety Act is a coordinated effort among product safety stakeholders who wish to see it repealed.

Therefore, with the support of the current CPSC Chairman, and soon to be majority of Democrats on the Commission, and in the wake of well-publicized events related to injuries and even deaths associated with some popular consumer products, House Democrats are well-positioned to pass the Sunshine in Product Safety Act in the coming year, if not months. Now, whether Senator Blumenthal can muster enough support for the Senate version of the bill is anyone's guess, particularly where, as here, 60 votes are needed to invoke cloture and move the bill forward. But, in the event that the legislation passes both chambers, we would expect President Biden to sign the Section 6(b) repeal bill into law.

Importantly, consumer product manufacturers, distributors, and retailers need to recognize that information disclosure practices at the agency have changed. The agency is much more aggressively releasing information using its authority to issue unilateral releases of its public health and safety findings, and this will only continue as more voices speak out over the perceived shortcomings of Section 6(b). Whether Section 6(b) is repealed or not, understanding and investigating incident data to determine what it means for the safety of products and how to better educate consumers on their safe use continues to be a business imperative.

Please feel free to reach out to us with any questions, and we will continue to update our clients and friends on this important issue affecting information disclosure by the Commission.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Cheryl A. Falvey

Partner – Washington, D.C.
Phone: +1 202.624.2675
Email: cfalvey@crowell.com

Matthew Cohen

Counsel – Washington, D.C.
Phone: +1 202.624.2831
Email: mcohen@crowell.com

Jessica D. Gilbert

Associate – Washington, D.C.
Phone: + 1 202.624.2582
Email: jgilbert@crowell.com