Legal Backgrounder

Vol. 29 No. 4 February 28, 2014

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Upsetting The Confidentiality Balance?: CPSC Proposes Revisions To Its § 6(b) Information Disclosure Regime

by Cheryl A. Falvey and Natalia R. Medley

Sometimes agency practice—those unwritten subtleties of how things actually get done—becomes so entrenched over the years that taking a fresh look in view of new realities is in order. The U.S. Consumer Product Safety Commission (CPSC) instructed its staff to do just that—modernize the Commission's information disclosure rule that flows from section 6(b) of the Consumer Product Safety Act (CPSA). The thirty-year-old rule, written before email and social media became preferred methods of communication, did not address certain practical realities of this new world. The rule revisions, approved by the Commission for notice and comment on February 12, 2014, may modernize the rule by allowing the Commission to move more quickly to release information in this digital age, but that speed comes with a price.[1]

The CPSC's statutory scheme recognizes the harm that can flow from an inaccurate or unfair statement by the Commission about a manufacturer's product. Section 6(b) of the Consumer Product Safety Act (CPSA) provides a unique procedural check to the Commission's information-gathering authority. With respect to any disclosure of information where the manufacturer of the product can be "readily ascertained," the Commission must "take reasonable steps to assure" that such information is "accurate" and that disclosure is "fair in the circumstances and reasonably related to effectuating the purposes" of the CPSA. No other federal safety agency has this type of provision protecting manufacturers from the harmful effects of an inaccurate or misleading public disclosure.

Manufacturer self-reports of a potential defect or regulatory violation have even more protection. There is a specific statutory exemption from public disclosure for "section 15(b)" self-reports except in limited circumstances. To release a § 15(b) report, the Commission must have (i) initiated an administrative proceeding to require a product recall, (ii) accepted in writing a "remedial settlement agreement" dealing with the product, (iii) obtained the submitter's consent, or (iv) published a finding that public health and safety require releasing information without the approximately 20 days' notice ordinarily afforded to the manufacturer.

CPSC's current information disclosure rule, 16 C.F.R. 1101, details the process the Commission uses to provide notice to a manufacturer of an upcoming information disclosure (*e.g.*, in response to a FOIA request or a media inquiry). Disclosure may also occur on the Commission's own initiative, for example, when it re-announces a recall in its monthly "Recall Roundup," a video featuring certain high-profile recalls over the past month. The information disclosure rule details the process by which the Commission must notify the manufacturer of the disclosure, provide a summary of the information to be disclosed, and allow the manufacturer the statutorily allotted time to comment on the fairness and accuracy of the information.

---

[1] [Editor's note: As of WLF's publication deadline, the Federal Register had not yet published the final text of the proposed rule. Once the notice appears, interested parties will have 60 days to comment, until April 28 or so.] For more information, see http://www.cpsc.gov/en/Regulations-Laws--Standards/Rulemaking/Final-and-Proposed-Rules/Information-Disclosure-Under-Section-6b-of-the-Consumer-Product-Safety-Act/

Cheryl A. Falvey served as General Counsel of the U.S. Consumer Product Safety Commission from 2008-2012 and is a partner at Crowell & Moring LLP; **Natalia R. Medley** is a Counsel at Crowell & Moring LLP.

The proposed rule significantly narrows the scope of the current rule—and CPSC practice—by removing benefits to manufacturers and private labelers not expressly required in statute. It also introduces new requirements that could discourage comments and challenges to public disclosures. Several aspects of the proposed rule would significantly alter the balance that the original rule struck between the interests of consumers and the need for fairness and accuracy with respect to information disclosure.

Narrowing the Scope of Information Protected from Agency Disclosure. The proposed rule limits § 6(b) to information "obtained under the acts the Commission administers." The rule previously interpreted the term "obtained" specifically to include information "generated or received" by the Commission in order to "cover all information in the possession of the Commission."[2] While the new proposal more closely tracks the statute, staff acknowledges in the preamble of the proposed rule that this revision changes the interpretation of § 6(b). At its hearing on the proposal, the Commission amended this preamble language to say that the scope of § 6(b) has not actually been narrowed "in practice." But shouldn't the words of the rule mirror agency practice? The purpose of notice-and-comment rulemaking is defeated if the words proposed do not disclose the intended practice.

For example, the Commission's rules currently require notice to the manufacturer before announcing that the Commission is launching an investigation. Agency practice had been to avoid disclosing the existence of an investigation into a particular manufacturer's product without notice to that manufacturer. With notice, a manufacturer might ask that in fairness the Commission indicate that the company is fully cooperating in the investigation or that no determination has yet been made as to whether the product is defective. But an online inquiry by a CPSC compliance officer indicating that she is investigating a product and asking consumers about their experience essentially announces the same pending investigation with no notice. It could spawn further media interest or even go viral in this new information age. So, can an investigator reach out to a consumer in an online public forum to seek information about a potential safety risk? Is such an inquiry raised in an online forum covered by § 6(b) as a communication "generated" by the Commission? Or, do the protections of § 6(b) now apply only to information the investigator receives from the consumer?

The proposed rule does not define or contain guidance about how the Commission will determine what information is "obtained" by the CPSC, which raises a number of questions in light of the many ways the Commission may obtain information and the changed interpretation. Information "obtained" might still include all information in the Commission's possession or it could be defined more narrowly to include only information the Commission has acquired or secured on its own initiative. Is information sent to the Commission by a third party (such as a consumer, third-party competitor, or attorney) "obtained" by the CPSC? Or will only information affirmatively sought by the Commission now be protected by § 6(b)?

The practical operation of the rule is unclear when considering technologies such as Facebook, Twitter, and even e-mail that have significantly improved abilities to communicate and share information since the CPSA was enacted, which could easily blur the lines between what is or is not "obtained" by the Commission. A major part of the impetus for modernizing § 6(b) was to account for new technologies, but the recommended rule revisions do not explain how the statutory language will be applied to them.

Not Providing Notice of Release of Publicly Available Information. The proposed rule expressly carves publicly available information out of the § 6(b) notification process, including "news reports; articles in academic and scientific journals; press releases … ; or information that is available on the Internet." The preamble to the proposed rule explains that "[n]either the statute nor the legislative history suggests that information that is readily available to the public is, or should be, subject to section 6(b)(1)." And at the CPSC's public meetings on the proposal, staff reiterated that § 6(b) does not cover information already in the public domain.

This appears to be a movement away from language in the original preamble and existing agency practice assuring that "the Commission will not disclose undocumented or unsupported information, information refuted by other information in the Commission files, or information rejected by the Commission

[2] 48 Fed. Reg. 57406, 57407 (December 29, 1983).

itself."[3] The fact that the information is public does not address whether the information contains factually accurate information based on generally accepted scientific methods rather than mere conjecture.

Commissioner Ann Marie Buerkle voiced concerns at the hearing on the proposed rule about possible effects this change could have if it means CPSC could publish information posted to a blog or elsewhere on the internet without taking steps to verify its veracity. Her view was that re-publishing public information about a specific manufacturer's product could also be seen as an endorsement of the information by the Commission, even if the original source was credited, which could unnecessarily stoke public fear and panic. She cited to the district court's opinion in *Doe v. Tenenbaum*, that CPSC's publication on its website bears its stamp of approval.[4] Similar concerns were raised when § 6(b) was originally debated in Congress, based on a fear that "public dissemination of premature, inaccurate or misleading information, '(i)ssued under the dignity and with the apparent imprimatur of the U.S. Government,' could have serious impacts upon reputation, good will and the product market."[5] In a February 4, 2014 memo responding to Commissioner Buerkle's questions, staff stated they "do not believe that [their] use of public data … would be seen as a direct or indirect endorsement by the agency of the information … ."

The term "publicly available" also has relevance in considering how the proposed rule will work in a modern, social media world where everything is public. If a consumer responds to a Commission tweet with a disparaging product-specific remark, under the proposed rule, it can probably remain on the CPSC's Twitter account as it is already "publicly available" before the Commission "obtains" it. Congress recognized reputational concerns that might come from third-party comments posted on a Commission-hosted internet presence when it authorized the Commission to move forward with its publicly searchable consumer complaint database. Congress mandated that forum to provide the ability for a manufacturer to comment and offer a disclaimer as to the accuracy of information contained on the site. Such protections may not be available in new or yet-to-emerge online social media outlets where the Commission has a presence.

Not Providing Notice When Re-Releasing "Substantially Similar" Information. Under the proposed rule, notice will no longer be provided to manufacturers when the Commission proposes to release information that is the same or "substantially similar" to information that has been previously cleared by the manufacturer and released. That is a marked change from the current rule, where subsequent notice is waived only where the information is *identical*.[6] The NPR also proposes removing the ability for firms to elect to receive later notices where similar information is set for public disclosure.[7]

Circumstances and knowledge about a product may change over time and a disclosure that seems accurate and fair at one point may later become inaccurate and unfair. A manufacturer may only be in the initial stages of its investigation into an issue when it first receives § 6(b) notice from the CPSC but may have a much better understanding about the product and issue later. For example, new evidence from a fire department report may shed light on whether a product caused a fire or a medical record may become available refuting an initial suggestion of causation in a consumer incident report. In such cases, the Commission may not have all of the information it needs to assess accuracy and fairness by relying on information gathered months—or even years—earlier, which increases the risk of disseminating unreliable information. Indeed, the staff acknowledged, in response to questions from Commissioner Buerkle, that on seven occasions in 2013 alone the Commission withheld information or modified a public disclosure after notifying a manufacturer regarding the re-release of information. Under the new proposed rule, CPSC would have released or would not have modified the information to assure its fairness and accuracy.

The proposed rule provides no definition as to what the CPSC considers "substantially similar" information, which does not provide stakeholders with any predictability as to when re-notification may not

[3] 48 Fed. Reg. at 57415.

[4] *Doe v. Tenenbaum*, 900 F. Supp. 2d 572, 597 (D. Md. 2012).

[5] *GTE Sylvania, Inc. v. CPSC,* 598 F.2d 790, 807 (quoting the statement of James F. Young, then-Vice President of General Electric Co., submitted regarding H.R. 8110).

[6] 16 CFR § 1101.11(b)(8).

[7] 16 CFR § 1101.21.

ISBN 1056 3059

occur. For example, if the language of a press release is used as the basis of a video re-announcement of a particular recall, that identical language may not need to be sent to the firm that recalled the product. But if the video portrays the product in a way that does not accurately depict how an injury might occur, the video could harm the firm once posted on YouTube even if the voice-over adheres to the press release's text.

No Longer Withholding Manufacturers' Comments from Disclosure. The proposed rule also introduces a new requirement for firms that wish to exercise their statutory right to provide comments under § 6(b). While the current rule honors requests from manufacturers and private labelers that their § 6(b) comments be withheld from public disclosure, the proposed rule would require firms to "provide a rationale … why the comments should not be disclosed … ," citing to legal authorities as appropriate. The proposed rule does not set forth a standard that must be met in order to make this showing but instead states that "[c]onclusory statements that comments must be withheld with no supporting basis are not sufficient to justify a request for nondisclosure." At the public meeting on February 12, Acting Chairman Robert Adler stated that he perceived this to be a "totality of the circumstances" standard and proposed an amendment to the preamble, to be reflected in the approved NPR, stating that a manufacturer or private labeler's interests would be weighed against the public interest.

The Commission has explained that this change will promote transparency and will strike a balance between protecting businesses' interests and the public's interest in knowing what a firm has said about its products. But it is not clear how the CPSC will decide whether to grant a firm's request to withhold comments, despite Commissioner Buerkle's pressure to articulate a clear standard. Staff has noted that "various confidentiality-related arguments could support nondisclosure of comments." This merely reiterates § 6(a) of the CPSA, which explicitly prohibits CPSC from publicly disclosing any trade secret or confidential information.[8] In fact, § 6(a) *only* requires that a manufacturer or private labeler mark such information as confidential and does not require that a firm make a showing to protect information from disclosure.[9]

Like other proposed changes, this new requirement runs the risk of chilling the Commission's collaborative relationship with industry. Placing a duty on a firm to establish a right to non-disclosure based on an uncertain standard, along with the threat of publication if the CPSC disagrees, may dis-incentivize firms from submitting any § 6(b) comments at all. This could further decrease industry's willingness to communicate with the Commission, harming the CPSC's ability to achieve its statutory goals.

Conclusion. The stakes are high for this § 6(b) rewrite because it is very difficult to remedy an inaccurate or unfair publication once it has occurred. The proposed rule lacks practical guidance about how the CPSC will make decisions about § 6(b) notices, comments, and disclosures. It does not set forth how the CPSC will determine what information it has "obtained," which remains unclear particularly given increases in technology that affect the flow of information, nor does it provide meaningful guidance about when information will be considered "substantially similar" so as not to trigger re-notification. Information that is otherwise publicly available, no matter how the Commission learned about it in the first place (such as, for instance, through a § 15(b) report),[10] would not be given any § 6(b) protection. And a firm's comments submitted to the CPSC are more likely to be publicly disclosed—even where a firm provides those comments to assist the Commission in achieving its goals. If CPSC is going to upset the balanced information disclosure regime that companies have come to rely upon in order to "streamline" and "modernize" the process, one hopes it would provide greater transparency and clarity about what the new rules will and will not permit the agency to do going forward. This new process will play out in a technology driven world where the harm that can flow from an inaccurate or unfair disclosure moves at the speed of the internet.

---

[8] *See GTE Sylvania, Inc.*, 598 F.2d at 808.

[9] *See* 15 U.S.C. § 2055(a)(3), (4) (Sec. 6(a)(3), (4)).

[10] *See* "CPSC Voluntary Recall Rule and the Impact on Disclosure of Manufacturer Self-reports Under Section 15(b)," by Cheryl A. Falvey, Natalia R. Medley, and Laura Jastrem Walther, Jan. 9, 2014 at http://www.retailconsumerproductslaw.com (detailing the concern that treating voluntary corrective action plans as enforceable settlement agreements will impact the § 6(b) confidentiality of materials submitted under § 15(b)).

  ISBN 1056 3059