April 28, 2014

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

RE: INFORMATION DISCLOSURE UNDER SECTION 6(b) OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT [CPSC DOCKET NO. CPSC-2014-0005]

On the behalf of the American Apparel & Footwear Association (AAFA), I am writing in response to the request for comments on the Consumer Product Safety Commission's (CPSC) notice of proposed rulemaking (NPR) to update the 16 CFR 1101, that interprets section 6(b) of the Consumer Product Safety Improvement Act.

AAFA is the national trade association representing the apparel and footwear industry including its suppliers, manufacturers, retailers and service providers. Our members produce and sell products that touch every American- clothing and shoes. Our industry accounts for more than four million U.S. employees and more than $ 350 billion in retail sales each year.

BACKGROUND

Section 6(b) of the CPSA governs information disclosure by the Commission to the public. When disclosing information, the Commission is required to the extent practicable to notify each manufacturer or private labeler of information to be disclosed that "pertains" to a consumer product, if the information "will permit the public to ascertain readily the identity of [the] manufacturer or private labeler" of the product. 15 U.S.C. 2055(b). Section 6(b)(1) also requires the Commission to "take reasonable steps to assure" that the information to be disclosed "is accurate, and that [its] disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the CPSA]."[1]

The notice of proposed rulemaking issued by the Commission proposes to update the information disclosure rules that interpret section 6(b) of the CPSA by:

1. **Modernizing** the rule to account for the significant advancements in information technology that have taken place since its initial adoption in 1983; and

[1] Federal Register/ Vol. 79, No. 38/ Wednesday, February 26, 2014/ Proposed Rules pg. 10712

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2. **Streamlining** the rule to be as closely aligned with 15 U.S.C. 2055(b) as possible, with the objectives of (a) eliminating unnecessary administrative burdens to the agency, (b) removing extra-statutory requirements, (c) eliminating redundancies in providing notice, (d) minimizing Freedom of Information Act (FOIA) backlogs, and (e) maximizing transparency and openness in our disclosure of information;[2]

AAFA and its members are committed to consumer product safety and working as partners with the CPSC on furtherance of shared goals of risk reduction and hazard avoidance.

At the same time, we are extremely sensitive to the damaging role that incorrect or misleading information has on product safety, both in undermining the brand names of companies who are key compliance partners of the agency and in confusing the public. It is with this in mind that we are concerned that the proposed changes weaken the protections that 6(b) provides to assure that information released by the Commission is fair and accurate. We offer the following comments on the proposed changes to the regulation, and would ask that the Commission not move forward on changes until these concerns are addressed.

A. Publicly Available Information Should Not be Exempt from the 6(b) Notification Process

The Commission has proposed that information that is publicly available or that has been disseminated in a manner intended to reach the public in general, such as news reports, articles in academic and scientific journals; press releases distributed through news or wire services; or information that is available on the Internet not be subject to is the notice and analysis provisions of Section 6(b)(1).[3]

AAFA strongly disagrees with the Commission's rationale that information already in the public domain should be exempt from the 6(b) notification process.

As noted previously, Section 6(b)(1) clearly states that the Commission must "take reasonable steps to assure" that the information to be disclosed "is accurate, and that [its] disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the CPSA]."[4] Accordingly, the Commission's publication of any information about a specific manufacturer's product, even information previously published elsewhere, could not only be seen by the public as verification of the truthfulness of the information but also an endorsement of the information by the Commission, even if the original source was credited.

Yet, the proposed rule would not require the Commission to verify in any way the accuracy of the information. Before the Commission re-reports such "publicly available" information, the Commission should take reasonable steps to verify the accuracy of the information by affording manufacturers an opportunity for notice and comment before the Commission republishes the information.

Otherwise, this proposed change would violate two of the fundamental tenets of the statute: 1) that the information publicly disclosed by the Commission is accurate and 2) that the

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[2] Ibid., pg 10713

[3] Ibid., pg. 10714

[4] Federal Register/ Vol. 79, No. 38/ Wednesday, February 26, 2014/ Proposed Rules pg. 10712

publicly disclosed information is "…reasonably related to effectuating the purposes of [the CPSA]."[5]

B. Information that is "Substantially the Same" Should Not be Exempt from the 6(b) Notification Process

The Commission has also proposed that information that is "substantially the same" as information that the Commission previously disclosed in accordance with section 6(b)(1), will not require new notice and comment.

According to the Commission "Although renotification is not statutorily required, firms currently may request renotification, or the opportunity to comment on subsequent disclosures of **identical** information." *See* 16 CFR 1101.21(b)(7), 1101.31(d).

We are concerned by the lack of clarity of the term "substantially similar." Additionally, the proposed rule fails to provide predictability as to when re-notification may not occur.

The lack of clarity of this proposed change would lead to significant and unnecessary uncertainty and confusion for both the regulated community and the public. Moreover, the proposed change, as currently written, again, would seem to undermine the two fundamental tenets of the statute: 1) that the information publicly disclosed by the Commission is accurate and 2) that the publicly disclosed information is "…reasonably related to effectuating the purposes of [the CPSA]."[6]

C. Non-disclosure of Manufacturer's Comments

The existing 6(b) regulation allows companies disclosing any information under section 6(b) to have designated portions of their comments disclosed or their comments withheld completely. The proposed rule would require firms that seek to have their comments withheld to provide a rationale supporting such withholding.

AAFA is concerned that CPSC has failed to provide a clear understanding of what factors staff will use when deciding whether to release a firm's comments. CPSC also should establish a process by which a firm can appeal a determination of CPSC staff to disclose information, despite a firm's presentation of thorough information accompanied with documentation as to why its comments should be withheld.

Further, this proposed change does not seem to align with the Commission's proposed goal of streamlining the 6(b) process. In fact, this proposed change would create additional burdens for both companies and the Commission.

In seeking to justify the proposed changes, the Commission has presented the obvious (even if unstated) argument that, the more information CPSC releases, the more it can protect consumers. However, the Commission fails to realize how detrimental the proposed changes are to the purposes of the CPSA if it discourages firms from sharing potentially helpful information because CPSC has not provided enough guidance or set out sufficiently concrete

[5] Federal Register/ Vol. 79, No. 38/ Wednesday, February 26, 2014/ Proposed Rules pg. 10712

[6] Federal Register/ Vol. 79, No. 38/ Wednesday, February 26, 2014/ Proposed Rules pg. 10712

criteria to allow firms to form reasonable expectations about when their comments will be protected from disclosure.

CONCLUSION

The Commission's discretionary rulemaking to "streamline" the information disclosure rules that interpret section 6(b) of the CPSA seems to be an example of a solution in search of a problem. Our experience is that the 6(b) process has worked well and that no changes are needed. If such changes are needed, we would urge the Commission to articulate what those needed changes are, and explain how proposals would accomplish those changes without undermining the basic program.

We believe the proposed rule lacks clarity and would dilute the statutory requirements that companies can and have used to safeguard their brands and reputations against the potential public release of unfair, inaccurate safety information regarding their products by the Commission. Specifically, AAFA believes the proposed rule, if implemented, would not streamline 6(b), but would instead violate the fundamental principles of the statute: 1) that the information publicly disclosed by the Commission is accurate and 2) that the publicly disclosed information is "…reasonably related to effectuating the purposes of [the CPSA]."[7] As such, AAFA believes the numerous and serious concerns raised regarding the proposed rule should give the Commission strong pause before proceeding to a final rule.

Thank you for your time and consideration in this matter. Please contact Danielle Abdul of my staff at 703.797.9039 or by email at dabdul@wewear.org if you have any questions or would like additional information.

Sincerely,

Stephen Lamar
Executive Vice President

[7] Federal Register/ Vol. 79, No. 38/ Wednesday, February 26, 2014/ Proposed Rules pg. 10712