September 27, 2012

VIA ELECTRONIC MAIL

The Honorable Inez M. Tenenbaum
Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: Significant Change to Section 6(b) Policy Announced at CPSC Safety Academy

Dear Chairman Tenenbaum:

The National Association of Manufacturers ("NAM") and the undersigned organizations have serious concerns about changes to the Consumer Product Safety Commission's ("CPSC" or "Commission") policy regarding section 6(b) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055(b), as announced on September 20, 2012.

For the last 30 years, the CPSC has followed a policy under both section 6(b) of the CPSA and section 7 of the Freedom of Information Act (relating to investigatory records) of not disclosing information relating to pending agency investigations until some resolution is reached. The current policy promotes voluntary reporting and industry cooperation while protecting manufacturers from unfounded publicity about products that are the subject of such investigations.

During remarks at the September 20th Safety Academy, Marc Schoem, Acting Director of Compliance and Field Operations, announced the intention of the CPSC to begin routinely including a 6(b) notice with case-opening letters involving defect investigations. This reference was very brief, and Mr. Schoem invited interested parties to attend the presentation entitled "The Nuances of 6(b)," by Melissa Hampshire, the CPSC's Assistant General Counsel for the Division of Enforcement and Information, to obtain more information on the initiative.

Ms. Hampshire told the attendees of an impending change in the CPSC's interpretation of its authority under section 6(b) as authorizing it to disclose preliminary, confidential information identifying the manufacturer of consumer products "under investigation" by the Commission. She stated that the CPSC would (within a few weeks) include new form language in each case-opening letter, whether the case is self-initiated by the CPSC or in response to a filing under section 15(b) of the CPSA. The form language will put the company on notice that the CPSC would disclose, both in response to a "media inquiry" and potentially affirmatively without any request, that the CPSC was conducting an "investigation" of the product that is the subject of the letter (including cases in which the letter was generated by an unsolicited, voluntary section 15(b) report from a manufacturer).

We are deeply concerned about this new initiative. Any announcement by the CPSC that a product is "under investigation" will have a substantial and negative impact on the reputation of the product, its manufacturer and those in its distribution chain. Such a statement by the agency charged with protecting the public will lead to unfounded publicity, unplanned inquiries to both the CPSC and the company from consumers, warranty claims and lawsuits. An announcement of an investigation has the potential to depress or even to halt sales and affect

the relationship between the company and its distributors. For small companies with limited product lines, it could place the company's very survival in jeopardy.

While the announcement of the policy change indicated that it was intended only for circumstances in which the CPSC is called upon to respond to requests from "media," that provides little solace for limiting the potential for product disparagement. The definition of "media" today has broadened to include bloggers, and we question the rational basis on which the CPSC could decide to grant or deny a request. To our understanding, there is no justification under the Freedom of Information Act ("FOIA") for responding to "media" requests and declining to respond to requests from the general public. Nor is there any basis for distinguishing between a response to a request about a specific product and a more general request about what products the CPSC may be investigating.

Some of our significant objections to the policy change are summarized below. First, implementing the policy change violates the express provisions of section 6(b) of the CPSA and the CPSC's regulations implementing that statute. Second, the policy change would result in the release of information that is unfair under the circumstances and is not reasonably related to effectuating the purposes of the CPSA. The published information could also be "inaccurate" since it implies that the CPSC has determined that the product at issue presents a potential risk justifying an affirmative "investigation." Most of these "investigations" are in fact simply the creation of a file including the manufacturer's voluntary report of a potential risk, with no affirmative action by the Commission whatsoever. The policy change as such would result in the release of information in violation of section 6(b)(1). Finally, the policy change would result in practical difficulties creating more work without any commensurate benefit to the public.

"Congress adopted safeguards specifically designed to protect manufacturers' reputations from damage arising from improper disclosure of information gathered and received by the Commission." Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 112-113 (1980). Those safeguards are included in both section 6(b)(1), which mandates a process for ensuring that information to be disclosed is fair and accurate, and in section 6(b)(5), which specifically limits the disclosure of information that is provided pursuant to section 15(b). The policy change fails to comply with both sets of safeguards.

The policy change violates the express provisions of section 6(b)(5)

The policy change proposes routinely providing notice to all manufacturers (or other entities) filing a report under section 15(b) that the CPSC intends to disclose certain information, invoking the process required under section 6(b)(1). When the CPSC proposes to release information submitted pursuant to section 15(b), or information directly derivative of that information, there are additional requirements imposed by section 6(b)(5) of the Consumer Product Safety Act. The CPSC recognizes the requirements of section 6(b)(5) in its own regulations:

> **In addition to** the requirements of section 6(b)(1), section 6(b)(5) of the CPSA imposes **further limitations** on the disclosure of information submitted to the Commission pursuant to section 15(b) of the CPSA, 15 U.S.C. 2064(b).

16 C.F.R. § 1101.61(a) (emphasis added).

The Commission cannot rely on any of the exceptions under section 6(b)(5) in order to avoid the prohibition of the release of section 15(b) information. The proposed policy goes far beyond situations where the CPSC has filed a complaint against the company, 15 U.S.C. § 2055(b)(5)(A); the CPSC has accepted a remedial settlement agreement, id. § 2055(b)(5)(B); or the company consents to a public disclosure, id. § 2055(b)(5)(C). Indeed, the policy change contemplates the release of information when none of those exceptions is relevant.

The CPSC further cannot rely on a finding that the release of information is required for "public health and safety." 15 U.S.C. § 2055(b)(5)(D). A boilerplate provision in a form communication from the CPSC staff cannot constitute the publication of a Commission finding. The Commission's regulations at 16 C.F.R. §1101.23(b) provide that a "public health and safety" finding is justified by a need to "warn the public quickly because individuals may be in danger . . . ." A public notice issued at the commencement of the review of a Section 15 report would be arbitrary and capricious. The regulatory scheme is designed, in part, to determine whether a particular product issue requires public notice. A decision to provide automatic notice would prejudge the outcome of every issue and turn the regulatory scheme on its head.

The policy change would result in an unfair disclosure and inaccurate information

In addition to failing to comply with section 6(b)(5), the policy change and the contemplated release of information does not comply with the provisions of section 6(b)(1). Section 6(b)(1) requires the Commission to take "reasonable steps" to ensure that where a product is identified the disclosed information is "accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes" of the Consumer Product Safety Act. 15 U.S.C. § 2055(b)(1). Disclosing that a product is "under investigation" does not meet this test.

As designed by Congress, much of the information contained in section 15(b) reports involves products not subject to recall because the CPSA requires reports when information reasonably supports the conclusion that a product "contains a defect which **could** create a substantial product hazard . . . ." 15 U.S.C. § 2064(b)(3) (emphasis added). The filing of a section 15(b) report does not in any respect indicate that a product should be subject to corrective action. To the contrary, as recognized by the Commission staff in the recently revised Recall Handbook:

> **Reporting a product to the Commission under section 15 does not automatically mean that the Commission will conclude that the product creates a substantial product hazard or that corrective action is necessary**. The CPSC staff will evaluate the report and works with the reporting firm to determine if corrective action is appropriate. Many of the reports received require no corrective action because the staff concludes that the reported product defect does not create a substantial product hazard.

Recall Handbook (March 2012 ed.) at 7 (emphasis in original). The CPSC staff has long encouraged early reporting, even when information is incomplete or when information is not certain to result in a conclusion that a reportable condition exists.

Under these circumstances, announcing that a product is "under investigation," based on a boilerplate notice issued in every case, does not satisfy the Commission's burden under section 6(b)(1). It is patently unfair under the circumstances to disparage a product for which no remedial action may be taken, when the very process designed to evaluate an issue is underway. It is similarly unfair to make such an announcement in a vacuum, yet providing additional information to place the announcement into context would completely subvert the process of the agency and a company considering a product issue in confidence. Moreover, such a disclosure is not reasonably related to the purposes of the CPSA.

The CPSC carefully controls notice of recalls so as to maximize effectiveness and to coordinate with a well-planned corrective action plan. Under this policy change, the CPSC will relinquish control of the process, disclose piecemeal (and potentially changing) information and expect consumers to understand the distinction between a product that is "under investigation" and a product that has been recalled. The policy is not only unfair to those filing Section 15 reports, but it in fact undercuts the purposes of the Act by focusing CPSC pronouncements on products for which corrective action might be required and diluting the CPSC's message about recalls that are found to be necessary.

The Commission's existing regulations recognize this unfairness. The regulation adopted to ensure that the CPSC takes "reasonable steps to assure information release is fair in the circumstances" states:

> The Commission may delay disclosure of information in some circumstances. For example, the Commission may elect to postpone an information release until an investigation, analysis or test of a product is complete, rather than releasing information piecemeal.

16 C.F.R. § 1101.33(a)(4).

Companies complying with the CPSC's encouragement to report issues where reporting is debatable, or in which information is not complete, rely on the confidential nature of the process. The policy change will certainly discourage companies from filing section 15(b) reports under those circumstances, precisely those reports that the CPSC staff has been encouraging for years.

The policy change would result in practical difficulties and more work for companies

The policy change would result in many practical difficulties for companies. As an example, if a company objected to the CPSC's boilerplate section 6(b)(1) notice, and the CPSC did not withdraw its proposed disclosure, any company that wanted to preclude disclosure would have no choice but to file suit pursuant to section 6(b)(3). Cf. Company Doe v. Tenenbaum, United States District Court for the District of Maryland Civil Action No. 8:11-cv-02958-AW (complaint filed under pseudonym and under seal seeking review of claim of material inaccuracy of consumer complaint submitted for publication in the CPSC Internet database). Because the policy change would permit the CPSC to release the information at any time after the expiration of the section 6(b)(1) time periods, the action would need to be filed prophylactically. Such an action presumably would be unnecessary in many cases, but any company seeking certainty about the anonymity of section 15(b) reports would have to file that

litigation in order to preserve its rights. Consequently, the policy change would embroil the CPSC and companies in expensive and time- and resource-consuming litigation, often for no purpose other than to enforce the express provisions of section 6(b)(5).

The CPSC failed to adhere to rulemaking requirements

Because this policy significantly changes long-standing, existing CPSC policy, and conflicts with existing regulations, changes to it must be made in accordance with the Administrative Procedure Act. See 5 U.S.C. § 553; Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission, 874 F.2d 205, 207 (4th Cir. 1989). It presents a substantive change from practice reasonably relied upon and has been released without any opportunity for public comment. As described above, the policy change will have substantial ramifications. Such a significant policy change should incorporate proper rulemaking procedures, including notice and comment.

In summary, we believe the policy change violates the Consumer Product Safety Act, as well as the CPSC's own regulations and guidance, in several respects and is ill-advised. Please contact Erik Glavich from the National Association of Manufacturers at (202) 637-3179 if you or your staff have questions regarding these concerns. Thank you for your consideration.

Sincerely,

Alliance for Children's Product Safety
American Apparel & Footwear Association
American Association of Exporters and Importers (AAEI)
American Cleaning Institute
American Coatings Association
American Home Furnishings Alliance
The Art and Creative Materials Institute
Association of Home Appliance Manufacturers
Baby Carrier Industry Association (BCIA)
Bicycle Product Suppliers Association
Business and Institutional Furniture Manufacturers Association (BIFMA)
Consumer Electronics Association
Consumer Healthcare Products Association
Consumer Specialty Products Association (CSPA)
Craft & Hobby Association (CHA)
Fashion Jewelry and Accessories Trade Association (FJATA)
Halloween Industry Association (HIA)
The Hosiery Association
The Information Technology Industry Council (ITI)
International Association of Amusement Parks and Attractions
International Sleep Products Association (ISPA)
Juvenile Products Manufacturers Association (JPMA)
Lighter Association
Motorcycle Industry Council
National Association of Manufacturers
National Electrical Manufacturers Association (NEMA)
National Retail Federation
Outdoor Power Equipment Institute (OPEI)

Personal Care Products Council
Power Tool Institute
Recreational Off-Highway Vehicle Association
Retail Industry Leaders Association (RILA)
Society of Glass and Ceramic Decorated Products (SGCDpro)
Specialty Vehicle Institute of America
SPI: The Plastics Industry Trade Association
Sporting Goods Manufacturers Association
Toy Industry Association (TIA)
Upholstered Furniture Action Council (UFAC)
Window Covering Manufacturers Association
Writing Instrument Manufacturers Association

CC: The Honorable Nancy A. Nord, Commissioner, U.S. Consumer Product Safety Commission
The Honorable Robert S. Adler, Commissioner, U.S. Consumer Product Safety Commission
The Honorable Anne M. Northup, Commissioner, U.S. Consumer Product Safety Commission
Melissa Hampshire, Assistant General Counsel for Division of Enforcement and Information, U.S. Consumer Product Safety Commission
Marc Schoem, Acting Director of Compliance and Field Operations, U.S. Consumer Product Safety Commission