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Proposed Changes to CPSA Section 6(b) Reduce Protections Currently Available to Manufacturers and Private Labelers

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Section 6(b) of the CPSA establishes procedures for and restrictions on the CPSC's public disclosure of information. It prohibits the CPSC from disclosing information about a consumer product that identifies a company unless the CPSC has taken ''reasonable steps'' to ensure the information is accurate, disclosure is fair under the circumstance, and disclosure of the information is ''reasonably related to effectuating the purposes of the CPSA'' and other laws administered by the CPSC.

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Before voting on the notice of proposed rulemaking (NPRM), the three CPSC Commissioners discussed the proposed amendments with CPSC staff and each other, as they did during a previous Jan. 24, 2014, open session. Both meetings made clear that Chairman Adler and Commissioner Robinson support amending 6(b), while Commissioner Buerkle is strongly opposed.

To appease Commissioner Buerkle and show the CPSC's commitment to check the accuracy and fairness of information released under the proposed rule, Chairman Adler and Commissioner Robinson offered several ''substitute'' amendments to the six initial proposed changes drafted since the Jan. 24 meeting. The substitute amendments became part of the NPRM after the vote; all of Commissioner Buerkle's proposed amendments were rejected, demonstrating the strict partisan split within the Commission.

Expanding Republication of Publicly Available Information

The most controversial amendment increases the kind of information exempt from Section 6(b), meaning that the CPSC does not need to comply with Section 6(b)'s requirements in order to publish the information. The information that is proposed to lose Section 6(b) protection includes (1) information published on the CPSC's consumer product safety database; (2) publicly available information such as news reports, academic and scientific journal articles, press releases and information found on the Internet; and (3) information that is substantially the same as information the CPSC previously disclosed in accordance with Section 6(b).

Commissioner Buerkle reiterated her concern that if the CPSC is allowed to re-publish publicly available information like newspaper articles or blog posts, then the CPSC may be viewed as endorsing that information, even if it is not necessarily accurate or reliable. She ar-

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gued that courts recognize information released by an administrative agency like the CPSC carries more weight, citing *Doe v. Tenenbaum*, 900 F. Supp. 2d 572, 597 (D. Md. 2012), *appeal docketed*, No. 12-2209 (4th Cir. argued Oct. 31, 2013). In response, Commissioner Adler said he disagreed with the *Tenenbaum* decision, noted it is on appeal and hoped the case is overturned.

Eliminating Privilege, Work-Product Claims a Means to Prevent Disclosure

Another amendment that may cause companies some heartburn is to exclude a claim of work-product or attorney-client privilege as a means to prevent information disclosure. The CPSC's rationale in favor of the proposal is that companies waive these privileges when they submit information to the CPSC. Moreover, companies in 2012 rarely claimed such privileges, and those who did claim one of these privileges also claimed the confidential business information protection, which will still remain in effect.

Commissioner Buerkle has expressed concern that the change might have a ''chilling effect'' on what companies share with the CPSC. Typically, confidential commercial information (such as trade secret information) includes a much smaller subset of information than that protected by work-product and attorney-client privilege. Thus, companies contemplating disclosure of information that on its face does not contain confidential commercial information may think twice about disclosing at all.

Additional Amendments

Other, less contentious amendments include requiring justification for withholding a company's comments, removing certain renotification requirements and moving to electronic notification to companies.

Justification Required to Withhold Company Comments

The proposed rule removes a company's ability to request that comments be withheld from disclosure for any reason, and instead requires companies to provide the CPSC with a rationale for withholding, such as an applicable statute or regulation, and to explain why disclosure is not necessary. Under the change, ''[c]onclusory statements that comments must be withheld with no supporting basis are not sufficient to justify a request for nondisclosure.''

Chairman Adler and Commissioner Robinson offered a substitute amendment adding new language to the proposed rule's text and preamble (the section of a proposed rule that provides a summary of the rule and supplementary information to put the rule in context). The new language supports the rationale behind the proposed rule change—balancing the public's interest in transparency with a firm's right in fair disclosure. While the substitute amendment was drafted to ''accommodate'' Buerkle, it does nothing to affect how the proposed rule will operate.

Renotification to Companies Not Required for Substantially Same Information

Currently, the CPSC is allowed to disclose ''identical information in the same format'' without renotifying a company unless the company specifically requests the opportunity to comment on the disclosures. The proposed amendment allows the CPSC to disclose ''information that is substantially the same as'' information the CPSC previously disclosed—without the need to renotify companies, even if they specifically request the opportunity to comment on subsequent information disclosures. Companies will still receive notification if additional information is added into the documents previously released. According to the CPSC, under the previous rule, only 25 percent of companies request renotification and the majority do not respond after they are renotified.

In support of the rule change, the CPSC staff cited administrative burdens in complying with FOIA requests, but Commissioner Buerkle questioned whether this is really true. The new rule also requires electronic handling of FOIA requests, which would allow the CPSC to easily renotify companies.

Chairman Adler and Commissioner Robinson's response was to present another substitute amendment which adds language noting that already-existing policy and federal law ensure the CPSC releases only accurate and unbiased information. Ultimately, this rule change will likely have little impact on companies, unless the CPSC takes too liberal an interpretation of the ''substantially the same'' test.

Narrowing of Information Subject to Section 6(b)

The proposed rule also changes the scope of information covered by Section 6(b) from information ''obtained, generated, or received'' by the agency to information ''obtained'' by the agency. The difference between what is ''obtained,'' ''generated'' or ''received'' by the CPSC is unclear, but the February hearing provided guidance through another substitute amendment, which explains that information subject to the rule ''has not been narrowed'' and that the deletions ''will not result in changes in [CPSC] policy.''

Electronic Notification

Finally, the proposed rule allows the CPSC to issue electronic notices and to notify companies electronically ''[w]henever possible.'' This change saves time and resources for CPSC and companies alike. This is a good change, allowing more efficient communication and exchange of information between companies and the CPSC.

Conclusion

The Commissioners continue to encourage the public to comment on the proposed changes. The 60-day comment period begins upon publication in the Federal Register. While some changes will likely not have much impact on companies, others will decrease protections currently available to manufacturers and increase information available to the public—even if it is not accurate and reliable.

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