



Submitted Testimony of

Remington A. Gregg

Public Citizen

Counsel for Civil Justice and Consumer Rights

to the

Committee on Oversight and Reform

United States House of Representatives

on

“Sleeping Danger: The Rock ‘n Play Sleeper and Failures in Infant Product Safety”

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Public Citizen appreciates the opportunity to submit testimony on this hearing regarding failures in infant product safety protections and flaws in the consumer product safety system. Public Citizen is a national non-profit organization with more than 500,000 members and supporters nationwide. Now in its fiftieth year, our organization represents the public interest through legislative and administrative advocacy, litigation, research, and public education on a broad range of issues that include product safety and consumer rights in the marketplace.

The U.S. Consumer Product Safety Commission (CPSC or Commission), founded in 1972, was dubbed the “most powerful Federal regulatory agency ever created”<sup>1</sup> when it was established. The CPSC was designed to be a modern agency, and so “Congress wanted the agency to have strong regulatory authority, generous funding, broad public participation (especially by consumers) in decisionmaking, widespread openness, and substantial independence from White House influence.”<sup>2</sup> As the CPSC enters its half century in existence, it is helpful to assess whether the CPSC has functioned as it was designed. There is much to be done to ensure the CPSC lives up to its mission to robustly protect consumers as Congress envisioned. In particular, as this Committee in its oversight power investigates failures in safeguarding infants from unsafe products, Public Citizen is eager to see Congress repeal Section 6(b) of the Consumer Product Safety Act.

A 2019 Public Citizen report found that Section 6(b)’s restrictions resulted in unacceptable delays in addressing hazardous products, including products used by infants—the most vulnerable in our population.<sup>3</sup> While our advocacy for Section 6(b)’s repeal predates 2019, that report showed conclusively just how problematic Section 6(b) is in keeping the agency from living up to its responsibilities to place the safety of our children and families before all else.

**I. Section 6(b) of the Consumer Product Safety Act contributes to the Commission’s lack of transparency, which has harmed children.**

Section 6(b) of the Consumer Product Safety Act (CPSA) restricts the CPSC from publicly disclosing any information from which the public can readily ascertain the identity of a manufacturer or private labeler of a consumer product unless: (1) the Commission takes reasonable steps to ensure the information is accurate, (2) the disclosure is fair in the circumstances, and (3) the disclosure is reasonably related to effectuating the purposes of the

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<sup>1</sup> Robert S. Adler, “*Model Agency*” to Basket Case—*Can the Consumer Product Safety Commission Be Redeemed?*,” 41 ADMIN. L. REV. 61, 62 (1989) (quoting Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 43-44 (1982)).

<sup>2</sup> *Id.* at 68.

<sup>3</sup> See Remington A. Gregg, *Delay and Secrecy: How Section 6(b) of the Consumer Product Safety Act Keeps Consumers in the Dark*, PUB. CITIZEN 1, 4 (June 24, 2019), [https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/6b-Report-2019-06-24\\_FINAL.pdf](https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/6b-Report-2019-06-24_FINAL.pdf).

CPSC and other laws administered by the Commission.<sup>4</sup> If the company objects to the release of the proposed information, and the agency decides to overrule the company and release the information, Section 6(b) gives the manufacturer the right to go to federal court to stop the release, which forces the agency into lengthy and expensive litigation—this in turn further delays the release of safety information to the public. The inevitable result? The CPSC is forced to issue vague warnings that fail to prevent avoidable injuries and deaths, or it simply issues no information at all.

Section 6(b) frustratingly ties the hands of the CPSC, which has had tragic real-world consequences. Consumer Reports found that the CPSC knew that the Fisher Price Rock ‘n Play and similar products were linked to infant deaths, but failed to inform the public about the risks of these specific products.<sup>5</sup> If the agency had sought to “name names,” under existing law, it could have been pulled into protracted litigation, which could have further delayed the release of safety information to parents. Rather than risk these delays, in May 2018, the CPSC issued a “consumer alert”—essentially a press release—that cautioned parents against the hazards of allowing babies to sleep unrestrained in “inclined sleep products.”<sup>6</sup> In the best circumstances, such a generic name does not provide enough information to the consumer to know that a specific product may be in their home, but that is especially true for busy, sleep-deprived parents of infants.

Section 6(b) not only muzzles the CPSC from releasing specific safety information, but prevents journalists, consumer advocates, and government watchdogs from obtaining information through the Freedom of Information Act (FOIA) about the agency’s unfortunately all too frequent failures to get dangerous products out of our homes in a timely manner.

## **II. Section 6(b) has hamstrung the Commission for years.**

Public Citizen’s 2019 report was not the first time our organization found problems with Section 6(b). In January 2008, a Public Citizen report revealed that the CPSC took an average of 209 days to warn the public about hazardous products in the 46 instances from 2002 to 2008 in which the Commission levied fines against manufacturers.<sup>7</sup> It was clear that while information regarding dangerous products was known by the manufacturers and the agency, it was withheld for unreasonable amounts of time from parents, other users of these products, and the public.

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<sup>4</sup> See 15 U.S.C. §2055(b).

<sup>5</sup> See Rachel Rabkin Peachman, *While They Were Sleeping: How a Product Tied to 73 Infant Deaths Came to Market and Stayed for a Decade, As Government and Industry Knew the Risks*, CONSUMER REPORTS (Dec. 29, 2019), <https://www.consumerreports.org/child-safety/while-they-were-sleeping/>.

<sup>6</sup> Gregg, *supra* note 3, at 11.

<sup>7</sup> See Taylor Lincoln, *Hazardous Waits: CPSC Lets Crucial Time Pass Before Warning Public About Dangerous Products*, PUB. CITIZEN 1, 2 (Jan. 2008), <https://www.citizen.org/sites/default/files/hazardouswaits.pdf>.

That meant that consumers remained at risk while the dangerous products stayed on the market. The report found that the delay in reporting dangerous products or issuing recalls was partially caused by the agency's lack of urgency at the time, as well as a lack of resources. However, it was also unnecessarily hamstrung by limitations within its governing statute such as Section 6(b)—a restriction that does not apply to other, similarly situated government agencies.

When Congress passed the Consumer Product Safety Improvement Act (CPSIA) in 2008, rather than remove Section 6(b) from the CPSA, Congress decided to require the CPSC to create saferproducts.gov. We are pleased that Congress required the Commission to create the informational database to allow parents and consumers the opportunity to have enough information to avoid purchasing dangerous products as well as a portal for reporting injuries and other harms caused by products. Saferproducts.gov has become a critical tool for protecting consumers from potential hazards and helps to close the time gap between a manufacturer learning of a hazard and the information actually reaching consumers, including information for specific types of infant-focused products like cribs and changing tables. It was obvious when the CPSIA was enacted that a database would not completely eradicate the problems caused by Section 6(b). With more than ten additional years of knowledge about harmful products remaining in Americans' homes, this assertion is even truer today. Therefore, saferproducts.gov must not be the sole way to close the time gap; instead, Congress must repeal Section 6(b). We encourage this Committee to work with other congressional committees to repeal Section 6(b) by quickly passing the Sunshine in Product Safety Act, which would repeal Section 6(b) from law.<sup>8</sup>

In addition to urging repeal of Section 6(b) in testimony before the U.S. House of Representatives Committee on Energy and Commerce's Subcommittee on Consumer Protection and Commerce during a hearing that explored whether the CPSC is fulfilling its mission to keep consumers safe,<sup>9</sup> we have repeatedly encouraged the CPSC to itself make the case for Congress to uncuff the agency and repeal Section 6(b). One CPSC commissioner even testified before Congress that “[p]eople die because of Section 6(b).”<sup>10</sup>

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<sup>8</sup> S. 1355, 117th Cong. (1st Sess. 2021).

<sup>9</sup> See *Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission Fulfilling Its Mission?: Hearing Before the Subcomm. on Consumer Prot. & Com. of the H. Comm. on Energy & Com.*, 116 Cong. 3 (2019) (statement of Remington A. Gregg, Counsel for Civil Justice and Consumer Rights, Public Citizen).

<sup>10</sup> *Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission Fulfilling Its Mission?: Hearing Before the Subcomm. on Consumer Prot. & Com. of the H. Comm. on Energy & Com.*, 116 Cong. 3 (2019) (statement of Elliot F. Kaye, Comm'r, Consumer Prod. Safety Comm'n).

### III. CPSC takes important step to protect infants.

As we work with Congress to repeal Section 6(b) and its dangerous impact on consumers, including infants—we are heartened by the Commission’s recent vote to finalize a mandatory safety standard for infant sleep products. Section 104 of CPSIA required the Commission to promulgate standards for durable infant and toddler products. Public Citizen strongly supported the Commission quickly finalizing the proposed rule that limits the incline of infant sleep products to a maximum of ten degrees for products that are not already regulated by another safety standard. That being said, too much time passed between the posting of the proposed initial rule and the final Commission vote to adopt a rule.<sup>11</sup> Tragically, during that timeframe, infants have been injured and died from unsafe sleeping products.<sup>12</sup> Moreover, this final rule adopted by the Commission could have been more protective. Public Citizen noted in comments submitted by our organization along with Consumer Federation of America, Consumers Union (now Consumer Reports), and U.S. PIRG (Consumer Groups) in response to the 2017 notice of proposed rulemaking that “Canada only allows up to a 7-degree angle in their sleep products.”<sup>13</sup> While it is laudable that the Commission accepted Dr. Erin Mannen’s recommendation to prohibit infant sleep products to an incline of no more than ten degrees, we urge the Commission to add to its priorities studying the impact and efficacy of adopting Canada’s more protective standard in order to determine whether further rulemaking is warranted.

### IV. Conclusion

In the mid-1960’s through the 1970’s, Congress passed monumental consumer protection laws including the Fair Credit Reporting Act, the Occupational Safety and Health Act, and the Consumer Product Safety Act (which established the CPSC). It is no surprise, then, that the era was dubbed the “consumer decade.”<sup>14</sup> Throughout Public Citizen’s 50 years of consumer

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<sup>11</sup> See Press Release, Consumer Prod. Safety Comm’n, CPSC Approves Major New Federal Safety Standard for Infant Sleep Products (June 2, 2021) <https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Approves-Major-New-Federal-Safety-Standard-for-Infant-Sleep-Products>.

<sup>12</sup> See Rachel Rabkin Peachman, *Inclined Sleeper Deaths Rise to 50 as Industry Continues to Sell the Products*, CONSUMER REPORTS (June 20, 2019), <https://www.consumerreports.org/child-safety/inclined-sleeper-deaths-rise-to-50-as-industry-continues-to-sell-the-products/> (according to Consumer Reports, four families “filed a joint lawsuit, alleging that their infants suffocated while in the Rock ’n Play Sleeper, with three of those deaths occurring between January and March 2019, just before Fisher-Price recalled the product.”).

<sup>13</sup> Consumer Groups, Comments on the Notice of Proposed Rulemaking “Safety Standard for Infant Inclined Sleep Products” (June 21, 2017), <https://www.regulations.gov/document?D=CPSC-2017-0020-0006>.

<sup>14</sup> Adler, *supra* note 1, at 63 (quoting Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 34 n.2 (1982)).

protection advocacy, we have focused on ensuring the government is acting in the best interest of the public, not carrying the weight for industry players. Fulfilling that mission means continuing to push the CPSC to fulfil its mandate of protecting consumers—including infants—and their families from unsafe products and to be a visionary leader at home and abroad for product safety enforcement. While the Commission hasn't always lived up to its potential, we are confident that it has a dedicated staff seeking to do just that.

However, while many on the Commission's staff work tirelessly to fulfill the agency's mission, unfortunately partisan politics, anemic funding, and the occasional apparent lack of interest from Congress or the executive branch regarding the agency's work makes all of the staff's work even more difficult. The Commission, however, can and must meet the failures highlighted through this hearing to promulgate additional robust rules and standards to protect children and all consumers, proactively working to get ahead of product safety hazards, and engaging with advocates early and often on problematic issues.

We look forward to being a strong partner in providing this Committee, Congress, and the Commission outside support they need to carry out the CPSC's mission more effectively, including keeping infants safe.

Thank you for the opportunity to share our views.