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March 28, 2018

RE: Comments on the Consumer Product Safety Commission’s Agenda and Priorities for FY 2019 & 2020

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Public Citizen is grateful for the opportunity to submit comments to the Consumer Product Safety Commission (CPSC or Commission) for the CPSC Agenda and Priorities Hearing for Fiscal Years 2019 and 2020.<sup>1</sup> Public Citizen is a national non-profit organization with more than 400,000 members and supporters. We represent the public interest through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues that include product safety and consumer rights in the marketplace.

## **I. Introduction**

Section 4(j) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2053(j)) requires the Commission to establish an agenda of action each year for the upcoming fiscal year. The law also requires the Commission to solicit public input before establishing its priorities. We are grateful for the opportunity to provide both written and, at a later date, oral input to the Commission. At the outset, we express our support for the Commission’s Strategic Plan 2016-2020 (Strategic Plan) and look forward to working with the Commission to ensure successful implementation.<sup>2</sup> This comment will focus on two issues that Public Citizen plans to work closely on with the CPSC during the next fiscal year: ensuring a more data-driven agency and increased transparency to effectuate the agency’s mission.

## **II. Creating an Even More Robust Data-Driven Agency**

The CPSC’s Strategic Plan states that “agency access to useful, accurate, and timely data is a cross-cutting priority focus” and that the agency “consistently looks for ways to improve the quality, transparency, reliability, and availability of data essential for achieving the agency’s

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<sup>1</sup> Notice of Public Hearing, Commission Agenda and Priorities, 83 F.R. 8853 (March 1, 2018).

<sup>2</sup> [https://www.cpsc.gov/s3fs-public/CPSC\\_2016-2020\\_Strategic\\_Plan.pdf](https://www.cpsc.gov/s3fs-public/CPSC_2016-2020_Strategic_Plan.pdf).

strategic objectives, goals, and mission.”<sup>3</sup> We strongly support the CPSC’s goal of using data to become a more efficient and effective agency for consumers and therefore urge the Commission to work to continue collecting timely and comprehensive data that will help the agency more effectively advance its mission.

We strongly support the consumer product safety database SaferProducts.gov, which was created by Section 212 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). We appreciate the CPSC’s commitment to this critically important consumer tool and encourage the Commission to enhance its utility. If administered correctly, with some small modifications, it could far better serve the mission of providing a central national repository for critical product safety information, and become a more effective tool to avert death or injury to the public.<sup>4</sup>

For example, we urge the Commission to further strengthen SaferProducts.gov by increasing its visibility and use by the public. We recommend that the CPSC make the website’s visibility a top priority and dedicate resources to advertising it on social media and in any media statements or responses issued by the Commission, and implement the recommendations in the Saferproducts.gov report issued by the Consumer Federation of America, Consumers Union, Kids in Danger (KID), Public Citizen, and the U.S. Public Interest Research Group (U.S. PIRG).<sup>5</sup> We also encourage the Commission to promote its availability through partnerships with state consumer protection agencies, consumer advocacy organizations, and industry to ensure the website is promoted through major consumer hubs, such as external websites and through social media.

Moreover, CPSC should explore innovative and tech-savvy ways to convey information on product recalls. This might include feedback loops that allow the Commission to measure the effectiveness of the information that is disseminated. For example, the Commission could consider agency action that pilots a program that allows consumers at the time of purchase to opt-in to receiving text messages if a product is recalled. Then, the Commission should study whether recall participation was increased because of the notification system as compared to other, similar recalls. This type of feedback loop would give the CPSC real metrics to understand the number of people who are receiving information on a recall, which in turn would

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<sup>3</sup> *Id.*

<sup>4</sup> To this end, in 2013 Public Citizen Litigation Group represented consumer groups as intervenors in a case against a company attempting to block the CPSC from publishing a consumer product report about one of its products on SaferProducts.gov. After a district court order granted the company’s motion to seal the case and proceed under a pseudonym, Public Citizen Litigation Group appealed the order to the U.S. Court of Appeals for Fourth Circuit, which held that the district court’s sealing order violated the public’s right of access under the First Amendment and that the court abused its discretion in allowing Company Doe to proceed under a pseudonym. *Company Doe v. Public Citizen*, 749 F.3d 246 (4th. Cir. 2014). In June 2014, the district court ordered the entire record in the case, including the district court’s opinion, unsealed. The court also amended the caption to name the plaintiff, “The Ergo Baby Carrier Inc.” *The Ergo Baby Carrier, Inc. v. Tenenbaum et al.*, No. DKC 11-2958 slip op. (D. Md. 2014).

<sup>5</sup> See generally, Consumer Federation of America, *Safer Products.gov: Five Years Live*, available at [https://consumerfed.org/wp-content/uploads/2016/11/11-29-16-SaferProducts\\_Report.pdf](https://consumerfed.org/wp-content/uploads/2016/11/11-29-16-SaferProducts_Report.pdf).

help the Commission better understand if companies, or itself in instances of mandatory recalls, are effectively disseminating critical information about dangerous products to the public.

Last year, the Commission hosted a workshop on recall effectiveness. We were eager to collaborate with the Commission on finding innovative ways to improve the outreach and effectiveness of recalls. Along with Consumer Federation of America and Kids in Danger, we submitted a list of recommendations to make the workshop productive and impactful, such as inviting technology and marketing experts as well as academics to the workshop for their input.<sup>6</sup> Unfortunately, these recommendations were not incorporated into the workshop, nor has there been follow-up to that meeting other than a recently released report.<sup>7</sup> We urge the Commission to continue this important conversation by holding additional meetings on the topic as well as by thoughtfully expanding the attendance list for such meetings in order to gain insights from persons with applicable expertise, especially those who have experience in mass communications with the public and innovating with the federal government.

### **III. Increased Transparency in the Decisionmaking Process**

The CPSC should do more to increase transparency in the decisionmaking process by improving information disclosure to the public. We place particular significance on strengthening information disclosures issued pursuant to section 6(b) of the Consumer Product Safety Act (CPSA). Since the Commission issued a Notice of Proposed Rulemaking in February 2014 to amend the 30-year old rule implementing section 6(b), the rulemaking has seen little traction.<sup>8</sup> We have supported the rulemaking's modest proposal to modernize and streamline the regulation and urge the Commission to continue with the proposed rulemaking without further delay.

As currently interpreted by the Commission, section 6(b) 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 the Commission takes reasonable steps to ensure the information is accurate, that disclosure is fair in the circumstances, and the disclosure is reasonably related to effectuating the purposes of the CPSA and other laws administered by the Commission.<sup>9</sup>

Unfortunately, Section 6(b) has restrained the CPSC in its ability to proactively disclose safety hazards to the public. To our knowledge, no other federal agency that deals with public health and safety is subject to similar public disclosure restrictions. 6(b) negatively affects consumers

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<sup>6</sup> See Appendix A for a copy.

<sup>7</sup> U.S. Consumer Product Safety Commission (CPSC), *Recall Effectiveness Workshop Report* (Feb. 22, 2018), available at [https://www.cpsc.gov/s3fs-public/Recall\\_Effectiveness\\_Workshop\\_Report-2018.pdf?R1VyLltrl8M\\_\\_id.2vkAkiHoUZjaSCab](https://www.cpsc.gov/s3fs-public/Recall_Effectiveness_Workshop_Report-2018.pdf?R1VyLltrl8M__id.2vkAkiHoUZjaSCab).

<sup>8</sup> Information Disclosure Under Section 6(b) of the Consumer Product Safety Act, 79 Fed. Reg. 10712 (proposed Feb. 26, 2014)(to be codified at 16 C.F.R. pt. 1101).

<sup>9</sup> 15 U.S.C. §2055(b).

by unnecessarily shielding critical product safety information from public view. Section 6(b) is outdated, anti-consumer, and intended solely to protect the reputation of businesses that put harmful products on the market. Landmark right-to-know laws like the Freedom of Information Act (FOIA) do not have a similar, overbroad restriction for information disclosures from other agencies and instead are constrained only by the FOIA's tightly-focused exemptions focused on interests such as protecting personal privacy of individuals. There is no legitimate justification for 6(b)'s limits to transparency, and Congress should eliminate it. We encourage the CPSC to make the case to Congress. Public Citizen intends to do the same.

Until Congress eliminates Section 6(b), the CPSC must prioritize the rulemaking process to increase proactive disclosures by the Commission and otherwise update section 6(b)'s outdated implementing regulations. However, even with proposed changes, section 6(b) will remain overly pro-industry because it would still allow manufacturers to weigh in on—or outright object to—product safety information before the Commission may disclose such information to the public.<sup>10</sup> Essentially, 6(b) requires the Commission to negotiate every recall announcement with the manufacturer or company. All the while, people—including children—are being hurt by dangerous products still allowed on store's shelves.

This section of the CPSA law is emblematic of the avoidable obstacles that thwart the Commission's ability to modernize and advance consumer safety. Advances in technology and communication since the law's adoption in have gone unaddressed. Unnecessary delays swallow up efficient dissemination of public safety information. One obvious example is the Commission's inability to publicly disseminate information that has already been publicly disclosed which simply gives business and manufacturers another built-in opportunity to influence the process before releasing critical product safety information. For example, the Commission cannot post information on its website that was previously released without notification to the manufacturer.<sup>11</sup> This is a burdensome requirement on the Commission and delays the release of important information.

Section 6(b) puts American lives and health at risk with burdensome procedures and delays that block public disclosure of crucial information on dangerous products. Section 6(b) is a relic that handcuffs the CPSC's core regulatory function of warning the public about potentially defective products and compels the CPSC to waste already scarce budgetary resources on procedures that do not serve any consumer protection or product safety goal.

Public Citizen supports the goals of the proposed rule to modernize and improve 6(b), which would greatly serve consumers and maximize transparency and openness by: (i) ensuring the

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<sup>10</sup> 16 C.F.R. 1101.

<sup>11</sup> See generally Statement of Acting Chair Robert S. Adler (Feb. 14, 2014), available at <https://www.cpsc.gov/about-cpsc/commissioner/robert-bob-s-adler/statements/statement-acting-chairman-robert-s-adler-0>.

information subject to the 6(b) Information Disclosure Regulation conforms with, and does not go further than, the statutory language of Section 6(b), thereby ensuring the regulation is not more restrictive of public disclosure of product information than required by current law; (ii) exempting publicly available information from the 6(b) Information Disclosure Regulation, including information posted on the consumer product safety information website; (iii) eliminating redundant notice requirements to manufacturers regarding information that is substantially similar to a previous disclosure; and (iv) eliminating the restriction on public disclosure of manufacturer comments.

The rulemaking changes will not solve the overall problem of secrecy that 6(b) enables, but it would make the process simpler and relieve the agency from unnecessary administrative burdens.

In the meantime, the Commission must dedicate sufficient resources in order to respond to FOIA requests in a timely manner and consistent with its statutory obligations. The average reported time for responding to simple and complex requests is 25 and 67 working days, respectively.<sup>12</sup> We urge the Commission to redouble its efforts to speed up its response time and continue to reduce its FOIA backlog.

### **Conclusion**

Public Citizen is acutely aware of the CPSC's enormous jurisdictional obligations and the challenges posed by disproportionately modest resources. Despite this, we believe if the Commission proceeds with a mandate to prioritize consumer safety above all else—and prioritize it high above the interests of business and industry—the CPSC can fulfill its decree to advance product safety and protect the lives and health of Americans. Thank you again for the opportunity to submit these comments.

Respectfully submitted,

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Public Citizen  
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<sup>12</sup> FOIA.gov (“Create a Request”)(last visited March 28, 2018).

Appendix A



June 23, 2017

Honorable Ann Marie Buerkle  
Acting Chairman  
Consumer Product Safety Commission  
4330 East-West Highway  
Bethesda, Maryland 20814

**Input of Consumer Groups for the Commission's Recall Effectiveness Workshop**

We appreciate the Consumer Product Safety Commission (CPSC) holding a workshop on recall effectiveness and welcome discussing this important consumer protection issue. As consumer organizations who work closely with the CPSC, we look forward to continuing to work with the agency to protect the public from hazards and dangerous products, and look forward to ongoing dialogue.

Our groups suggest that the CPSC focus the limited time available during the workshop on discussing concrete proposals for improving recall effectiveness. The workshop should devote the bulk of its time to brainstorming and discussing innovative ideas to increase the effectiveness of recalls. The workshop can achieve this by encouraging discussion on the following:

- **Improving communication with the public**  
The workshop should explore innovative and tech-savvy ways to convey information on recalls. This might include feedback loops that allow the Commission to measure the effectiveness of the information that is disseminated. For example, the Commission could consider agency action that allows consumers to opt-in to receiving text messages if a product is recalled. This type of feedback loop would give the CPSC real-time metrics to understand the number of people who are receiving information on a recall.
- **More robust approaches to recall effectiveness and communication**  
In order for recalls to be effective, consumers must be aware of a recall and know how to comply with the recall. Therefore, the workshop should explore how to expand and diversify reach to consumers that includes including press releases, social media, and

paid media. The CPSC should also consider the most effective ways to communicate with particular populations who likely own specific recalled products.

- **Incentives for consumer responsiveness to recalls**

Firms charged with implemented recalls should provide incentives to consumers to encourage consumer compliance. The workshop should include a discussion about incentives and how innovation could occur regarding the frequency and type of such incentives.

The workshop should focus on working with recalling companies to create more robust and effective corrective action plans (CAP). This could include preparedness for consumer response to recalls, outreach to supply chain, and coordination between manufacturers and retailers.

- **Invite technology and marketing experts to the workshop**

The Commission should invite technology and marketing experts from academia, government, public interest and consumer organizations, and other stakeholders to attend the workshop to provide input on how to more effectively interact with the public. They should be provided advance notice so that they have an opportunity to prepare recommendations to present to the Commission during the workshop.

Our groups would be happy to provide suggestions for topics and experts and to share our experiences in working on recall effectiveness. The CPSC should provide participants with read ahead material before the workshop to ensure that all participants can fully engage. Please do not hesitate to contact the organizations below for more information on the topics discussed.

Respectfully submitted,

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