



Written Testimony of

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before the

Subcommittee on Consumer Protection and Commerce

Committee on Energy and Commerce

U.S. House of Representatives

on

“Protecting Americans from Dangerous Products: Is the Consumer Product Safety Commission

Fulfilling its Mission?”

April 9th, 2019

Good afternoon Chair Schakowsky, Ranking Member McMorris Rodgers, and Members of the Subcommittee:

Thank you for inviting me to testify before you. My name is Remington A. Gregg, and I am counsel for civil justice and consumer rights at Public Citizen. Public Citizen is a national non-profit organization with more than 500,000 members and supporters. We represent 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. While we care about a large range of product safety issues that we urge the U.S. Consumer Product Safety Commission (CPSC or Commission) to address, this testimony focuses on the areas that Public Citizen works on most closely: increasing transparency, improving the effectiveness of the Commission, holding corporate wrongdoers accountable, and ensuring that companies that recall dangerous products do a better job of getting harmful items out of people's homes.

I. Section 6(b) of the Consumer Product Safety Act contributes to the agency's lack of transparency

In January 2008, a Public Citizen report revealed that the Consumer Product Safety Commission took an average of 209 days to warn the public about hazardous products in the 46 cases from 2002 to 2008 in which the Commission levied fines against the manufacturers.¹ 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, children, and other users of these products. Consumers remained at risk while the dangerous products stayed on the market. We 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—restrictions that do not apply to other, similarly situated government agencies.

1. 6(b) unnecessarily shields important health and safety information from the public

Section 6(b) of the Consumer Product Safety Act 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 certain criteria are met, which can have the effect of stopping the flow of pertinent information from getting to the public. As a result, Section 6(b) has restrained the CPSC's ability to proactively disclose safety hazards to the public. Section

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

6(b) is outdated, anti-consumer, and intended solely to protect the reputation of businesses that put harmful products on the market.

As currently written, 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: (1) the Commission takes reasonable steps to ensure the information is accurate, (2) disclosure is fair in the circumstances, and (3) the disclosure is reasonably related to effectuating the purposes of the CPSA and other laws administered by the Commission.²

When Congress passed the Consumer Product Safety Improvement Act (CPSIA) in 2008, rather than remove 6(b) from statute, Congress decided to require the CPSC to create saferproducts.gov. We are pleased that Congress required the Commission to create the database to give consumers more information to enable them to avoid purchasing dangerous products. It is clear that saferproducts.gov has become a critical tool for protecting consumers from potential hazards and helps to close the time gap between the manufacturer learning of a hazard and the information actually reaching consumers—an unfortunate result of Section 6(b). It was obvious when the CPSIA was enacted that a database would not completely eradicate the problems caused by 6(b). With ten additional years of knowledge, this assertion is even truer today. While we continue to applaud the database, true transparency requires 6(b) to be removed from law.

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 by unnecessarily shielding critical product safety information from public view. There is no legitimate justification for this law, and Congress should eliminate it. We have repeatedly encouraged the CPSC to make the case to Congress as we do so now.

2. Until Congress removes 6(b) from the law, it should require the Commission to finalize rulemaking aimed at easing the law's restrictions

Until Congress eliminates Section 6(b), the CPSC must prioritize the rulemaking that it has begun in order to increase proactive disclosures by the Commission.³ Like the statute, section 6(b)'s implementing regulations are outdated and pro-industry.⁴

The 30-year old CPSA rule 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 rule's adoption have gone unaddressed. Unnecessary delays swallow

² 15 U.S.C. §2055(b).

³ 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).

⁴ *Id.*

up efficient dissemination of public safety information. One obvious example is the Commission's inability to publicly disseminate information that has previously been publicly disclosed which simply gives business and manufacturers another built-in opportunity to influence the process before releasing critical product safety information.

Public Citizen supports the goals of the proposed rule, which would greatly serve consumers and maximize transparency and openness including: (i) ensuring the 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.⁵

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.⁶ 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.

We urge the Commission to continue with the proposed rulemaking without further delay. 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.⁷ Public Citizen still has not received requested documents from a FOIA request that was submitted on September 25, 2018.⁸ We urge the Commission to redouble its efforts to speed up its response time and continue to reduce its FOIA backlog.

II. The Commission must collaborate with technologists with technical expertise to make saferproducts.gov better

We strongly support the consumer product safety database saferproducts.gov, which was created by Section 212 of the CPSIA. We appreciate the CPSC's commitment to this critically important

⁵ *Id.*

⁶ *Id.*

⁷ *Consumer Product Safety Commission*, <https://www.foia.gov/> (last visited Apr. 5, 2019).

⁸ FOIA Request from Public Citizen to Consumer Product Safety Comm'n (Sept. 25, 2018) (acknowledging receipt of the request on November 19, 2018) (on file with the author).

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.⁹

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. Specifically, we strongly urge the Commission to 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),¹⁰ which stated, "there is room to improve both the database itself and how the CPSC collects, uses, and disseminates data."¹¹ We recommended that the Commissioner do so in the following ways:

- Work to increase the database's use by healthcare professionals, consumers and advocates;
- Fold additional data sources from other CPSC databases and resources into saferproducts.gov;
- Increase the data analysis that the agency performs, expand and improve the data categories of harm that are listed in the database, and annually report the data's findings. All of this will help the agency and the public understand if there are: (1) patterns in the reports of harm that the CPSC should know about and (2) potential product types that the agency and manufacturers should be aware of that are most likely to cause hazards to a consumer's safety.

While some of these recommendations (which are discussed more extensively in the report) could be easy to implement, some may be more challenging. As the Commission considers improvements to saferproducts.gov, Public Citizen has continuously urged the Commission to

⁹ 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. June 12, 2014).

¹⁰ See generally, Consumer Federation of America, *Safer Products.gov: Five Years Live* (2016), available at https://consumerfed.org/wp-content/uploads/2016/11/11-29-16-SaferProducts_Report.pdf.

¹¹ *Id.*, at 5.

collaborate with technologists and innovators, including those who have experience in the private sector, to collaborate in order to implement the recommendations that we have made to the Commission. Thus far, to our knowledge, they have failed to take our advice.

III. Public Citizen applauds the use of civil and criminal penalties against corporate wrongdoers

1. Criminal and civil penalties should be used robustly in order to serve as an effective deterrent tool

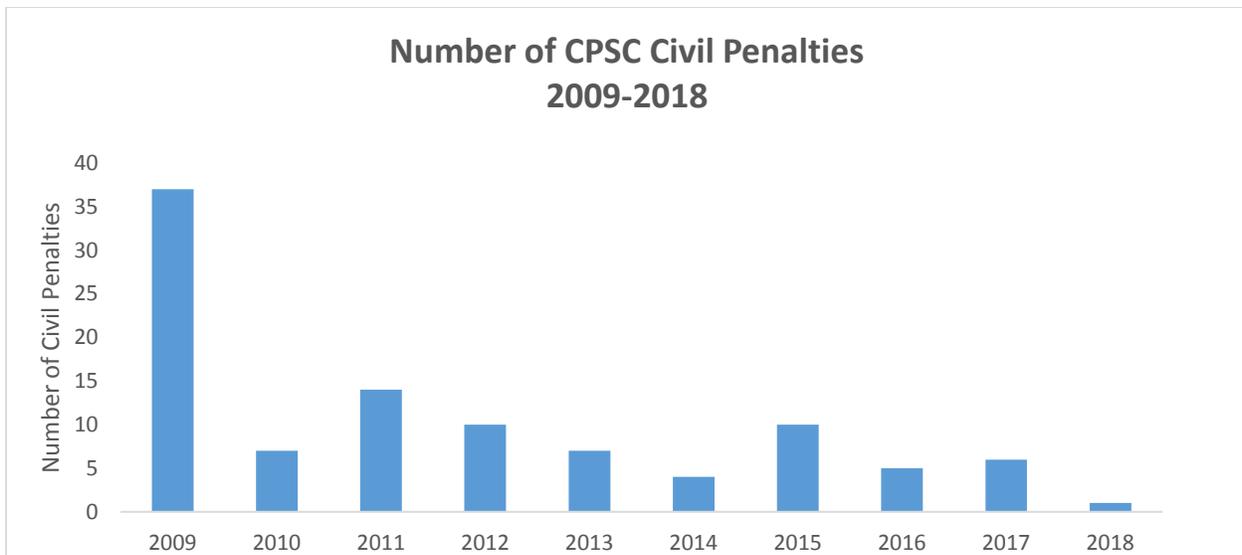
When Congress passed the original Consumer Product Safety Act in 1972, it not only created the Consumer Product Safety Commission (CPSC or Commission) but gave it the Commission the authority to impose monetary penalties against product manufacturers for placing unsafe products into the marketplace. Criminal and civil penalties serve as an important tool to discourage companies from cutting corners when manufacturing products and they also create an incentive to ensure that manufacturers quickly report product defects.

The CPSIA amended the Consumer Product Safety Act in several important ways, including by increasing the cap on penalties from \$8,000 to \$100,000 per violation, and from \$1.825 million to \$15 million for a series of related violations.¹²

Over the last ten years, the CPSC has used its broadened authority wisely and has increased the amount that it imposes on companies. In 2017, for example, the CPSC imposed a record fine against Polaris, a recreational off-road vehicle (ROV) manufacturer for multiple product safety violations including, among other things, failing to notify the CPSC about defects in some of their ROVs. By the time Polaris notified the Commission, the company had received 150 complaints about ROVs catching fire, including a fire that resulted in the death of a 15 year-old passenger. While CPSIA gave commissioners discretion to use increased penalties in the judgements imposed on companies, and they had been making use of the higher penalty possibilities, that trend has slowed since the Trump administration came into power. According to a recent Public Citizen report, in Trump’s first year in office, the CPSC [i]mposed about \$21.4 million in penalties with an average penalty of \$5.3 million. That was down from \$37.3 million a year earlier...¹³—Barack Obama’s last year in office. In addition, according to our research, the Trump administration-run CPSC has “completed no enforcement actions in the fourth quarter of 2017 or the first quarter of 2018.” The CPSC imposed its first penalty against in April 2018.

¹² *Consumer Product Safety Improvement Act Tenth Anniversary Album* 38 (2018), available at <https://consumerfed.org/wp-content/uploads/2018/08/cpsia-anniversary/?page=1>.

¹³ Rick Claypool et al., *Corporate Impunity: “Tough on Crime” Trump is Weak on Corporate Crime and Wrongdoing* 34 (2018), available at <https://www.citizen.org/sites/default/files/corporate-enforcement-public-citizen-report-july-2018.pdf>.



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2. The dip in enforcement is the direct result of current Commission leadership

This dip in enforcement actions is likely due to new leadership at the agency. CPSC Acting Chair Ann Marie Buerkle has consistently voted against imposing civil penalties on companies. In fact, during her tenure (both as acting chair and a commissioner), our report noted that Buerkle voted against imposing penalties “in 16 out of 21 instances for companies that failed to report problems with their products.” Buerkle’s seeming aversion to using civil penalties is one of the reasons why Public Citizen spoke out in October 2017 and April 2019 in opposition to her being the permanent head of the CPSC.¹⁵ When asked about Public Citizen’s reasons for opposing her nomination, Acting Chair Buerkle refused to answer the questions and simply stated that on her watch the agency has “fulfilled its obligation under the statutes.”¹⁶

Congress empowered the CPSC with the responsibility of imposing penalties on companies when they place dangerous products into the marketplace and fail to report or otherwise open consumers up to injury or death. Civil penalties are a tool that should be used robustly, both to protect consumers against harm and to carry out Congress’s intent when it increased the CPSC’s civil penalty authority a decade ago. While we hope the agency will reverse the current trend under Acting Chair Buerkle and instead go back toward imposing meaningful civil penalties on

¹⁴ Information in the graph was compiled by Consumer Federation of America.

¹⁵ Letter from Lisa Gilbert, Vice President for Legislative Affairs, Pub. Citizen, and Remington A. Gregg, Counsel for Civil Justice and Consumer Rights, Pub. Citizen, to United States Senate (Apr. 2019) (on file with author); Letter from Lisa Gilbert, Vice President for Legislative Affairs, Pub. Citizen, and Remington A. Gregg, Counsel for Civil Justice and Consumer Rights, Pub. Citizen, to United States Senate (Oct. 4, 2017) (on file with author).

¹⁶ C-Span, Washington Journal, *available at* <https://www.c-span.org/video/?c4743248/ann-marie-buerkle-role-cpsc> (Aug. 2, 2018).

corporate wrongdoers in furtherance of its important mission to ensure that only safe products make it into the marketplace, this unfortunately seems unlikely.¹⁷

The Commission under Acting Chair Buerkle's leadership has shown a disinclination to place the safety of consumers over industry loyalty. For example, according to the Washington Post, the CPSC collected 200 consumer-submitted reports from 2012 to 2018 of a "spontaneous failure of the stroller wheel" for the Britax jogging stroller.¹⁸ Nearly 100 adults and children reported injuries as a result, including torn ligaments, smashed teeth, sustained facial lacerations, and one child bled from his ear canal.¹⁹ After extensive engineering tests and investigations, CPSC staff found that children could suffer "potentially life-threatening injuries."²⁰ The manufacturer refused the request for a voluntary recall of nearly 500,000 strollers. In February 2018, the CPSC sued to force a recall, but Acting Chair Buerkle, who has broad control over the Commission's agenda, reportedly slowed the action. The dispute ended in November 2018 with a weak settlement with the company, approved on a party line Commission vote.

Acting Chair Buerkle also hired as the agency's General Counsel a former member of the board of directors for the Portable Generators Manufacturers Association. This choice shows a lack of appreciation for the important mission of the agency to protect Americans from unreasonable injury and death.

This month, the Department of Justice (DOJ) brought the first criminal charge against corporate wrongdoers for failing to promptly notify the Commission that a product presented a risk of injury or death to consumers.²¹ The two corporate executives, who sold residential dehumidifiers in the United States, allegedly failed to disclose for at least six months that the dehumidifiers could catch fire. DOJ also alleges that the corporate executives continued to sell the dehumidifiers to retailers with false certifications that the products met safety standards while also withholding information about the product catching fire from retailers and insurance companies that paid for damages that resulted from the fires. Under that law, "manufacturers, importers, and distributors of consumer products" are required to "immediately" report information to the CPSC that reasonably supports the conclusion that a product contains a defect

¹⁷ See generally Alan Zibel, *Consumer Carnage: How Federal Enforcement of Consumer-Protection Laws Has Declined Under Trump* (2019), available at

<https://www.citizen.org/sites/default/files/consumeragencies.pdf?eType=EmailBlastContent&eId=eb0584cf-dbf0-4251-b01a-b0e86d86066a>.

¹⁸ https://www.washingtonpost.com/business/economy/after-hundreds-of-crashes-this-britax-jogging-stroller-faced-recall-then-trump-appointees-stepped-in/2019/04/02/faf23c20-4c06-11e9-b79a-961983b7e0cd_story.html?noredirect=on&utm_term=.83981741c6c9.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Press Release, Department of Justice, Two Corporate Executives Indicted in First-Ever Criminal Prosecution for Failure to Report Under Consumer Product Safety Act (Mar. 29, 2019), available at

<https://www.justice.gov/opa/pr/two-corporate-executives-indicted-first-ever-criminal-prosecution-failure-report-under>.

that could create a substantial product hazard or creates an unreasonable risk of serious injury or death.²² While long overdue, Public Citizen is encouraged that the Department is using its authority to hold the most blatant corporate wrongdoers criminally responsible. We urge the Commission to work with the Department of Justice to identify others who should be prosecuted under this statute.

IV. Ensuring Effective and Prompt Recalls

The agency has been largely unsuccessful in getting consumers to return unsafe products to retailers, and recall rates remain shockingly low. The average rate at which consumers participate in corrective actions is about 6% for all product types.²³ In 2017, the Commission hosted a workshop on recall effectiveness. Public Citizen was eager to collaborate with the Commission to help find 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 and academics to the workshop for their input.²⁴ Unfortunately, these recommendations were not incorporated into the workshop, nor has there been follow-up actions to that meeting other than a recently released report.²⁵ We urge the Commission to continue this important conversation by expanding voices on this topic beyond those initially assembled to ensure that all viewpoints are solicited and the right expertise is in the room. It cannot be overstated how important it is for the Commission to actively solicit the views of especially technologists and those with experience innovating with the federal government.

Moreover, Congress should closely monitor why the agency has failed to hold Ikea responsible for its unacceptably low rate recall rate of defective dressers. Sadly, the defective model dresser has injured 91 and killed 8 children after the dresser tipped over onto them.²⁶ But since the high-profile recall was announced in 2016, Ikea has only given 175,000 refunds and re-installed 268,000 dangerous dressers despite the fact that the recall affected more than 17 million dressers.²⁷

Ikea is just one company where the Commission should be required go farther to ensure more effective recalls. To that end, we urge the Committee to seek information from the Commission

²² 15 U.S.C. § 2064.

²³ Letter from Consumer Organizations to the U.S. Consumer Product Safety Commission (Sept. 5, 2018), *available at* <https://consumerfed.org/wp-content/uploads/2018/09/consumer-comments-on-recall-effectiveness.pdf>.

²⁴ *Id.*

²⁵ Joseph F. Williams, *Recall Effectiveness Workshop Report* (2018), *available at* https://www.cpsc.gov/s3fs-public/Recall_Effectiveness_Workshop_Report-2018.pdf?R1VyLltrl8M__id.2vkAklHoUZjaSCab.

²⁶ *IKEA Reannounces Recall of Malm and Other Models of Chests and Dressers Due to Serious Tip-Over Hazard; 8th Child Fatality Reported; Consumers Urged to Choose Between Refund of Repair*, IKEA.COM (Nov. 21, 2017), https://www.ikea.com/us/en/about_ikea/newsitem/112117-MALM-and-Chest-of-drawers-Recall.

²⁷ We do not have updated statistics, but urge the Committee to seek them from the Commission and/or Ikea.

on what it is doing to push Ikea to do more to get these unsafe dressers out of homes and generally where else the CPSC is seeing very low product returns, meaning these dangerous products are currently posing threats to Americans health and safety.

V. Conclusion

The Commission faces many challenges. Until Section 6(b) is removed from the law, the agency will be constrained and thwarted from releasing certain important information without agreement from manufacturers. In the interim, it is critical to improve the profile and usability of saferproducts.gov so that the public, advocates, and Congress have the most accurate picture of product safety hazards and to help track harmful product trends. Moreover, the data suggest that Commission leadership is prepared to continue a “less enforcement is best” attitude. We urge Congress to make it clear to the agency that its mission to protect the public from unreasonable injury or death requires it to promulgate robust rules to protect consumers and hold corporate wrongdoers accountable with strong penalties that serve as an effective deterrent.

Public Citizen is acutely aware of the CPSC’s enormous jurisdictional obligations and the challenges posed by disproportionately modest resources. Despite this, we believe that if the Commission proceeds with a mandate to prioritize consumer safety above all else—including 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 for the opportunity to provide comments and I look forward to your questions.