



**[Billing Code 6355-01-P]**

## **CONSUMER PRODUCT SAFETY COMMISSION**

16 CFR Part 1015

### **Procedures for Disclosure or Production of Information under the Freedom of Information Act; Amendments**

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Consumer Product Safety Commission (Commission, CPSC, or we) is issuing this notice of proposed rulemaking (NPR) to update its Freedom of Information Act (FOIA) rule. We are proposing to revise the rule to conform to the amendments of the FOIA Improvement Act of 2016 (the 2016 FOIA) to the FOIA. The Commission also proposes to update the rule to reflect changes in Commission procedures, update Commission contact information, including current methods of submitting requests for records to the Commission, revise employee titles, and make various technical changes and corrections. This NPR seeks comments on the proposed changes to the rule.

**DATES:** Submit comments by [INSERT DATE - 75 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by Docket No. CPSC-2016-0030, by any of the following methods:

*Electronic Submissions:* Submit electronic comments to the Federal eRulemaking Portal at <https://www.regulations.gov/>. Follow the instructions for submitting comments. The

Commission does not accept comments submitted by electronic mail (email), except through: <https://www.regulations.gov/>. The Commission encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

*Written Submissions:* Submit written comments by mail/hand delivery/courier to: Office of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

*Instructions:* All submissions received must include the agency name and docket number for this proposed rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to: <https://www.regulations.gov/>. Do not submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If furnished at all, such information should be submitted by mail/hand delivery/courier.

*Docket:* For access to the docket to read background documents or comments received, go to: <https://www.regulations.gov/>, and insert the docket number, CPSC-2016-0030, into the “Search” box, and follow the prompts.

**FOR FURTHER INFORMATION CONTACT:** Renee McCune, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7673; or Todd A. Stevenson, Chief Freedom of Information Officer, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-6836.

**SUPPLEMENTARY INFORMATION:** The Commission is proposing to amend the agency’s procedures for disclosure or production of information under the Freedom of Information Act. 16 CFR part 1015.

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## **I. Background Information**

On June 30, 2016, the President signed into law the 2016 FOIA, Public Law No. 114-185 (2016). The 2016 FOIA amends the Freedom of Information Act, 5 U.S.C. 552, requiring an agency to review its FOIA regulations and issue regulations on procedures for the disclosure of records under the new amendments. Specifically, the 2016 FOIA requires: certain records be

available for public inspection in an electronic format; agencies to make available for public inspection in an electronic format records that have been requested three or more times; that an agency not withhold information under FOIA unless the agency reasonably foresees that disclosure would harm an interest protected by a FOIA Exemption or disclosure is prohibited by law; extending the number of days for an administrative appeal of an adverse determination from 30 to 90 days; limiting the FOIA Exemption for records created 25 years or more before the date on which the records were requested; the assessment of fees be limited in certain circumstances; and requesters be notified of available dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.

The Commission proposes amendments to its regulations implementing the 2016 FOIA, 16 CFR Part 1015, to incorporate these new statutory requirements. The proposed amendments would revise the Commission's FOIA regulations to comply with the FOIA, as amended by the 2016 FOIA, and would update Commission procedures, contact information, and methods of submitting requests for records to the Commission, in addition to other conforming and technical revisions. Updating Commission procedures and Commission contact information would provide clarity for requesters seeking records from the Commission.

## **II. Section-by-Section Analysis of the Proposed Revision of the Procedures for Disclosure or Production of Information under the Freedom of Information Act**

### **Subpart A—Production or Disclosure Under 5 U.S.C. 552(a)**

#### *Proposed Changes to § 1015.1 (Purpose and scope.)*

Initially, we would update § 1015.1(a) to add the Children's Gasoline Burn Prevention Act, the Virginia Graeme Baker Pool and Spa Safety Act, and the Child Nicotine Poisoning

Prevention Act to the scope of statutes for which records must be maintained in connection with the Commission's responsibilities and functions under those acts because they were enacted after the last revision to the regulation in 1997.

The proposal also would revise § 1015.1(b) to reflect new FOIA 5 U.S.C. 552(a)(8)(A), requiring agencies to analyze under a foreseeable harm standard the withholding of information permitted by the exemptions set forth in 5 U.S.C. 552(b). The proposal would allow information to be withheld pursuant to the exemptions, only if the Commission reasonably foresees that disclosure would harm an interest protected by a specific FOIA exemption, or if disclosure is otherwise prohibited by law. This proposal, consistent with the 2016 FOIA, would not require disclosure of information otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under 5 U.S.C. 552(b)(3) (FOIA Exemption 3), which prohibits the disclosure of matters specifically exempted from disclosure by another statute. The proposal would specify that the Commission will consider the record's age, content, and character in assessing whether it reasonably foresees that disclosure of the document would harm an interest protected by an exemption. Additionally, consistent with the FOIA as amended by the 2016 FOIA, we also propose a revision that would require that we consider partial disclosure when full disclosure of a record is not possible and that we take reasonable steps to segregate and release nonexempt information.

Under the proposed revision, for example, Commission records that currently fall within the parameters of 5 U.S.C. 552(b)(5) (FOIA Exemption 5) would be subject to the foreseeable harm standard. FOIA Exemption 5 incorporates, among other privileges, the deliberative process privilege, which is considered a discretionary exemption, meaning that withholding of records resides within the discretion of the agency, rather than mandated by law. As the Senate report on

the FOIA amendment explains: “[t]he foreseeable harm standard applies only to those FOIA Exemptions under which discretionary disclosures can be made. Several FOIA Exemptions, by their own existing terms, cover information that is prohibited from disclosure or exempt from disclosure under a law outside the four corners of the FOIA. Such information is not subject to discretionary disclosure and is therefore not subject to the foreseeable harm standard.” Senate Report No. 114-4, p 8 (February 23, 2015). Under this analysis and Department of Justice guidance, records protected by the deliberative process privilege under FOIA Exemption 5 shall be considered for release under the foreseeable harm standard, even if the records may otherwise be properly withheld under this exemption. In deciding whether to make a discretionary release of records protected by the deliberative process privilege, the Commission may consider, in addition to the record’s age, content, and character, the nature of the decision at issue, the status of that decision, and the personnel involved.

The foreseeable harm standard, however, would not be applied to disclosures prohibited by law or covered by FOIA Exemption 3, which pertains to matters specifically exempted from disclosure by another statute. Exemption 3 would include disclosures prohibited under section 6 of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2055(a)(2), and thus, the proposal to apply the foreseeable harm standard would not alter, or otherwise limit, the information disclosure restrictions set forth in section 6. Current § 1015.1(b) already references disclosures prohibited by law under Section 6(a)(2) of the CPSA. The proposal, as revised, would preserve that prohibition, consistent with the statutory direction, and it would clarify that information covered by FOIA Exemption 3 is prohibited from disclosure and not subject to analysis under the foreseeable harm standard. Specifically, the proposed revision would state that Commission

records subject to Section 6 and 25(c) of the CPSA, 15 U.S.C. 2055 and 2074(c), fall within the scope of FOIA Exemption 3.

The proposal also would revise § 1015.1(c) to remove the existing statement that the Attorney General's Memorandum on the 1974 Amendments to the FOIA may be consulted in considering questions arising under the FOIA. That memorandum is outdated and should not be consulted in considering questions arising under the FOIA because the FOIA has been statutorily amended multiple times since 1974.

In place of the current § 1015.1(c), we propose a new § 1015.1(c) to reflect that the Commission Secretariat serves as the agency's Chief FOIA Officer. The 2016 FOIA amends the FOIA at 5 U.S.C. 552(j) to require each agency to designate a Chief FOIA Officer, who shall be a senior official of the agency, and shall have, subject to the authority of the head of the agency, among other responsibilities, responsibility for compliance and implementation of section (j) of the FOIA. The revised § 1015.1(c) would state that the Commission's Chief Freedom of Information Officer, a senior official at the Commission, would be the Secretariat. Therefore, for clarity and consistency with the provisions of § 1015.4, which vests ultimate authority for responding to FOIA requests in the Commission's Secretariat, and in conformance with amendments made to the FOIA, we propose new language explaining that the Secretariat of the Commission is the Chief Freedom of Information Officer, who, subject to the authority of the Chairman, is responsible for compliance with, and implementation of, 5 U.S.C. 552(j).

We additionally propose minor and non-substantive changes in grammar.

*Proposed Changes to § 1015.2 (Public reference facilities.)*

To reflect amendments in the 2016 FOIA that focus on public inspection in an electronic format, we are proposing to revise the title of this section to “*Public inspection.*” Additionally, we propose removing “and copying” from § 1015.2(a) and (b), and replacing that phrase with “in an electronic format,” to conform to the amendments to the FOIA at 5 U.S.C. 552(a).

We also propose removing the statements in § 1015.2(b) regarding additional Commission public reference facilities. With changes in technology, public inspection at the Commission headquarters is rare, and we do not anticipate a need for additional public reference facilities. To provide additional information to the public about the Commission’s electronic reading room, we propose adding the Commission’s website address to § 1015.2(c) and a statement indicating that records that the Commission must make available for public inspection in an electronic format may be accessed through the e-FOIA Public Access Link at the Commission’s website address.

Additionally, to conform with amendments to the FOIA at 5 U.S.C. 552(a)(2)(D), we are proposing a new § 1015.2(d), which requires the agency, subject to any restrictions imposed by section 6 of the CPSA, to make available for public inspection in an electronic format, copies of certain records, regardless of form. Specifically, the Commission shall make available for public inspection, records that have been released under FOIA, records that, because of the nature of the subject matter, the agency determines are likely to become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

We additionally propose correcting “Secretary” to the current title of “Secretariat” throughout this paragraph and updating the room number of the Office of the Secretariat.

*Proposed Changes to § 1015.3 (Requests for records and copies.)*



We propose a revision to the title of this section by removing “and copies” to reflect amendments to the FOIA at 5 U.S.C. 552(a).

To reflect current practice, we also propose updating § 1015.3(a) on the ways requesters may submit requests for records to the Commission, to include electronic methods. In addition to submitting requests by mail, requesters would be able to submit a request through the Commission’s e-FOIA Public Access Link, e-mail, or facsimile. We also propose a technical correction to reflect the Commission’s address. To promote good FOIA customer service, we also propose to revise § 1015.3(b) to state that, before submitting requests, requesters may contact the Commission’s FOIA contact or FOIA Public Liaison to discuss the records the submitter seeks and to receive assistance in describing the records.

Additionally, throughout this section we propose changing “Secretary” to “Secretariat” to update the position to its current title.

*Proposed Changes to § 1015.4 (Responses to requests for records; responsibility.)*

We propose changing “Secretary” to “Secretariat” throughout this section to reflect the name of the position to its current title.

*Proposed Changes to Rule § 1015.5 (Time limitations on responses to requests for records and requests for expedited processing.)*

We propose updating § 1015.5(a) to incorporate new procedural requirements and to reflect current Commission practices and advances in technology. We propose clarifying that time limitations on responses to requests submitted by postal mail would begin to run at the time the request is received and date-stamped by the Office of the Secretary (which we propose revising

to the Office of the Secretariat). We would also update the regulation to reflect the current practice that the Office of the Secretariat will date-stamp requests the same day that it receives the requests. We also propose that time limitations on responses to requests submitted electronically would begin to run at the time the request is electronically received, if the request is submitted during “working hours,” which we define as 8 a.m. to 4:30 p.m. EST. For responses submitted electronically during non-working hours, the proposed change would require that time limitations begin to run the next working day after the request is submitted.

If the Commission is unable to respond to a request within this time frame, the current § 1015.5(b) allows the Secretariat, at the initial stage, or the General Counsel, at the appellate stage, to extend the time for responding to requests up to 10 additional working days, if a request satisfies the criteria for “unusual circumstances.” Moreover, as explained in current § 1015.5(d), if the Secretariat or General Counsel determines that an extension of more than 10 days is required, the Secretariat or General Counsel must give the requester an opportunity to limit the scope of the request or arrange for an alternative timeframe to process the request. Under the new FOIA amendments, in those circumstances, agencies are required to make available its FOIA Public Liaison to assist in the resolution of any disputes between the requester and the agency. The 2016 FOIA additionally requires agencies to notify requesters of the right to seek dispute resolution services from the Office of Government Information Services. Therefore, we propose adopting language stating that if an extension of time greater than 10 working days is necessary, the Commission will make available its FOIA Public Liaison for purposes of dispute resolution. Additionally, we propose providing information about where on the Commission’s website, the Commission’s designated FOIA Liaison(s) is listed and also stating that the Commission will notify requesters in writing of the availability of the Office of Government

Information Services to provide dispute resolution services, as required by the 2016 FOIA. We propose inserting this language into a new § 1015.5(e), and we propose re-designating the succeeding paragraphs in § 1015.5 to conform to this change.

We also propose adding a statement to the current § 1015.5(f)(2), clarifying that requests for expedited processing may be submitted through any of the methods described in the proposed § 1015.3(a), in which we propose updating the regulation to reflect new electronic methods of submission.

We additionally propose revising “Secretary” to “Secretariat” throughout, to change the name of the position to its current title.

*Proposed Changes to § 1015.6 (Form and content.)*

To reflect the current organizational structure of the agency and to align with the 2016 FOIA amendments to the FOIA, indicating that documents for public inspection will be made available in electronic format, we propose revising § 1015.6(a) to state that when a requested record has been identified, requesters shall be supplied with a copy or notified of where and when the document will be made available for public inspection in an electronic format. We also propose removing the reference to making records available at a requested regional office. This option is outdated and no longer applicable because the Commission does not have regional offices that the public can visit.

We additionally propose amending § 1015.6(a) to conform with the 2016 FOIA amendments to 5 U.S.C. 552(a)(6)(A)(i), which require the Commission, when responding to a records request, to notify requesters of their right to seek assistance from the Commission’s FOIA Public Liaison.

In the case of a denial, we propose revisions to conform with the 2016 FOIA amendments to 5 U.S.C. 552(a)(6)(A)(i)(III)(aa), which requires that agencies notify requesters when there is an adverse determination that requesters have the right to appeal within a period determined by the head of the agency that is not less than 90 days after the date of such determination. Accordingly, we propose revising § 1015.6(b)(4) to change “30 calendar days” to “90 calendar days.” We also propose adding a new § 1015.6(b)(5), which would require the Commission, in the case of a denial, to notify requesters of their right to seek dispute resolution services from the Office of Government Information Services.

We additionally propose revising “Secretary” to “Secretariat” throughout the section, to revise the title of the position to its current title.

*Proposed Changes to § 1015.7 (Appeals from initial denials; reconsideration by the Secretary.)*

We propose revising the deadline for appealing a denial of a records request from 30 days to 90 calendar days in § 1015.7(a) to conform with the 2016 FOIA amendments described above regarding proposed changes to § 1015.6.

We additionally propose updating the regulation at § 1015.7(a) to list the ways, including electronic methods, that a requester may appeal a denial to the General Counsel of the Commission.

To reflect changes in Commission procedures due to advances in information technology, we propose updating § 1015.7(b) to specify that time limitations on appeals submitted by postal mail would begin to run when the appeal is received and date-stamped by the Office of the Secretary (proposed to be changed to the Office of the Secretariat). We would also update the regulation to

reflect the current practice that the Office of the Secretariat will date-stamp requests the same day that it receives the requests. We also propose that time limitations on appeals submitted electronically would begin to run at the time the appeal is electronically received, if the request is submitted during “working hours,” which we define as 8 a.m. to 4:30 p.m. EST. For responses submitted electronically during non-working hours, the proposed change would require that time limitations begin to run the next working day.

To conform with the 2016 FOIA amendments to 5 U.S.C. 552(a)(6)(A)(i)(III)(bb), which require agencies to provide notification in an adverse determination of the right to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services, we propose including a statement in § 1015.7(e) stating that the Commission will provide such a notification.

We additionally propose revising “Secretary” to “Secretariat” throughout the section, including in the title, to correct the name of this position.

*Proposed Changes to § 1015.9 (Fees for production of records.)*

We propose to make technical changes throughout this section, including a revision to § 1015.9(b) to reflect updated ways to effectuate fee payment. We also propose to account for efforts expended to locate and retrieve electronic information by revising the term “search” in § 1015.9(c)(2) and the definition of “duplication” in § 1015.9(c)(3) and to account for new technology changes that are not reflected in the regulation. The proposal would also account for the efforts to scan documents through a revision of § 1015.9(e)(1), which would require a requester to pay the direct costs associated with scanning documents.

We also propose to revise § 1015.9(f)(6) to conform to the 2016 FOIA amendments to 5 U.S.C. 552(a)(4)(A)(viii)(II). The changes would require the Commission to waive fees where the agency fails to comply with a time limit that it has extended because the agency has determined that unusual circumstances apply. However, if the extension for unusual circumstances involves more than 5,000 responsive pages, the Commission may continue to charge fees, provided it has given timely notice to the requester and has discussed with the requester how to effectively limit the scope of the request. Thus, the regulation would be revised to prevent the Commission from assessing search fees for any requester or duplication fees for an educational institution, non-commercial scientific institution, or a representative of the news media requester, if the Commission fails to comply with an extended time limit, unless 5,000 pages are responsive to the request, and the Commission has made three good faith attempts to discuss with the FOIA requester limiting the scope of the request.

We additionally propose revising “Secretary” to “Secretariat” throughout the section, including in the title, to correct the name of this position.

*Proposed Changes to § 1015.10 (Commission report of actions to Congress.)*

We propose revisions to this section to conform to the 2016 FOIA amendments to 5 U.S.C. 552(e)(1). Specifically, we propose adding a statement that the Commission must submit the report to the Director of the Office of Government Information Services in addition to its current requirement to submit the report to the Attorney General of the United States. We also propose adding, in conformance with the statute, new § 1015.10(h), stating that the report shall include the number of times the Commission denied a request for records under 5 U.S.C. 552(c) and new

§ 1015.10(i), stating that the report shall include the number of records that were made available for public inspection in an electronic format under 5 U.S.C. 552(a)(2).

*Proposed Changes to Rule § 1015.11 (Disclosure of trade secrets to consultants and contractors; nondisclosure to advisory committees and other government agencies.)*

We propose to add language to § 1015.11 to clarify that the reference in § 1015.11(a) and (b) to 5 U.S.C. 552(b)(4) includes not only trade secrets, but also includes commercial or financial information.

We also propose revising § 1015.11(b) to incorporate an amendment to the CPSA, 15 U.S.C. 2078(f), by the Consumer Product Safety Improvement Act of 2008, Public Law No. 110-314 (2008), which permits the Commission to share information with federal, state, and local agencies, if certain requirements are satisfied.

### **Subpart B—Exemptions From Production and Disclosure Under 5 U.S.C. 552(b)**

*Proposed Changes to § 1015.15 (Purpose and scope.)*

We propose removing language in § 1015.15(a) that references the internal Commission procedure for withholding exempt records because, as explained below in *Proposed Changes to Rule § 1015.17 (Internal Commission procedure for withholding exempt records.)*, we propose removing § 1015.17 entirely.

We also propose revisions to § 1015.15(b) to conform to the 2016 FOIA amendment to 5 U.S.C. 552(a)(8)(A), which provides that agencies shall withhold information under 5 U.S.C. 552, only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in 5 U.S.C. 552(b), or disclosure is otherwise prohibited by law.

Currently, the rule states that the Commission will make available, to the extent permitted by law, records authorized to be withheld under 5 U.S.C. 552(b), unless the Commission determines that disclosure is contrary to the public interest. To align with the 2016 FOIA amendments, we propose revising this section to state that the Commission will make available records authorized to be withheld under one of the FOIA exemptions, “unless the Commission reasonably foresees that disclosure would harm an interest protected by the exemption or disclosure is prohibited by law or otherwise exempted from disclosure under 5 U.S.C. 552(b)(3).”

Additionally, we propose updating § 1015.15(c) to reflect the focus of the 2016 FOIA on public inspection of documents in an electronic format, which is consistent with current practice. The proposal would require that briefing packages, or portions thereof, which the Secretary (which we propose revising to Secretariat), upon the advice of the Office of the General Counsel, has determined would be released, upon request, would be made available for public inspection in an electronic format through the Commission’s website. Specifically, we propose removing the language stating that such briefing packages would be publicly available in the public reference facility established under § 1015.2, and replacing it with proposed language indicating that the information will be available electronically on the Commission’s website.

We also propose revising “Secretary” to “Secretariat” in § 1015.15(c), to correct the name of this position and propose a non-substantive grammatical revision in the first sentence of § 1015.15(b).

*Proposed Changes to § 1015.16 (Exemptions (5 U.S.C. 552(b)).)*

The 2016 FOIA amends 5 U.S.C. 552(b)(5) to include a sunset provision on the deliberative process privilege so that it does not apply to records created 25 years or more before the date on



which the records were requested. We propose amending § 1015.16(e) to add language reflecting this change.

We also propose non-substantive technical corrections to §§ 1015.16(e) and (f) to track the statutory language.

*Proposed Changes to § 1015.17 (Internal Commission procedure for withholding exempt records.)*

We propose removing all of § 1015.17 and reserving this section. Section 1015.17 describes an internal Commission procedure that allows a Commission bureau or office director who believes that it is against the public interest to disclose a Commission record prepared by his/her office that may be exempt from disclosure under the inter- intra-agency memorandum exemption at 5 U.S.C. 552(b)(5) or the investigatory file exemption at 5 U.S.C. 552(b)(7) to request that the Secretary withhold the document, and, if necessary, appeal that decision to the Commission. The current § 1015.17(a)(1) states that if the Secretary agrees to withhold the document, the requester shall be notified in writing of the denial and of his/her right to appeal. Section 1015.17 is not necessary and should be removed because procedures for Commission responses to requests based on an analysis of harm to the public interest would now be described in detail in proposed § 1015.1(b) and § 1015.6 and include additional updated requirements not in § 1015.17. Accordingly, we propose removing § 1015.17 because it does not reflect current internal Commission procedures. Moreover, even if the provisions were not outdated, we would propose removing this provision because it describes an internal procedure that is more appropriate for including in a Commission Directive on staff procedure than in a regulatory scheme.

**Subpart C—Disclosure of Commission Accident or Investigation Reports Under 15 U.S.C. 2074(c)**

*Proposed Changes to § 1015.20 (Public availability of accident or investigation reports.)*

We propose updating § 1015.20(a) to reflect current Commission procedure. The rule currently states that accident or investigation reports are available to the public under the procedures set forth in subpart A and that no portion of such reports are subject to the investigatory file exemption. Current Commission procedure allows for the withholding of accident or investigation reports, if the requirements of the investigatory file exemption are met. Therefore, we propose revising this section to state that accident or investigation reports are available to the public under the procedures set forth in subpart A, unless such reports are subject to the investigatory file exemption.

**III. Environmental Considerations**

The Commission’s regulations address whether the Commission is required to prepare an environmental assessment or an environmental impact statement. 16 CFR part 1021. These regulations provide a categorical exclusion for certain CPSC actions that normally have “little or no potential for affecting the human environment.” 16 CFR 1021.5(c)(1). This proposed rule falls within the categorical exclusion.

**IV. Regulatory Flexibility Analysis**

Under section 603 of the Regulatory Flexibility Act (RFA), when the Administrative Procedure Act (APA) or another law requires an agency to publish a general notice of proposed rulemaking, the agency must prepare an initial regulatory flexibility analysis (IFRA), assessing

the economic impact of the proposed rule on small entities or certify that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603(a), 605. The Commission chooses to provide notice and comment for this rulemaking. However, because this is a “rule of agency organization, procedure, or practice,” the APA does not require a notice of proposed rulemaking. 5 U.S.C. 553. Additionally, we note that the rule would merely set out in a regulation the procedural requirements stated in the FOIA of 2016, update Commission procedures, and make other technical changes and corrections. We expect that the proposed rule will not have a significant economic impact on a substantial number of small entities.

#### **V. Paperwork Reduction Act**

The Paperwork Reduction Act (PRA) establishes certain requirements when an agency conducts or sponsors a “collection of information.” 44 U.S.C. 3501-3520. The proposed rule would amend the Commission’s rule to conform to the 2016 FOIA and to update Commission procedures and make other technical changes and corrections. The proposed rule would not impose any information collection requirements. The existing rule and the proposed revisions do not require or request information from firms, but rather, explain the Commission’s FOIA procedures. Thus, the PRA is not implicated in this proposed rulemaking.

#### **VI. Executive Order 12988 (Preemption)**

According to Executive Order 12988 (February 5, 1996), agencies must state in clear language the preemptive effect, if any, of new regulations. Section 26 of the CPSA explains the preemptive effect of consumer product safety standards issued under the CPSA. 15 U.S.C. 2075. The proposed rule is not a consumer product safety standard, but rather, would revise a rule of

agency practice and procedure by implementing the FOIA of 2016 and making technical revisions or corrections. Therefore, section 26 of the CPSA would not apply to this rulemaking.

## **VII. Effective Date**

In accordance with the APA's general requirement that the effective date of a rule be at least 30 days after publication of the final rule, the Commission proposes that the effective date be 30 days after the date of publication of a final rule in the **Federal Register**. 5 U.S.C. 553(d).

## **VIII. Request for Comments**

The Commission requests comments on all aspects of the proposed rule. Comments should be submitted in accordance with the instructions in the **ADDRESSES** section at the beginning of this document. Written comments must be received by [INSERT DATE - 75 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

### **List of Subjects in 16 CFR 1015**

Administrative practice and procedure; Consumer protection; Disclosure of information; Freedom of information.

For the reasons set forth in the preamble, the Commission proposes to amend 16 CFR part 1015 to read, as follows:

### **PART 1015 —PROCEDURES FOR DISCLOSURE OR PRODUCTION OF INFORMATION UNDER THE FREEDOM OF INFORMATION ACT**

1. The authority citation for part 1015 is revised to read, as follows:

**AUTHORITY:** 15 U.S.C. 2051-2084; 15 U.S.C. 1261-1278; 15 U.S.C. 1471-1476; 15 U.S.C. 1211-1214; 15 U.S.C. 1191-1204; 15 U.S.C. 8001-8008; 110 P.L. 278, 122 Stat. 2602; 5 U.S.C. 552.

2. Amend § 1015.1 by revising the third sentence in paragraph (a) and revising paragraphs (b) and (c) to read, as follows:

**1015.1 Purpose and scope.**

(a) \*\*\* These records include those maintained in connection with the Commission's responsibilities and functions under the Consumer Product Safety Act, as well as those responsibilities and functions transferred to the Commission under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, the Refrigerator Safety Act, the Flammable Fabrics Act, the Children's Gasoline Burn Prevention Act, the Virginia Graeme Baker Pool and Spa Safety Act, and the Child Nicotine Poisoning Prevention Act, and those maintained under any other authorized activity. \* \* \*

(b) The Commission's policy with respect to requests for records is that disclosure is the rule and withholding is the exception. All records or portions of records not exempt from disclosure will be made available. Records which may be exempted from disclosure will be made available unless: (1) disclosure is prohibited by law; (2) the Commission reasonably foresees that disclosure would harm an interest protected by an exemption described in 5 U.S.C. 552(b); or (3) disclosure is exempted under 5 U.S.C. 552(b)(3). See § 1015.15(b). Section 6(a)(2) of the Consumer Product Safety Act, 15 U.S.C. 2055(a)(2), prohibits the disclosure of trade secrets or other matters referred to in 18 U.S.C. 1905; Section 6(b) and Section 25(c) of the CPSA. The Commission will consider the record's age, content, and character in assessing whether it reasonably foresees that disclosure of the document would harm an interest protected by an exemption. Additionally, the Commission will consider whether partial disclosure of

information is possible whenever the Commission determines that a full disclosure of a requested record is not possible and will take reasonable steps necessary to segregate and release nonexempt information.

(c) The Secretariat of the Commission is the designated Chief Freedom of Information Officer who, subject to the authority of the Chairman, is responsible for compliance with and implementation of 5 U.S.C. 552(j).

3. Amend § 1015.2 by:

a. Revising the section heading;

b. Revising paragraphs (a), (b) and (c); and

c. Adding paragraph (d).

The revisions read, as follows:

**§ 1015.2 Public inspection.**

(a) The Consumer Product Safety Commission will maintain in a public reference room or area the materials relating to the Consumer Product Safety Commission that are required by 5 U.S.C. 552(a)(2) and 552(a)(5) to be made available for public inspection in an electronic format. The principal location will be in the Office of the Secretariat of the Commission. The address of this office is:

Office of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814.

(b) This public reference facility will maintain and make available for public inspection in an electronic format a current index of the materials available at that facility which are required to be indexed by 5 U.S.C. 552(a)(2).

(c) The Consumer Product Safety Commission will maintain an “electronic reading room” on the World-Wide Web at <https://www.cpsc.gov> for those records that are required by 5 U.S.C. 552(a)(2) to be available by “computer telecommunications.” Records that the FOIA requires the Commission to make available for public inspection in an electronic format may be accessed through the e-FOIA Public Access Link at <https://www.cpsc.gov>.

(d) Subject to the requirements of Section 6 of the CPSA, the Commission will make available for public inspection in an electronic format copies of all records, regardless of form or format, that (1) have been released to any person under 5 U.S.C. 552(a)(3) and (2) that because of the nature of their subject matter, the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records or that have been requested three or more times.

4. Amend § 1015.3 by:

a. Revising the section heading;

b. Revising the first sentence of paragraph (a);

c. Adding a sentence at the end of paragraph (b); and

d. Removing the word “Secretary” from paragraphs (d) and (e), wherever it appears, and adding, in its place, the word “Secretariat”.

The revisions read, as follows:

**§ 1015.3 Requests for records.**

(a) A request for access to records of the Commission shall be in writing addressed to the Secretariat and shall be submitted through any of the following methods: the e-FOIA Public Access Link at <https://www.cpsc.gov>; e-mail to [cpsc-foia@cpsc.gov](mailto:cpsc-foia@cpsc.gov); mail to Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, MD 20814; or facsimile to 301-504-0127. \* \* \*

(b) \* \* \* Before submitting their requests, requesters may contact the Commission's FOIA contact or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

\* \* \* \* \*

(d) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified by the Secretariat or delegate of the Secretariat.

(e) The Consumer Product Safety Commission uses a multitrack system to process requests under the Freedom of Information Act that is based on the amount of work and/or time involved in processing requests. Requests for records are processed in the order they are received within each track. Upon receipt of a request for records, the Secretariat or delegate of the Secretariat will determine which track is appropriate for the request. The Secretariat or delegate of the Secretariat may contact requesters whose requests do not appear to qualify for the fastest tracks and provide such requesters the opportunity to limit their requests so as to qualify for a faster track. Requesters who believe that their requests qualify for the fastest tracks and who wish to be notified if the Secretariat or delegate of the Secretariat disagrees may so indicate in



the request and, where appropriate and feasible, will also be given an opportunity to limit their requests.

**§ 1015.4 [Amended]**

5. Amend § 1015.4 by removing the word “Secretary” wherever it appears, and adding, in its place, the word “Secretariat”.

6. Amend § 1015.5 by:

a. Revising paragraph (a)

b. Removing the word “Secretary” in paragraphs (b), (b)(1), (d), and (d)(2) wherever it appears adding, in its place, the word “Secretariat”;

c. Redesignating paragraphs (e) through (g), as paragraphs (f) through (h), respectively;

d. Add new paragraph (e);

e. Removing the word “Secretary” in redesignated paragraphs (f), (g), (g)(3), (g)(5), and (h) wherever it appears, and adding, in its place, the word “Secretariat”; and

f. Revising redesignated paragraph (g)(2).

The revisions read, as follows:

**§ 1015.5 Time limitation on responses to requests for records and requests for expedited processing.**

(a) The Secretariat or delegate of the Secretariat shall respond to all written requests for records within twenty (20) working days (excepting Saturdays, Sundays, and legal public holidays). The time limitations on responses to requests for records submitted by mail shall begin to run at the time a request for records is received and date stamped by the Office of the

Secretariat. The Office of the Secretariat shall date stamp the request the same day that it receives the request. The time limitations on responses to requests for records submitted electronically during working hours (8 a.m. to 4:30 p.m. EST) shall begin to run at the time the request was electronically received and the time limitations on responses submitted electronically during non-working hours will begin to run the next working day.

(b) The time for responding to requests for records may be extended by the Secretariat at the initial stage or by the General Counsel of the Commission at the appellate stage up to an additional ten (10) working days under the following unusual circumstances:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the Office of the Secretariat.

\* \* \* \* \*

(d) If the Secretariat at the initial stage or the General Counsel at the appellate stage determines that an extension of time greater than ten (10) working days is necessary to respond to a request satisfying the “unusual circumstances” specified in paragraph (b) of this section, the Secretariat or the General Counsel shall so notify the requester and give the requester the opportunity to:

(1) \* \* \*

(2) Arrange with the Secretariat or the General Counsel an alternative time frame for processing the request or a modified request.

(e) If an extension of time greater than ten (10) working days is necessary, the Commission shall make available its FOIA Public Liaison for this purpose. A list of the Commission FOIA Public Liaisons is available at <https://www.cpsc.gov/Newsroom/FOIA>. The

Commission will also notify requesters in writing to the availability of the Office of Government Information Services of the National Archives and Records Administration to provide dispute resolution services.

(f) The Secretariat or delegate of the Secretariat may aggregate and process as a single request requests by the same requester, or a group of requesters acting in concert, if the Secretariat or delegate reasonably believes that the requests actually constitute a single request which would otherwise satisfy the unusual circumstances specified in paragraph (b) of this section, and the requests involve clearly related matters.

(g) The Secretariat or delegate of the Secretariat will provide expedited processing of requests in cases where the requester demonstrates a compelling need for such processing.

(1) \* \* \*

(2) Requesters for expedited processing must include in their requests, which may be submitted through any of the methods described in § 1015.3(a) of this part, a statement setting forth the basis for the claim that a “compelling need” exists for the requested information, certified by the requester to be true and correct to the best of his or her knowledge and belief.

(3) The Secretariat or delegate of the Secretariat will determine whether to grant a request for expedited processing and will notify the requester of such determination within ten (10) days of receipt of the request.

(4) \* \* \*

(5) The Secretariat or delegate of the Secretariat will process as soon as practicable the documents responsive to a request for which expedited processing is granted.

(h) The Secretariat may be unable to comply with the time limits set forth in this § 1015.5 when disclosure of documents responsive to a request under this part is subject to the requirements of section 6(b) of the Consumer Product Safety Act, 15 U.S.C. 2055(b), and the regulations implementing that section, 16 CFR part 1101. The Secretariat or delegate of the Secretariat will notify requesters whose requests will be delayed for this reason.

7. Revise § 1015.6 by:

a. Revising paragraph (a);

b. Removing the word “Secretary” from paragraphs (b), and (c) wherever it appears, and adding, in its place, the word “Secretariat;”

c. Removing the number “30” in paragraph (b)(4), and adding, in its place, the number “90”; and

d. Adding paragraph (b)(5).

The revisions read, as follows:

**§ 1015.6 Responses: Form and content.**

(a) When a requested record has been identified and is available for disclosure, the requester shall be supplied with a copy or notified as to where and when the record will be made available for public inspection in an electronic format. If the payment of fees is required the requester shall be advised by the Secretariat in writing of any applicable fees under § 1015.9 hereof. The requester will be notified of the right to seek assistance from the Commission’s FOIA Public Liaison.

(b) A response denying a written request for a record shall be in writing signed by the Secretariat or delegate of the Secretariat and shall include:

\* \* \* \* \*

(4) A statement that the denial may be appealed to the Commissioners of the Consumer Product Safety Commission. Any such appeal must be made within 90 calendar days of receipt of the denial by the requester.

(5) A statement that the requester has the right to seek dispute resolution services from the Commission's FOIA Public Liaison or the Office of Government Information Services.

(c) If no response is made within twenty (20) working days or any extension thereof, the requester can consider his or her administrative remedies exhausted and seek judicial relief in a United States District Court as specified in 5 U.S.C. 552(a)(4)(B). When it appears that no response can be made to the requester within the applicable time limit, the Secretariat or delegate of the Secretariat may ask the requester to forego judicial relief until a response can be made. The Secretariat or delegate of the Secretariat shall inform the requester of the reason for the delay, of the date on which a response may be expected and of his/her right to seek judicial review as specified in 5 U.S.C. 552(a)(4)(B).

8. Amend § 1015.7 by:

a. Revising the section heading;

b. Revising paragraphs (a) and (b);

c. Removing the word "Secretary" in paragraphs (c) and (g) wherever it appears, and adding, in its place, the word "Secretariat"; and

d. Revising paragraph (e).

The revisions read, as follows:

**§ 1015.7 Appeals from initial denials; reconsideration by the Secretariat.**

(a) When the Secretariat or delegate of the Secretariat has denied a request for records in whole or in part, the requester may, within 90 calendar days of its receipt, appeal the denial to the General Counsel of the Consumer Product Safety Commission, attention of the Secretariat. Appeals may be submitted through any of the following methods: the e-FOIA Public Access Link at <https://www.cpsc.gov>; e-mail to [cpSC-foia@cpSC.gov](mailto:cpSC-foia@cpSC.gov); mail to 4330 East West Highway, Room 820, Bethesda, MD 20814; or facsimile to 301-504-0127.

(b) The General Counsel, or the Secretariat upon reconsideration, will act upon an appeal within 20 working days of its receipt. The time limitations on an appeal submitted by mail shall begin to run at the time an appeal is received and date stamped by the Office of the Secretariat. The Office of the Secretariat will date stamp the request the same day that it receives the request. The time limitations on an appeal submitted electronically during working hours (8 a.m. to 4:30 p.m. EST) shall begin to run at the time the appeal was electronically received and the time limitations on responses electronically submitted during non-working hours will begin to run the next working day.

(c) After reviewing the appeal, the Secretariat will reconsider his/her initial denial. If the Secretariat upon reconsideration decides to release any or all of the information requested on appeal, an appeal as to the information released will be considered moot; and the Secretariat will so inform the requester and submitter of the information in accordance with §§ 1015.6(a) and 1015.18(b). If the Secretariat decides to affirm the initial denial, in whole or in part, the General

Counsel will decide the appeal within the 20-day time limit or any extension thereof in accordance with § 1015.5.

\* \* \* \* \*

(e) The General Counsel's action on appeal shall be in writing, shall be signed by the General Counsel, and shall constitute final agency action. A denial in whole or in part of a request on appeal shall set forth the exemption relied upon; a brief explanation, consistent with the purpose of the exemption, of how the exemption applies to the records withheld; and the reasons for asserting it. The decision will inform the requester of the right to seek dispute resolution services from the Commission's FOIA Liaison or the Office of Government Information Services. A denial in whole or in part shall also inform the requester of his/her right to seek judicial review of the Commission's final determination in a United States district court, as specified in 5 U.S.C. 552(a)(4)(B).

\* \* \* \* \*

(g) Copies of all appeals and copies of all actions on appeal shall be furnished to and maintained in a public file by the Secretariat.

9. Amend § 1015.9 by:

- a. Removing the word "Secretary" in paragraphs (a), (e)(9), (f)(4), (5) and (7), and adding, in its place, the word "Secretariat";
- b. Revising paragraph (b), (c)(2) and (3);
- c. Adding a sentence at the end of paragraph (e)(1);
- d. Adding paragraph (f)(6);

e. Redesignating paragraph (f)(6) as paragraph (f)(7).

The revisions read, as follows:

**§ 1015. 9 Fees for production of records.**

(a) The Commission will provide, at no charge, certain routine information. For other Commission responses to information requests, the Secretariat shall determine and levy fees for duplication, search, review, and other services, in accordance with this section.

(b) Fees shall be paid to the Treasury of the United States according to the directions provided by the Commission.

\* \* \* \* \*

(c)(2) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents and the reasonable efforts expended to locate and retrieve information from electronic records.

(3) *Duplication* refers to the process of making a copy of a document, including electronically, necessary to respond to a FOIA request. The Commission will honor the requester's preference for receiving a record in a particular format when it can readily reproduce it in the form or format requested.

\* \* \* \* \*

(e)(1) \*\*\* Where paper documents must be scanned in order to comply with a requester's preference to receive records in an electronic format, the requester must also pay the direct costs associated with scanning those materials.

\* \* \* \* \*



(f)(6) Search fees shall be waived for all requests and duplication fees shall be waived for requests from educational institutions, non-commercial scientific institutions, and representatives of the news media if the Commission fails to comply with any time limit and notice under § 1015.5(b) - (d) and 5 U.S.C. 552(a)(6) other than those exceptions stated in 5 U.S.C. 552 (a)(4)(A)(viii)(II). Those exceptions include:

(i) if the Commission has determined that unusual circumstances as defined in § 1015.5(b) apply and the Commission provided timely written notice to the requester as required by § 1015.5(e), then failure to comply with the time limit in § 1015.5(b) – (d) is excused for 10 additional days; or

(ii) if the Commission has determined that unusual circumstances as defined in § 1015.5(b) apply and more than 5,000 pages are necessary to respond to the request, and the Commission has provided timely written notice in accordance with § 1015.5(e) and the Commission has discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith efforts to do so) how the requester could effectively limit the scope of the request; or

(iii) if a court has determined that exceptional circumstances exist as defined in 5 U.S.C. 552(6)(C), then failure to comply with § 1015.6(b)-(d) and 5 U.S.C. 552(a)(6) shall be excused for the length of time provided by the court order.

(7) Any determination made by the Secretariat concerning fee waivers may be appealed by the requester to the Commission's General Counsel in the manner described at § 1015.7.

10. Revise § 1015.10 as follows:

a. Adding a phrase at the end of the undesignated introductory paragraph;

- b. Add paragraph (h) and (i).

The revisions read, as follows:

**§ 1015.10 Commission report of actions to Congress.**

On or before February 1 of each year, the Commission shall submit a report of its activities with regard to freedom of information requests during the preceding fiscal year to the Attorney General of the United States and to the Director of the Office of Government Information Services. This report shall include:

\* \* \* \* \*

(h) The number of times the Commission denied a request for records under 5 U.S.C. 552(c).

(i) The number of records that were made available for public inspection in an electronic format under 5 U.S.C. 552(a)(2).

- 11. Amend § 1015.11 by revising paragraphs (a) and (b) to read, as follows:

**§ 1015.11 Disclosure of trade secrets to consultants and contractors; nondisclosure to advisory committees and other government agencies.**

(a) In accordance with section 6(a)(2) of the CPSA, the Commission may disclose information which it has determined to be a trade secret or other matter referred to under 5 U.S.C. 552(b)(4) to Commission consultants and contractors for use only in their work for the Commission. Such persons are subject to the same restrictions with respect to disclosure of such information as any Commission employee.

(b) In accordance with section 6(a)(2) of the CPSA, the Commission is prohibited from disclosing information which it has determined to be a trade secret or other matter referred to

under 5 U.S.C. 552(b)(4) to advisory committees, except when required in the official conduct of their business, or to other Federal agencies and state and local governments except when permitted by the provisions of section 29(f) of the CPSA.

12. Amend § 1015.15 by:

- a. Removing the words “and the internal Commission procedure for withholding exempt records” from paragraph (a); and
- b. Revising paragraph (b) and (c).

The revisions read, as follows:

**§ 1015.15 Purpose and scope.**

(a) The regulations of this subpart provide information concerning the types of records which may be withheld from production and disclosure by the Consumer Product Safety Commission. These regulations also provide information on the method whereby persons submitting information to the Commission may request that the information be considered exempt from disclosure, and information concerning the Commission's treatment of documents submitted with a request that they be treated as exempt from disclosure.

(b) No identifiable record requested in accordance with the procedures contained in this part shall be withheld from disclosure unless it falls within one of the classes of records exempt under 5 U.S.C. 552(b). The Commission will make available, to the extent permitted by law, records authorized to be withheld under 5 U.S.C. 552(b) unless the Commission reasonably foresees that disclosure would harm an interest protected by the exemption or disclosure is prohibited by law or otherwise exempted from disclosure under 5 U.S.C. 552(b)(3). In this regard the Commission will not ordinarily release documents that provide legal advice to the

Commission concerning pending or prospective litigation where the release of such documents would significantly interfere with the Commission's regulatory or enforcement proceedings.

(c) Draft documents that are agency records are subject to release upon request in accordance with this regulation. However, in order to avoid any misunderstanding of the preliminary nature of a draft document, each draft document released will be marked to indicate its tentative nature. Similarly, staff briefing packages, which have been completed but not yet transmitted to the Commission by the Office of the Secretariat are subject to release upon request in accordance with this regulation. Each briefing package or portion thereof released will be marked to indicate that it has not been transmitted to or acted upon by the Commission. In addition, briefing packages, or portions thereof, which the Secretariat upon the advice of the Office of the General Counsel has determined would be released upon request in accordance with this regulation, will be made available for public inspection in an electronic format through the Commission's website at <https://www.cpsc.gov> promptly after the briefing package has been transmitted to the Commissioners by the Office of the Secretariat. Such packages will be marked to indicate that they have not been acted upon by the Commission.

\* \* \* \* \*

13. Amend § 1015.16 by:

a. Revising paragraph (e); and

b. Removing from paragraph (f) the misspelled word “consitute” and adding, in its place, the word “constitute”.

The revisions read, as follows:

**§ 1015.16 Exemptions (5 U.S.C. 552(b)).**

\* \* \* \* \*

(e) Inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

\* \* \* \* \*

**§ 1015.17 [Reserved]**

14. Remove and reserve § 1015.17.

**§ 1015.20 Public availability of accident or investigation reports.**

15. Amend § 1015.20, by removing the period and the words “No portion of” from the first and second sentence of paragraph (a), and adding, in its place, “unless” and “s” to the word “report” to read as follows:

(a) Accident or investigation reports made by an officer, employee, or agent of the Commission are available to the public under the procedures set forth in subpart A of this part 1015 unless such reports are subject to the investigatory file exemption contained in the Freedom of Information Act (as restated in § 1015.16) except that portions identifying any injured person or any person treating such injured person will be deleted in accordance with section 25(c)(1) of the CPSA. \* \* \*

Dated: December 21, 2016

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Todd A. Stevenson,  
Secretariat, Consumer Product Safety Commission

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