

Litigation Alert

THE NEW CONSUMER PRODUCT SAFETY COMMISSION PUBLIC DATABASE: PRODUCT SAFETY OR LAWYER BONANZA?

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The Consumer Product Safety Commission ("CPSC") is an independent federal regulatory agency formed in 1972. The CPSC is assigned the task of protecting the general public from unreasonable risks of injury or death related to the use of consumer products. In response to a number of toy recalls in 2007, Congress passed the Consumer Product Safety Act of 2008 (the "Act"). As part of the Act, the CPSC was required to create a new database, SaferProducts.gov, to allow consumers to report unsafe products and make such complaints available for search and review by the public.

More specifically, the Act requires the CPSC to maintain this database on the safety of consumer products, as well as other products or substances regulated by the CPSC. A "soft launch" of the new database is currently up and running, although, the database is currently only accessible by the CPSC and product manufacturers. The "soft launch" is intended to allow the CPSC and product manufacturers to test their internal compliance procedures in anticipation of the database being made fully accessible to the public. The database is scheduled to be fully operational on **March 11, 2011**. Importantly, consumer reports and comments collected during the initial "soft launch" will not be published or searchable once the database is fully operational in March. How the creation of this database will impact product liability litigation is yet to be determined. However, the purpose of this article is to provide consumer product companies with a brief overview of how the CPSC will track consumer complaints so that they may effectively deal with the potential increase in consumer complaints, as well as the likely increase in products liability litigation.

Reporting Procedures Under The Act. Pursuant to Section 6A of the Act, the CPSC is implementing a publicly available, searchable database. The database will allow consumers and others to file "reports of harm" describing a harm or risk of harm related to the use of consumer products. The intended purpose of the database is to allow true consumer complaints; however, the categories of persons who can file such reports obviously include plaintiff's attorneys and experts, consumer groups, etc., each of which may have a different agenda. Therefore, the potential to manipulate the reporting procedures seems obvious. The database is required to be publicly available, searchable and accessible through the Internet. It includes product recall information, reports of harm submitted by consumers and other database users (including plaintiff's attorneys and experts) related to the safety of consumer products. It will also contain comments on consumer reports submitted by manufacturers and others.

What Happens After A Consumer Makes a Report of Harm? After receipt of a "report of harm," the CPSC must provide the product manufacturer with a copy of the report within five business days. The CPSC will then post the report 10 business days after providing notice to the product manufacturer. During that 10-business day period, the manufacturer (or other interested party, such as a private labeler) may comment on the report, and may identify any alleged confidential information it wants removed from the report. In addition, a manufacturer can challenge the report if

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it is "materially inaccurate or duplicative." The CPSC can then redact the confidential information if required and either append the company's comments to the report or redact inaccurate information. Nonetheless, the CPSC will post the report, even if it has not yet had time to address the alleged inaccuracies identified by the product manufacturer. Accordingly, it is imperative that product manufacturers provide the CPSC with sufficient time to review the comments before the 10-business day publishing deadline expires. However, regardless of how quickly product manufacturers respond to consumer reports, the CPSC does not guarantee that claims of inaccuracy or confidential information will be reviewed and determined prior to the posting of the report. A request for expedited review is available for a "materially inaccurate" report if the request is timely, marked for expedited review and is limited to five pages. Given the lack of accountability related to posting inaccurate or confidential information, manufacturers of consumer products must be vigilant in responding to the reports, such that at least the company's comments can be appended to the report.

After the reports are filed, anyone may search the database by manufacturer, product name, private labeler name, model name, etc. Of course, the CPSC "does not guarantee the accuracy, completeness or adequacy of the contents of the database, particularly with respect to information submitted by persons outside of the CPSC." Therefore, a number of issues will arise when data obtained from this site is offered into evidence in a products liability trial. It will be argued that this is the type of information upon which an expert can rely, thus making admissibility much more likely. In fact, it raises the potential for abuse if incorrect, inaccurate or false reports of harm have been submitted about the product.

The Business Portal. Another important aspect of the Act is the "business portal," which allows companies to register and receive notification about reports related to their products. The person designated by the company will receive a copy of the reports filed by consumers. In addition, the company can use the portal to submit comments about the reports electronically. Consequently, in order for consumer companies to effectively manage complaints reported through the database, it is important to ensure that a designated representative register with the CPSC. Thereafter, the designated representative should effectively determine whether corrective actions need to be taken concerning a complaint within 24-72 hours of the receipt of the report so as to provide the CPSC with a realistic opportunity to redact inaccurate or confidential information.

The Potential Impact On Consumer Product Companies. The potential pitfalls to this new system are obvious; yet continue to go unaddressed by the CPSC. While intended to help consumers, the new database system could well lead to a host of additional litigation and inaccurate reporting. The likelihood of inaccurate postings seems high given the lack of adequate safeguards built into the reporting system. In addition, the possibility of competitors, attorneys or experts manipulating the data seems likely. The time frame for comments is too short, and the fact that the CPSC will not commit to any timeline by which it must assess the possible inaccuracies is troubling. Depending on the volume of reports, this could present a real challenge and the very real possibility of inaccurate postings being made and more importantly, being allowed to be posted without correction.

What Should You Do To Minimize Your Risk of Harm? Practically speaking, manufacturers, private labelers, distributors and others involved in the distribution of consumer products would be wise to immediately register in order to receive electronic notification of new postings. This will allow faster access to the information. Furthermore, consumer product companies should establish internal procedures designed to efficiently and timely manage communications with the CPSC related to the new database. In light of potential increased liability exposure stemming from the new database, consumer product companies would be wise to consult outside counsel to assist in designing and implementing such internal reporting systems.

To view the publicly available database, log on to: <http://www.saferproducts.gov/index.html>

To read the Act: <http://www.cpsc.gov/businfo/frnotices/fr11/database.pdf>

To read the CPSC Staff Briefing Package: <http://www.cpsc.gov/library/foia/foia11/brief/database.pdf>

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