

What Your Business Needs to Know to Navigate the CPSC Database

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Introduction

On Friday, March 11, 2011, the Consumer Product Safety Commission (the "CPSC") expects to formally launch a searchable, publicly available consumer product safety information database ("Database"). Located at <http://www.SaferProducts.gov>, the Database allows consumers and organizations to view and submit reports for any harm or risk of harm occurring with the use of any consumer product marketed in the United States.

For manufacturers of consumer products subject to CPSC's requirements (including importers and private labelers) this Database represents a double-edged sword. On one hand, the intent of the Database is to allow rapid communication between consumers and covered businesses regarding any possible product defects. On the other hand, the CPSC does not vet any of the reports beyond ensuring the report meets certain minimal information requirements and, while there is a comment and response procedure, there is still a real possibility of incomplete or inaccurate reports remaining in the Database for the world to see.

What is a Report?

The Database is a collection of reports of harm ("Reports") submitted by consumers--which is defined broadly and includes, without limitation, not only retail users, but also family members, health care professionals, agents, government bodies, investigators, and organizations--which contains information about a harm or potential harm related to the use of a consumer product.

An individual submitting a Report is asked to provide certain information listed below (items with an asterisk (*) appearing next to the item means it is information required for the Report):

1. Description of the consumer product or substance; *
2. Identification of the manufacturer or private labeler; *
3. Description of an illness, injury, or death, or risk of injury, illness, or death related to the use of a consumer product or other product or substance within the jurisdiction of the CPSC; *
4. Description of the date, or an approximate date, on which the incident occurred; *
5. Indication of which category of submitter they fall within, i.e., consumer, government agency, health care professional, child service provider, or public safety entity; *
6. Name, mailing address, telephone, and email address for the submitter of the Report; *
7. Victim's name and contact information;
8. Photographs and documents which assist to identify a product or manufacturer;
9. Whether an injury occurred and whether, and what type, of medical treatment was received;
10. Whether or not the submitter consents to publication of the Report in the Database; *
11. Whether or not the submitter consents to provide their name and contact information to the manufacturer or private labeler identified in the Report; and
12. Verification of the truth and accuracy of the information in the Report. *

While anonymous consumers can submit Reports to the CPSC, those anonymous Reports will not be posted to the Database.

How and when can covered businesses respond to a Report?

Once the Report has been submitted to the CPSC, the CPSC will, within five business if practicable, review the Report and any attached photographs or additional information to ensure the Report conforms to the minimum information requirements. After this initial review, the Report is forwarded to the relevant business and the Report is posted to the Database 10 business days after submission to the business. If the business chooses to comment on the Report and wishes the comment to appear simultaneously with the posting of the Report, they must submit a response comment within the 10 business day time period between the CPSC's submission to the business and posting of the Report along with adequate time for the CPSC to review the comment. As a practical matter, this gives a business an extremely short timeframe to comment on Reports if it wishes the comment to appear simultaneously with the Report. The business can still respond to any Report at any time after the Report has been posted.

Can a Report be removed?

A Report can be removed from the Database if it contains "materially inaccurate" information. Materially inaccurate information is information that is false or misleading, and is so substantial and important as to affect a reasonable consumer's decision making about the product. Unlike comments to a Report which can only be made by the business, claims regarding material inaccuracy can be made by anyone.

However, businesses (or any party) wishing to mount a successful challenge to the accuracy of a Report will face an uphill battle. A party submitting a claim that information in a Report is materially inaccurate bears the burden of proof and must:

1. State the unique identifier of the Report to which the request for a determination of materially inaccurate information pertains;
2. Specifically identify the exact portion(s) of the Report claimed to be materially inaccurate;
3. State the basis for the allegation that such information is materially inaccurate;
4. Provide evidence, which may include documents, statements, electronic mail, Internet links, photographs, or any other evidence, sufficient for the CPSC to make a determination that the designated information is materially inaccurate;
5. State what relief the requester is seeking: exclusion of the entire Report; redaction of specific information; correction of specific information; or the addition of information to correct the material inaccuracy;
6. State whether and how an alleged material inaccuracy may be corrected without removing or excluding an entire Report; and
7. State whether the person submitting the allegation of material inaccuracy is authorized to make claims of material inaccuracy on behalf of the person or organization concerned.

Every party making a claim that a Report contains materially inaccurate information must also: (a) verify that the information in the claim is true and accurate to the best of the person or firm's knowledge, information, and belief; and (b) certify in writing that they intend, in good faith, to assist the CPSC in the defense of any judicial proceeding that may be brought thereafter to compel the disclosure of information that the CPSC has determined to be materially inaccurate information.

If the CPSC makes a determination that a Report contains materially inaccurate information, the CPSC shall notify the person making such claim and take one of the following actions:

1. decline to add the materially inaccurate information to the Database;
2. correct the materially inaccurate information; and, if the minimum requirements for publication are still met, publish the Report in the Database; or
3. add information to the Report to correct the materially inaccurate information; and, if the minimum requirements for publication are still met, publish the Report in the Database.
4. take other appropriate action.

What benefits does a Business receive for registering with the CPSC?

Registration allows the CPSC to quickly notify the business if a Report is submitted naming the business as the responsible manufacturer, importer or labeler and gives the business an open line of communication with CPSC regarding any Reports. Since the CPSC is required to post a Report within 10 business days after submitting the Report to the business for comment, any delays in communication could have a significant impact on whether the business is able to present sufficient information in a timely fashion to prevent the Report from being publicly posted.

How can businesses use the Database to their advantage?

While the stated purpose of the Database is to protect consumers from faulty or defective products and provide a line of communication between consumers and businesses, in practice, the Database may devolve into a quagmire of potentially inaccurate or incomplete Reports while offering consumers a mix of unfiltered Reports.

First, businesses should register with the CPSC to ensure timely notification of any adverse Reports and ensure an open line of communication with the CPSC in case a response is necessary.

Second, businesses should be aware of the various timing windows and the importance of preparing a rapid, effective response to CPSC in time to prevent a Report from being posted. While a Report can be pulled from the Database, it is much more beneficial if the Report never posted in the first place.

Third, businesses should have clear internal policies setting forth the procedures for processing, investigating and responding to Reports. Again, given the extremely short time frames dictated by CPSC, even marginal delays could mean the difference between a company preventing an inaccurate Report from being posted at all, and an inaccurate Report residing for a lengthy period in the Database for consumers, competitors and even plaintiffs' lawyers to see.