

## ALERTS AND UPDATES

### The CPSC Product-Safety Database: Now Live and in Full Operation

March 14, 2011

The new searchable product-safety database operated by the U.S. Consumer Product Safety Commission (CPSC), [www.SaferProducts.gov](http://www.SaferProducts.gov), became fully operational on March 11, 2011. What will be its impact? Will it help consumers make informed decisions in purchasing safe toys for their children? Will it help regulators and manufacturers identify potentially dangerous trends before they otherwise might have been noticed? Will it be misused by plaintiffs' attorneys and experts as a means of "proving" the occurrence of incidents or injuries that never happened?

The short answer to each of these questions is not known—at least for now. What is known, however, is that every manufacturer, importer, distributor and retailer of consumer products should be aware of how the database works and may want to implement a plan for dealing with it.

The CPSC has maintained that the database will "give consumers access and information to product safety in a quicker manner so that they can be informed about what is in the marketplace," and that it "will be a critical tool for the public to know about when responding to hazards." The database has been championed by consumer advocates echoing the CPSC's pronouncements and regarded unfavorably by industry organizations as a likely mass of unreliable information that may be confusing to consumers—and that may be misused by plaintiffs' attorneys and experts in legal proceedings.

These concerns are not unfounded. Submissions to the database are not checked or verified by the CPSC. Inaccurate or misleading information in the database could affect a company's reputation and the value of its brands, invite litigation, trigger an obligation to make a Section 15 report to the CPSC or lead to a CPSC investigation of a company or its products. Information also could be used by competitors or by plaintiffs in litigation to support allegations that the company was on notice of prior accidents or complaints.

From a legal perspective, all content of the database is hearsay that should be inadmissible in court if offered to prove the truth of the matter asserted (such as whether an incident actually occurred), but some legal counsel and experts are likely to search for other means of getting selected data into court in order to prove their cases, and companies should take steps to monitor and respond to reports regarding their products.

#### Background

The CPSC database was created in response to a mandate from Congress in Section 212 of the Consumer Product Safety Improvement Act of 2008, which provides that subject to the availability of appropriations, the CPSC shall establish and maintain a database on the safety of consumer products, and other products or substances regulated by the CPSC, that is publicly available; searchable; and accessible through the CPSC website.

After conducting a series of public hearings, the CPSC adopted final regulations in December 2010 (16 CFR Part 1102, 75 Fed. Reg. 76832), by a 3–2 vote, that define the scope and operation of the database. What may be considered among the more-controversial provisions of the final regulations—and a significant change from the regulations as first proposed—are Sections 1102.10(a)(1) and 1102.10(a)(5), which define who may submit "reports of harm" to the database.

As originally proposed, Section 1102.10(a)(1) would have defined "consumers" who may submit reports as including "users of consumer products, family members, relatives, parents, guardians, friends, and observers of the consumer products being used." As finally adopted, however, this definition was expanded to include all of those, plus "attorneys, investigators, professional engineers, agents of a user of a consumer product, and observers of the consumer products being used." This description is now so broad and all-encompassing that a category described as "other" in the original regulations was dropped. Section 1102.10(a)(5), which defines "public safety entities" who may submit reports was similarly expanded from a short list of police, firefighters and the like, to include "consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations, so long as they have a public safety purpose."

In short, the final CPSC regulations permit virtually anyone who claims to be "interested" to make their own contribution to the database regarding an actual or perceived incident or issue, and the same incident could be the subject of multiple reports that, based upon differing perspectives and details, might be categorized as separate incidents.

## Reports of Harm

A fundamental feature of the database is the ability of consumers; local, state or federal government agencies; healthcare professionals; child service providers; and public safety entities to submit "reports of harm" to the CPSC that will, after undergoing cursory screening process, become part of the public database.

Submitters of reports of harm are asked to provide details about the alleged harm or risk, and reports must provide certain mandatory information in order to be included on the publicly searchable website. The regulations permit reports of harm to be made by telephone, paper, email and Internet, but the CPSC anticipates the vast majority of reports will be made via its interactive website.

In order to be considered for publication in the database, the report must describe the category of the submitter and contain the following "minimum information":

- Description of the product;
- Identity of the manufacturer or private labeler;
- Description of harm;
- Date of incident;
- Contact information of the submitter;
- Verification that information submitted is true to the best of the submitter's knowledge; and
- Consent to publish the report on the public database.

All of this information must be submitted for the report to be published, but the reporting party's contact information, verification and consent will not be published in the public database.

The Internet reporting system will prompt reporting parties to provide additional information about the product at issue, such as brand; model number; serial number; date of manufacture and date of purchase. However, this information (which might be key to a manufacturer seeking to identify a product) is not mandatory, and failure to provide it will not prevent the report from being published in the public database.

The reporting party may also provide personal information that will not be publicly available, but which is likely to be of interest to the CPSC, including: (1) the victim's name and contact information; (2) photographs and documents to identify a product or manufacturer; (3) any injury and whether, and what type of, medical treatment was received; and (4) whether the submitter consents to providing his or her name and contact information to the manufacturer or private labeler.

## **Accuracy of Reports**

There are concerns that the database will contain inaccurate information that may cause harm to companies in the marketplace and in court. These fears are not unfounded. The CPSC regulations do not require any fact-checking before a report is published, and require only that certain data fields be filled. The first page of the SaferProducts.gov website contains the following disclaimer in bold type:

CPSC does not guarantee the accuracy, completeness, or adequacy of the contents of the Publicly Available Consumer Product Safety Information Database on SaferProducts.gov, particularly with respect to information submitted by people outside of CPSC.

## **Publication of Reports and Company Responses**

To the extent practicable, the CPSC must transmit a report of harm to the manufacturer, importer or private labeler within five business days of submission of the completed report of harm. If the CPSC cannot determine whom the manufacturer or private labeler is from the report or otherwise, then it will not post the report on the database. The CPSC will publish a report that meets the minimum information requirements 10 business days after transmitting the report to the manufacturer, importer or private labeler—regardless of whether it receives any response.

**Notice to Companies:** If a company has registered with the CPSC to receive database reports, it will receive the report by email to the company's designated contact person; otherwise, the report will be mailed to whatever contact information the CPSC has for a business believed to be associated with a product that is the subject of a report of harm. A mailed report might not be received until after the report has been published, and the regulations do not provide a company extra time to respond to a mailed or misaddressed report. There is no provision for giving notice to retailers or licensors.

**Timing of Company Responses:** A business that receives a report of harm from the CPSC may respond and have its response posted to the database, along with the report of harm. A response can be submitted at any time, but must be submitted within 10 business days of the CPSC's notice to the company in order to have the response posted simultaneously with the report of harm.

**Content of Company Responses:** In responding to a report of harm, a company may (1) make comments about the report, (2) claim that a report contains material inaccuracies or (3) claim that the report contains confidential information. Claims of confidentiality or materiality trigger certain investigative obligations of the CPSC, but typically will not delay publication of the report. The CPSC will publish the report unless it makes an actual determination that the report contains material inaccuracies, but the CPSC's review for inaccuracies might not take place until after the inaccurate report has been published. The CPSC states that it will, however, redact those portions of a report claimed to contain confidential business or trade secret information, and it will withhold publication of confidential information pending that review. A responding company is responsible for proving that a report is materially inaccurate and that information in the report is confidential.

## Recommendations for Companies

Any company that produces, imports, distributes or sells consumer products in the United States should be aware of the new CPSC database. In order to benefit from information that is posted to the database, and to reduce the risk of inaccurate or confidential information being published in the database, companies should consider taking the following actions:

- Appoint one or more employees who have product safety and reporting responsibilities to act for the company relative to the database;
- Review the database online at [www.SaferProducts.gov](http://www.SaferProducts.gov), including the how-to video tutorials on business registration and responses, and become familiar with its operation and features;
- Have the company's primary contact register the company on the database. If the company does business under multiple names, it may be necessary to register under multiple company names to ensure that all notices are received promptly;
- After completing the registration, supplement it by adding the names and email addresses of all individuals who will receive reports and provide responses on behalf of the company;
- Develop procedures for investigating and responding promptly to all reports;
- Act promptly upon receipt of all reports and submit timely comments, claims of material inaccuracy or claims of confidential information as appropriate;
- Incorporate data from the database into the company's overall product safety surveillance and tracking systems so that timely Section 15 reports can be made when necessary;
- Monitor the database for potential reports regarding the company's products that were not attributed to the company, and submit comments or objections as appropriate; and
- Prepare to defend against misuse of the database by competitors, litigants or others in order to potentially reduce the risk of harm to the company and its brands.

## For Further Information

If you have any questions about the information addressed in this *Alert*, please contact [Paul S. Rosenlund](#), [Robert B. Hopkins](#), any [member](#) of the [Product Safety, Compliance and Recalls Group](#), the [Products Liability and Toxic Torts Practice Group](#), or the attorney in the firm with whom you are regularly in contact.

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