

## **Manufacturers Should Carefully Monitor the New Consumer Product Safety Information Database**

### ***Product Liability Advisory***

By Timothy Freeman

The new online Consumer Product Safety Information Database (database) has recently become publicly available, and all manufacturers of consumer products would be wise to take notice, as it has the potential to increase their exposure to costly litigation.

For several decades, the Consumer Product Safety Commission (CPSC) has gathered and maintained a database of consumer complaints related to death, injury and diseases allegedly caused by consumer products. Such information was accessible to the public via the Freedom of Information Act after reasonable steps were followed to ensure fairness and accuracy, and after the manufacturer had a chance to investigate and comment on the incident. In contrast, the rules recently promulgated by the CPSC have created new disclosure requirements for consumer product safety-related incident reports that provide much less protection for manufacturers and potentially open the door for fraud, abuse and a significant increase in litigation.

The rules recently promulgated by the CPSC permit reports of alleged harm to be submitted to the CPSC via an online portal on the database, email, telephone or written submission. 16 CFR § 1102.10(b). Reports that meet the "minimum requirements for publication" are, "to the extent practicable," transmitted to the identified manufacturer or private labeler within five business days. 16 CFR § 1102.20(c). The specified "minimum requirements for publication" include the following: 1) a description of the consumer product; 2) the identity of the manufacturer or private labeler; 3) a description of the harm allegedly caused by the product; 4) the date of the incident; 5) the category of the submitter; 6) the contact information of the submitter; 7) verification of the submitter; and 8) consent of the submitter to publish the report. 16 CFR § 1102.10(d). It should be noted, however, that the information that is transmitted to manufacturers **does not** include the name and contact information of the submitter, photographs that could be used to identify the submitter, or medical records. 16 CFR § 1102.20(a).

The identified manufacturer then has **only 10 business days** to review the incident report, investigate the alleged incident, and submit comments and/or objections to the CPSC before the report will be published on the database. 16 CFR § 1102.28.

More specifically, the CPSC is required to publish reports of harm within 10 business days of when they are transmitted to the manufacturer, **regardless of whether an investigation into the accuracy of the report has been completed.**

16 CFR § 1102.28. The only exceptions to the requirement of publication are if the report contains confidential information, trade secrets or "materially inaccurate information." 16 CFR § 1102.24, 1102.26.

A manufacturer seeking to exclude or correct materially inaccurate information bears the burden of proof and must provide evidence "which may include documents, statements, electronic mail, Internet links, photographs, or any other evidence, sufficient for the Commission to make a determination that the designated information is materially inaccurate." 16 CFR § 1102.26(b)(4). If this nebulous burden is not met, the CPSC is required to "publish reports of harm on the 10th business day after transmitting a report of harm." 16 CFR § 1102.26(i)(2).

### **Implications for Manufacturers**

In practice, it will likely be difficult for manufacturers to prevent the publication of misleading information about their products on the database. More specifically, in order for manufacturers to prevent the publication of materially inaccurate information on the database, they must investigate the alleged incident, produce evidence that is sufficient to prove that information in the incident report is "materially inaccurate," and transmit such information to the CPSC, which then must perform its own evaluation and make a determination regarding the accuracy of the information – all within 10 business days. As it may be very difficult, if not impossible, for such a process to be completed within 10 business days, manufacturers may be powerless to prevent false or misleading information regarding their products from being published on the database.

In addition, it appears as though incident reports are not required to provide enough information for manufacturers or private labelers to be able to determine whether the product at issue was unsafe or defective or whether the consumer was negligent or careless in his or her use of the product. Further, the database does not account for the overall quantum of the relevant product in the marketplace, making it impossible to compare the relative safety of two competing products. For example, there may be a significant difference between a product that has one safety complaint for every 1,000 units in circulation and a product that has one safety complaint for every 1,000,000 units in circulation. The database is not structured to account for such relative differences in the safety of products, and thus could mislead consumers.

Although manufacturers have the ability to object to the publication of incident reports that contain confidential information or material inaccuracies, such objections may prove to be of little significance in practice. First, consumers will likely not be able to submit confidential business information or trade secrets because they generally do not have access to such information. Further, it will be very difficult for manufacturers to object on the basis of material inaccuracy in most cases because they will not know who the submitter is and will likely not have an opportunity to inspect the product or the scene of the accident. While a short

description of the accident may be enough for a manufacturer to determine that it is impossible for a particular mode of failure to occur, such a conclusion may not be sufficient to convince the CPSC that the incident report is materially inaccurate.

### **Strategies to Mitigate the Impact of the Database**

Manufacturers should register with the CPSC and select a preferred method of receiving incident reports and then assign someone to monitor, investigate and respond promptly to all such reports. Pursuant to 16 CFR § 1102.20(f), (g), manufacturers may "register with the Commission to select a preferred method for receiving reports of harm that identify such firm as the manufacturer or private labeler" and "may comment on the information contained in such report of harm." If a manufacturer's comments meet basic requirements for publication, they will be published on the database along with incident reports, which may help to ameliorate the prejudicial impact of the incident reports. 16 CFR § 1102.12. Any comments that manufacturers make, however, are likely to be construed as admissions that may be used against them in subsequent litigation, so careful consideration is necessary.

Manufacturers may determine that the best policy is not to comment on incident reports unless they have the opportunity to inspect the product and obtain more information from the submitter. Such a policy would prevent manufacturers from the obvious risks involved in making comments based on incomplete information. However, lack of responsiveness to incident reports on the database could be used to suggest that manufacturers were indifferent to consumer complaints and safety hazards associated with their products. Thus, manufacturers must think carefully about whether they want to comment on incident reports and the manner in which they do so. In any event, manufacturers would be well advised to have a designated person monitor, investigate and perform a detailed analysis as to whether and how to comment on incident reports as they are received.

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