

**Client Advisory | December 2010**

## **Consumer Product Safety Incident Database Set to Launch March 11, 2011**

On March 11, 2011, the Consumer Products Safety Commission (the “Commission”) will launch a publicly accessible database of consumer product incident reports. This new database has the potential to significantly impact how manufacturers and private labelers respond to consumer product safety complaints.

Product manufacturers and private labelers should understand how the database will work, and how it may be used by consumers and the plaintiffs’ bar alike, and develop a plan to respond if a consumer product safety issue does arise. This will enable manufacturers and private labelers to respond to any incidents in a timely and strategic manner in order to minimize their potential liability going forward.

Since the Consumer Product Safety Improvement Act of 2008 (“the Act”) was signed into law, more stringent safety standards and regulations have been put in place for consumer products. In addition to the provisions of the Act currently in effect, such as restrictions on the use of lead and phthalates in children’s products, the Act requires the Commission to create and maintain a publicly available, searchable database on the safety of consumer products that can be accessed through the Commission’s Internet site. The goal of the database is to provide the public with faster, more effective responses to product hazards and consumers with more timely information about products in order to keep their families safe. On November 24, 2010, the Commission voted 3 to 2 to approve the draft notice with some amendments as a final rule.

### **What Will The Database Cover?**

The database, to be accessed through the web site [www.SaferProducts.gov](http://www.SaferProducts.gov),

will cover all consumer products under the Commission’s jurisdiction, including toys and baby products, sports and fitness equipment, home improvement equipment, clothing, appliances and electronics. For example, any reported incidents of cordless drills malfunctioning or ladders collapsing due to some alleged manufacturing or design defect will be included in the database. Other examples of reportable incidents include coffee makers overheating, floor finishes emitting noxious odors, and children becoming entangled in window blind cords.

### **Who Will Have Access To The Database?**

SaferProducts.gov will have two separate portals, a consumer portal and a business portal.

The consumer portal will allow anyone to report product safety incidents and potential product hazards, as well as search for prior incidents and product recalls. Individuals or entities submitting a report will be able to upload photographs, narratives, and other tools to aid the Commission in its investigation of the incident. Additionally, the reporting individual or entity will be required to provide contact information which the Commission will use to verify the incident and the product’s manufacturer. The Commission cannot disclose this contact information, except to the product’s manufacturer or private labeler, unless the reporting individual or

entity has consented in writing to such disclosure.

Although anyone may file a report, the reports will not be publicly available until after the incident is reviewed and verified by the Commission and the manufacturer or private labeler, if identifiable, has been given an opportunity to respond. If the manufacturer or private labeler cannot be identified, the report will not be posted to the database. Once a report has been submitted to the Commission, it has five business days to forward the report to the product’s manufacturer or private labeler for comment. Once the manufacturer or private labeler receives the report, it has only ten business days to submit comments before the report is published in the database. It is important to note that a manufacturer or private labeler is not obligated to provide comments before a report is published. However, the Commission will publish the report within ten business days after it is submitted to the manufacturer or private labeler for comment regardless of whether the manufacturer or private labeler submits a response. Based upon the Commissioners’ remarks during the November 24<sup>th</sup> hearing, it appears the Commission will adhere closely to the 15-day time period from receipt of a report to its publication because it construes the Act as giving it no discretion to extend the time period - even if the Commission’s investigation of the incident remains ongoing.

According to the final rule, if a manufacturer or private labeler believes a report contains a material inaccuracy, it may challenge the report by submitting a claim in the same manner it would submit comments. Although the Commission must use its best efforts to review allegations of material inaccuracy before it publishes the report, if no determination is made by the tenth business day, the report will be published. However, if the Commission determines that the incident data is materially inaccurate, the report will either be corrected or not published. Because the circumstances precluding publication of an incident report under the Act are limited, manufacturers and private labelers should assume that once they receive a product safety incident report, it will be made available to the public in some form.

The business portal, in contrast, will provide a secure environment for business-to-government and government-to-business exchange of information. By registering and creating a user account on the business portal, manufacturers and private labelers will receive email transmissions of batched reports and have certain privileges in accessing reports and additional details. The business portal will also enable registered users to respond to reports, provide comments for publication, and request that the Commission correct or remove inaccurate information. Additionally, if

a manufacturer or private labeler believes that confidential data has been submitted, it can request the data be redacted. The Commission will either make a determination on confidentiality prior to posting the report on the tenth business day or redact the disputed information until a final determination is made. The business portal also will allow manufacturers and private labelers to register contact information and receive e-mail and/or text message alerts of reports, allowing for prompt investigation, review and comment.

### What Are The Pitfalls For Manufacturers And Private Labelers?

The proposed database could be fraught with problems for manufacturers and private labelers not only because of the short time period they have to respond before an incident report is first made public, but because the very nature of the database makes it prone to inaccuracies, exaggeration and abuse. Parties filing a report may blame the wrong manufacturer or product, or be totally unaware of material alterations to the product by the consumer. This is particularly true because the Act does not require the report to be submitted by the injured party or an eye witness. A submitter need only “check the box” to confirm that the report is true and accurate to the best of his or her knowledge and

is not required to verify the information under oath. The publication of these reports may also carry a certain aura of legitimacy among consumers merely because they are posted on a government created and sponsored website. More troubling is the fact that the plaintiffs’ bar will undoubtedly use the database to identify allegedly defective products and complaint-ridden manufacturers to pursue in class action litigation.

As a result, manufacturers and private labelers should carefully consider how and when to respond to such reports. If they respond prematurely before they have completed their investigation, and that response proves to be inaccurate later on, that may be damaging to the manufacturer or private labeler in subsequent litigation. Manufacturers and private labelers may choose not to respond to an individual report, opting instead to wait until the Commission has completed its investigation. Whatever approach a manufacturer or private labeler ultimately decides to adopt, it should do so only after it has developed a comprehensive strategy and response plan so that it is not unwittingly reacting to such reports. By developing and implementing a well-thought-out strategy, product manufacturers and private labelers will have the groundwork in place to mount a successful defense in any litigation that may ultimately arise.

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Darlene K. Alt, Partner

+1 401 276 6476

Stephen J. MacGillivray, Partner

+1 401 276 6499

Erika J. Lindberg, Associate

+1 401 528 5832

dalt@eapdlaw.com

smacgillivray@eapdlaw.com

elindberg@eapdlaw.com

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