

E-ALERT | Consumer Law

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CONSUMER PRODUCT SAFETY COMMISSION PUBLISHES CONSUMER PRODUCT SAFETY DATABASE RULE

The Consumer Product Safety Commission (“CPSC” or “Commission”) has cleared the way for implementation of its publicly available consumer product safety information database by recently publishing a final database rule in the Federal Register.¹ The consumer product safety database, which will contain reports of harm caused by consumer products, is scheduled to launch on March 11, 2011.²

Publication of the final database rule followed on the heels of a contentious debate among the Commissioners over two primary aspects of the proposed database rule: (1) the scope of permissible submitters of reports of harm; and (2) the CPSC’s procedures for handling materially inaccurate reports of harm. The Commission passed a draft final database rule on a 3-2 party line vote on November 24 following its party-line rejection of an alternative proposal containing additional manufacturer protections.

The CPSC’s consumer product safety database rule warrants careful attention from manufacturers, importers, retailers, and private labelers. The database will contain reports of consumer product safety incidents submitted by a broad range of individuals and entities, including attorneys, consumer advocacy groups, and public safety organizations. Reports of harm could expose companies to potential liability for failure to submit timely reports of substantial product hazards or defects and failure properly to certify compliance with consumer product safety laws. The database will also provide readily available consumer product safety and recall information to product liability attorneys, business competitors, and potential whistleblowers.

CONGRESS’S AUTHORIZATION OF A CONSUMER PRODUCT SAFETY DATABASE

In 2008, Congress passed and President Bush signed into law the Consumer Product Safety Improvement Act (“CPSIA”). In addition to mandating tougher lead limits and requiring compliance certification for children’s products based on third-party testing by accredited laboratories, Congress authorized and required the CPSC to establish and maintain a publicly available, searchable electronic database of consumer product safety information. The database is “intended to provide a single point of access to reports of harm involving consumer products, manufacturers’ comments on the reports, and consumer product recall information.”³ The CPSC engaged in an intensive period of database rulemaking in 2009 and 2010, which included multiple public hearings and the consideration of dozens of comments by manufacturers, trade associations, and consumer advocates. The major components of the final database rule are described below.

¹ Publicly Available Consumer Product Safety Information Database; Final Rule, 75 Fed. Reg. 76,832 (Dec. 9, 2010).

² *Id.* at 76,863.

³ CPSC, “Final Rule: Publicly Available Consumer Product Safety Information Database,” Tab B at 1 (Oct. 14, 2010), available at <http://www.cpsc.gov/library/foia/foia11/brief/publicdb.pdf>.

BROAD SCOPE OF SUBMITTERS OF REPORTS OF HARM

The CPSIA specifies five categories of persons and entities that may submit reports of harm to the database: “(i) consumers; (ii) local, state, or federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities.”⁴ During the database rulemaking process, the CPSC proposed expansive definitions of “consumers” and “public safety entities” that will effectively permit anyone to submit a report, continuing its current practice of accepting data from any source. Despite public comments supporting, and an alternate proposal containing a narrower definition of permissible submitters of reports of harm, the final rule adopted the more expansive interpretation.

Specifically, the final rule defines “consumers” as “including, but not limited to, users of consumer products, family members, relatives, parents, guardians, friends, attorneys, investigators, professional engineers, agents of a user of a consumer product, and observers of the consumer products being used.”⁵ The final rule further defines “public safety entities” to include “consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations, as long as they have a public safety purpose.”⁶

MANDATORY AND OPTIONAL CONTENT OF REPORTS

Reports of harm will describe incidents in which consumer products caused actual or a risk of “injuries, illness, or death.”⁷ Electronic database reports must include: (1) a description of the consumer product or component at issue; (2) the identity of the manufacturer or private labeler; (3) a narrative description of the actual or potential harm; (4) the date of the incident; (5) the submitter’s name and contact information; and (6) the category of submitter (e.g., public safety entity).⁸ Submitters also must verify that a report is accurate, and consent to publication of the report in the database.⁹ The CPSC will not publish reports lacking the required information, such as anonymous reports or reports that do not identify the relevant manufacturer. In addition, the reporting form will contain optional fields for such information as the product’s model number and date of purchase.

STRICT TIMELINE FOR PUBLICATION OF REPORTS

The CPSIA established a strict timeline for CPSC review and publication of reports of harm in the database. In general, the CPSC must publish a report of harm within fifteen business days of submission. Upon receipt of a report containing the required information, the Commission must, “[t]o the extent practicable,” transmit the report to the relevant manufacturer and/or private labeler within five business days.¹⁰ The Commission must publish reports within ten business days of transmission to the manufacturer.¹¹

⁴ 15 U.S.C. 2055a(b)(1)(A).

⁵ 16 C.F.R. § 1102.10(a)(1).

⁶ *Id.* § 1102.10(a)(5).

⁷ 15 U.S.C. § 2055a(g).

⁸ 16 C.F.R. § 1102.10(d)(1)-(6).

⁹ *Id.* § 1102.10(d)(7)-(8).

¹⁰ 15 U.S.C. § 2055a(c)(1). Situations in which transmission may be impracticable include the following: “(1) the manufacturer or private labeler is out of business with no identifiable successor; (2) the submitter misidentified a manufacturer or private labeler; (3) the report of harm contained inaccurate or insufficient contact information for a manufacturer or private labeler; or (4) the Commission cannot locate valid contact information for a manufacturer or private labeler.” 16 C.F.R. § 1102.20(c).

¹¹ 15 U.S.C. § 2055a(c)(3)(A); 16 C.F.R. § 1102.26(d).

MANUFACTURER NOTICE AND COMMENT PROVISIONS

Manufacturers may respond to reports in three ways: (1) submit comments for publication in the database along with the report of harm,¹² (2) designate confidential business information for redaction, and/or (3) seek to prevent publication or seek removal of reports containing materially inaccurate information.

1. Comments on Reports of Harm

Unlike a blog, only the relevant manufacturer or private labeler may comment on a report of harm submitted for publication in the database. The final rule permits manufacturers to submit comments at any time, although the Commission encourages prompt responses.¹³ Comments may be submitted in the same general format as reports of harm, and must include a unique identifier supplied by the CPSC, verification of the comment's accuracy, and consent to publication.¹⁴

2. Designations of Confidential Information

Within ten days of receipt of a report of harm from the CPSC, manufacturers may submit a designation of confidential information where a report of harm contains trade secrets or similar proprietary data.¹⁵ Confidentiality designations must: (1) identify the specific portions of a report that contain confidential information; (2) state whether the information has ever been released in any manner or is commonly known; (3) if known, state the company's relationship with the person who submitted the report of harm and identify how the submitter obtained the information; (4) identify the harm to the manufacturer that would be caused by publication of the information; and (5) verify the authority of the person requesting confidential treatment.¹⁶ A manufacturer that designates information as confidential also must agree to assist the CPSC in the defense of any proceeding subsequently brought to compel disclosure of the redacted information.¹⁷

If the CPSC fails to make a determination of a confidentiality claim before the publication deadline, it will publish a redacted version of the report in the database.¹⁸ A manufacturer may challenge in federal court a CPSC determination that information is not confidential and therefore will be disclosed.¹⁹

3. Designations of Materially Inaccurate Information

Any user of the database may challenge a report or manufacturer comment on grounds of material inaccuracy at any time.²⁰ The final database rule defines materially inaccurate information as "false or misleading, and which is so substantial and important as to affect a consumer's decision making about the product."²¹ The purported material inaccuracy must relate to a required component of the

¹² The rule helps to facilitate manufacturer monitoring and response to reports by permitting businesses to register their preferred method of receiving reports with the CPSC and to designate an individual responsible for responding to them. 16 C.F.R. 1102.20(f).

¹³ The draft final rule permitted the Commission to decline to publish comments received more than one year after transmitting a report to the manufacturer, but this provision was removed from the final rule.

¹⁴ 16 C.F.R. § 1102.12(c).

¹⁵ *Id.* § 1102.24(d).

¹⁶ *Id.* § 1102.24(b).

¹⁷ *Id.* § 1102.24(e).

¹⁸ *Id.* § 1102.24(d).

¹⁹ 15 U.S.C. § 2055a(c)(2)(C)(iii); 16 C.F.R. § 1102.24(h).

²⁰ 16 C.F.R. § 1102.26(d).

²¹ *Id.* § 1102.26(a).

report or comment (e.g., the product at issue or the date of the incident).²² The CPSC will investigate all such claims and, if it determines that a report or comment is materially inaccurate, will correct, redact, or remove the report within seven days of its determination.²³

The final database rule – unlike the draft final rule and the alternate proposal – does not permit the CPSC to withhold or remove reports from the database during the pendency of an investigation: “Absent a determination [of material inaccuracy], the Commission will publish reports of harm on the tenth business day after transmitting a report of harm”²⁴ The CPSC will endeavor to resolve claims of inaccuracy before a disputed report is published, and expedite review of timely claims that are less than five pages long.²⁵ The final rule does not, however, bind the Commission to a definite timeline for making accuracy determinations. Accordingly, it is likely that potentially inaccurate reports will appear on the database, at least temporarily.

RECALL INFORMATION

In addition to reports of harm and manufacturer comments, “[a]ll information presented in a voluntary or mandatory recall notice that has been made available to the public shall be accessible and searchable in the [d]atabase.”²⁶ The CPSC will also include in the database any additional information it determines to be in the public interest, consistent with the requirements of the Consumer Product Safety Act’s (“CPSA’s”) general confidentiality provisions.²⁷ The Commission will refrain initially from publishing substantial product hazard reports submitted to the agency under the CPSA’s reporting requirements (Section 15 reports), but may include such reports in the database in the future. The CPSC will not publish submitters’ and victims’ names and contact information, medical records (without consent), or publish photographs of victims unless it deems such publication to be in the public interest, such as those that could be used to identify a victim.²⁸

DATABASE IMPLICATIONS FOR MANUFACTURERS

The CPSIA expressly exempts the database’s contents from the confidentiality and disclosure requirements of Sections 6(a) and (b) of the CPSA.²⁹ These provisions require the Commission, prior to disclosure, to provide manufacturers with notice and an opportunity to comment on reports of harm, and to “take reasonable steps to assure” that reports of harm are accurate, and that disclosure is “fair in the circumstances and reasonably related” to purposes of the CPSA.³⁰

The CPSC plans to raise public awareness and stimulate use of the electronic database through a comprehensive outreach and education campaign in 2011. The Commission anticipates that its public awareness campaign will double the current volume of reporting to approximately 30,000

²² See 16 C.F.R. § 1102.26(a)(1); see also *id.* § 1102.26(a)(2) (requiring claims of inaccuracy regarding a manufacturer comment to relate to a central element of the comment). The party alleging inaccuracy bears the burden of proof. *Id.* § 1102.26(b).

²³ See *id.* § 1102.26(g)-(j).

²⁴ *Id.* § 1102.26(d).

²⁵ *Id.* § 1102.26(c)(1).

²⁶ *Id.* § 1102.14.

²⁷ 16 C.F.R. § 1102.16.

²⁸ *Id.* § 1102.10(f).

²⁹ *Id.* § 1102.44(a). Sections 6(a) and (b) will still apply in other contexts, however, including specifically information submitted via “(1) Section 15(b) of the CPSA; or (2) Any other mandatory or voluntary reporting program established between a retailer, manufacturer, or private labeler and the Commission.” *Id.* § 1102.44(b).

³⁰ 15 U.S.C. § 2055(b)(1).

reports in the database's first year of operation.³¹ The projected increase in the volume and visibility of reports of harm, and the CPSC's lack of resources to systematically determine the accuracy of reports prior to publication, will require manufacturers to remain vigilant in monitoring and responding to relevant content in the public database.³²

Covington & Burling LLP has extensive experience with consumer product safety statutes and regulations and has been closely tracking the development of the CPSC's publicly available consumer product safety information database. If you have any questions concerning the material discussed in this client alert, please contact any of the attorneys listed below:

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³¹ CPSC, "Final Rule: Publicly Available Consumer Product Safety Information Database," Tab B at 5 (Oct. 14, 2010), available at <http://www.cpsc.gov/library/foia/foia11/brief/publicdb.pdf>.

³² 15 U.S.C. § 2064(b).