

Client Alert.

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CPSC Database: With Sunshine Comes Shadows

By Linda Lane and Jessica Roberts

Next week, the Consumer Product Safety Commission (“CPSC”) will meet to decide the parameters of a proposed Final Rule for implementing the CPSC’s new “Consumer Product Safety Improvement Act Database” (“Database”). The Database is due to launch in March 2011, and regardless of whether the current version of the Final Rule is approved, the Database will change the way consumer product incident data is collected and disseminated. Instead of accessing consumer incident data through published reports, studies, or FOIA requests, incident data will be accessible to all at www.saferproducts.gov. The Database is intended to increase transparency. However, due to the potentially dubious quality of the reports published, both industry groups and consumers may find that this is not a change for the better.

BACKGROUND OF THE DATABASE

In August 2008, Congress passed the Consumer Product Safety Improvement Act (“CPSIA”), which amended the Consumer Product Safety Act (“CPSA”) to add many stringent requirements for the manufacturers, importers, retailers, and private labelers of consumer products. Among other changes, the CPSIA mandated that the CPSC must establish and maintain a Database that will make reports of harm relating to consumer products publicly available, searchable, and accessible through the CPSC website.

On November 17, 2010, the CPSC will decide whether to adopt the proposed Final Rule for the Database.

HOW THE DATABASE WILL WORK

The current version of the Final Rule establishes the following procedures for the Database:

- submitters will provide the CPSC with reports of harm;
- within five business days of receipt, the CPSC will transmit those reports to manufacturers or private labelers for comments whenever practicable; and
- ten business days after the reports have been transmitted to the company, the CPSC will publish the reports.

Access to the Database will not require registration, and those who may submit reports include consumers, government agencies, health care professionals, child care service providers, and public safety entities.

In order for a report to be published, it must meet the following minimal requirements:

- a description of the consumer product;
- the identity of the manufacturer or private labeler;
- a description of the harm;
- the incident date;

Client Alert.

- the category of the submitter;
- some contact information;
- a consent for publication; and
- a verification.

The proposed Final Rule requires a party submitting the report to verify that he or she has reviewed the information and that the information contained therein is true and accurate. Concerns have been raised by industry groups that allowing public safety entities to verify reports (instead of requiring verification by the underlying complainants) will reduce the effectiveness of this safeguard.

Nonetheless, once the CPSC receives a complete report of harm, it will transmit the report to the manufacturer or private labeler of the involved product within five business days of its submission “whenever practicable.” Comments (by the manufacturer or private labeler) made within 10 business days of receiving the report will be published with the report of harm.

In theory, materially inaccurate information—defined as “information that is false or misleading and relates to a matter which is so substantial and important as to affect a reasonable consumer’s decision making about the product”—will not be published in the Database. But, even if a manufacturer or private labeler requests that the report of harm be excluded as materially inaccurate, under the current version of the Final Rule, the CPSC cannot withhold the report until it makes such a determination. Thus, the report will be published even if there is an ongoing investigation into the report’s material accuracy.

In addition, the manufacturer or private labeler may request that certain information be withheld or redacted as confidential. In this situation, the CPSC may then exercise its discretion to withhold the report of harm until it makes a determination as to the information’s confidentiality.

THE SIGNIFICANCE OF THE DATABASE TO CONSUMERS AND INDUSTRY

Although some have suggested that there is no reason to “fear the sunshine” created by the Database, the real concern for consumer product businesses (and consumers) will come from the shadows that these reports cast. Although a centralized Database may make some relevant information more readily available, it will also increase the risk of disseminating bad information to the public. The value of each report will vary considerably depending on the submitter.

CPSC staff acknowledged at an October 20, 2010 briefing that currently only a small percentage of the reports submitted to the CPSC warrant further investigation. Moreover, when investigated, it is often revealed that reports of harm are inaccurate and that there is nothing wrong with the product named. Under the current system, such reports of harm rarely result in product recalls. In contrast, when the Database goes live, information will be published on the Internet within 15 days of its submission unless a determination is made that the report is materially inaccurate. And there are no assurances that such a determination is capable of being made within that time.

With serious questions about the quality of the information published, it is unlikely that the Database will truly help the majority of consumers make informed choices. Instead, many fear that the Database will devolve into a panning site for plaintiff attorneys hoping to strike gold.

Client Alert.

CONCLUSION

Despite its potential flaws, the Database is due to go live in March 2011. At that time, the public will be able to access reports of harm and corresponding manufacturer responses. It is important for businesses to be prepared. Manufacturers and private labelers should register with the CPSC (through a process soon to be announced) in order to ensure that they receive timely notifications of any report of harm relating to their products. This will provide companies with an opportunity to have their responses published at the same time the incident report is published.

Companies should also develop a policy regarding their response to these incidents. Although each response will need separate consideration, developing a plan and procedure for response will make the load lighter during the tight 10-day response period. Steps taken to prepare in advance of a report will help make a quick and effective response possible.

Morrison & Foerster has closely followed the CPSIA as it evolved in Congress and was ultimately signed into law in 2008. We have since advised a variety of clients on its implementation and helped them keep abreast of developments emanating from the CPSC. In addition, we regularly represent children's and consumer product companies and trade associations and assist them with a variety of legislative, regulatory, administrative enforcement, and litigation matters.

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