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Consumer Product Safety Commission Alert

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The Consumer Product Safety Commission's New Searchable Consumer Product Incident Database: Are You Prepared?

By: Cheryl A. Possenti, Esq.

Imagine a nation where any consumer who believes he was harmed by a product is encouraged to post his grievance in an anonymous fashion on a government sponsored website, complete with pictures, with no substantiation required whatsoever. On March 11, 2011 the United States will be such a nation.

In the wake of an unprecedented number of recalls of toys and children's products containing lead paint, on August 14, 2008, the Congress passed the Consumer Product Safety Improvement Act of 2008, ("CPSIA"). The majority of the legislation affected toys and children's products. Section 212 of the Act, however, contains a less publicized but equally powerful provision which will affect the manufacturers of all consumer products.

The CPSIA requires the Consumer Product Safety Commission ("CPSC") to establish a searchable public database of reported incidents involving consumer products. It must include "reports of harm" received from local, state and federal agencies, as well as health care professionals, child services providers, public safety entities and consumers.

Some product manufacturers may have spent the last two years since the passage of the CPSIA lulled into blissful complacency based on a misguided belief that the newly passed CPSIA only affected children's products. This temporary respite is about to come to a halt. No consumer product manufacturer will be able to escape the consequences of the CPSC's public database after it becomes operational on March 11, 2011.

On September 10, 2009 the CPSC published its Report to Congress in response to the requirements of Section 212 of the CPSIA. This Section requires the CPSC to implement a publicly accessible, searchable database of consumer product incident reports. It also requires the CPSC to "expedite efforts to upgrade and improve the information technology systems in use by the Commission on the date of enactment of this Act."

The Report to Congress outlines in detail the CPSC's plans for technology improvements and the operation of the database, which currently bears the working name "SaferProducts.gov."

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Beginning on March 11, 2011, any consumer will be able to post complaints for inclusion in the CPSC's database of consumer product incidents, regarding any consumer product, complete with photographs.

Consumers who submit incident reports to the CPSC must supply their names and contact information to the CPSC. Consumers, however, can choose to have their contact information withheld from the manufacturer of the product at issue.

Manufacturers have 10 days within which to challenge the accuracy of the possibly anonymous incident report. After this time, unless the CPSC decides that the report contains confidential material or has made a determination that the report is materially inaccurate, the incident report and most of the accompanying documents will be included in the CPSC's publicly searchable database. If the CPSC later determines that the information is inaccurate, then the CPSC will redact or correct information in the database.

The CPSIA Section 212(a)(b)(5) states that, "The Commission shall provide clear and conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness or adequacy of the contents of the database." While the consumer product incident reports that comprise the SaferProducts.gov database, themselves, will be anonymous hearsay and while the reports from consumers do not squarely fit in the "public records" exception to the rules prohibiting the admission of hearsay evidence, there is no doubt that the incidents included in the CPSC SaferProducts.gov database be the source of much future controversy over the admissibility of these incidents as "other similar incidents," particularly in product liability actions.

After extensive discussion, submission of comments and meetings, on May 24, 2010 the CPSC published a Notice of Proposed Rulemaking in the Federal Register. The proposed rule would interpret the various statutory requirements pertaining to the information to be included in the database. The public and stakeholders were permitted to submit comments on the proposed rule by July 23, 2010.

On October 14, 2010 the CPSC distributed a proposed Final Rule, containing a number of changes made to the originally published Notice of Proposed Rulemaking, in response to the 37 comments it received representing more than 100 separate issues related to the Proposed rule and the Database. The proposed rule was set for a Decision meeting on November 17, 2010.

Shortly before the November 17, 2010, two of the five CPSC Commissioners, Nancy Nord and Anne Northup circulated an alternate proposed Final Rule. This alternate rule contained most of the provisions of the originally proposed rule, but contained certain key differences. The alternate Final Rule provides that, in the event the CPSC has not had an opportunity to decide whether the report is materially inaccurate, it may delay the publication of the report in the database until it has made such a decision. The alternate Final Rule also limits the persons who are entitled to submit reports for inclusion in the database to persons who have first hand knowledge of the incident. The originally proposed Final Rule, on the other hand,

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permits attorneys and non-governmental organizations to submit reports for inclusion in the database.

The alternate Final Rule also requires that the report must contain at least two identifying features of the involved product, such as a brand name, model number, date of manufacture, serial number, date code, UPC code, price paid, retailer or other descriptive information about the product in order to be included in the database. Under Section 1102.10(d)(1) of the original Final Rule, on the other hand, consumers would be permitted to include detailed information to identify a product, however, the report will be considered acceptable as long as the description of the product includes “a word or phrase sufficient distinguish the product as a consumer, product a component part of a consumer product or a product or substance regulated by the Commission.” Thus, reports may be included if they describe a toaster, a stroller, a vase or a battery, even if this information provides no useful information as to which specific type or model of the product was actually involved in the incident.

The CPSC decisional meeting, which is open to the public and is customarily made available on the Internet is now scheduled to take place on Wednesday, November 24, 2010. Access to the web broadcast can be obtained through the CPSC website, www.cpsc.gov.

Manufacturers of all consumer products must be prepared to timely respond to CPSC notifications that incidents involving their product will be posted and available to the public. Regardless of the form or content of the database, the database is mandated by Congress under the CPSIA and the database, in some form, the CPSC must implement the database by March 11, 2011. Currently, consumer product companies may have in place existing processes for reviewing, analyzing, and responding to CPSC Consumer Incident Reports and the Epidemiological Investigation Reports that the CPSC periodically supplies to companies. Under the current statutes, commonly referred to as Section 6(b), such information is not routinely provided to members of the public, and is only disclosed in response to a Freedom of Information Act request, and then only after a company has had an opportunity to comment on and object to the disclosure of such records.

While these Freedom of Information Act procedures will remain in effect for documents other than the consumer complaints that comprise the proposed SaferProducts.gov database, companies are best served to completely overhaul and streamline their existing system for reviewing, analyzing and providing challenges or comments to consumer complaint information received from the Consumer Product Safety Commission. The very limited 10 day period within which a manufacturer may provide information to the CPSC is not a creation of the CPSC, itself, but, instead, is mandated under the statute. Without procedures to prevent the disclosure of inaccurate reports pertaining to a company’s products, the Internet publication of inaccurate, accessible, anonymous consumer product incident reports will be inevitable.

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