

## Consumer Shield or Litigation Sword?

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**An aggressive, protective and proactive attack will best serve your clients' interests.**

# The New CPSC Public Database of Incidents

In August 2008, Congress passed the Consumer Product Safety Improvement Act of 2008, which requires the establishment of a public database in which the Consumer Product Safety Commission (CPSC) will make

publicly available reported incidents involving consumer products. *Consumer Product Safety Improvement Act of 2008*, Title II, Section 212, adding new Section 6A to follow 15 U.S.C. §2055. References herein are to the Section 6A designation. While specific plans for the database will not be submitted to Congress until February 2009, the political pressure to make this information public, coupled with limited opportunity to challenge its accuracy, raises many questions concerning whether the plaintiffs' bar will be able to use the database to unfairly target companies for product liability litigation.

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### The CPSC Database

The CPSC has been charged to "establish and maintain a database on the safety of consumer products, and other products or substances regulated by the Commission." Section 6A(a)(1). The database must be public, searchable and accessible through the CPSC website. 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. Section 6A(b)(1)(A).

By February 10, 2009, the CPSC must provide Congress with a detailed plan for the database, including plans for its "operation, content, maintenance and functionality." Section 6A(a)(2). This plan will include a detailed implementation schedule and a public campaign to promote consumer awareness.

### What Is a "Report of Harm"?

Congress provided minimum standards for publication of a "report of harm" in the database. "Harm" is defined as (1) injury, illness or death; or (2) risk of injury, illness, or death, as determined by the CPSC. Section 6A(g). The report must describe the product, identify the manufacturer or private labeler, describe the harm related to the product's use, provide contact informa-



tion for the person submitting the report and include a statement by the person submitting the report verifying the truth and accuracy of the information provided. Section 6A(b)(2)(B). However, the identity of the person verifying the accuracy of the report may not be released to the manufacturer or private labeler without that person's consent. Section 6A(b)(2)(B)(v).

Concealing the identity of the person who submitted the report creates two immediate problems. First, it forces manufacturers or private labelers to respond to the accuracy of a report without any opportunity to contact or question the person who submitted it to better understand the incident. Second, it encourages specious reports. The manufacturer or private labeler likely will never determine whether the incident occurred as reported or at all.

### **How Quickly Will the "Report of Harm" Be Published in the Database?**

According to the authorizing legislation, if the report of harm identifies the manufacturer or private labeler (the minimal requirement for a report is identifying a manufacturer), the CPSC must transmit the report with the identity of the reporting party redacted, unless the party otherwise provides consent to the manufacturer or private labeler, within five business days "to the extent practicable." Section 6A(c)(1). The CPSC is mandated to include the report in the database within 10 business days thereafter. Section 6A(c)(3)(A). This means there is a maximum 15-business-day period from report to publication. The manufacturer has less than 10 days to investigate the incident and to respond.

Due to the compressed timeframe, it is imperative that the manufacturers or private labelers receive the report at the earliest possible moment. What remains unclear is how and to whom the CPSC will "transmit" the report to ensure a real opportunity to respond. The additional phrase, "to the extent practicable," in the legislation instills little confidence that transmitting the report to the manufacturer or private labeler is a priority.

### **Can the Manufacturer or Private Labeler Challenge the Accuracy of a Report?**

Despite the unrealistic window of opportu-

nity, manufacturers or private labelers can challenge the accuracy of a report of harm. When a report of harm is made, the CPSC is permitted to determine, within the maximum 15-business-day period, whether the information is "materially inaccurate," in which case it must (1) decline to add the inaccurate information to the database; (2) correct the inaccurate information and add the revised information to the database; or (3) add information to inaccuracies in the database. Section 6A(c)(4)(A). During this timeframe, the manufacturer or private labeler may submit comments to convince the CPSC that the report is materially inaccurate and should not be included in the database.

The reality is that the manufacturer or private labeler must investigate and respond to the CPSC far enough in advance to permit the CPSC to conclude that the report is materially inaccurate, all within the 10-business-day window (assuming the report is "transmitted" and received on the same day). When this database goes into effect, it will be imperative that companies be organized and prepared to process and respond to these reports almost immediately.

### **What about Confidential Company Information?**

A manufacturer or private labeler may request that portions of the report identified as confidential be so designated and redacted. Section 6A(c)(2)(C)(i). The CPSC will determine whether the information contains or relates to trade secrets or financial information. Pursuant to Section 6A(c)(2)(C)(i), the CPSC will determine if the information falls under 18 U.S.C. §1905 or 5 U.S.C. §552(b)(4). Again, the CPSC must make a confidentiality determination after the manufacturer or private labeler receives and responds to the report, but before the 10-business-day period expires. If the CPSC determines the information is not confidential, it shall notify the manufacturer or private labeler and include the information in the database. Section 6A(c)(2)(C)(iii). The manufacturer or private labeler is permitted to bring an action in United States District Court to seek removal of confidential information from the database, but not to enjoin its publication. Section 6A(c)(2)(C)(iii).

While the Consumer Product Safety Improvement Act of 2008 pays lip service

to a manufacturer or private labeler's right to bring an action, it also lets the horse out of the barn. With members of the plaintiffs' bar and consumer protection advocates monitoring the database on a daily basis, subsequently removing confidential information provides no protection, but merely limits its dissemination. Moreover, the lasting effect may be that a claim of con-

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fidentiality in the future is moot because the information was already released to the public. For these reasons, a manufacturer or private labeler must prepare to aggressively and immediately mount CPSC challenges to any report that may contain confidential information.

### **May a Manufacturer or Private Labeler Include Counter Balancing Information in the Database?**

On request, a manufacturer or private labeler can submit comments on reports of harm to the CPSC to add to the database. Section 6A(c)(2)(A), (B). Manufacturer or private labeler comments are subject to the CPSC's "materially inaccurate" determination. Section 6A(c)(4). It is unclear if a manufacturer or private labeler has a remedy if the CPSC declines to publish its comments.

While these comments also may be submitted afterwards, publication of the report of harm without the manufacturer or private labeler's comments creates an unchallenged record of an incident. Once again, manufacturers and private labelers should immediately comment so that the initial publication of the report of harm includes the company's position.

### **Will the Database Have Litigation Consequences?**

The CPSC is required to provide conspicuous notice to users of the database that it does not guarantee the accuracy, completeness or adequacy of the database content. Section 6A(b)(5). However, this purported disclaimer will not necessarily prevent unverified and questionably inaccurate reports of harm from becoming evidence in product liability cases.

While a report of harm is hearsay, the database is government-created, which may give a report a cloak of reliability, especially if the CPSC screens such a report for “material inaccuracies.” A manufacturer or private labeler’s published comments falls under an exception to the hearsay rule if considered by a court as an implied admission. In short, courts may seriously consider admitting into evidence these unverified hearsay reports included in the CPSC database if previously uncontested.

Moreover, evidence of prior substantially similar incidents may be admissible in product liability and negligence cases to prove notice of defect or condition. Historically, information regarding prior incidents would be obtained from company records of reported incidents or prior lawsuits to which the company was a party. In both cases, the company knew the complainant and had the opportunity to fully investigate the claim, putting it in a position to accurately determine whether the incident was similar to an incident in a particular case.

By contrast, the company has virtually no opportunity to fully investigate reports of harm since it is not even permitted to know the identity of the complainant. The company is limited to an unidentified person’s version of how a particular incident may have occurred. When members of the plaintiffs’ bar attempt to use reports of harm as prior similar inci-

dents, companies will be placed at a prejudicial disadvantage.

Questions will also be raised in litigation as to whether a manufacturer or private labeler waived any confidential protections or conceded the accuracy of a report if it does not mount a CPSC challenge. If a company had an opportunity to challenge a CPSC report publication but did not, it may have difficulty convincing a court that it has a protected interest or should not be bound to the reported incident as accurate or true.

### **Can the CPSC Remove Reports of Harm from the Database?**

After investigation, if the CPSC determines that information made available in the database is materially inaccurate or duplicative, within seven business days it must (1) remove it; (2) correct it; or (3) add information to correct inaccuracies. Section 6A(c)(4)(B).

If manufacturers or private labelers cannot convince the CPSC not to publish a questionably inaccurate report of harm, the fight does not end at that point. The CPSC has authority to consider evidence of a baseless claim after it has been reported. For example, many reports of harm may ultimately result in personal injury suits, during which the manufacturer or private labeler may match the claim with a previous report of harm. If it is determined that the claim lacks merit, the manufacturer or private labelers should immediately submit additional information and ask the CPSC to remove the report of harm from the database. From a long-term perspective, a manufacturer or private labeler will have a continuing duty to preserve the integrity of the database information by proactively working with the CPSC to remove inaccurate information.

### **How Can Manufacturers or Private Labelers Prepare to Protect Their Rights?**

Once the database is available online, companies need to have a well-conceived, efficient plan in place to react to reports of harm, confer with counsel, and take proactive steps to protect their interests. At minimum, the plan should include the following elements:

1. Develop a prearranged agreement with the CPSC for transmitting reports of harm to maximize time to respond.
2. Assign reports of harm *high* priority, given the time constraints.
3. Immediately conduct a mini-analysis of the identified product and determine the plausibility that it caused the type of reported incident.
4. Review the report of harm for potentially confidential or proprietary information.
5. Post a carefully considered counterbalancing comment, keeping in mind its potential admissibility in any future litigation.
6. If the report of harm identified the complainant, which will happen only when the complainant expressly consents to such disclosure, immediately contact the person to investigate; document all attempts to make such contact.
7. Digest all report-related information and generate a response to the CPSC within the time constraints.
8. Develop a system to process post-publication information and ensure that inaccurate reports of harm are removed from the database as quickly as possible.

While the burden on manufacturers and private labelers is heavy, an aggressive, protective and proactive attack on these reports of harm will best serve the interests of the manufacturers and private labelers subject to this new legislation. 