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Newsletters

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Consumer Product Safety Database to Launch in Less Than One Year

Under President Obama's Open Government Initiative, and pursuant to Section 212 of the Consumer Product Safety Improvement Act (CPSIA), 122 STAT. 3048-3052), signed into law by President Bush on August 14, 2008), the United States Consumer Product Safety Commission (CPSC) is creating a searchable public database documenting reports of harm from consumer products. Section 212 states that the database will permit "(i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public service entities" to submit reports of harm relating to the use of products regulated by the CPSC. The database (to be available at www.SaferProducts.gov) is slated to be implemented on March 11, 2011. On April 15, 2010, the CPSC voted 3-2 to approve the Notice of Proposed Rulemaking (NPR) and start working out the details for the database. Manufacturers have reason for concern.

Under current law (Section 6(b) of the Consumer Product Safety Act), the CPSC receives consumer complaints, but must inform a manufacturer before releasing any information about its products to the public. The manufacturer then has 15 days to challenge the information. The CPSC can overrule a company's challenge of the release of data, but a manufacturer may then seek court intervention — a process which can be lengthy and, critics say, can delay the release of information that could result in the prevention of harm from dangerous products.

Under the new law, the CPSC must post a report in the database within a total of 15 days of receiving it. After a report is submitted to the CPSC, the agency must, to the extent practicable, forward it to the manufacturer within five business days. The manufacturer then has 10 days to respond to the report before it gets posted in the online database. If the CPSC determines, after investigation, that information previously posted is materially inaccurate, then the agency must remove or correct the information within seven business days. However, there is no specific time frame for the CPSC to initiate and complete an investigation of whether or not the challenged information is indeed inaccurate and to reach such a determination. The CPSC's staff has declined to recommend a time limit in this regard. (See "Publicly Available Consumer Product Safety Information Database NPR," April 14, 2010, pp. 3-4.

The CPSC may redact portions of a report designated by the manufacturer as confidential trade secret information if the agency agrees that the noted passages constitute trade secrets. However, the CPSC may override the

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challenge and post the information if it disagrees with the manufacturer's contentions.

A report of harm must include, at a minimum: (1) a description of the product, (2) identification of the manufacturer or private labelers, (3) a description of the harm, (4) contact information for the person submitting the report (although the person's name is not included in the posted report), and (5) a verification by the person submitting the information that the information is "true and accurate to the best of the person's knowledge." The law does not provide a sanction for providing inaccurate information, and the CPSC refused to incorporate a federal criminal penalty warning about supplying false information at the verification stage. (See CPSC Commissioner Anne M. Northup's Statement Regarding the Notice of Proposed Rulemaking," April 22, 2010, p. 4.

The following mockup of what the CPSC envisions a report form to look like was taken from the agency's Report to Congress, September 10, 2009.

Business and litigation concerns

1. Consumer reports that may be inaccurate or slanderous

The process of submitting a report, as described above, is easy and informal. If a person who submits a report is careless and misidentifies the product and/or manufacturer, blame for an unsafe product is bound to be wrongly placed. Worse yet is the potential for the database to be misused by competing product manufacturers to harm a company's reputation, or by those litigating against manufacturers.

Further, because the database is online, information contained in it can spread quickly. Where the information is inaccurate, it may cause irreparable harm to a company's reputation. Moreover, it would cause consumers to become concerned about a product they bought that, in reality, is perfectly safe. Although the website will include a disclaimer that the CPSC does not guarantee the accuracy of the database's contents, the reports will be on a federal agency's website. As a result, consumers may rely upon the database as a credible source of information.

CPSC Commissioner Robert S. Adler responded to some of these concerns on April 15, 2010 by providing assurances that "the Commission will, depending on resources, attempt to weed out the obviously inaccurate reports before publication," and that "the Commission will make every effort possible to reach a quick decision regarding [a manufacturer's claim that a report contains materially inaccurate information] and then either correct [the report] or exclude it from the database." However, such assurances likely provide little consolation to manufacturers wise to the fact that those bells cannot be unrung.

Indeed, CPSC Commissioner Nancy Nord's Statement on the Notice of Proposed Rule advises: "while the agency will 'review' the complaints, this review is only a 'capture and post' process without screening for facts through a filter of required information. It is important that the public using the data understand that any review of the agency is not directed at the substance of the complaint. In addition, we will not be investigating, and do not have the capacity to investigate, the vast majority of the complaints that come in and are posted. This point is not clearly made in the NPR, and it may well create a public expectation that complaints posted to the federal government's database have had some level of investigation and therefore can be relied on for making safety assessments or purchasing decisions."

2. Sources of information are too broad-based

As noted above, Section 212 of the CPSIA delineates the sources from which the CPSC may receive reports of harm. The sources listed suggest that Congress sought to limit the reporters of harm to individuals having a close connection to an incident involving a product (consumers, health care professionals and child service providers) or entities whose purpose is to promote the public's safety and welfare (government agencies and public safety entities).

However, according to Commissioner Northup in the proposed rule—without any statutory support—"the Commission defines 'consumers' so broadly that even bystanders and/or people that may hear about the accident can submit a report. In addition, the Commission adds a sixth category of 'Others including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations.'" Commissioner Northup argues that the proposed rule will allow "too many reports from people without

direct knowledge of incidents to submit reports that are subject to too little verification."

3. Manufacturer's inability to contact person submitting report

Under Appendix B of Section 212 of the CPSIA, the CPSC may not disclose the contact information of any individual or entity which submits a report, except that such information may be provided to the manufacturer or private labeler with the express written consent of the person submitting the report.

Without the submitter's contact information, a manufacturer will be unable to obtain information necessary to verify the report, or to determine whether the product may have been misused.

4. Ten business days an insufficient time period for manufacturers/private labelers to respond to reports

Upon receipt of a report, the manufacturer will begin to investigate the report, draft comments in response to it, and determine whether the report contains confidential trade secret information. If the report does contain such information, the manufacturer may only request that it be redacted. If the CPSC disagrees with the manufacturer's contention, the manufacturer will have to file a lawsuit to keep it out. To accomplish all of the above within 10 days will be unrealistic in many cases.

To illustrate the point, consider an inquiry concerning a product such as a piece of exercise equipment, which may have dozens of component parts manufactured by different entities. Merely determining which part is at issue may take more than 10 business days. In such cases, by the time the manufacturer could even begin to investigate the incident and formulate a response, the 10-day time limit will have passed.

Similarly, some time may be lost in actually getting the report to the appropriate person within the manufacturer's organization. To address this concern, the CPSC has indicated that it will allow companies to register the contact information for their appropriate liaison. However, a particular product may have multiple manufacturers. In these instances, when reports are submitted identifying a product by brand name, it may take additional time to pin down the right manufacturer and contact person.

5. Reports not required to include date of harm

There are multiple concerns with regard to the fact that the date of the harm is not a required component of a report. For example, not knowing the date of the alleged harm makes it more difficult to keep track of duplicative reports. The existence of multiple reports for a single incident unnecessarily will make a product appear more unsafe than would otherwise be the case. In addition, manufacturers may be unable to determine whether the report concerns a product model that has already been taken off the market.

Furthermore, there is no provision for the timing of reports in relation to when the subject incident occurred. The greater the passage of time, the greater the chance the report is inaccurate.

Relatedly, there is no provision for taking down reports after a certain amount of time. Without an "expiration date," the database has the potential to become replete with outdated information. As a result, products that are actually safe may appear dangerous simply by virtue of having been involved in a number of incidents over time.

6. Drawbacks of using the database as an "early warning system"

The statute envisions that the database will be supplemented with an "early warning system," a "tool that provides CPSC staff with the ability to compare reported incidents with all prior incidents to look for patterns that would indicate a potential problem." (CPSC's Report to Congress, p. 8). However, the danger of "false positives" will likely mean that consumers may stop using products that are actually safe and useful.

7. Other concerns

Additional concerns about the database include, for example:

- Greater potential for class action lawsuits;
- Use of the database to obtain discovery on other claims;
- Impact of increased costly litigation on small businesses;
- Potential for product liability insurance premiums to increase;
- Impact on business operations due to the disruption of responding to reports, putting small businesses at a significant disadvantage.

Manufacturers should prepare themselves for the implementation of the database by speaking with counsel and developing ideas for minimizing (1) risks associated with the soon-to-come public database and (2) disruption to their business operations.

For more information, please contact your regular Hinshaw attorney.

Hinshaw Obtains Victory for Volkswagen in Design Defect Case

On March 26, 2010, Jeffrey S. Fertl, and Noah D. Fiedler, attorneys in Hinshaw & Culbertson LLP's Milwaukee office, obtained a unanimous verdict in favor of Volkswagen AG and Volkswagen Group of America, Inc. in a design defect case. The lawsuit arose out of a one-car rollover accident on October 26, 2006, resulting in plaintiff's ejection from her 1999 Volkswagen Jetta and subsequent paraplegia. Plaintiff alleged that she was ejected as a result of a defect in the vehicle's restraint system. While plaintiff claimed no recollection of the accident or of seat belt use, her experts opined that she was properly wearing her seat belt and that the seat belt buckle was inadvertently released just prior to the roll sequence, causing plaintiff to become ejected from the vehicle and resulting in her paraplegia. Defense experts opined that the evidence showed plaintiff had not been wearing her seat belt prior to the accident. After a three-week trial, the jury found that plaintiff had not met her burden of establishing that she was wearing her seat belt at any time prior to the crash.

Plaintiff sought $27 million in damages, but recovered $0. Plaintiff has indicated that she will not appeal.

For more information, please contact Jeffrey S. Fertl, Noah D. Fiedler or your regular Hinshaw attorney.

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