

Consumer Product Safety Commission Approves Final Rule Imposing Structure for the Publicly-Available Complaint Database

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The Consumer Product Safety Commission ("CPSC" or "Commission") recently approved by a vote of 3-2 a final rule regarding the structure of a consumer complaint database available to the public. The database, which will be available at www.SaferProducts.gov in March 2011, will allow consumers to submit reports regarding harm or potential harm caused by consumer products and allow consumers to search for complaints that have been filed about various consumer products.

Section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA") requires the Commission to establish and maintain this database. The CPSIA requires that the database be "publicly available, searchable, and available through the Commission's Web site," and sets forth specific content, procedures, and search requirements that the database must meet. The Commission's rule implements the CPSIA's statutory requirements.¹

Key provisions of the final rule include:

- **Definitions of "consumers" and "public safety entities," parties that may submit reports of harm to the database.** "Consumers" include, but are 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." "Public safety entities" include "police, fire, ambulance, emergency medical services, federal, state, and other public safety officials," as well as "other public safety officials and professionals, including consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations, so long as they have a public safety purpose."
- **Information that must be provided before the Commission will publish the report in the database. Required information includes:** (1) a description of the consumer product; (2) the identity of the manufacturer or private labeler; (3) a description of the harm, which must relate to bodily harm or risk of bodily harm; (4) the incident date; (5) the submitter's contact information (this information, as well as other confidential information will not be published, nor will it be provided to the product manufacturer or private labeler unless the submitter provides express written consent to provide this information to the manufacturer or private labeler); (6) the category under which the submitter falls (e.g., consumer, government agency, public safety entity); (7) the submitter's affirmative verification that the information in the report is true and

accurate to the best of the submitter's knowledge; and (8) the submitter's consent to publish the report in the database.

- **Transmission of reports of harm to the identified manufacturer or private labeler.** The CPSC will provide report information to the product manufacturer or private labeler within five business days, to the extent practicable, of the submission of the completed report of harm. If an entity has registered with the CPSC, through the methods provided in the final rule, the CPSC will send the report through the method identified in the registration. If an entity is not registered with the Commission, the Commission will send reports of harm to the firm's principal place of business.
- **Procedures for a manufacturer or private labeler to submit comments related to a particular report.** The CPSC will publish these comments so long as the report relates to information contained in a specific report of harm, the manufacturer or private labeler includes its unique identifier provided by the CPSC, the manufacturer or private labeler affirmatively verifies that information is true and accurate, and the manufacturer or private labeler requests publication.
- **Publication in the database of publicly-available recall information.** Any information provided to the CPSC as part of a voluntary or mandatory recall notice and made available to the public will also be accessible and searchable in the database.
- **Procedures for determining if a report contains materially inaccurate information.** At any time, any person reviewing a report or a manufacturer comment in the database may request that the report or comment be removed or edited because it contains "materially inaccurate information," which is defined as "information that is false or misleading, and which is so substantial and important as to affect a reasonable consumer's decision making about the product" (e.g., identification of a consumer product, identification of a manufacturer or private labeler, the harm or risk of harm, the date or approximate date on which the incident occurred). Reports that include the required information, however, will be published "not later than the tenth business day after the date after such report of harm is transmitted to the manufacturer or private labeler by the CPSC," regardless of whether claims of material inaccuracy about the report are still pending. Therefore, unless the Commission makes a determination about an alleged material inaccuracy within the ten-day period, the submitter's report will be published. If after publication, the Commission determines that the report contains a materially inaccuracy, the Commission will remove, correct, or add information to address the inaccurate information. The Commission's rule does not require the that the Commission make a determination about material inaccuracy within any set time period.

Chairman Tenenbaum and Commissioners Moore and Adler voted in favor of the final rule. Commissioners Nord and Northup voted against the final rule, objecting to many of the rule's provisions, such as provisions regarding who may submit comments, what information must be in a report, and how alleged inaccuracies in reports will be addressed and corrected. Both Commissioners harshly criticized the final rule in their dissenting statements. For example, Commissioner Northup stated that "the decision to implement this final rule will most likely produce an unworkable Database, a rule vulnerable to legal challenge, and possibly a well-deserved decision by Congress to defund operation of the database."² Commissioner Nord stated that the final rule "is not responsive to the comments and ignores Congressional direction" and that "[s]afety is not advanced by the [Commission's] approach."

The CPSC's final rule will become effective 30 days after its publication in the Federal Register. In the meantime, manufacturers and private labelers of consumer products should develop internal procedures for handling reports and the related potential product liability consequences.

Kelley Drye & Warren LLP

Kelley Drye & Warren's [Consumer Product Safety](#) practice group is experienced in providing advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary, we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies. For more information about this client advisory, please contact:

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¹ Publicly Available Consumer Product Safety Information Database, Final Rule (Nov. 30, 2010), *available at* <http://www.saferproducts.gov/> (to be published in the Federal Register). The final rule will be codified at 16 C.F.R. Pt. 1102.

² Statement of Commissioner Anne M. Northup On the Final Rule Implementing the Publicly Available Consumer Product Safety Information Database (Nov. 24, 2010), *available at*, <http://www.cpsc.gov/>.