

'Database Of Doom'? New CPSC Database To Go Live

Law360, New York (December 6, 2010) -- After intense debate, the U.S. Consumer Product Safety Commission has voted to implement a database mandated by statute in 2008. The searchable and publicly accessible database will contain reports of potential or actual harm observed with consumer product use. All reports meeting minimum data requirements will be posted, with very limited exceptions, although the commission need not verify the complaints. Unprecedented access, to be sure. The Washington Times recently addressed the subject, calling this the "database of doom." How will this really affect the world? Could these provisions be incorporated by other federal agencies, tracking other adverse events?

The Database and Its Discontents

On Dec. 1, 2010, the CPSC voted 3-2 in favor of a final rule establishing the public reporting database mandated by Section 212 of the Consumer Product Safety Improvement Act (CPSIA) of 2008. The rule creates new 16 CFR part 1102, which outlines the database and its related procedures. Despite intense debate, the commission majority concluded that the procedures as outlined were needed and appropriate. The database should be live by March 2011.

In practical effect, the rule names a huge range of people and organizations, all empowered to submit reports for any observed harm occurring with product use. Reports also may be submitted for the observed potential that a consumer product could cause injury, illness or death, even if no such harm actually occurred. Publication will occur quickly, though the CPSC need not verify anything other than the completeness of the reports.

Although product manufacturers may challenge the posting of trade secrets or materially inaccurate information, the rule does not offer significant or streamlined protections. To the contrary, the rule errs strongly in favor of publication, with controversial issues resolved through manufacturer comment or later corrections. And if a manufacturer does challenge publication, the CPSC will expect help with the effort and expense of defending against a lawsuit seeking disclosure.

The new database system may leave consumers steeped in unfairly negative impressions, the CPSC mired in challenge and product manufacturers exposed to greater liability. Of course, less dire outcomes also are possible. Only time will tell.

For now, you may choose to read about the database in greater detail below. This is a highlights summary, focused on particularly relevant provisions. Why might you care? As the federal government opens access to adverse event reports throughout its regulatory structure, similar provisions could be incorporated by other agencies, into other database systems. This issue warrants following.

Who Can Submit What?

Reports that a consumer product caused harm may be submitted to the CPSC by consumers, government agencies, health care professionals, child service providers or public safety entities. "Harm" is defined broadly as "any injury, illness, or death, or any risk of injury, illness, or death." Included within the definition of "consumer" are a product user's family, friends, attorneys, investigators and agents, as well as any person who observes the product being used.

Included within the definition of "public safety entities" are consumer advocates and people who work for consumer

advocacy organizations. A very wide range of people accordingly will be empowered to publish reports indicating that product use did cause harm or had the potential to cause harm.

The CPSC will transmit reports to the product manufacturers or private labelers, after confirming that the reports contain all information required by rule. To the extent practicable, this transmission will be made within five business days after the completed report is submitted to the CPSC.

Transmission will be made by the means requested, including electronic, if the manufacturer has registered with the CPSC. Otherwise, postal mail will be used. The CPSC will publish all complete reports to the database just 10 days after transmitting them to the manufacturers, with very limited exceptions.

What must a report contain, before it will be transmitted and published? A description of the consumer product, the identity of a manufacturer or private labeler, a description of the harm, an incident date, the submitter's category and contact information, the submitter's verification of truth and consent for publication to the database.

Technically, this prevents anonymous reports. In reality, however, the name and contact information for the submitter will not be shared with the manufacturer or published to the database without consent. This opens up potentially devastating possibilities for consumers to be left with a wrong impression.

Procedures for Challenge

After receiving a report, the manufacturer or labeler may identify specific information as being trade secrets that have not been disclosed publicly before and that should be protected, for compelling reasons. The rule indicates that the CPSC may, in its discretion, delay publication of the report until this issue has been resolved. CPSC presentations suggest the general approach will be to wait.

If the CPSC agrees information is confidential, this will be redacted from the report before publication. If the CPSC does not agree, the information will be published to the database and the company will be required to seek relief in federal court. Of course, the very publication by the CPSC could jeopardize the information's legal and commercial value.

The potential for such destruction may be limited by a lack of access to true trade secrets, except by inside personnel who have contractual or fiduciary obligations to protect them.

A manufacturer or labeler also may challenge the publication of "materially inaccurate information," defined as information that is false or misleading and relating to a matter so substantial and important as to affect a reasonable consumer's decision making about the product. The rule does not offer the CPSC the discretion to delay report publication while resolving inaccuracy claims. Despite such claims, a report will be published to the database within 10 days after transmission to the manufacturer.

If the CPSC happens to determine that material inaccuracies exist before publishing a report, then it may decide not to publish the report or to remove or correct the inaccurate information. The CPSC also may take these actions later, if it determines that inaccuracy exists.

Manufacturers bear the burden of proving material inaccuracy. It may be difficult for them to locate sufficient evidence to meet this burden, since the CPSC is prohibited by statute from disclosing a reporter's contact information or a person's medical records without consent.

Context May Be Provided

In addition to challenging publication, manufacturers or private labelers may request that comments be added to the database. The comments must relate to information contained in a specific harm report, but need not be restricted to a claim that the report is inaccurate.

General statements may be permissible, including the maker's overall commitment to safety. Information about recalls or other restorative means also may be included.

Just as a manufacturer may challenge the accuracy of reported information, a report submitter may challenge the accuracy of comments. The CPSC will determine whether material inaccuracy exists, in the form of false or misleading information that relates to a matter which is so substantial and important as to affect a reasonable consumer's decision making about the product.

If the challenger meets the burden of proving such inaccuracy, the CPSC may remove or correct the comment.

Many Voices, All Empowered

Based only on the provisions discussed thus far, it is difficult to imagine timely resolution by the CPSC of all issues that could be raised. Yet there is more.

The rule in fact authorizes "any person or entity" reviewing a harm report or a manufacturer's comments to request exclusion or correction for materially inaccurate information. Given the potential for political and economic motivations, this provision could open the door to a crushing request wave.

Does This Help?

The CPSC database was intended to give people ready access to complete information about previously observed harms occurring with products they may consider using. In theory, this could help consumers avoid unnecessary or undesirable risks. In practice, the database may leave the CPSC mired in challenge, while offering consumers nothing more than an unfiltered and misleading mess.

The database also may raise product liability exposure for manufacturers. Not only will plaintiffs counsel have access to reports; they also will have access to arguments that product makers were provided notice of serious risk potentials, early and often.

This will be true, even though the reports are not verified by the CPSC and despite the fact that manufacturers often will not have access to the information they need to conduct truly in-depth evaluations.

How will this database actually affect the world? We shall see. Stay tuned for 2011.

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