

## **SaferProducts — Not Just Another Website**

Law360, New York (February 11, 2011) -- On March 11, 2011, the U.S. Consumer Product Safety Commission will launch a public database of consumer product incident reports. This new database will undoubtedly become a tool for the plaintiffs bar to target product manufacturers and private labelers for class action litigation and will likely change the way manufacturers and private labelers respond to consumer product safety complaints.

Product manufacturers, including importers and private labelers, should understand how the database will work, and how it may be used by consumers and the plaintiffs bar alike, and develop a strategy for responding to consumer product safety issues should they arise. This will enable manufacturers and private labelers to respond to incidents in a timely and strategic manner in order to minimize their potential liability going forward.

### **A Federal Mandate to Create the Public Database**

Since the Consumer Product Safety Improvement Act of 2008 (CPSIA) was enacted, more stringent safety standards and regulations have been put in place for consumer products. In addition to the provisions of the CPSIA currently in effect, such as restrictions on the use of lead and phthalates in children's products, Section 212 of the CPSIA requires the commission to create and maintain a publicly available, searchable database on the safety of consumer products that can be accessed through the commission's website.

The goal of the database is to provide the public with faster, more effective responses to product hazards and consumers with more timely information about products in order to keep their families safe.

The database, to be accessed through the website [www.SaferProducts.gov](http://www.SaferProducts.gov), will cover all consumer products under the commission's jurisdiction, including toys and baby products, sports and fitness equipment, home improvement equipment, clothing, appliances and electronics.

It will allow the public to report a harm or injury, or risk of harm or injury, related to the use of any product within the CPSC's jurisdiction. Manufacturers and private labelers will be notified when these reports are filed and given an opportunity to provide comments before the reports are posted to the website. The public will then be able to search the database and access the reports.

Recently, the CPSC began a "soft launch" to test the database. This provides an opportunity for manufacturers and private labelers that have completed the registration process to begin receiving electronic reports to test their own internal procedures before the database goes public on March 11.

Which reports are included in the public database depends on when they are received by the CPSC. None of the reports received by the CPSC during the soft launch period will be included in the public database; only reports received by the commission on and after the public launch will be published.

However, once the database is launched, any report received by the commission — even if it involves an earlier incident — will be posted to the website.

### **The Database: The Consumer and Business Portals**

When it is officially launched next month, SaferProducts will have two separate portals, a consumer portal and a business portal.

#### *The Consumer Portal*

The consumer portal will contain a searchable database, allowing the public, as well as the plaintiffs bar and business competitors, to access reports of prior safety incidents, product recalls and potential hazards asserted against a particular manufacturer. There will be basic and advanced search capabilities and the advanced search function will allow anyone to tailor their search by keyword, manufacturer, brand name or model number.

The consumer portal also allows consumers to report product safety incidents and potential hazards. In a troubling decision, the commission has taken an expansive view of the term "consumer."

The definition is not limited to the person who allegedly used or was injured by the product, but includes anyone with a connection to the product or with some knowledge of the incident or hazard — e.g., friends, relatives, caregivers or any representative of the individual that used the product at issue; any investigators, engineers, government agencies or other persons or entities that examined the product in any way; and anyone that observed the product in use even if that individual did not witness the incident.

The commission does not require someone filing a report to have firsthand knowledge of the incident or hazard they are reporting.

Although almost anyone may file a report, a report will not be publicly available until after it is reviewed and verified by the commission and the manufacturer or private labeler has been given an opportunity to respond. If the manufacturer or private labeler cannot be identified, the report will not be published.

A report must also contain the following eight categories of information:

- A description of the consumer product or substance.
- Identification of the manufacturer or private labeler.
- A description of the illness, injury or death; or risk of injury, illness or death related to the use of the product or substance at issue.
- The actual or approximate date of the alleged incident.
- The category of the submitter, i.e., a consumer, government agency, health care professional, child service professional or public safety entity.
- The name and contact information of the submitter. (This information will not be made public, except to the manufacturer or private labeler upon written consent from the submitter.)
- The submitter's consent to publish the report in the database. (If a submitter does not consent, the CPSC will still maintain and investigate the alleged incident.)
- Verification that the information in the report is accurate to the best of the submitter's knowledge and belief.

Reports lacking one or more of these items will not be published or transmitted to the manufacturer or private labeler for comment. Although requiring certain information heightens the likelihood of accuracy, the commission has not provided any guidance on how detailed the information must be or how thoroughly the commission will review or verify the reports prior to publication.

Once a report has been filed, the commission has five business days to forward the report to the product's manufacturer or private labeler for comment.

Once the report has been transmitted, the manufacturer or private labeler has only 10 business days to submit comments before the report is published in the database. The commission will adhere closely to this 15-day time period from receipt of a report to its publication because it construes the CPSIA as giving it no discretion to extend the time period even if the commission's investigation of the incident remains ongoing.

### *The Business Portal*

The business portal is designed to serve as a secure environment for government-to-business and business-to-government communications. Once registered, manufacturers and private labelers will be able to log into the business portal to access reports, provide comments and designate information in a report as confidential or materially inaccurate.

## **What Should Manufacturers Do to Prepare for the Launch of SaferProducts?**

Manufacturers and private labelers should consider taking the following steps in preparation for the March 11 launch:

- Register with the CPSC to receive the reports electronically. This can be done through the “Business Registration” link on the SaferProducts website. Because the database is in the midst of a soft launch, registration is open and, by registering early, companies can test their internal protocol for handling the reports.
- Be proactive. Develop a comprehensive strategy for responding to the reports so your business is prepared for handling any incidents that may arise. It is a mistake for a manufacturer to assume that no reports involving its products will be submitted so no response plan is necessary. By developing and implementing a well thought-out strategy, manufacturers will have the groundwork in place to mount a successful defense in any litigation that may ultimately arise.
- Decide how and when to comment on reports and be consistent. Manufacturers may want to delay submitting substantive comments until after they have completed an internal investigation, as a premature response may prove to be inaccurate later on and damaging in subsequent litigation. Other alternatives include waiting until after the commission has completed its investigation before responding to an individual report or not responding altogether. There is no obligation to provide comments and they may be submitted or updated any time.
- Be prepared to review the reports for confidential and materially inaccurate information and register your claim with the commission as soon as possible after receipt of the report. The commission will either decide claims of confidentiality before posting the report in the database or redact the information until a final decision is made. No clear guidelines have yet been announced as to how the commission will handle claims of material inaccuracy other than indications suggesting that such information will not be posted for some undefined period of time.
- Because the circumstances precluding publication of a report under the CPSIA are limited, you should assume that a report will be made available to the public in some form.

## **Potential Pitfalls for Manufacturers**

The public database could be fraught with problems for manufacturers, importers and private labelers not only because of the short time period they have to respond before a report is first made public, but because the very nature of the database makes it prone to inaccuracies, exaggeration and abuse.

Parties filing a report may blame the wrong manufacturer or product, or be totally unaware of material alterations to the product by the consumer. This is particularly true because the CPSIA does not require the report to be submitted by the injured party or an eyewitness.

A submitter need only “check the box” to verify that the report is true and accurate to the best of his or her knowledge. The publication of these reports may also carry a certain aura of legitimacy among consumers merely because they are posted on a government created and maintained website, despite the existence of a general disclaimer that the CPSC does not guarantee the accuracy or completeness of the reports.

It is almost certain that the plaintiffs bar will use the reports to mine for new products and defendants to target in class actions.

In addition, the reports are likely to be used to bolster punitive damages claims and jump-start settlement negotiations. The CPSC’s National Electronic Injury Surveillance System (NEISS) database offers further insight as to how the SaferProducts reports may be used in future litigation.

The NEISS is similar to SaferProducts in that it compiles data from hospitals reporting product-related injuries into a searchable database. Plaintiffs have been successful in admitting NEISS data to prove notice to a manufacturer and knowledge, or the reasonable availability of knowledge, of the dangerous qualities of a product at the time the product left its control.

Manufacturers should expect to see SaferProducts reports used in the same manner, especially now that they will receive early notice from the commission of every report filed involving one of their products.

Manufacturers can minimize their exposure by planning ahead and developing a protocol for responding to the reports. Prompt preparation is essential, the reports will begin coming in just a few short weeks.

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