

Product Liability & Toxic Torts

The Consumer Product Safety Incident Database: Access v. Accuracy

Insufficient time given to verify the contents of an incident report before its publication.

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Cyberspace and the Consumer Product Safety Commission will converge on March 11, 2011—the deadline to launch a searchable consumer product safety incident database.

On August 12, 2008, President Bush signed the Consumer Product Safety Improvement Act of 2008 (“CPSIA”), enacting the most comprehensive consumer products legislation since 1972. A striking feature of the CPSIA is Section 212, which directs the creation of a publicly accessible, searchable consumer product safety database. Section 212 requires the commission to establish and maintain a database on the safety of consumer products, and other products or substances regulated by the commission. Section 212 further mandates that the database be publicly available, searchable and accessible through the

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commission’s Internet Web site.

Three fundamental components comprise the database. First, the database must include reports of harm related to the use of consumer products that the commission receives from multiple sources: consumers, local state or federal government agencies, health-care professionals, child service providers and public safety entities. “Harm” is not limited to injury, illness or death; it also includes the risk of injury, illness or death, as determined by the commission. Second, the database must publish any information about products the commission deems a substantial product hazard or products that have been subject to voluntary corrective action by the manufacturer. Finally, the database must include comments submitted by the manufacturer or private labeler in response to the incident report if so requested. By casting such a wide net, the commission will become a repository of mountains of data.

This data must be sorted and accessible by categories such as the date of submission, the name of the product, the model name, the name of the manu-

facturer or private labeler, and any other element the commission considers to be in the public interest.

Every incident report submitted for inclusion in the database will be required to (i) describe the consumer product; (ii) identify the manufacturer or private labeler; (iii) describe the harm relating to the use of the consumer product; (iv) provide the contact information of the person submitting the report; and (v) verify that the information submitted is true and accurate to the best of the person’s knowledge, and consent to the inclusion of the information in the database. The commission may supplement the report with any other information it deems to be in the public interest. The name, address or other contact information of the person or entity submitting a report cannot be shared with the manufacturer or private labeler of the product unless the person or entity supplying the information consents and such information is used strictly to verify the contents of a report.

Once a report is submitted, the commission must forward it to the manufacturer or private labeler identified in the

report within five business days “to the extent practicable.” The manufacturer or private labeler has only 10 business days, at most, to read, investigate, draft comments to the report, and/or take action to prevent disclosure of confidential information contained in the report. Section 212 requires the commission to publish the incident report in the database no later than the 10th business day after the commission transmits the report to the manufacturer or private labeler. The manufacturer or private labeler may request that the commission include its comments in the database. If the commission receives such comment, the commission must make it available in the database at the same time as the report or as soon as practicable.

SaferProducts.gov

As with any legislation, the devil is in the details. On September 10, the commission submitted a report to Congress outlining how it intends to establish and maintain the database through a new Web site, tentatively called SaferProducts.gov. Two portals are planned—a consumer portal and an industry portal. The consumer portal will allow users to post the details of a product safety-related incident, and enable users to search for prior incidents. Much like purchasing a product on-line, single prompts and drop-down menus will guide the user through a step-by-step process. The user will be able to upload photographs, narratives and other artifacts in conjunction with the incident report.

Communication with manufacturers, distributors and retailers will be conducted through a separate industry portal. Where the manufacturers of the consumer product are identifiable, incident reports will be sent to the manufacturer “as quickly as possible” to afford the manufacturer the opportunity to investigate and respond to the report. The manufacturer can review the report and provide comments. Only authorized and registered manufacturers and retailers will be allowed to comment on incident reports. Comments may be published along with the incident report if requested.

Confidentiality

The commission has announced its intent to apply security and user-interface components in the industry portal to isolate industry users and segregate internal data so that companies will not be able to view data from other companies, but details on how the commission intends to accomplish this goal are hazy. Portions of the report may be designated as confidential. If the commission determines that a report contains or relates to a trade secret, the commission can redact the information before publication in the database. If the commission disagrees with the manufacturer’s confidential designation, the commission can override the objection after notifying the manufacturer or private labeler. The manufacturer’s last resort to protect confidential, proprietary information from public disclosure is to file a lawsuit in federal court to seek removal of the information from the database.

Access v. Accuracy

Public access to safety-related incidents involving consumer products is paramount. The commission has underscored the need to educate the public about product safety to save lives. Despite this worthy goal, the critical question is what value such information will have if the contents in the database are not accurate? Under the proposed structure of the database, manufacturers and private labelers are severely limited in their ability to confirm or deny the alleged incidents involving their products. The scope of the investigation is restricted by time and the willingness of the person or entity supplying the incident report to disclose their identity. Manufacturers have only 10 business days to investigate the incident report before it is published. Investigative efforts may be further hamstrung if the person or entity filing the incident report elects not to divulge its identity. In that case, a manufacturer or private labeler may be forced to investigate an incident report in a highly compressed time period without even the name or contact information of the consumer to validate the alleged incident. Reporting consumers are not required to certify under penalty of law that the

information provided to the commission is true and accurate. That leaves the commission as the only backstop to prevent publication of inaccurate or false information.

On the one hand the commission is required to provide clear and conspicuous notice to users that “the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database,” and on the other hand the commission is charged with the gate-keeping function of removing or correcting materially inaccurate information from the database. If the commission determines that a report contains material errors prior to publication, it can decline to add the information to the database, correct the information, or supplement the report to correct the discrepancy. If inaccurate information is discovered after publication, the commission must, not later than seven business days after such determination, remove, correct or add information to revise the entry. All incident data will be subject to the commission’s review to verify its authenticity, but the details on how the commission intends to investigate the veracity of every incident report are lacking. The report hints that the verification process may be limited to ensuring that the “submitters are who they say they are.” As to the accuracy of the substantive contents of the report, the commission appears to rely on a mouse click on its webpage next to the following statement: “I verify that this information is true and accurate to the best of my knowledge and that I consent to this information being included in the database.”

The database will have a profound effect on consumer product manufacturers. The commission touts SaferProducts.gov as an improved system to access, evaluate, investigate and share vast amounts of data. The flaw and inherent unfairness of the database is the insufficient time a manufacturer or private labeler is allotted to verify the contents of an incident report before its publication. Worse yet are the flimsy mechanisms to verify the contents of the report. The database will exponentially increase the product-related data available to the public, but the reliability of the data remains questionable. Without better fact-checking systems, the

database has the potential to cause more harm than good. An inaccurate report can unnecessarily alarm consumers about a product that poses no actual danger. False information published on a governmental Web page can also irreparably tarnish the goodwill and reputation of manufacturers and their products.

The commission has encouraged manufacturers and industry groups to provide suggestions on the proposed database before it is operational. Manufacturers and trade associations should tell the commission what is needed to ensure the dissemination of accurate consumer product information. For example, if an

incident report is disputed and the commission cannot verify its contents before the mandatory publication date, the incident report should include a warning that the contents have not been verified. Until the commission adopts marked improvements to the database, let the consumer product manufacturers beware. ■