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Strategies For The CPSC Database Of Reports Of Harm

Law360, New York (May 28, 2010) -- The Consumer Product Safety Commission recently published notice of an intent to issue regulations concerning a searchable database of incident reports on consumer products. The CPSC has for several decades maintained an agency database similar in nature to the searchable database, but information from that agency database could only be released pursuant to the Freedom of Information procedure. The CPSC searchable database is a requirement of the bipartisan Consumer Protection Safety Improvement Act of 2008.

The CPSC searchable database substantially increases the stakes of incident reporting for manufacturers, importers and private labelers (collectively here, manufacturers). By definition, the incident reports are statements of adverse events with consumer products. While the searchable database is open to all, it can be expected that lawyers, journalists, bloggers and others looking for patterns of adverse events to publicize will be leading users of the information.

This article examines the draft regulations for the CPSC searchable database, with an eye toward the strategic thinking of manufacturers. The target date for rolling out the searchable database is currently unknown, both because of the uncertainties in the rulemaking process, and the completion of programming for the database. Since Congress mandated the searchable database, though, it is timely for manufacturers to consider strategically what to do when they are the subject of an incident report.

The Proposed CPSC Searchable Database

A new entry in the CPSC searchable database will be triggered by a “report of harm.” A report of harm is limited to information about injuries, illnesses or death, or the risk of any of these occurring, relating to the use of a consumer product. In effect, anybody with access to such information can submit a report of harm.

In order to be published by the CPSC in the searchable database, a report of harm must contain all of the following: a description of the product sufficient to show that it is a consumer product; the identity of the manufacturer; a description of the harm caused or risked by the product; the submitter’s contact information; a verification of the report to the best of the submitter’s knowledge, information and belief; and the submitter’s consent to publish the report in the searchable database.

Published information in the database will omit from the initial report of harm, among other things, the submitter’s contact information, private or confidential information, and materially inaccurate information.

Manufacturers identified in a report of harm may submit a comment on the report for inclusion in the searchable database. CPSC publication of the comment requires: that the comment relates to information in a specific report

of harm; a verification to best of the manufacturer's knowledge, information and belief; and a request for publication in the searchable database.

The CPSC has to provide a manufacturer which is the subject of a report of harm all information from that report which is not subject to being withheld on privacy grounds, within five days of completion of the report of harm. The CPSC will generally publish reports of harm on the 10th day after transmission of the report to the manufacturer. If the manufacturer's comment is made more than one year after receiving the report, the CPSC has discretion not to publish the comment.

Any person reviewing a report of harm, before or after publication, may request that specified information or an entire report or manufacturer's comment be excluded or corrected because it contains materially inaccurate information. Information is materially inaccurate if it is false or misleading and concerns: the identity of a product or manufacturer; the harm or risk of harm to the consumer; or the status of an investigation about a product or corrective action. The CPSC requires that any person alleging materially inaccurate information must certify that he or she will assist the CPSC in the defense of any judicial proceeding to compel disclosure of that information. The CPSC has the discretion to review submissions to the searchable database for materially inaccurate information in the absence of any request.

If the report of harm contains trade secret or other specified confidential information, the manufacturer may seek to prove to the CPSC that such confidential information should not be published. A timely request concerning confidential information may delay publication of the report of harm in the searchable database, while the CPSC determines the validity of the claim. The CPSC requires that any person alleging confidential information must certify that he or she will assist the CPSC in the defense of any judicial proceeding to compel disclosure of that information.

In addition to reports of harm and manufacturer comments, the searchable database has to publish all information presented in a mandatory or voluntary recall notice in the public domain. The CPSC also has the authority to include additional information in the searchable database.

The CPSC searchable database will prominently display a disclaimer that the CPSC does not guarantee the accuracy, completeness or adequacy of the contents of the database. That disclaimer will be auto-generated on any documents printed from the database.

Strategic Considerations

The CPSC is a potential public relations minefield for manufacturers and even their downstream distributors and sellers. The same is true in product liability litigation, for related reasons. Again, the database only publishes bad news, so appearing there can never be good.

When a manufacturer receives a report of harm which accurately identifies the manufacturer or its product, the manufacturer has to determine whether the statement of the harm or risk of harm should be challenged as materially inaccurate. If the report is not materially inaccurate in that regard, the manufacturer has to decide whether to comment on the report for the searchable database.

The decision not to comment has the same public relations quality as a "no comment" quote to a journalist. That decision provides no positive information, and so seems evasive or as if there is no positive information to convey.

Commenting for the database, however, also has its risks. The information in the comment might precede more complete information which develops in the fullness of time. If the comment turns out to be incomplete or even

ultimately inaccurate, that fact might be used in an adverse public relations campaign or in products liability litigation.

The CPSC searchable database has only negative implications for manufacturers in litigation, since it publishes only reports of harm. This database will be a go-to source for plaintiff attorneys looking for notice of prior claims for the same or similar products.

If the database does provide notice of prior claims, or notice concerning a substantially similar product, the manufacturer's comment or no-comment will come into play. The risk is that a manufacturer's decision not to comment could be interpreted as a tacit admission of the correctness of the report.

Comments, on the other hand, will be scrutinized with fully focused hindsight for whatever scorn the plaintiff's attorney can heap on them. This will highlight the pitfalls of commenting in the absence of complete information. Statements that are deemed to minimize the risk of harm may be grist for an argument in support of punitive damages.

On a somewhat positive note, though, reports of harm should not be admitted into evidence as a governmental report or data compilation. The CPSC's disclaimer of accuracy and completeness emphasizes that reports of harm are not the government's work.

The best way for manufacturers, importers and private labelers to respond effectively to reports of harm submitted to the CPSC searchable database is to anticipate what to do if such a report is received. Receipt of a report should trigger an investigative function which many companies already have institutionalized. Target deadlines for action should be established, as silence in the face of mere passage of time may have negative implications. On the other hand, it will not always be necessary or advisable to prepare a comment in the 10 days between receipt of a report of harm and likely publication of that report. Disciplines involved in considering how to respond to a report of harm should ordinarily include both public relations and products liability counsel who understand that "clamming up" may prove to be a poor long-term strategy.

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