

The New CPSC Database and Reporting Requirements

Neil A. Goldberg, Esq.

Cheryl A. Possenti, Esq.

Joseph J. Welter, Esq.



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Public Database of Product Safety Incidents

- CPSC must establish a database of “reports of harm” from consumer products.
- Database must be:
 - Public
 - Searchable
 - On CPSC website



Public Database of Product Safety Incidents

- Database must include reports from:
 - Local, state or federal agencies
 - Health care professionals
 - Child service providers
 - Public safety entities
 - Consumers
- Reports must include:
 - Product
 - Manufacturer or private labeler
 - Description of harm
 - Contact information of person reporting
 - Verification by person reporting



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Public Database of Product Safety Incidents

- Problem:
 - Manufacturer or private labeler have an opportunity to review and comment on the incident report before it goes into the database, BUT,
 - CPSC *may not* give the manufacturer or private labeler the contact information of the person submitting the report without *consent* of the submitter.
 - **Result:** Anonymous adverse incident reports affecting a brand can be published in a public database with no opportunity to refute.



How Database Will Work

Company Confidential Information

- Reports of harm related to use of consumer product to be publicly-accessible in a database (Section 6A(a)(1))*
- If report identifies manufacturer, Commission must provide report within 5 business days (Section 6A(c)(1))
- Manufacturer may request that portions of the report identified as confidential be so designated and redacted (Section 6A(c)(2)(C)(i))

* Consumer Product Safety Improvement Act of 2008, Title II, Section 212, adding new Section 6A to follow 15 U.S.C. § 2055.



Trade Secret Information (Section 6A(c)(2)(C)(i))

- Commission makes determination whether report:
 - Contains or relates to a trade secret;
 - Contains information concerning trade secrets, processes, operations, style of work, or apparatus (18 U.S.C. §1905); or
 - Contains trade secrets and commercial or financial information (5 U.S.C. § 552(b)(4))



Financial Information (Section 6A(c)(2)(C)(i))

- Commission also empowered to protect financial information:
 - Identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association (18 U.S.C. §1905);
 - Information relating to any income return or copy thereof or any book containing any abstract or particulars thereof (18 U.S.C. §1905).



Review of Request (Section 6A(c)(2)(C)(iii))

- If Commission determines information is not confidential, it shall notify the manufacturer and include the information in the database.
- Manufacturer may bring an action in United States District Court to seek removal of information from database (not to enjoin its publication).



Problems With Protecting Confidentiality

- The horse is out of the barn
 - Confidentiality is compromised
 - Court action only limits the damage
 - Waiver of confidentiality in future litigation
 - Effect of unchallenged determination in future litigation
- In litigation, a court may order disclosure of redacted report despite a finding by the Commission of confidentiality



Failure to Challenge Database: Litigation Consequences

- Jury may see database
 - Susceptible to government document hearsay exception
 - Misleadingly “cloaked” with indicia of reliability if maintained by government
 - Creative plaintiff’s attorneys will find a way to make it relevant, (e.g. to establish prior notice)



Aggressively Challenge Database Information

- Company has less than 10 days to respond to an incident report
 - CPCS must provide report within five days
 - The report must be posted on website 10 days after report provided to company
 - CPSC must make determination of accuracy and confidentiality within that 10 days
 - Company may have comments posted in database



Aggressively Challenge Database Information

- Upon receipt of report:
 - MUST be given high priority
 - Legal and factual analysis to challenge accuracy of each reported incident
 - Legal and factual analysis of any confidential information that needs to be redacted
 - Prepare company comment to be posted
 - Timely and fact-specific letter with all supporting documentation to CPSC



Other Confidentiality Issues: Product Recalls

- The greater the number of recalled products, the greater the likelihood that plaintiffs’ attorneys in class action “judicial hellholes” will race one another to the court to file the first class action.
- Disputes among plaintiffs’ class action counsel for fees can dwarf disputes between plaintiffs and defendant over substantive issues.
- Issues:
 - Timeliness of recall/failure to prevent additional incidents
 - Good news: Providing recall remedy can defeat plaintiff’s claim for economic damages as consumers are “made whole”
 - Mitigate against punitive damage claims



Other Confidentiality Issues: Product Recalls

Litigation issues surrounding recalled products;

- Disclosure: some courts ignore the spirit of Section 6 and order disclosure of confidential submissions to the CPSC.
- FOIA requests to the CSPC can result in disclosure of hearsay complaints and unsubstantiated incident reports cloaked with the apparent authority of a government investigation.
- Joint press releases on CPSC website issued without careful negotiation can lead to claims of admission of liability or admission of defect.
- Plaintiffs may presume recalled products are easy targets.



Other Confidentiality Issues: Product Recalls

- What will happen to your reports?
 - Section 37 - Litigation Results - Reports Are Confidential
 - Section 102 - Choking Incidents - Reports Are Confidential
 - Section 15
 - Reports are confidential, unless there is a corrective action
 - Materials submitted with request for confidentiality will be considered confidential
 - Requests for confidentiality are usually honored by CPSC Freedom of Information Officer



Other Confidentiality Issues: Product Recalls

- Corrective action plan may be susceptible to disclosure in litigation
- Good risk management practices:
 - No admission of liability language
 - Compromise is without prejudice or precedent
 - Recitation of manufacturer's position or affirmative denial of Commission's position



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