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PRODUCT LIABILITY UPDATE

CPSC Database Has Potential for Far-Reaching Business and Legal Implications

During the past year, much of the public's focus on the Consumer Product Safety Improvement Act of 2008 (CPSIA) has centered on the regulations governing children's toys and materials such as lead and phthalates. One section of the CPSIA that has not received much attention but may have a potentially significant impact on manufacturers, distributors and retailers of consumer products is Section 212, which requires the Consumer Product Safety Commission (CPSC) to implement a publicly accessible, searchable database of consumer product incident reports. On September 10, the CPSC issued its "Report to Congress Pursuant to Section 212 of the Consumer Product Safety Improvement Act of 2008—Implementation of a Searchable Consumer Product Safety Incident Database," which outlines the CPSC's planned rollout of this database. As described below, this database has the potential to have far-reaching business and legal implications for how manufacturers, distributors and retailers of consumer products report and respond to consumer complaints.

SAFERPRODUCTS.GOV—PROPOSED CONSUMER PRODUCT SAFETY INCIDENT DATABASE

The CPSC has proposed that SaferProducts.gov (a working name only) will provide a central location where consumers can report product safety incidents or search for prior incidents and recalls on products they own or are thinking about buying. According to the CPSC, this centralized database will make it easier for the CPSC and consumers to report, analyze and respond to consumer products that pose potential hazards. The CPSC's target audience for SaferProducts.gov is broad given the wide range of products that fall within the CPSC's jurisdiction, including toys and baby products, appliances, computers, home improvement products, sports and recreation equipment, fitness equipment and electronics.

Although the CPSC has provided few procedural details in its report to Congress, it has stated that all incident data submitted to SaferProducts.gov will be subject to CPSC review to verify its authenticity. Any data or consumer reports found to be "materially inaccurate," or determined to have been posted by someone whose identity cannot be verified, will either be corrected or will not be published. The CPSC also will have the ability to correct or remove data or reports that are subsequently determined to be "materially inaccurate."

In addition to the consumer portal, SaferProducts.gov will include an industry portal—a secure environment for business-to-government and government-to-business exchange of information, enabling manufacturers to respond to consumer reports. The CPSC envisions that this industry portal will include a mechanism whereby manufacturers, distributors and retailers that have registered their contact information will be able to receive alerts of reported incidents immediately

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via email and/or text messaging. The company will then be given 10 business days to investigate and respond to the report before the report is posted for public review. Any comments provided by the company will be published along with the report. Further, although few specifics are reported, the industry portal will apply “appropriate security” restricting companies from viewing other companies’ data. The CPSC reports that SaferProducts.gov will be operating by March 11, 2011, which complies with the 18-month deadline set forth in the CPSIA.

LEGAL IMPLICATIONS

Although SaferProducts.gov is not the first public database on which consumers can report complaints about products, there are three components of the database that present significant business and legal ramifications for manufacturers, distributors and retailers of consumer products.

First, unlike other databases, SaferProducts.gov will be maintained and strictly monitored by the CPSC, which has the power to initiate investigations and product recalls. In fact, the CPSC already has stated its intention to use SaferProducts.gov as a tool for this purpose. This intended use of the database by the CPSC raises a number of potential issues with respect to a company’s reporting requirements under the Consumer Product Safety Act (Safety Act). Currently, manufacturers, distributors and retailers of consumer products have an obligation to immediately (within 24 hours) inform the CPSC of their receipt of information that reasonably supports the conclusion that a product fails to comply with an applicable consumer product safety rule, contains a defect that could create a substantial product hazard or creates an unreasonable risk of serious injury or death. 15 U.S.C. § 2064(b). Section 2064(b), however, carves out an exception to this reporting requirement if the company “has actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or risk.”

The creation of SaferProducts.gov can be both a blessing and a curse with respect to this exception. On the one hand, the CPSC’s control and maintenance of the SaferProducts.gov database could reduce a company’s burden of determining whether information posted on the database creates a reporting requirement under the Safety Act. On the other hand, the CPSC’s control of the database combined with the short window of time afforded companies to investigate consumer reports, takes much of the evaluation process out of the company’s hands and places it in the hands of the CPSC. Because manufacturers, distributors and retailers are more familiar with their products and are in a better position to determine whether those products create an unreasonable risk of serious injury or death, this situation creates the potential for an increased number of, and potentially less efficient, investigations and recalls implemented by the CPSC.

Accordingly, as the CPSC continues to develop SaferProducts.gov over the next 15 months, manufacturers, distributors and retailers should monitor how the CPSC intends to respond to information posted on the database. It also may be advisable for industry associations to request that the CPSC clarify exactly how it intends to use the database as a tool for initiating investigations and recalls. Given the significant penalties that the CPSC can assess for a company’s failure to report under Section 2064(b), it also is advisable for companies to push the CPSC to



clarify that information posted on SaferProducts.gov will indeed satisfy the reporting exception in Section 2064(b).

Second, companies will need to determine how best to monitor or use SaferProducts.gov. As stated previously, SaferProducts.gov is not the only public forum or database to which consumers can report incidents or complaints about a company's products. In addition to longstanding forums such as the Better Business Bureau, consumers are now using social networking web sites such as Facebook[®], MySpace[®] and Twitter[®] to complain about companies, products and services. It is not always possible or advisable for companies to chase down and investigate every such complaint. Moreover, with the CPSC providing only 10 days for companies to investigate consumer reports submitted to SaferProducts.gov, it may not be possible for companies to conduct a sufficiently thorough investigation to respond adequately to the complaint. Adding to this difficulty is the fact that in its current version, SaferProducts.gov does not require consumers to provide their contact information, a detailed narrative of the alleged incident, the manner in which they were using the product or the nature of their injuries. As a result, companies should review their current procedures for monitoring and investigating consumer reports to determine whether, based on their specific products, they need or want to make any adjustments to accommodate SaferProducts.gov.

The third component of SaferProducts.gov that presents significant business and legal implications is the public nature of the database and the CPSC's plans to implement numerous ways in which information on the database can be shared. Given the public nature of the postings, companies may be deemed under the law to have knowledge of the incidents and complaints. Thus, the database will serve as an easily accessible tool for plaintiffs in future litigation to locate potential evidence of "alleged other similar incidents" or evidence to support a punitive damages claim. This is particularly troubling given that the CPSC has not explained the steps it will take to verify the accuracy of consumer reports submitted to the database. As a result, in determining how or whether to monitor SaferProducts.gov, companies should consider involving their legal department or counsel. Not only will doing so help companies understand the potential impact of the reports and/or their responses, but involving legal counsel at this stage also adds the potential benefit of invoking the attorney-client privilege and protecting certain communications from discovery in future litigation.

In the event a company decides to respond to a consumer report, its response may involve confidential and proprietary information. Again, given the public nature of the postings and responses, it is important that companies take steps to ensure that any confidential or proprietary information that they submit in response to a report is properly protected by the CPSC. While the CPSC has stated that it will apply "appropriate security" to confidential and proprietary information and employ a security certification and accreditation process, it is critical for companies to develop a complete understanding of the security policies and technologies ultimately employed by the CPSC.

Another implication of the public nature of SaferProducts.gov is that the database will undoubtedly serve as a new resource for an always creative plaintiffs' bar searching for potential lawsuits. The



searchable capacities of the database will enable plaintiffs' attorneys to search for potential personal injury or consumer claims, as well as to identify potential class actions or mass torts. These concerns are exacerbated by the CPSC's intention to use social networking and other electronic media aggressively to publicize and share the information posted on SaferProducts.gov. The CPSC, for example, is planning on rolling out dedicated pages and/or channels on Facebook, Twitter, YouTube[®] and Flickr[®]; a CPSC blog to communicate its activities with the public; and a "Share This" tool on the CPSC web site that will enable users to send content to social networking sites. As a result, incorrect or incomplete information can easily and quickly be circulated to thousands, or even millions, of consumers.

PREPARING FOR THE IMPLEMENTATION OF SAFERPRODUCTS.GOV

The CPSC's recent report to Congress is just the first formal step in the development of the database. The lack of details in the CPSC's report suggests that there is still significant work that needs to be done before SaferProducts.gov is up and running (with a target deadline of March 11, 2011). With many questions still to be answered, it is an excellent time for manufacturers, distributors and retailers to start evaluating how the database may impact their businesses and determining the most effective way to monitor the database once it comes online. Additionally, because the CPSC still has many details to finalize and is seeking the input of industry organizations and trade associations, interested companies and associations have an opportunity to get involved and help shape the development of the database.

FOR MORE INFORMATION

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