Index of Comments
Publicly Available Consumer Product Safety Information Database
CPSC-2010-0041

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0002	6/29/10	Amanda Ellison	[redacted]
0003	7/14/10	Michele Witte	[redacted]
0004	7/14/10	Wayne Morris	AHAM 1111 19th Street, NW Washington, DC 20036
0005	7/14/10	Alan Garton	[redacted]
0006	7/14/10	Patrick Cook	[redacted] E. [redacted]
0007	7/26/10	Alison Manhoff	[redacted]
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0014	7/26/10	Donald Sedlacek	
0015	7/26/10	Tucker Helmes	[redacted]
0016	7/26/10	Charles Duke	[redacted]

0017	7/26/10	Sean Kane	[redacted]
0018	7/26/10	Gibson Vance	[redacted]
0019	7/26/10	Ed Desmond	[redacted]
0020	7/26/10	Steve Pfister	[redacted]
0021	7/26/10	Gregg Ublacker	Director of Regulatory Affairs 16 Yankee Candle Way South Dearfield, MA 01373
0022	7/26/10	Cary Silverman	[redacted]
0023	7/26/10	Kyle Pitsor	[redacted]
0024	7/26/10	Stacey-Ann Taylor	[redacted]

0025	7/26/10	Robert Waller	[redacted]
0026	7/26/10	Ann Staron	
0027	7/26/10	Joanne Mattiace	[redacted]
0028	7/26/10	Jim Pauley	[redacted]
0029	7/26/10	Christine Hines	[redacted]
0030	7/26/10	Julia Hughes	[redacted]
0031	7/26/10	Stephanie See	[redacted]
0032	7/26/10	Matthew Hall	
0033	7/26/10	Kimberly Billoni	[redacted]

0034	7/26/10	Christopher McLean	[redacted]
0035	7/26/10	Michele Pittenger	[redacted] #4
0036	7/26/10	Sara Mayers	[redacted]
0037	7/26/10	Rosario Palmieri	National Association of Manufacturers
0038	7/26/10	Rebecca Mond	American Apparel & Footwear Association

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0002
Comment from Amanda Ellison

Submitter Information

Name: Amanda Ellison
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[redacted]

General Comment

I agree with this proposal. People have the right to know anything they feel they need to know about the products that they are purchasing. There are too many products that have been later recalled because of defects or long-term side effects.

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0003
Comment from Michele Witte

Submitter Information

Name: Michele Witte
Address:
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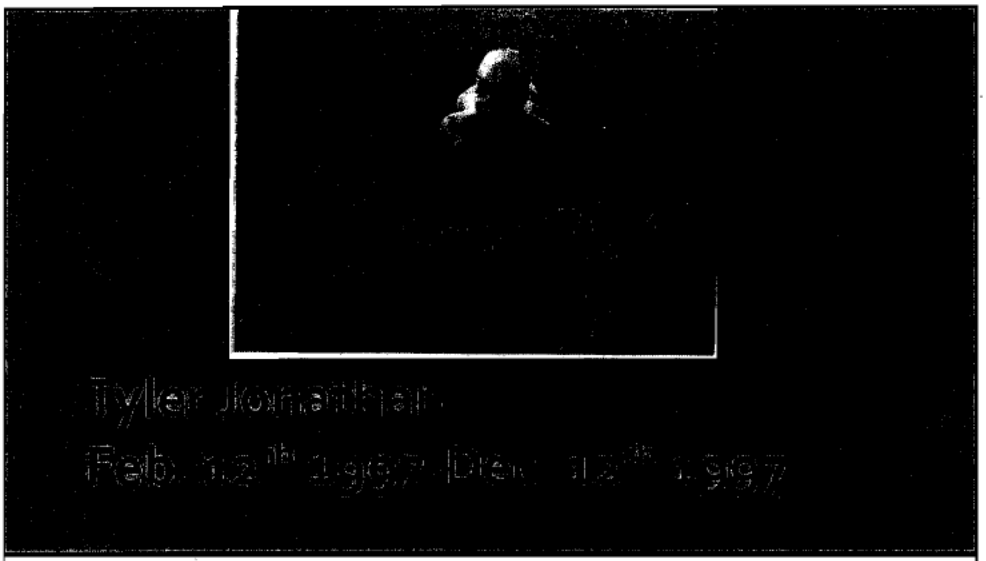
General Comment

Consumers have the right to know if a product has caused injury or death. If I knew that the drop side crib I purchased new from a reputable manufacturer / retailer killed some of the babies placed in it I would never have purchased the product. If I read on a database about the children who died in the crib I purchased I could have reasoned that the design was unsafe. No one protected me, the consumer, from purchasing a crib that was known to cause injury and death. Horrific. My son would be alive today if I would have known that drop side cribs kill. See the attached powerpoint. I had to learn about these babies on my own through google.

Attachments

CPSC-2010-0041-0003.1: Comment from michele witte



[redacted] died because he had a drop-side crib

Bobby Cuffaro

[redacted], New York
Age 6 months
Died in 2004, trapped between the mattress and side rail of his drop-side crib

Liam Jenkins

- [redacted], California
- Age: 9 months old
- died in 2005, trapped in a drop side deathtrap

Reese Morgan

- [redacted], Louisiana
- Age 6 Months
- Died in May 2009, trapped by a drop-side crib

Emmys Taylor

- [redacted], Iowa
- Died in October 2008, suffocated by his drop-side crib

Courtney Sue Barr

- [redacted], New York
- Age 7 months
- Died May 2007, trapped by her drop-side crib

Carter Mitchell Park

- [redacted], West Virginia
- Age 6 months
- Died January 2007, suffocated by his drop-side crib

Edward Millwood

- [redacted], GA
- Age 6 months
- Died November 2006, hanged by his drop-side crib

Serenity Bergey

- [redacted], Florida
- Age: 2 ½ years old
- died in 2007, trapped between the mattress and side rail of her drop-side crib

Ariel Allison

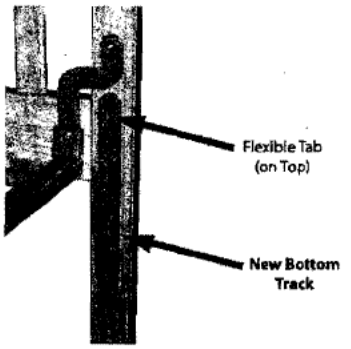
- [redacted], Kentucky
- died in her Drop-side crib this past September

Royale Arceneaux

- [redacted] Texas
- Age 8 months
- Died in February 2008, trapped by a drop-side crib

Sidrangulation and suffocation Hazard

The Hazard of Drop Sides



April 2009

- On April 23, 2009 Toys 'R' Us announced that the company will stop taking orders for any cribs with a drop side
- By January 1st 2010, Toys R Us stopped selling cribs with drop-sides due to the strangulation and suffocation hazard
- Bravo Toys R Us!

July 2009

- CPSC recalls Simplicity Drop-side cribs after an 8 month old boy from Houston, Texas became entrapped and suffocated to death.
- But two months later, a family in Princeton, KY did not hear about the recall. They woke up on Sept. 5th 2009 to find their dear daughter trapped and killed in her recalled crib.

October 2009

- Suffolk County Bans the Sale of Drop-side Cribs, the first such ban in the Nation

December 2010

- ATSM International, which sets world-wide industry standards for cribs, balloted item F1169 and removed the drop side design from the standard.

December 2011

- Nassau County Votes Unanimously to Ban the Sale of Drop-side Cribs

January 2010

- **Rockland Legislature votes unanimously to ban the sale of drop-side cribs**
- "Without state or federal action on this well-demonstrated hazard, I believe that it's our duty to take action at the county level"
  - - Legislature Alden Wolfe (D-Suffern)

[redacted]

- Their son, [redacted] died in a "repaired" drop-side crib in October of 2008
- The couple could not afford a new crib when the side rail originally detached, so dad used duck tape to secure the crib side.
- One day after burying their son both [redacted] were arrested for child endangerment. All charges were dropped after more than a year of attorney fees and bail moneys.
- [redacted] also died in a drop-side that her dad duck-taped.
- Shouldn't cribs never require duct tape?

Extra, Extra!

- 600,000 cribs recalled after baby's death
- 11 baby deaths now linked to Simplicity cribs
- More than 2.1 million cribs recalled
- Stork Craft Baby Crib Recall: Over 500,000 Cribs

Total: Over 5,000,000 (FIVE MILLION) Drop-side cribs have been recalled for one unifying reason:

Strangulation / suffocation Hazard

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0004
Comment from Wayne Morris

Submitter Information

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Submitter's Representative: Wayne Morris
Organization: AHAM

General Comment

See attached file(s)

Please see attached comments of the Association of Home Appliance Manufacturers.
Thank you.

Attachments

CPSC-2010-0041-0004.1: Comment from Wayne Morris

AHAM
ASSOCIATION OF HOME APPLIANCE MANUFACTURERS

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By Federal eRulemaking Portal

July 16, 2010

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD 20814

Re: Docket No. CPSC-2010-0041

Dear Mr. Stevenson:

Enclosed are the comments of the Association of Home Appliance Manufacturers (AHAM) regarding the proposed rule on the publicly available consumer product safety information database, Docket No. CPSC-2010-0041. With this proposed rule, the Commission has carefully taken a number of comments from AHAM and other stakeholders into consideration. But AHAM wishes to reiterate and raise a few important points for additional consideration. In particular, when implementing CPSA § 6A, AHAM urges the Commission to follow closely the statute's nondiscretionary requirements, and not go beyond the authority the statute grants the Commission. Furthermore, AHAM continues to believe that accuracy and integrity of the database must be an overriding consideration.

AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's membership includes over 150 companies throughout the world. In the U.S., AHAM members employ tens of thousands of people and produce more than 95% of the household appliances shipped for sale. The factory shipment value of these products is more than $30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security. Home appliances also are a success story in terms of energy efficiency and environmental protection. New appliances often represent the most effective choice a consumer can make to reduce home energy use and costs.

I. The Statute Specifically Enumerates Those Who May Submit Reports For Inclusion On The Public Incident Database, And The Commission Must Not Go Beyond That Statutory List.

The CPSA lists those who may submit reports of harm for inclusion in the public incident database: (i) consumers; (ii) local, State, or Federal government agencies; (iii) health care

professionals; (iv) child service providers; and (v) public safety entities. CPSA §§ 6A(b)(1)(A)(i)-(v). This is an exclusive list, as indicated by the fact that Congress considered who should be permitted to submit reports for inclusion on the database and chose to identify specific reporters. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (stating that the cannon of statutory construction that the expression of one thing suggests exclusion of the others "depends on a series of two or more terms or things that should be understood to go hand in hand, which [is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded") (citation omitted); *United States v. Johnson*, 529 U.S. 1114, 1118 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth"). The Commission cannot add to that list. Yet, in the proposed rule, the Commission did just that. In proposed 16 C.F.R. § 1102.10, the Commission added to the list of proper reporters, "others including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." The addition of this "other" category is improper, not entitled to deference by a court if challenged, and should be removed in the final rule for (at least) three reasons.

First, by adding an "other" category, the Commission has acted outside the authority Congress granted it in the statute. Congress specifically delineated five categories of reporters who may submit reports for inclusion on the public incident database. The Commission is within its authority to define those categories as it has done in 16 C.F.R. §§ 1102.10(a)(1)-(5). But nowhere does CPSA § 6A(b)(1) grant the Commission the authority to enumerate additional categories of reporters, much less one that negates all of the categories Congress took care to delineate.

Second, this *ultra vires* action is contrary to the plain meaning of the statute. It is a cardinal rule of statutory interpretation that a statute must not be interpreted in a manner that would render other provisions of the statute superfluous or unnecessary. *See, e.g., Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.). Here, the Commission's addition of a catch-all "other" category makes the categories of reporters Congress specifically delineated entirely superfluous because the "other" category is so broad as to encapsulate every category of reporter, thus making any specific designation unnecessary.

Third, the addition of an "other" category is unreasonable and contrary to sound public policy. Congress intended that the database advance public safety by better informing consumers of potential product hazards. *See* Cong. Rec. H7586 (2008) ("It requires the CPSC to create a searchable and user-friendly public database on deaths and serious injuries resulting from consumer products so that parents have access to the information they need to protect themselves and their children."). Congress selected reporters who would contribute to that purpose—those who use or observe the use of the consumer product (and thus the resulting harm or risk of harm) and those who may be involved in treating or responding to the harm. Congress did not include in its list of reporters those who may be commercially or financially motivated to submit reports of harm. By allowing *anyone* who wants to submit a report for inclusion in the database to do so, the Commission has opened the flood gates to those who may be motivated to "salt" the database such as attorneys and competitors. Opening up the database to these and

other groups will not serve Congress's intent to advance product safety. Instead, it will decrease the database's accuracy and integrity, making it unreliable for consumers attempting to obtain information about potential product hazards and looking to make a decision as to whether to purchase a product.

Because the Commission's action in adding the "other" category to those permitted to submit reports for inclusion on the public incident database is outside the scope of its statutory authority, contrary to the plain meaning of CPSA § 6A, and unreasonable, AHAM urges the Commission to do what it must and remove the category when it issues the final rule.

II. Private Information Should Be Redacted On Report Attachments.

Proposed 16 C.F.R. § 1102.10(f) lists information that will be excluded from publication in the database. AHAM supports all of these categories. AHAM understands 16 C.F.R. § 1102.10(f)(1) and (2) to mean that the submitter's and/or victim's name and contact information will not be posted in the database in any form, including if that information appears on attachments submitted with the report of harm. It is critical that the Commission take extra care to ensure that nothing is posted containing a reporter's or victim's private information without consent from the reporter or victim.

III. Auto-Fill Should Only Be Used With Caution.

In a number of places, the Commission has indicated its intent to use an auto-fill function. Overall, AHAM supports this approach along with drop-down menus, text fields, and other methods intended to help reporters accurately and completely fill out and submit a report of harm. But the Commission should not use the auto-fill function for fields such as model numbers, in which the use of auto-fill could generate confusion and inaccuracy. The first numbers of a model number are often identical across a variety of products. It may be that only the last several numbers of a model number serve to identify and differentiate between a particular manufacturer's products. Using auto-fill for the model number field in particular could thus result in imprecise identification of products. We also believe auto-fill should not be used for brand names, as there are several that are similar. Consumers should fill in the brand name and model/serial numbers. Free text fields would be preferable.

The Commission should also be careful that the use of auto-fill does not limit reporters' responses. For example, if a term is not recognized by the system in an auto-fill field, the reporter should still be able to enter that term rather than have the system refuse a response because it is not recognized by auto-fill.

IV. Errata Should Be Corrected.

AHAM has identified several errors that should be corrected in the final rule.

First, the reference to § 1102.20(e) in proposed 16 C.F.R. § 1102.12(b)(1), which is intended to reference manufacturer registration, is incorrect. It should reference § 1102.20(f),

which is the manufacturer registration section. The same error is in § 1102.20(d)—the reference to "paragraph (e) of this section" should be a reference to paragraph (f).

Second, there appears to be a comma missing in the definition of "report of harm." Currently, proposed § 1102.6(8) states "*Report of harm* means any information submitted to the Commission through the manner described in § 1102.10(b) regarding an injury, illness, or death, or any risk of injury, illness, or death as determined by the Commission, relating to the use of a consumer product." AHAM believes a comma should be placed between "death" and "as determined by the Commission." That punctuation is consistent with the definition of "harm" in proposed § 1102.6(5) and CPSA § 6A(g). To avoid ambiguity and confusion, AHAM suggests using parallel construction by inserting a comma as described above.

* * *

AHAM appreciates the opportunity to file these comments and would be glad to provide further information as requested.

Respectfully submitted,

Wayne Morris
Vice President, Division Services

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0005
Comment from Alan Garton

Submitter Information

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Submitter's Representative: Alan Garton
Organization: GS1 US

General Comment

See attached file(s)

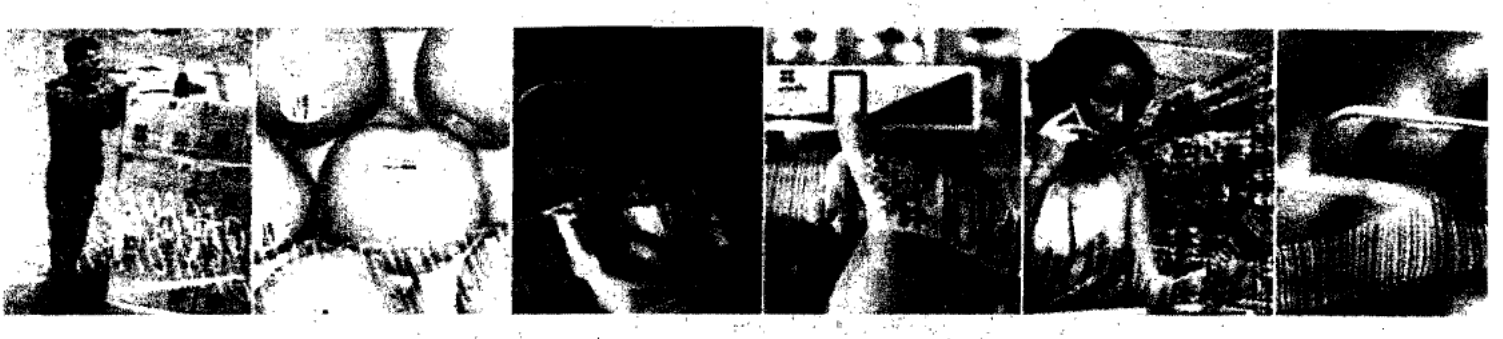
Attachments

CPSC-2010-0041-0005.1: Comment from Alan Garton

GS1 US

GS1 US Comments to Docket CPSC-2010-0041

July 12, 2010



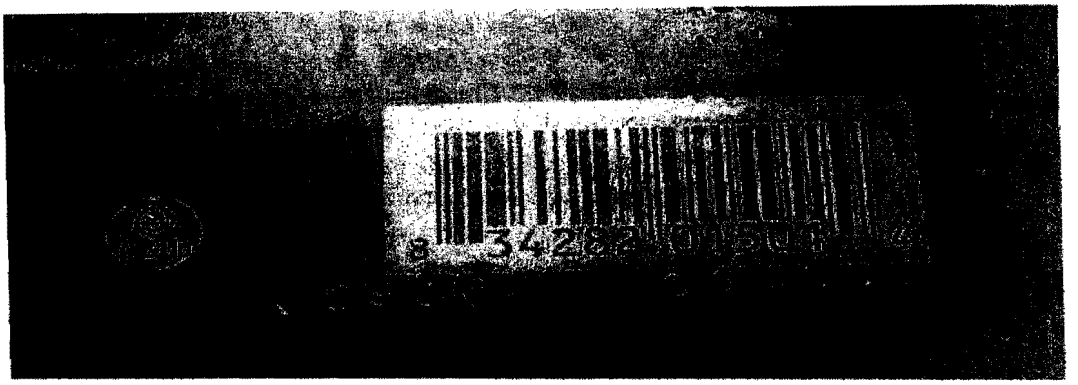
Docket No. CPSC -2010-0041 Comments by GS1 US

GS1 US appreciates the opportunity to provide these comments to the CPSC in its consideration of *the establishment and maintenance of a product safety information database that is available to the public*. As CPSC considers various options and recommendations regarding product codes; GS1 US recommends CPSC consider the use of globally recognized and accepted product and location standards to support the information needs of businesses, government, other interested parties and **most importantly, the consumer.** Implementation of the GS1 Standards to identify products is widespread and their use to enhance consumer product safety is a natural and reasonable approach for manufacturers and retailers.

Background; GS1 and GS1 Standards: GS1 is a not for profit, neutral, community guided, global standards organization. GS1 Member Organizations manage an integrated suite of global standards that provides supply chain visibility through the accurate identification, capturing, and sharing of information regarding products and locations. GS1 US manages the GS1 System of Standards in the United States. Using GS1 identification numbers, companies and organizations are able to globally and uniquely identify *physical things* like trade items, physical locations, assets, and logistic units as well as *logical things* like corporations and departments.

GS1 US Comments and Recommendation:

- **Product Identification;** The most widely implemented identification number in the world is the GS1 Global Trade Item Number (GTIN). It was employed over 30 years ago and is used in U.P.C. and EAN barcode symbols by the vast majority of retailers and suppliers in all sectors of the globe. UPC/EAN tags are used for scanning products for the consumer at point of sale. The GTIN in the barcode is a unique identifier which provides a link to the manufacturer or brand owner of the product. It is typically stored in product masters files and used in shipping/receiving documents and invoices. In the case of the consumer, it is placed on packages, hangtags and store receipts and used as a reference to the product he or she has purchased. In today's world of fast moving technology, it is becoming commonplace to find consumers using applications in their cell phones to scan UPC/EAN symbols to capture information about products.
- **Recommendation:** Because proprietary model and serial numbers can be duplicated by various manufacturers, GTINs eliminate confusion and can assist the consumer with a quick and unique link to the product. Considering the broad implementation of Global Trade Item Numbers in UPC/EAN symbols, GS1 US recommends that CPSC consider asking manufacturers and retailers to include the GTIN of the unsafe product in the *product safety information database.* The following is a real world illustration of a GTIN in a U.P.C. barcode symbol along with a date code on a consumer package.



GS1 US Overview

GS1 US is one of 108 country-based Member Organizations of GS1, a global organization dedicated to the design and implementation of standards and solutions to improve the efficiency and visibility of supply and demand chains, both globally and across industries. More than 1 million companies use GS1 standards to do business across 150 countries. GS1 and its subsidiaries and partnerships connect companies with standards-based solutions that are open, consensus-based, and universally endorsed. GS1 US Member Companies represent more than 200,000 businesses in more than 25 industries including all categories of Apparel, Toys, Consumer Packaged Goods, Fresh Foods, Healthcare, Retail, General Merchandise, Publishing, Government and High Tech

- Countries with a GS1 Member Organization
- Countries served on a direct basis from GS1 Global Office (Brussels)

For more information, please contact;

Alan Garton

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0006
Comment from Patrick Cook

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Submitter's Representative: Patrick Cook
Organization: Galaxy Fireworks, Inc.

General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0006.1: Comment from Patrick Cook

Galaxy Fireworks, Inc.
204 E. Martin L. King Jr. Blvd.
Tampa, Fl. 33603
813-234-2264

July 12, 2010

Office of the Secretary
U.S. Consumer Product Safety Commission,
4330 East West Highway, Room 502
Bethesda, MD 20814

Re: *Consumer Product Safety Commission, 16 CFR Part 1102 Publicly Available Consumer Product Safety Information Database; Proposed Rule Docket No. CPSC–2010–0041*

Dear Mr. Secretary,

Our company, Galaxy Fireworks, Inc., is a direct importer, retailer, and wholesaler of consumer fireworks products. We have been in the consumer fireworks industry for over 25 years, and are members of the American Pyrotechnics Association (APA). We are members of the American Fireworks Standards Laboratory (AFSL) as well as members of the National Fire Protection Association (NFPA).

On May 24, 2010 the Consumer Product Safety Commission (CPSC) published a Notice of Proposed Rule Making for a Publicly Available Consumer Product Safety Information Database on the agency website. This proposed rule contains the procedures and documentation requirements for a database of incidents and or injuries as they relate to consumer products. A review of this document has brought forth the following issues that could affect importers and manufacturers of consumer fireworks and other goods that are regulated by the CPSC.

First and foremost, the terms "risk of bodily harm" or "risk of injury" need to be deleted from §1102.10(d) (3) specifically and from the entire NRPM in general. These terms lack the specificity that is required in a public access database such as this. A better option would be to exclude the references to risk and stick to verifiable injury incidents as these allude to things that have not happened yet. This database must be based on concrete instances and not on issues or injuries that may (or may not) occur.

Manufacturers comments to a report are allowed in accordance with the requirements noted at §1102.12. The problem is that this section only allows comments from the named company(s) in the official report, and does not allow any inputs from other industry members. At §1102.16 *(Additional information)* it states that the "*CPSC may include in the Consumer Product Safety Database any additional information it determines to be in the public interest...*" This section defines the criterion that is required

for the additional information to meet to be eligible for inclusion in the database, yet it is not specific on who may submit the additional information that the CPSC decides to include. This would be the ideal location for industry members other than the named company or other professional organization to insert comments on the incident or injury.

The criterion for materially inaccurate information is set forth at §1102.26, and it is this section that that specifies what constitutes materially inaccurate information, as well as the procedures and requirements for excluding inaccurate material from the report. This section, if used properly, has the potential to become one of the most influential portions of the reporting process. An example of an incident from the consumer fireworks industry that could possibly be excluded as materially inaccurate would be in the case of an injury or incident involving a sparkler bomb.

Sparkler bombs are homemade explosive devices made with consumer fireworks (colored sparklers bound tightly together) that are extremely unstable and violently explosive. Colored sparklers, when used properly (one at a time), are safe to use when following common sense safety practices. Each box of sparklers sold in the U.S. contains very specific warnings and cautions developed by the fireworks industry and the CPSC to help reduce the risk of burns or eye injuries due to flying debris. However, there is nothing that can be done to completely prevent the consumer from attempting to modify the composition or the effect of the device.

Herein lies the danger to the consumer and it is beyond the scope and control of the affected industry to correct this deficiency. Industry simply cannot design a label that is a replacement for common sense. We can, however, petition the CPSC to remove the posting as the incident or injury would not have happened had the product been used in the manner or fashion that it was designed for. If all of the applicable warning and cautions had not been adhered to by the consumer, then the report should be declared "materially inaccurate" and not be posted. Industry should not be penalized for the intentional misuse of their product by a consumer.

Additionally, at §1102.26(h) - *Commission determination of material inaccuracy after publication*, it is noted that the Commission has seven days to make a determination on what to do with a report that contains materially inaccurate information. This time frame should be readdressed, and any materially inaccurate information should be removed from the site immediately until the issue at hand is resolved. Each day that inaccurate information is posted on the internet to the public is another day of commercial loss for the affected manufacturer or retailer. After the information is either edited or corrected it could again be reinserted into the database.

Further on in this section is the clause (at §1102.26(j) - *Commission determination of no material inaccuracy*) that allows the Commission to make arbitrary decisions regarding the accuracy or inaccuracy of subject matter or issue at hand, as well as having the final decision in whether or not the report in question is published after their review process. It must be emphasized that there are no guidelines or allowances in this proposed rule for any type of appeals process for their decision(s). This arbitrary processing of reports and

attaching materials and documentation must be changed and an appellate process instituted.

A public database such as the one envisioned by the Congress and the CPSC will make a great tool for the consumer as well as the manufacturer or importer if it is properly designed and implemented. This has been an ongoing process with a lot of public inputs, and we feel that the issues addressed above should be reviewed and clarified prior to full implementation of this proposed rule.

I would like to thank you for providing us with the opportunity to comment on this important rulemaking. Should you have any questions or require clarification of any comments presented herein, please feel free to contact me at (813) 234-2264 or via email at galaxyfire@aol.com

Respe[redacted]

Patrick Cook
General Manager

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Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0007
Comment from Alison Manhoff

Submitter Information

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Organization: Consumer Healthcare Products Association
Government Agency Type: Federal
Government Agency: CPSC

General Comment

Please see attached file.

Attachments

CPSC-2010-0041-0007.1: Comment from Alison Manhoff

CHPA

founded 1881

July 20, 2010

Office of the Secretary
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Submitted electronically via www.regulations.gov

Re: **Docket No. CPSC-2010-0041:** *Publically Available Consumer Product Safety Information Database*

Dear Mr. Stevenson:

The Consumer Healthcare Products Association ("CHPA") appreciates the opportunity to provide comments on the Consumer Product Safety Commission's ("CPSC" or "Commission") proposed rule, "Publically Available Consumer Product Safety Information Database," published in the Federal Register on May 24, 2010. Founded in 1881, CHPA is a national trade association representing leading manufacturers of over-the-counter ("OTC"), non-prescription medicines and dietary supplements. As described in more detail below, in order to ensure the continued safe reporting of adverse events associated with our members' products and prevent consumer confusion, we strongly believe OTC and dietary supplement product incident reports should not be included in the CPSC safety incident database.

Food and Drugs are Not Regulated as "Consumer Products"

Pursuant to Section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), the Commission is required to implement a "database on the safety of consumer products, and other products or substances regulated by the Commission." As you are aware, the food and drug products manufactured and distributed by our member companies are specifically exempted from the CPSC definition of "consumer products" and these products are highly regulated by the Food and Drug Administration ("FDA"). Consumer Product Safety Act, P.L. 92-573, Sections 3(a)(5)(H) and (I). We believe the only food and drug products that fall within the scope of the Commission's regulatory authorities are those for which the Commission has imposed packaging requirements pursuant to the Poison Prevention Packaging Act ("PPPA") (P.L. 91-601). Further, the Commission's regulatory authority over such products is limited to the product packaging.

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FDA has an Established Safety Reporting System for OTCs and Dietary Supplements

While the implementing language for CPSC's database references products regulated by the Commission that may not be "consumer products," we do not believe the intent of this provision of the law was to include OTCs and dietary supplements. As you are likely aware, FDA has an expansive and well-established adverse event reporting system for OTCs and dietary supplements, MedWatch (http://www.fda.gov/Safety/MedWatch/default.htm). Under the Federal Food Drug and Cosmetic Act, as amended in 2006 by the Dietary Supplement and Nonprescription Drug Consumer Protection Act (P.L. 109-462), manufacturers of OTCs and dietary supplements are required to report "serious adverse events" to FDA. Further, OTC drug and dietary supplement product labeling is required to include manufacturer contact information to enable consumers to report such events to manufacturers. P.L. 109-462, 2(d). Additionally, the MedWatch system also includes voluntary adverse event reporting procedures for consumers (see http://www.fda.gov/Safety/MedWatch/HowToReport/ucm053074.htm). The timely reporting of adverse events to FDA through this robust system is a critical mechanism for ensuring the health and safety of the American public.

CPSC's Database would Create Consumer Confusion and Delay Critical Reporting to FDA

If the CPSC were to incorporate PPPA regulated drug and dietary supplement product packaging into its safety incident database, it is likely to cause significant consumer confusion. Consumers using drug and dietary supplement products may not distinguish between packaging related consumer safety incidents and incidents related to the underlying drug or dietary supplement (it is also unclear how the consumer will differentiate PPPA regulated packaging from non-PPPA regulated packaging for reporting purposes). Therefore, it is likely that consumers would inadvertently submit important drug or supplement safety information to the CPSC instead of to the manufacturer or FDA, thereby delaying the appropriate review of this important information. Any delay in reporting this information to the manufacturer or FDA could have significant health and safety consequences for consumers.

The background information to the proposed rule states that "reports of harm that fall outside the scope of CPSC regulatory authority will be referred to an appropriate agency or entity with notification of such action to the submitter." As discussed above, the timing of such reporting to FDA is critical to the safety of American consumers. With more than 15,000 consumer reports anticipated annually (and, in addition, 7,500 manufacturer comments and 2,500 or more requests to treat information confidentially or as materially inaccurate), it is not clear that CPSC will have the resources to ensure that critical drug or supplement safety reports are transferred to FDA in a timely manner.

Value of PPPA Regulated Packaging Safety Incident Reports to CPSC is Unclear

Furthermore, we question the value of reporting PPPA regulated packaging safety incidents to CPSC. Unlike many of the "consumer products" regulated by the CPSC, it is improbable that PPPA product packaging will contribute to the types of "harm" (as defined in Section 212 of the CPSIA) common with "consumer products." While "harm" may result from PPPA regulated packaging in cases where children are able to break into the packaging and access the OTC or dietary supplement product, as you

know, PPPA packaging is designed and tested to be child-resistant and not child-proof. Reports of PPPA packaging "failures" are therefore not necessarily a "harm" under the law. Further, packaging related incident reports of this nature will not assist CPSC in achieving its consumer safety goals as child resistant packaging is carefully regulated through the testing protocols required by CPSC regulations. Considering this information, it is unclear what types of PPPA related safety reports CPSC intends to include in the database.

PPPA Regulated Packaging Should Not Be Included in CPSC's Database

We urge the Commission to carefully consider these concerns when interpreting the meaning and intent of the database provisions of the CPSIA and considering whether the provisions are really intended to include incident reports related to PPPA regulated packaging of OTCs and dietary supplements.[1] If the Commission determines it must incorporate OTC and dietary supplement products with PPPA regulated packaging into the database, it is imperative that the Commission provide sufficient instructions making it clear to the consumer that reports regarding the drug or dietary supplement itself should not be submitted to CPSC and must be reported directly to FDA and/or the manufacturer, as appropriate. The CPSC consumer reporting form must emphasize that only incident reports related to PPPA regulated packaging should be reported. Further, CPSC will need to vigilantly monitor any reports received prior to public posting to ensure the incident report falls within the jurisdiction of the CPSC database and that any reports that should be submitted to FDA are transferred in a timely manner.

CHPA members thank the CPSC for the opportunity to provide our comments on this important issue. If the Commission has any questions or if CHPA can be of any assistance, please let us know.

Sincerely,

[redacted]

Associate General Counsel
Consumer Healthcare Products Association

[1] Additionally, while outside the scope of these comments, many of our member companies also manufacturer products in other product classes such as cosmetics and medical devices that may require child resistant packaging under the PPPA or otherwise be regulated by the CPSC. As these products are also highly regulated by FDA, many of the same principles outlined in this letter support their exclusion from the database and we encourage the Commission to carefully consider this information when developing the database.

see also CPSC-2010-0041-0010

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0008
Comment from Hoyt Webb

Submitter Information

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Organization: Legrand North America

General Comment

Please see our attached file for constructive comment and suggestions regarding the proposed rule for the Publicly Available Consumer Product Safety Information Database.

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Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0009
Comment from Douglas Troutman

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General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0009.1: Comment from Douglas Troutman

VIA ELECTRONIC MAIL SUBMISSION

July 21, 2010

Mr. Todd Stevenson
Office of the Secretary
United States Consumer Product Safety Commission
4300 East West Highway
Bethesda, MD 20814

RE: Consumer Product Safety Commission – Product Incident Safety Database
Docket No. CPSC – 2010 – 0041

Dear Mr. Stevenson;

The American Cleaning Institute℠ (ACI, formerly The Soap and Detergent Association, SDA) represents the $30 billion U.S. cleaning products market and includes the formulators of soaps, detergents, and general cleaning products used in household, commercial, industrial and institutional settings; companies that supply ingredients and finished packaging for these products; and oleochemical producers.

As described in the May 24, 2010 Federal Register notice, the Consumer Product Safety Improvement Act (CPSIA) requires the Commission to establish and maintain a product safety information database that is available to the public. The database would encompass the safety of consumer products and other products or substances regulated by the Commission. The proposed published rule seeks, among other things, to interpret various statutory requirements concerning submission, notice, publishing and maintenance of information to be included in the database.

The proposed published rule also seeks to address confidential and materially inaccurate information issues. Under the requirements of Section 212 of the CPSIA, the database is to include, "reports of harm relating to the use of consumer products" and is to include, among other things, a description of the product; identification of the manufacturer or private labeler; a description of the harm related to the use of the product; and contact information. Moreover, the database is to be searchable by date of report, the name of the product as well as model and other names given by the manufacturer, among other factors the Commission may provide.

The following are ACI comments regarding Commission structure and implementation of a product incident safety database.

Confidential Information/Materially Inaccurate Information

The protection of confidential business information (CBI) is a priority issue for ACI members. The success of the new product safety incident database will hinge on the careful management of any such information such that manufacturers can have confidence that their CBI will be protected.

Before the enactment of the CPSIA, the Consumer Product Safety Act (CPSA) required that the Commission follow the notice provisions of Section 6 of the CPSA before publicly disclosing any information that allowed the public to readily ascertain the identity of a manufacturer or private labeler of a consumer product. Section 6 of the CPSA contains requirements for giving notice of such information to the manufacturer or private labeler and providing an opportunity to comment on the information prior to public disclosure. Section 6 of the CPSA also requires the Commission to take reasonable steps to assure that disclosure of such information is accurate, fair in the circumstances, and reasonably related to effectuating that purpose of the CPSA (as noted in the Federal Register notice, the Commission has issued regulations interpreting Section 6 at 16 CFR part 1101). Moreover, the public has access to incident data through reports and studies published by the Commission or, through Freedom of Information Act (FOIA) requests. The Commission further notes that new Section 6(A) of the CPSA (as amended by the CPSIA) specifically excludes any report submitted pursuant to the public database provisions from the notice requirements of Section 6(a) and (b) of the CPSA.

This last item, the exclusion of specific reports submitted pursuant to the public data base provisions from Section 6(a) and (b) of the amended CPSA, while statutorily required, must be carefully reviewed and managed. Given that the database is completely brand new, and thus has never been adequately "road tested," ACI believes that further guidance and detail from the Commission on the interplay of all of the provisions of Section 6 to address the criteria for confidentiality determinations is necessary. Toward that end, ACI urges the consideration of, among other options, coded identifiers and other devices to protect CBI.

ACI also reiterates from our February comment letter that factual accuracy and veracity are two fundamental elements underpinning a credible and viable incident database. These two elements are crucial to avoid false or misleading reports or even incident reports created based on mere rumor. The accuracy and completeness of factual circumstances are very important to the incident report, and are essential to any attempt to demonstrate incident patterns. The Commission should ensure that thorough and descriptive data fields are developed to accomplish the objective of securing accurate and complete information. This should include accuracy in product reporting that accounts for product, production or other manufacturing descriptors. Moreover, the database must have a mechanism for addressing false and inaccurate reports that do not meet the test of factual accuracy and veracity. Finally, a process for confirming the accuracy of an alleged incident is necessary.

Information Quality, Gathering and Maintenance

ACI encourages the Commission to utilize best practices in creating the database that are consistent with the databases that manufacturers and others currently utilize to collect information and data from consumers and product users. ACI also encourages the Commission to focus the scope of the database on issues that are core to its mission of protecting public safety in this era of limited resources.

The statutory timelines for a manufacturer's response to a report are relatively short, and to facilitate efficient responses to reports given the timelines, it will be imperative that a process for timely delivery, correct contacts and receipt be established. Proper notice and posting of the comments as soon as practicable after the report may pose significant time and process issues for the Commission.

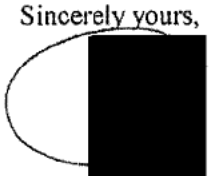
The Commission's proposal would also expand who can submit reports for database inclusion in contravention of the express language of the enacted law. ACI understands that the intent of the statute

was to set specific reporting entity categories for the incident database: consumers; local, state or federal government agencies; heath care professionals; child service providers; and finally, public safety entities. ACI recommends that the Commission not add to this list given the untested and nascent nature of the database. The addition of other entities or categories would very likely add confusion to an already clear Congressional intent concerning database information. Moreover, the Commission does not provide any further rationale or public policy interest for the addition of other reporting entities or categories. The ultimate consumer protection interest is only substantiated by accurate and meaningful information intended to protect the consumer interest, and toward that end, the Commission should be careful to protect this new system from overload or abuse.

ACI notes that the ability to remove certain materially inaccurate information in consumer incident reports from the database is crucial. ACI believes that if certain information misidentifies the product in question in the incident report, then this information should automatically be considered materially inaccurate. Examples include listing an incorrect product, manufacturer or private labeler, model, or brand; any information that is not directly related to the incident, such as unsubstantiated opinion statements about the product's design or general safety; and reports of an injury or hazard caused by something other than the product identified in the report. While some of these would specifically appear as listed in the Commission's proposal (e.g. incorrectly identified product, manufacturer or private labeler) ACI respectfully requests the inclusion of the additional categories noted above. Finally, clarification as to the requirements for challenging a report as false or inaccurate inside the response window is essential, as is clarification of the process for filing such challenges if the relevant information comes to light outside the response time.

ACI strongly urges the consideration of these comments and appreciates the attention of the Commission to these issues. Should you or your staff require further assistance please contact me at (202) 662-2508 or at dtroutman@cleaninginstitute.org.

Sincerely yours,



Dougl[redacted]an
Senior Director, Government Affairs

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0010
Comment from Hoyt Webb

Submitter Information

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Organization: Legrand North America

General Comment

Please see the attached file for our comments and suggestions regarding the proposed rule.

Attachments

CPSC-2010-0041-0010.1: Comment from Hoyt Webb

Legrand North America

July 21, 2010

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Room 502
Bethesda, MD 20814

SUBMITTED VIA WWW.REGULATIONS.GOV

Re: Publicly Available Consumer Product Safety Information Database – Proposed Rule (Docket No. CPSC-2010-0041)

Legrand North America, Inc. (LNA) is pleased to respond to your request for comments on the Consumer Product Safety Commission's (CPSC) proposed rule establishing a Publicly Available Consumer Product Safety Information Database. LNA (www.legrand.us) is comprised of several companies that operate in markets including energy saving equipment, electrical wiring devices, and data communications products and services. Our companies include Pass & Seymour, Inc. (Syracuse, NY), The Watt Stopper Inc. (Santa Clara, CA), and The Wiremold Company (West Hartford, CT). LNA has several manufacturing facilities in the US with, as our name suggests, additional operations in Canada and Mexico. As members of the National Electrical Manufacturers Association (NEMA), our companies share the concerns of others in our industry that the implementation of the required database be undertaken in a manner that achieves the legislative goals requiring its creation and affords industry participants clarity with regard to their obligations and predictability with regard to their role in the processes proposed to be established by the CPSC.

LNA has contributed general insights with regard to the proposed rule to NEMA, which insights NEMA may elect to submit with other comments it is consolidating from members for submission to the CPSC. In addition to the insights offered through NEMA, LNA would like through this separate submission to share some more specific ideas that the CPSC may find helpful.

As an executive summary, this submission offers suggestions to stimulate CPSC's thinking regarding how optimally to address the following concerns: (i) data privacy, (ii) fraud prevention, (iii) fair competition, and (iv) potential promotion of premature litigation. The ideas offered are intended to be thought provoking, and not to suggest that our proposed solutions are the best way for the CPSC to address these concerns or otherwise manage the administrative burdens associated with the creation of the new database.

In this regard, it is important to point out that like many NEMA members, LNA's companies primarily produce products that are not "regulated products" under the Consumer Product Safety Act, as amended by the Consumer Product Safety Improvement Act of 2008 (Public Law 110-314), or products explicitly stated to be within CPSC's jurisdiction but for which no mandatory standard has been issued, but rather are subject to the voluntary standards of Underwriter's Laboratory and/or the National Electric Code of the National Fire Protection Association. Nevertheless, LNA

has a long history of corporate citizenship, and is moved to contribute freely and constructively to the important effort CPSC is undertaking to draft what we recognize will be a very important rule.

Certain More Important Concerns Regarding the Proposed Rule

The concerns and questions raised by the proposed rule include the following:

1. What information will be revealed by the database and to whom? How will issues of data privacy (contact information of individual submitters) be addressed if the database will be open to public scrutiny? (The subject of Proposed Section 1102.10(e))

2. The proposed rule addresses the submitter and the named manufacturer separately, but does not appear to contemplate communication between the submitter and the manufacturer, to facilitate follow – up or corrective action. Would allowing a certain amount of communication facilitate the rectification of consumer product issues identified in submissions and the improvement of consumer safety?

3. What actual processes does the CPSC anticipate having in place when evaluating both submissions and manufacturer's responses to provide reasonable assurances against misinformation or fraud from either party? (The subject of Proposed Section 1102.10(d)(5), with respect to submitters and Section 1102.12(c), with respect to manufacturers).

4. Insofar as submitters may already possess warranty or other legal rights with regard to their reported incident, there is legitimate concern that the public reporting of incidents that have not been fully investigated may give rise to premature litigation. The submitters, the CPSC and the manufacturer(s) that may be named in a report all have an interest in ensuring reports and responses are as honest and as complete as possible within the tight timeframes required by Congress. However, the ten-day manufacturer's response time is widely believed to be inadequate for a full investigation either by the manufacturer or by the CPSC, and many in the industry expect that responses will be supported by only a preliminary assessment in most cases.

   For this reason, we are concerned that early publication may facilitate precipitous legal action based on the authoritative status of publications to the database. We submit the CPSC should share this concern, as well. Section 1102.10(f) contemplates the CPSC will exercise a certain level of discretionary control over the publication or withholding of publication of certain information under certain circumstances. To the extent the submitter and the manufacturer ultimately end up in litigation, the CPSC is likely to be asked to provide testimony of some kind (affidavit, deposition, etc.) regarding any determination it made to publish or withhold information pertinent to the case. In light of the fact that the CPSC envisages a very active participation in the information vetting process and information correction process, it is reasonable to ask to what extent consideration has been given regarding: (i) how to limit premature litigation, (ii) whether the probative value of published reports/comments ought to be limited, so that they may not be used as conclusive evidence by either party in a legal proceeding (separate and distinct from the evidence supporting or refuting the alleged claim), or (iii) how to avoid having submitters or manufacturers seek testimony / depositions from CPSC regarding their decision whether or not to publish in whole or in party a report of harm or a manufacturer's comment? Should the existence of a report in the database, in and of itself be afforded any probative value under the Federal Rules of Civil Procedure?

5. What is the contemplated life span of reports of harm and related comments?

Proposals for Consideration

LNA submits the following proposals represent reasonable alternatives to address the concerns highlighted above:

A. With regard to concerns 1 and 2 above, and as a modification to the currently proposed rule 1102.20, CPSC might consider allowing submitters to "opt in" and have their submissions and contact information automatically copied to the registered contact for the manufacturer named in the report of harm. This type of "opt in" is in keeping with the "check box" CPSC indicated it intends to use to have submitters verify and attest to the accuracy of their submissions. See Response to Comment (Summary 5) of the Proposed Rules. An "opt in" would lighten CSPC's burden as information broker. Also, building an "opt in" would not only serve 'honest reporting' goals but also discourage suspect behavior. LNA submits that this type of "opt in" would be a good example of the means that CPSC has indicated it is seeking to facilitate the exchange of accurate information between submitters and manufacturers. See Response to Comments (Summary 24).

   Further, to the extent a submitter elects not to "opt in" the CPSC might consider using a pop-up questionnaire to obtain its own statistical information regarding why. Much depends on the robustness of the database, but if this were possible, it would offer CPSC an instant statistical reference point for later internal analysis – separate and apart from CPSC's intended facilitation of public statistical analysis per its Response to Comments (Summary 8) – using any number of metrics. For example, tying the "opt out" information to the nature of the report filed, the CPCS might be able to discern a good deal of reporting characteristics, e.g., of those who did not "opt in," W% of the reported incidents were from current employees (signaling potential fear of retribution), X% were from competitors (signaling potential ulterior motives), Y% were ultimately deemed fraudulent, and Z% gave no reason.

B. With regard to concern 3 above, although the proposed rule in Section 1102.26 would allow for the removal of "materially inaccurate information" in a report of harm, it is unclear how the time period associated with such a request relates to the relatively quick time period for the CPSC to review a report and a manufacturer's response prior to publication. Although this does not appear to be neatly sorted out, sub-paragraphs (g) and (h) make it clear that the CPSC contemplates instances in which materially inaccurate information would have to be removed prior to publication (under (g)) or after publication (under (h)). For a manufacturer whose reputation may be seriously impacted by a fraudulent report, rectification after publication may be too late to prevent significant brand damage.

   With regard to potential publication of incomplete or inaccurate information, LNA generally supports the comments contained in Comments (Summary 30), including the possibility of relying on procedures grounded in due process, and which contemplate the granting of extensions for responses from manufacturers in situations in which the CPSC has made a determination of materially inaccurate information prior to publication. We also feel CPSC's Response in this regard is reasonable in its preference for correction over exclusion. However, because of the very high risk associated with *post*-publication determinations of materially inaccurate information, LNA recommends that additional thought be given to craft a more expedited process than that currently envisaged at proposed 1102.26(i)(2) to resolve issues as fully as possible prior to publication.

   With regard to the potential for fraud, LNA recommends that, in addition to the "opt in" and the minimum information requirements already contemplated in proposed rule 1102.10(c)(4), CPSC make clear both in the proposed rules and in any contemplated

marketing campaign the penalties applicable to the intentional filing of false information, and consider an accelerated penalty structure for such activity when part of any anti-competitive practices. Although we feel CSPC's Response to Comments (Summary 7) presents a well-considered systems monitoring prophylaxis, the proposed rules, including 1102.26(g)-(i), addressing the actions contemplated to be taken upon the discovery of "materially inaccurate information", do not currently indicate what consequences may flow from a finding that there has been an intentional submission of misinformation. Consequences of such activity need to be highlighted both in the rules and in marketing associated with the database, including that the matter may be referred for administrative or criminal proceedings, if warranted, including to the Federal Trade Commission and/or Department of Justice where anti-competitive or criminal behavior is suspected. A reasonable warning to this effect might also be included with the disclaimers referenced in the Comments (Summary 22), and also suggests an answer to the enforcement query raised by CPSC in its Response to Comments (Summary 24).

C. With regard to concern 4 above, LNA understands that the ten-day response time cannot be changed without further legislative action, and feels one way to address the fact that the time frames involved are not expected to permit full investigations is to address the likelihood that publications based on incomplete information will be available for use as evidence. In this regard, the following two proposals may be useful:

- the database might present only anonymous, aggregated information with regard to the submitters, while allowing the named, registered manufacturer to see the information on the submitter for follow up purposes, perhaps combining this access with the "opt in" idea above for submitters. This would inhibit premature litigation by shielding submitters from general searches by unsolicited law firms, while allowing them to seek and retain counsel at their own initiative if they deem it warranted;
- all published information (both submissions and any response thereto by manufacturers, in each case as authorized to be published by the CPSC), and the fact of its publication in the database, be declared inadmissible as evidence to establish the truth of the allegations or responses reflected in the database.

Plaintiffs would still have the same burden of proving the truth of any allegations in court, and be able to rely on the same information regarding the reported incident, and defendants would likewise be able to rely on whatever information they have, but it removes from the equation any evidentiary presumption of truth based upon (i) the fact that it was reported, (ii) the fact that there was a response, or (iii) the fact that the CPSC reviewed both and elected to publish what was published. Neither party would be able to argue in reliance on any publication to the database as conclusive evidence that a submitter's allegations or a manufacturer's response thereto are, in fact, true merely because CPSC vetted them under proposed Subpart B and elected to publish them in whole or in part. CPSC's redaction or other modification of information submitted in a report of harm or a response, e.g., for privacy or other reasons, would be equally shielded. This has the added benefit of inhibiting attempts by either party to solicit testimony from the CPSC in support of their position.

In answer to your request for possible disclaimers for the database (in your Response to Comments (Summary 22), LNA submits that such disclaimers would also include a notification, in keeping with the disclaimer of accuracy, completeness and adequacy, that for example "The fact of publication in whole or in part in the Consumer Product Safety Information Database, or later modification, retraction or removal therefrom, may not be used to establish the truth or falsehood of any reported allegations or comments in any related litigation."

used to establish the truth or falsehood of any reported allegations or comments in any related litigation."

D. With regard to concern 5 above, although it will certainly be important for both Freedom of Information Act (FOIA) and statistical purposes that CPSC retain incident reports for at least as long as such law requires and for whatever timeframe thereafter CPSC deems appropriate, the information in the database is likely to be of little informative value to the public if an effective resolution has been reached either through repair, replacement, recall, etc. This is likely to occur in a shorter timeframe than CSPC may be otherwise required or otherwise wish to preserve the information for its own statistical analysis. The current proposed rule does not indicate that there is an intent to have the database serve a longer-term historical/archival role. However, questions are raised whether a time limit should be established after which a report and any associated comment(s) will no longer appear in the database, and what criteria the CPSC might use to determine when to remove a report and its associated comment(s).

   LNA asks that CPSC consider using its own recall guidelines as the reference, and consider including a rule that if a published report has not necessitated a recall within, for example, one year following publication, that it be removed from the database, but remain available via FOIA request as required. This would reduce both CPSC's and manufacturers' burden associated with responding to inquiries regarding reports that have already been addressed and resolved, while maintaining the availability of the information for statistical study, trend analysis, etc. Recalled products would be subject to timelines established under current reporting requirements, and the CPSC could elect to establish a different timeframe regarding how long reports/comments related to recalled products remain available in the database. The evolution of this may lead to a natural sub-classification within the database wherein reports relating to recalled products are in their own partition. An alternative suggestion is to contemplate segregating the database into two distinct searchable partitions, one for active reports, and one for resolved reports, though at some point storage requirements will inevitably require that a limit be placed on the volume of historical information made publicly accessible.

Thank you for providing LNA the opportunity to comment on CPSC's proposed rule for the Publicly Available Consumer Product Safety Information Database. Please do not hesitate to contact me with any questions or concerns at (860) 233-6251.

Respectfully,

[redacted]

Hoyt K. Webb
Vice President & General Counsel
Legrand North America, Inc.

cc: Files

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Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0011
Comment from Jane Wishneff

Submitter Information

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Submitter's Representative: Jane Wishneff
Organization: Consumer Speciality Products Association

General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0011.1: Comment from Jane Wishneff

CSPA®
Representing Household & Institutional Products

Aerosol - Air Care - Cleaners - Polishes
Automotive Care - Antimicrobial - Pest Management

July 22, 2010

Todd A. Stevenson
Office of the Secretary
U.S. Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland 20814

Re: Publicly Available Consumer Product Safety Information Database (Docket No. CPSC-2010-0041 [75 Fed. Reg. 29156])

Dear Mr. Stevenson:

The Consumer Specialty Products Association (CSPA) supports the important mission of the Consumer Product Safety Commission (Commission) to protect the public from unreasonable risk of injury. We do, however, have serious concerns with the Commission's proposed rule published on May 24th outlining how the Commission plans to implement the consumer product safety incident database as required under section 212 of the Consumer Product Safety Improvement Act (CPSIA). As currently constructed, CSPA fears that the incident database will fail to provide the Commission or the public with accurate and high quality data about the risks of consumer products.

CSPA is the premier trade association representing the interests of approximately 240 companies engaged in the manufacture, formulation, distribution and sale of approximately $80 billion annually in the U.S. of hundreds of familiar consumer products that help household, institutional and industrial customers create cleaner and healthier environments. Our products include disinfectants that kill germs in homes, hospitals and restaurants; candles, fragrances and air fresheners that eliminate odors; pest management products for home, garden and pets; cleaning products and polishes for use throughout the home and institutions; products used to protect and improve the performance and appearance of automobiles; aerosol products and a host of other products used everyday. Through its product stewardship program Product Care®, scientific and business-to-business endeavors, CSPA provides its members a platform to effectively address issues regarding the health, safety, sustainability and environmental impacts of their products. For more information, please visit www.cspa.org.

§ 1102.10 Reports of harm

In its proposed rule, the Commission lists those who may submit reports of harm for inclusion in the public incident database to include consumers, local, state or federal government agencies, health care professionals, child service providers and public safety entities. Additionally, the Commission has expanded this already expansive list by adding an "other" category to the eligible reporters under the database. This goes beyond the list of identified reporters laid out in the Consumer Product Safety Improvement Act and expanding this list is outside of the Commission's authority. Not only is this outside the Commission's authority in its implementation of the database, the addition of an "other" category is unreasonable and contrary to sound public policy. Those reporters identified by Congress are parties who will contribute to the purpose of the database – to advance pubic safety by better informing consumers of potential product hazards. By allowing *anyone* who wants to submit a report for inclusion in the database to do so, the Commission has opened it up to those who may be motivated by other purposes to report into the database such as attorneys and competitors. Allowing these types of reporters will only decrease the database's accuracy and integrity, making it unreliable for consumers who are looking to obtain information about potential product hazards.

It is essential that only those incidents that truly reflect the safety of a product should be published on the incident database. SaferProducts.gov should not be a portal for consumers to publish their dissatisfaction with a particular consumer product. Such opinion-based comments regarding a product's quality or effectiveness (versus its safety) should be considered outside the scope of the incident database and should be rejected for submission by the Commission. Allowing the database to become a "blog" of sorts for commentary about a product's quality or utility diminishes the real intent of the database, namely to inform consumers with *reports of harm* that are truthful, correct, and properly verified.

To ensure the accuracy of the information being submitted by consumers, CSPA recommends that in addition to the information cited in the proposed rule, the Commission also request the following information from submitters to substantiate their claims. Not only will this allow the Commission to better review and ensure the accuracy of incident claims, but it will enhance the quality of data ultimately available to consumers on SaferProducts.gov and help manufacturers follow-up on incident reports. Reports that do not include this information, however, should still be accepted as complete as long as it contains the mandatory information required under §6A(b)(2)(B) of the CPSA and those requirements already laid out in the proposed rule.

Examples of additional information that the Commission should require consumers to provide in reporting alleged incidents include:

a. Verification that the label instructions were followed when using the product;
b. The date or range of dates on which the harm occurred or manifested itself; and
c. Brief description of the circumstances of the incident, including the following information:
    1. How the product was being used at the time of the reported incident;
    2. Where the product was being used;

3. Description of what happened;
4. Whether the consumer used any other products or devices along with the product involved in the incident; and
5. How much of the product was used over what period of time (if applicable).

d. Whether the manufacturer has been contacted prior to submission of the report.

It is preferred that reports submitted a certain time period (e.g., one year) after the alleged harm occurred not be published in the database. In lieu of that provision, however, it is critical that the person or entity filing the report include a date of the incident (point (b) above). Without some knowledge of approximate time-frame of the harm, it will be impossible for the manufacturer to investigate and provide useful comments, given normal product life cycles.

A description of where the product was used is necessary, in the case of "hybrid" products, for the Commission to quickly determine whether the report of harm falls outside the scope of CPSC regulatory authority. These hybrid products are those sold to both consumer and commercial users from certain retailers, warehouse stores and the internet. A commercial use of a product that may also be sold to consumers is not under Commission jurisdiction. Since such products are used very differently in the commercial setting, a report of harm would also not be completely relevant to the Commission's mission of improving the safety of consumer products.

In addition, knowing whether the manufacturer has been contacted about a report of harm will certainly expedite a manufacturer's investigation under the 10 day time-frame to file comments, or to request a designation of materially inaccurate information, before the report is published. Making this information required may also serve to encourage consumers to do exactly that, namely contact the manufacturer. The manufacturer should always be the first point of contact for the consumer with an allegation of harm, as that will expedite ultimate resolution and customer satisfaction. The Commission should include that point on the report form instructions, namely that the consumer is advised to also contact the manufacturer, as well as file the report of harm.

In a related point, the form should prominently warn consumers that (1) in case of an emergency, the consumer should dial 911 or a poison control center as appropriate, not first submit the report; and (2) in case of a non-emergency situation needing expeditious professional advice (e.g., allergic reaction, spill), the consumer should contact the manufacturer first, since filing the report will not lead to an individual resolution of the issue.

Further, to the greatest extent possible, the Commission should require that the submitter retain the product in question for at least one year. Retaining the product helps facilitate proper investigation by the Commission and the manufacturer.

§ 1102.20 Transmission of reports of harm to the identified manufacturer or private labeler

Large consumer companies may have multiple business units which act somewhat independently. For that reason, the Commission must allow more than one contact to be designated to whom reports of harm will be forwarded, as well as more than one person who is

authorized to file comments under § 1102.12. The latter may be accomplished by allowing a generic e-mail address (e.g., cpsiareports@companyx.com) to which reports will be sent, and to which multiple employees have access. However, given the inability of one contact person to cover these multiple business units, especially in the tight time-frame of 10 days to file comments (e.g., vacations), multiple contacts should be allowed to be designated to respond for the parent company.

§ 1102.26 Designation of materially inaccurate information

The Commission fails to outline any procedures it will take to review and ensure the accuracy of the information submitted by consumers prior to its publication in its proposed rule. Through the reporting requirements under §6(a)(2) of the CPSA, we have seen an overwhelming amount of incorrect, invalid and downright fraudulent incident information which must be carefully scrutinized before being posted to a public website and the Commission should ensure the accuracy of information being posted to SaferProducts.gov. CSPA believes that a critical component of this program must include proper verification by the Commission of the accuracy and validity of the information being submitted to ensure that frivolous and mischievous reports are not made publicly available. As currently drafted, the proposed rule would allow for the review of a claim by the Commission *only after* a claim of inaccurate information is received from an outside party. Even then, the Commission seems to be implementing an arbitrary five page limitation on claims of materially inaccurate information.

Additionally, any inaccuracy in a report should be sufficient to warrant removal of the *entire report* until all other facts can be verified and a corrected report can be posted. Under the proposed rule, the Commission would only remove the inaccurate information of the subject report. Additionally, submitters who knowingly make, use, or cause to be made or used, a false or misleading submission or statement should be subject to a fine.

Weeding out inaccurate reports benefits all parties involved – consumers, the Commission, and manufacturers – and enables the database to perform its fundamental function, namely to protect and inform the public with truthful, correct, and verified information pertaining to the safety of consumer products.

§ 1102.28 Publication of reports of harm

In its notice of proposed rulemaking, the Commission states that there will be no statute of limitations for which reports of harm can be submitted for inclusion in the public database. CSPA believes that there should be a time frame in which consumers can file claims concerning a particular incident (i.e., one year following the incident) in order to ensure that the information being submitted to the Commission is reliable and accurate. Reports made after that time frame should automatically be rejected by the Commission. Additionally, the Commission should establish a timeframe for which reports will be included in the database, a point which the Commission does not address in the May 24th notice of proposed rulemaking. Information contained in the database for a period of one to two years most likely will be obsolete and of little value to consumers as manufacturers respond quickly and efficiently to reports of harm from the use of their products.

Paperwork Reduction Act

The Commission's estimate of the number of reports that it will receive under the new database is based on the reports it currently receives. This is without the availability of the database (which may encourage more fraudulent reports) and without the marketing consumer awareness campaign that the Commission is planning. For those reasons, the estimated annual reporting burden is a significant underestimation. Secondly, the four hours the Commission has estimated it will take for manufacturers to research and prepare comments once a report is filed is not an accurate representation of the time it will take to fully investigate these reports of harm. The four hour average estimate was undoubtedly given to the Commission in light of the 10 day clock to file comments before a report is published. Manufacturer time to establish root cause and close an investigation will surely exceed that average.

Conclusion

Once again, we appreciate the Commission's solicitation of stakeholder comments on this very important issue and look forward to being involved in more discussions on this issue as it develops. If you have any questions regarding these comments, please do not hesitate to contact me at 202-833-7303 or jwishneff@cspa.org.

Sincerely,

Jane E. Wishneff
Regulatory Counsel & Director of International Affairs

PUBLIC SUBMISSION

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Comment from Susan Young

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General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0012.1: Comment from Susan Young

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July 23, 2010

VIA E-DOCKET

Todd Stevenson
Consumer Product Safety Commission
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Bethesda, MD
20814

RE: CPSC-2010-0041
Proposed Rule for Publicly Available Consumer Product Safety Information Database; 75 Fed. Reg. 29156 (May 24, 2010).

Dear Mr. Stevenson:

The Power Tool Institute, Inc. ("PTI") appreciates the opportunity to comment on the Consumer Product Safety Commission's ("CPSC") proposed rules under the Consumer Product Safety Act ("CPSA") for the establishment of a publicly available consumer product safety database (the "Proposed Rule"). 75 Fed. Reg. 29,156 (May 24, 2010) (hereinafter, "Proposed Rule").

I. INTRODUCTION

PTI members represent leading producers and manufacturers of portable and stationary power tools all over the world. Since its founding in 1968, two of PTI's core objectives have been public education and outreach and the establishment of high standards of safety in both the manufacturing and the use of power tools. These objectives are at the core of the mandate to the CPSC in section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA") passed by Congress and signed into law by President George W. Bush.

The Proposed Rule is the result of a process that included stakeholder participation in the form of a public hearing, a two-day workshop in January 2010, and the submission of public comments. We applaud the CPSC for its consideration of stakeholder comments, however, the Proposed Rule continues to present a number of significant concerns that, left unaddressed in the final rule, would undermine the legislative intent of section 211, the effectiveness and accuracy of the consumer product safety database, and expose producers and manufacturers to increased costs from potentially frivolous litigation. These concerns are discussed in detail below and PTI urges the CPSC to address them in the final rule.

II. COMMENTS

A. Reports of Harm – § 1102.10

1. CPSC Should Limit the Persons or Entities Who May Submit Reports of Harm

Section 1102.10(a) of the Proposed Rule sets out who may submit reports of harm for publication in the database. Congress indicated its preference in section 212 which describes the content of the database as reports of harm relating to the use of consumer products submitted to the CPSC by consumers, local, state and Federal agencies, health care professionals, child service providers, and public safety entities.

The Proposed Rule expands the definition of the statutory term "consumers" to include "observers of the consumer product being used[.]" *See* Proposed Rule at 29,176. In our view, such a definition goes well beyond any reasonable interpretation of Congress' use of the term and exponentially expands the potential for inaccurate reports of harm in the database. For example, a well-intentioned bystander may observe an accident involving the use of a power tool and conclude that a report should be filed with the CPSC on the incident. In this scenario, the bystander might think they know the particular power tool involved in the incident, however, there is an extremely high probability that lacking any connection to the purchase of the power tool, the use of the power tool in the situation at issue, or the person injured, the report of harm will contain any number of inaccurate or misleading statements.

The Proposed Rule also goes beyond the statutorily prescribed list and adds an amorphous category of eligible submitters titled "[o]thers." The Proposed Rule describes, but does not limit, the definition of "others" as "attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." *See* Proposed Rule at 29,176. In the preamble to the Proposed Rule, the CPSC acknowledges adding the "others" category to allow for the submission of report of harm by "those persons who may not clearly fit within the statutorily identified categories." *See* Proposed Rule at 29,158. In our view, CPSC's proposal to go beyond the congressionally defined categories not only risks legal challenge, it is also unwise as a matter of policy. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (discussing a potential challenge to agency regulations where "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Had Congress desired to lend flexibility to the CPSC to determine its own categories of submitters or to go beyond its prescribed category, it could clearly have done so. That it chose not to do so is an indication of its intent to limit the use of the database to its intended purpose: consumer safety and education.

Choosing, as CPSC proposes, to allow parties such as trial attorneys, special interest groups, and others to submit reports risks turning the database into a breeding ground for costly litigation. As attorney Shari Claire Lewis noted recently in the New York Law Journal, allowing this exhaustive group of "others" to file reports could lead to "deliberate manipulation of the database to create false records of multiple incidences or injuries where none may exist." *See* Shari Claire

Lewis, Rise of the Consumer Product Safety Commission's Database, New York Law Journal (June 18, 2010) *available at* http://www.law.com/jsp/article.jsp?id=1202462785470&rss=newswire#13. One CPSC Commissioner, Anne M. Northrop, noted this risk in April, "[t]his scattershot approach to data collection will generate a database of dubious reliability. As a result, the database will become useless at best—and potentially far more destructive than that." *See* STATEMENT OF COMMISSIONER ANNE M. NORTHUP REGARDING THE NOTICE OF PROPOSED RULEMAKING ON THE PUBLICLY AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION DATABASE, Apr. 22, 2010, *available at* www.cpsc.gov/pr/northup04232010.pdf.

2. CPSC Should Require Reports to Include the Date and Location of the Incident.

Section 1102.10(d) of the Proposed Rule sets forth the minimum requirements for report of harm to be published in the database. Section 1102.10(d)(3) discusses the required description of the harm and states that the description "need not, include the date on which the harm occurred or manifested itself, and the severity of any injury and whether any medical treatment was received." *See* Proposed Rule at 29,177. Allowing reports of harm to be published in the database with no date and location of the alleged incident vastly increases the difficulty for manufacturers to quickly identify any available information regarding the facts of the case.

Not requiring the date and location of the alleged harm also increases the likelihood of duplicative reporting. Lacking the basic information about the specific incident, the database could have multiple reports based on the same incident (especially given the Proposed Rule's overly broad interpretation of potentially submitters). Such duplication is confusing to consumers and can only reduce the effectiveness of the database.

Finally, not requiring the date of the incident risks overloading the database with outdated information. Such information may pertain to products no longer on the market. This would have a significant impact on the usefulness of the report and the accuracy of an incident that may have occurred in the distant past.

Given the extremely short timeframe in which manufacturers must determine whether to submit a request for a Commission determination regarding materially inaccurate information, it is imperative that manufacturers receive, at the very least, the key information that will allow them to investigate the incident swiftly and effectively so as to respond to the report in a timely manner.

B. Materially Inaccurate Information – § 1102.26

Section 1102.26 discusses the process and procedures relating to claims that a report of harm contains materially inaccurate information. PTI has a number of specific comments relating to this section, however, it is imperative that CPSC understand one challenge that affects manufacturers globally and will have a significant impact on the accuracy and reliability of the database: counterfeit products. As an industry, our manufacturers face the daily challenge of

counterfeit power tools being sold in the market to consumers where the company has no control over safety or reliability. It is therefore vital that any database of reports of harm require sufficient details relating to incidents to allow manufacturers to conduct a review to determine whether the product involved is actually a legitimate product of that manufacturer. Such reviews can take time and it is therefore important that CPSC allows the flexibility necessary for manufacturers to respond and ensure that the database is accurate.

1. CPSC Should Adopt a "Reasonable" Standard in the Definition of "Materially inaccurate information in a report of harm"

Section 1102.26(a)(1) defines "Materially inaccurate information in a report of harm" as "information that is false or misleading in a significant and relevant way that creates or has the potential to create a substantially erroneous or substantially mistaken belief in a Database user about information in a report of harm relating to" the identification of a product, the identification of a manufacturer, or the harm or risk of harm that resulted from the product's use. *See* Proposed Rule at 29,179.

This proposed definition creates an exceedingly high bar for manufacturers to meet in the limited window of time they have to investigate incidents and file requests with the CPSC prior to publication of a report of harm. Coupled with the ability of report submitters to withhold key information about the alleged incident and the ability of trial attorneys and special interest groups to submit a multitude of reports (both issues discussed above), manufacturers will essentially have a maximum of ten days to uncover information about the facts and nature of an untold number of incidents alleged in reports of harm before they are published and visible to the public.

Even if a manufacturer is able to generate a request relating to inaccurate information to the CPSC in that ten-day window, the Proposed Rule's test of materiality goes well beyond the standard legal definition for materiality. For example, in defining what constitutes a "material statement" under section 10(b) of the Exchange Act, the courts have looked to see "'whether the...misrepresentations...would have misled a reasonable investor." See In re Morgan Stanley Information Fund Securities Litigation, 592 F.3d 347, 360 (2nd Cir. 2010). This same "reasonable" standard has been adopted in the context of statements in criminal cases under 18 U.S.C. § 1001 where the Supreme Court stated that the statement in question must have a "natural tendency to influence, or [be] capable of influencing" the decision of the decision-making body in question. U.S. v. Gaudin, 515 U.S. 506, 509 (1995).

As is the case with the statutes discussed in these cases, the Proposed Rule should define "Materially inaccurate information in a report of harm" in the following way:

> (1) *Materially inaccurate information in a report of harm* means information that is false or misleading that creates or has the potential to create an erroneous or mistaken belief in a reasonable Database user about information in a report of harm[.]"

Using a reasonable standard will allow the CPSC to fairly evaluate industry requests such that Commission staff will not be asked to determine what information is "significant" or "substantially" erroneous or mistaken in the mind of a database user.

2. *Publication of Reports of Harm and Manufacturer Comments Should be Delayed Until Requests for Designation of Materially Inaccurate Information Have Been Resolved by the CPSC*

Subpart C of the Proposed Rule lays out the timing from submission of a report of harm to publication. The timeline is as follows:

i. Once a report of harm has been submitted, section 1102.20(c) requires submission of the report, where practicable, to the manufacturer of the product in question within five business days.

ii. Once the manufacturer receives the report of harm, it has the discretion to request that certain portions of the report be designated "confidential." The Proposed Rule states that this request must be received by the CPSC "in a timely manner."

iii. A manufacturer, or any other person or entity, may also request that the report, or portions thereof, be excluded from the database or corrected because it contains materially inaccurate information. Such a request can be submitted anytime, however, if such a request is received prior to publication of the report, the CPSC "may" withhold the report until a determination on the claim can be made. Absent such a determination, the CPSC "will generally publish reports of harm on the tenth business day after transmitting a report of harm."

In addition to the above timeline, the Proposed Rule states that expedited review of requests for designation of materially inaccurate information may be granted where such requests are no more than five pages (including attachments).

The Proposed Rule's timeline makes no commitment to a time-certain review of requests for designation of materially inaccurate information while simultaneously indicating its intent to publish reports of harm generally within ten business days. This presents the serious possibility that reports of harm will be made publicly available in the database even while one or multiple requests have been issued to the CPSC with evidence indicating that the report of harm is materially inaccurate. The CPSC commitment to publication of reports of harm on the tenth business day, even where the report is subject to a request for designation of materially inaccurate information, goes beyond the statutory prescription. The statute clearly states that the CPSC shall publish reports of harm "not later than the 10th business day" after sending the report to the relevant manufacturer **except** where a request for designation of materially inaccurate information has been received prior to publication in the database. *See* 15 U.S.C. 2055a(c)(3)(A). Clearly Congress intended for publication of reports of harm to be both swift

and accurate. Doing so requires a firm commitment to resolution of requests for designation of materially inaccurate information prior to publication in the database.

Given the CPSC's commitment to investigating and resolving claims of materially inaccurate information in both reports of harm and manufacturer comments, a solution to this concern should include a set timeline for resolution of both types of requests relating to a single incident prior to publication in the database. There is simply no need to rush reports of harm or other comments into a government-run publicly available database where there is the risk of misleading consumers and damaging what may be innocent businesses. At the very least, if the CPSC is determined to publish reports of harm while investigations into their accuracy are pending, the Commission should flag such reports to make consumers aware that the information conveyed is under review.

3. *Publication of Reports of Harm and Manufacturer Comments Should be Delayed Until Requests for Designation of Confidential Information Have Been Resolved by the CPSC*

Under section 1102.24, subsequent to the receipt of a report of harm, a manufacturer identified by the report may request that portions of the report of harm be designated as confidential information. *See* Proposed Rule at 29,179. The Proposed Rule states that such requests "must be received in a timely manner" to allow the CPSC, in its discretion, to withhold publication of the report of harm pending a determination regarding confidential treatment. *See id.* Nothing in the Proposed Rule requires the CPSC to make such a determination prior to publishing the report of harm on the database.

The CPSC should withhold publication of reports of harm which are the subject of requests for designation of confidential information until it makes a determination on those requests. As cited in the Proposed Rule, confidential information can consist of trade secrets or other matters considered to qualify as confidential information under other Federal statutes. *See id.* The Proposed Rule requires the requester to bear the burden of proof to show that publication of this information "would be likely to cause substantial harm to the company's competitive position." *See id.* Even if the CPSC ultimately determines that a company has met this burden (and the other elements discussed in the section), there is unlikely to be a remedy for the harm inflicted on the company once the report of harm is published and publicly available. Accordingly, the final rule should impose a set timeline for resolution of requests and require such resolution prior to publication of the report of harm in the database.

III. CONCLUSION

As envisioned by the CPSIA, the Consumer Product Safety Information Database is a potentially important tool for consumers to learn more about product safety and be better able to make educated choices of consumer products. However, as currently designed in the Proposed Rule, the CPSC risks creating a government-run database rife with potentially inaccurate or misleading information. Such a device would only further confuse consumers and be open for use primarily as a tool for trial attorneys and special interest groups. Addressing the issues highlighted above would be a vital step to ensuring the database fulfills its intended purpose.

Thank you again for giving us the opportunity to comment on this important rule. Please feel free to contact me with any questions.

Sincerely,

SUSAN M. YOUNG

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General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0013.1: Comment from Allen Weidman

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July 22, 2010

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Federal eRulemaking Portal
www.regulations.gov

Office of the Secretary
Consumer Product Safety Commission
Room 502,
4330 East West Highway
Bethesda, MD 20814

Re: Docket No. CPSC-2010-0041

Dear Mr. Secretary,

The National Candle Association welcomes the opportunity to comment on the Commission's proposed rulemaking for the Publicly Available Consumer Product Safety Information Database, mandated by Section 212 of the Consumer Product Safety Improvement Act of 2008 (Public Law 110-314).

The National Candle Association (NCA) is the trade association representing U.S. candle manufacturers and their suppliers. Candles are used in seven out of 10 American households and are among the most ubiquitous of consumer products. NCA member companies account for more than 90 percent of all candles made in the United States.

NCA believes that a properly designed and implemented database would be of significant value to both the public and the CPSC as a means of identifying unsafe consumer products. However, the database as currently proposed invites abuse and the posting of inaccurate and unsubstantiated information that could mislead consumers, unfairly defame manufacturers of safe products, and undermine the integrity of the database and the CPSC. To correct these inadequacies, NCA suggests the following:

I. Submitted incident reports should be verified for accuracy BEFORE being posted in the database to avoid CPSC dissemination of inaccurate or misleading information about the safety of consumer products.

It is a fundamental expectation that a federal agency would scrutinize submissions prior to posting to ensure that accurate, substantiated information is published in a public

database. The posting of inaccurate information regarding a consumer product could irreversibly damage the reputation of a company whose products are safe, cause unfounded fear and concern among consumers, and undermine the credibility of the database.

In addition to eliminating beforehand the posting of false, inaccurate or unfounded reports to the database, CPSC should also establish a means for promptly removing, correcting or redacting posted reports that are subsequently found to be false or inaccurate. Once inaccurate information is posted on the Internet, it is virtually impossible to correct or remove it from the public domain, especially when the information is sourced to a federal agency.

II. Only reports of actual incidents of harm should be allowed in the database.

The term "risk of" bodily harm or injury is speculative and conjectural and should be excluded from the definition of harm. A possible risk can be conjured for virtually any consumer product, allowing reports to be placed in the database when no harm or even likelihood of harm has occurred.

Posting a database report about a product for which there is no actual evidence of harm would severely mislead consumers and would unfairly and irrevocably harm a company's reputation and product sales.

Only reports that demonstrate a reasonably certain cause and effect should be published. Reports on the use of a product or exposure that allegedly resulted in delayed effects should not be published unless there is credible evidence or reason to believe that there may be a causal relationship. The date and location of the incident should be included in the submitter's report.

III. Only persons with direct evidence of harm caused by a specific consumer product should be permitted to submit incident reports for inclusion in the database, as is clearly established by the statute.

In calling for establishment of the public consumer product safety information database, Congress clearly intended to limit submitters of reports to parties with specific knowledge of an incident, defined as (i) consumers; (ii) local, State or Federal government agencies; (iii) health care professions; (iv) child service providers; and (v) public safety entities. However, in its proposed rule, CPSC has unreasonably expanded the definition of "consumers" to include family members, relatives, friends, observers, etc., and added a category of "other" persons that includes attorneys, investigators, advocacy groups and special interest groups.

This allows dozens of individuals with no direct knowledge of a specific incident to submit reports, turning the database into an unsubstantiated collection of hearsay and

urban myths, creating fodder for product liability lawyers seeking to initiate litigation or find new clients, and opening the way for product or company smear campaigns based on innuendo rather than any factual evidence.

IV. Manufacturer claims of material inaccuracy should be promptly investigated and resolved before a report is posted to the public database.

If a manufacturer provides comment claiming material inaccuracy in a report, the information in question should be flagged and suspended from publication pending investigation by CPSC staff. Investigation and resolution of any flagged material should be conducted within a prompt and specific time period. If the flagged material is substantiated, the report should be promptly posted to the public database; otherwise the report should be deemed invalid and eliminated from database consideration.

In addition, an incident report should not be posted to the database until the full 10 business day period has transpired in order to ensure that manufacturer comments provided within the allotted response time are included in the posted incident report.

V. The CPSC must develop a process to verify the authenticity of the person submitting a report to the database to avoid fraudulent or mischievous submissions.

Anyone can establish an e-mail address or even dozens of e-mail addresses without verification of one's identity. Similarly, there is no procedure for establishing the veracity of an individual's street address when submitting a report. At a minimum, submitters should provide a contact phone number, and CPSC staff should be required to contact the individual by phone to affirm the existence and legitimacy of the submitter, and to verify the contacted person's submission of a report.

VI. Additional fields should be added to the report submission form to ensure sufficient identification of a product in question.

At a minimum, fields should be added to indicate the approximate date and location of the product purchase, and the UPC code number, to help identify the product in question. This is critical for manufacturers whose product lines are extensive and/or who sell products with widely varying shelf and usage lives, and/or distinctive geographic distribution patterns. The inclusion of the UPC code is especially important in helping differentiate similar products or products with similar brand names.

VII. The CPSC should develop procedures to verify that the proper responsible party/manufacturer is notified of an incident report, and that misdirected incident reports are placed in abeyance until the proper manufacturer is identified.

The proposed manufacturer portal can facilitate the timely transmittal of incident reports to manufacturers, but only if the Commission creates widespread manufacturer awareness of the portal and registers a significant percentage of U.S. manufacturers before the database launch.

Manufacturer registrations to the portal should be authenticated by the CPSC, including the identity of the official contact person, and a receipt validation should be developed to verify that transmitted incident reports are actually received by the manufacturer. An example transmittal-and-response test should be part of the registration process to confirm that the CPSC-manufacturer communications loop functions properly for each registrant.

Incident reports transmitted to the wrong manufacturer due to misidentification of the product, brand or company, should be promptly flagged as "misdirected," returned to the CPSC within the 10-day comment period, and temporarily suspended from publication in the database so that the appropriate manufacturer can be identified and afforded the right to comment. Upon receipt of a misdirected incident report, CPSC should treat the report as a new submission, *i.e.*, "restart" the statutory timeframes for review/transmittal and manufacturer response.

The National Candle Association hopes these comments will prove useful to the Commission in developing a final rule that establishes a fair and equitable product safety database that will be useful, valid and reliable to both the public and manufacturers.

Respectfully submitted,

Allen Weidman
Executive Vice President

PUBLIC SUBMISSION

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0014
Comment from Donald Sedlacek

Submitter Information

Name: Donald Sedlacek

General Comment

I agree with the proposal to create the publicly available Product Safety Information Database. The database will help to create increased awareness of the Consumer Product Safety Commission and the database it manages. The database will allow for quick dissemination of safety and health hazards that might not otherwise be possible through other means. As more consumers use the database to gather information on products, there will also be more consumers to provide feedback about dangerous products.

The database will also provide the consumers an opportunity to provide additional feedback on hazards that others may have experienced. It may even be possible to neutralize the hazard by avoiding use of the product in a certain environment or by not using the product for certain functions. The consumer may also find that the risks are too high to continue using the product and therefore avoid possible harm.

There are some businesses that worry that the database will lead to the reporting of false information and irreparable damage to the company's reputation. The CPSC has taken steps to stop this from happening by requiring the notification of the manufacturer or labeler of comments on their product and allowing the manufacturer to respond. If the information reported in the database is found to be materially inaccurate information it will be removed.

The database could also provide an additional tool to manufacturers to identify flaws in its products and make quick determinations about mitigation of the defect through recalls and other methods. This could save the manufacturer or labeler from costly lawsuits and bad press.

Products such as baby strollers and many other products used by infants are among those that need to be under intense scrutiny for any safety hazards. The public database will provide the public with a way to check the safety of these products.

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Comment from Tucker Helmes

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Organization: BAHP
Government Agency: CPSC

General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0015.1: Comment from Tucker Helmes

BAHP
CENTER FOR BABY AND ADULT HYGIENE PRODUCTS

July 22, 2010

Office of the Secretary
Consumer Product Safety Commission
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4330 East West Highway
Bethesda, MD 20814

Docket No. CPSC-2010-0041

Submitted via: www.regulations.gov

RE: Comments Regarding Proposed Rule Regarding Publicly Available Consumer Product Safety Information Database, 16 CFR Part 1102

The Center for Baby and Adult Hygiene Products ("BAHP") is providing comments in response to the Consumer Product Safety Commission's ("CPSC") publication of the Notice of Proposed Rulemaking, as noted above. We are grateful for the opportunity to comment. BAHP represents companies who manufacture and market disposable diapers (including training pants), and other hygiene products. BAHP is formerly known as The Personal Absorbents Products Council ("PAPC"). Its members include Procter & Gamble and Kimberly-Clark Corporation.

BAHP supports the important mission of the CPSC to protect the public from unreasonable risk of injury. A successful public database of product safety information requires accurate and high quality data about real risks of consumer products. Our comments below are focused on delivering that goal and refer to both the proposed rule and the proposed implementation strategy as described in the September 10, 2009 CPSC Report to Congress.

Reports of Harm (Incident Report Form)

BAHP recognizes the important development and usefulness of a database which focuses on content collected via Reports of Harm. We observe the database could be compromised and its usefulness diluted by an excessive number of potentially misleading and/or fraudulent postings which could be incorrect, inaccurate, frivolous, or otherwise not authentic. In Section 1102.10, the CPSC's proposed content requirements can help decrease this concern. However, in 1102.10 part (d) (5) *Verification*, CPSC's proposal describes a process of self-verification by the submitter. Given the nature of information submission, especially electronic submissions and CPSC's limited resources, this may be the best that can be achieved. However, CPSC uses the term "Verification" in the proposed rule and the statement from the September 2009 report to

Congress: "All incident data submitted via SaferProducts.gov will be subject to CPSC review to verify its authenticity -- that submitters are who they say they are."

By using the terms "verification" and "verify its authenticity," the CPSC is communicating a level of validation that is not likely to be achieved. This is in contrast to the CPSC proposed disclaimers (Section 1102.42) which state: "The Commission does not guarantee the accuracy, completeness or adequacy of the contents of the Consumer Product Safety Information Database, particularly with respect to the accuracy, completeness, or adequacy of information submitted by persons outside of the CPSC."

To better address the reality of the ability for CPSC to verify a submitter's identity, BAHP requests that Section 1102.10(d)(5) be re-titled "*Self-Verification*" instead of "*Verification*" to be more accurate and minimize the connotation that CPSC is verifying anything directly.

Another approach to better validate electronic submissions would be the many examples of e-mail validation/verification methods used by many websites. Some of these programs send e-mail verification (if the e-mail bounces back the submission is rejected) and some of these programs send an e-mail password and link to consumers to allow them to continue the submission process in a more verified manner.

Data integrity is an important concern for this database since it will be filled with content from many different submitters. Maintaining an accurate list of key field codes will be a large challenge. In several responses, CPSC writes that incident report input screens would incorporate "auto-fill functions, dropdown menus, and text fields where appropriate. For example, an auto-fill function will be provided for brand name, model name or number, manufacturer name, retailer name, and similar fields based on information we have collected in our database library, which will grow over time." Auto-fill functions can provide accurate and consistent input data if the database library has a quality control work process to decrease the number of incorrect entries. For instance, the database will need to know that Brand XYZ-1 and Brand XYZ1 are the same. If they both get submitted and both end up in the database library, the integrity of the database will be compromised.

A more accurate identification of the product would come from a Universal Product Code (UPC) field. Knowledge of the UPC will allow a manufacturer to clearly identify the correct product being referenced, even if the manufacturer does not get to see the product in question. BAHP strongly suggests that CPSC urge submitters to include the product UPC. Ideally a specific field would be designed to capture the UPC, making it more likely the submitter would include this important information to clearly identify the consumer product of concern.

A consumer product UPC will clearly define the manufacturer/distributor and the product brand along with other specific information. However, to comply with CPSIA Section 103(a) Tracking Labels for Children's Products, additional information will be available to track the location and time of production. BAHP suggests that CPSC provide a field for production code information

to increase the likelihood that a submitter will include this important information in their incident report. For those products not covered by CPSIA Section 103(a), this field can be used for any additional product identification information available to the submitter that could help the manufacturer evaluate the incident report.

In addition to possible confusion on brand nomenclature, there is also a concern about confusion related to product identity. A large concern for many consumer product manufacturers is counterfeit products, especially as it relates to the safety of these products. Without being able to evaluate the product in question prior to the publication of a report of harm, CPSC should acknowledge that there is no method to determine if the product that has caused the harm is counterfeit. Including both a UPC and production code in database fields could help increase the likelihood of detecting a counterfeit product before the manufacturer is able to inspect it. Product inspection can only happen if the consumer is willing to provide a sample of the product to the manufacturer. However, by then serious damage to a brand's and/or manufacturer's reputation could already have occurred. While the current CPSC database disclaimer indicates that the information is not guaranteed to be correct, BAHP suggests that CPSC urge consumers to communicate with manufacturers and provide them with sample product, if available, when requested to ensure they are not unknowingly using counterfeit product.

BAHP notes that CPSC has published guidance and/or draft documents related to implementation of CPSIA on a number of occasions that facilitate transparency and interpretation of these regulatory initiatives. BAHP acknowledges the purpose of the database is to collect reports of harm and the information in the proposed rule regarding definition of harm. BAHP observes that CPSC recognizes the usefulness of information regarding the report circumstances, including severity, which are related directly to an incident. While we expect that narrative descriptions can help to clarify incidents regarding reports of harm, we note that narratives may not be amenable to analysis or classification of reports, particularly with regard to the degree of harm or metrics associated with incidence or severity of harm reports. CPSC recognizes these types of factors and concepts in its regulations found at 16 CFR Part 1115, and in its recall handbook. Additionally, we refer to links of FDA and EPA, provided below, which help to clarify the type of information expected in those reports.

The FDA (Reporting Serious Problems to FDA) and EPA (EPA Pesticide Adverse Event Reporting) have published documents regarding adverse event reporting. These may be useful references to develop the approach to the database. To that end, BAHP believes CPSC should provide guidance for thresholds and verification of reports of harm, and encourages CPSC to offer guidance that speaks to incidence and severity metrics for the database. Further, CPSC should provide guidance and information that clarifies the types of reports it intends to include in the database, and the basis upon which those reports will be included. Similarly, it would be useful to have examples of reports which CPSC would exclude. Ultimately addressing these issues would serve to improve the quality of the report and the usefulness of this information to CPSC and other database stakeholders.

BAHP notes the potential for medical information to be included in a report of harm and encourages CPSC to carefully consider whether any obligations, particularly privacy, are posed by the Health Insurance Portability and Accountability Act of 1996, similar state laws or other ethical standards that may apply to release of medical information.

Manufacturer Notification and Response

Manufacturers will need to develop new work processes to receive the expected larger number of incident reports and to determine the best approach to respond. To ensure that such work processes are in place by March 11, 2011, BAHP urges that a final rule be published in the Federal Register promptly to allow time for manufacturers to develop their work processes against the details of the final rule.

If the Commission is unable, despite its best efforts, to publish a final database rule at least 30 days in advance of the March 11 implementation date, BAHP suggests that CPSC exercises its regulatory discretion on implementation of the timings for database content information, including both the reports of harm and the manufacturer comments. With a very short period of time to develop new work processes for this new database, it may not be possible to immediately meet the 10 day turnaround time to receive a manufacturer's comment to be published along with a report of harm. This could be especially difficult for small and medium sized businesses with smaller staffs available for this new type of work.

In the Description of the Proposed Rule (III) A. Proposed Subpart A- Background and Definitions Section 1102.6- Definitions, there is a key omission from the definitions. While "Manufacturer" has its definition clearly defined and referred to previous definitions, the term "Private Labeler," which comes from the original CPSC Act, is not defined or explained here, although it is used throughout the proposed rule and is used to define the term "Manufacturer Comment," Section 1102.6(b)(7). In the disposable diaper industry, like many consumer product categories, there are companies that do not manufacture the products they distribute. BAHP believes it is critical that the rule and database itself clearly define the term "private labeler" so that entities required to submit clearly know their responsibilities.

Section 1102.12 of the proposed rule provides details on the Manufacturer Comments while Section 1102.20 describes the procedure for transmission of reports of harm to the identified manufacturer. These sections have been developed with a focus on an individual report of harm from a specific incident.

BAHP observes that less serious and more frivolous reports of harm for some consumer products may be stimulated by the CPSC public awareness campaign (details discussed below) that is planned to include "early initiatives that will dramatically increase the public's engagement with CPSC through use of social media/networking" (from Sept 2009 CPSC Report to Congress).

CPSC is also encouraging repeated submissions of harm for the same incident. In fact, the CPSC response to Question 12 in Section 1102.10 Reports of Harm quotes CPSIA conferees: "multiple reports of the same incident could provide different relevant details and that information from those reports could be helpful to the public and should, therefore, remain in the database."

When a Manufacturer reviews reports of harm in their Manufacturer Portal, they will at times see duplications of the same incident and/or a large number of submissions reporting the same or similar incidents. If the Manufacturer comment procedure is focused on developing a comment tied to an individual report of harm, manufacturers may find themselves having to copy-and-paste the same response a large number of times, creating unnecessary work and no additional value for consumer safety. This may be particularly burdensome for small and medium sized businesses.

BAHP requests that Manufacturers have the ability to group common reports of harm found in their Manufacturer Portal and deliver a single Manufacturer Comment that can be tied to all the individual reports of harm in the database.

In addition to Reports of Harm through an Incident Report Form, Section 1102.6(b)(1), would define "additional information" to include in the database any information, other than reports of harm, that the Commission determines to be "in the public interest." Although this authority comes from the CPSIA, there is no standard at all for "in the public interest" as criteria for inclusion of information into the database.

BAHP recommends all information in the database be tied to a specific incident and its report of harm. If additional information is to be part of the database, well-defined criteria for its inclusion in the database should be developed and adhered to. Failure to do so undermines the effectiveness and accessibility of the database contents by detracting from the incidence and response information.

In Section IV. "Comments on the Publicly Available Database and CPSC's Responses" a comment was made that was not addressed in the CPSC Response. In Subpart B Section 1102.12: Manufacturer Comments, question 20, the following comment was reported: "One commenter was concerned that the status of CPSC investigations, including the existence of the investigation, should not be included in the database." The CPSC did not respond to this comment. As this information is not a "report of harm" but a separate assessment that may include the sharing of confidential information, BAHP would agree with this comment and requests that CPSC investigation status not be included in the database.

The proposed rule (16 CFR Part 1102) discusses the consumer that has been allegedly harmed by a consumer product. The CPSC uses the term "victim" ten times. BAHP believes use of the term "victim" to describe the consumer who may have been harmed is improper. The term "victim" makes an assumption that a crime or civil wrong has been committed against the consumer. Since the report of harm is a consumer's (or someone who knows the consumer)

allegation of an incident involving the safety of a consumer product, the use of the term "victim" is inappropriate. In some incidents, for example, the harm may have been caused by misuse of the product or gross negligence by the person harmed.

The term "consumer" is neutral and more descriptive of the individual. This is more consistent with the terminology used by the CPSC in the background (Section I) for this database where CPSC says: "For several decades, the Commission has gathered and maintained a database of consumer complaints known as consumer product incident reports involving a description of incidents related to the use of consumer products that fall within the scope of the Commission's jurisdiction." Thus "consumer" is a more accurate description of the person who has used a consumer product and alleges an incident.

BAHP strongly recommends that all occurrences of the term "victim" be replaced with the more accurate term "consumer."

Materially Inaccurate Information

In the section on Materially Inaccurate Information, the Commission asks (page 29161): "Should the Commission include in this section a 'burden of proof' requirement and, if so, what should be the meaning of the term and what standard of proof would be imposed under it?"

BAHP notes that CPSC does indicate for the designation of confidential information (Section 1102.24) that "Each requester seeking such a designation of confidential information bears the burden of proof and..." and then details are used to define the information required. In the same way, BAHP recommends each requester seeking a designation of materially inaccurate information should bear the burden of proof defining the information that is deemed inaccurate and providing information to support the designation of what is materially inaccurate.

Public Awareness Campaign

The September 10, 2009 CPSC Report to Congress contains an extensive section on the proposed Public Awareness campaign to accompany the roll-out of the database. In Section 3.5 of this report the CPSC highlights its planned Social Media/Networking campaign. This may include a "Share This" tool to allow users to send content from CPSC.gov web pages to common social media sites such as Facebook and Twitter.

BAHP observes that information from CPSC.gov web pages, including the Consumer Product Safety Information Database, may be pushed to many social media sites multiple times without the proper level of disclaimers and cautions. Information pushed from a U.S. Government site may be assumed by some to be information that has been completely verified, validated and could be mistaken as completely authentic and true.

The disclaimer that CPSC includes in the proposed rule (Section 1102.42) is to be "prominently and conspicuously displayed on the database and on any documents that are printed from the database." To ensure that this disclaimer follows any information that is retrieved from the database, BAHP requests that Section 1102.42: Disclaimers be amended to indicate that the disclaimer notice will be "prominently and conspicuously displayed on the database and on any documents that are downloaded, printed or otherwise transferred from the database." It would be best to have this disclaimer notice as an electronic watermark that would decrease the chances that any downloaded document from the database would then be reposted or shared without this important disclaimer.

BAHP continues to be engaged in activities CPSC is conducting regarding implementation of the Consumer Product Safety Improvement Act. For further information, please contact the undersigned directly at 202-721-4154 or helmest@socma.com.

Sincerely,

Dr. C. Tucker Helmes
Executive Director
Center for Baby and Adult Hygiene Products

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Publicly Available Consumer Product Safety Information Database

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Comment from Charles Duke

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Organization: Zippo Manufacturing Company
Government Agency Type: Federal
Government Agency: CPSC

General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0016.1: Comment from Charles Duke

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July 22, 2010

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RE: CPSC Docket No. CPSC-2010-0041; Comments on the Publicly Available Consumer Product Safety Information Database Notice of Proposed Rulemaking

Dear Mr. Stevenson,

These foregoing comments will respond to the Notice of Proposed Rulemaking that would establish a publically available consumer product safety information database.

Zippo Manufacturing Company is the maker of the world famous Zippo Windproof lighter. It has other product lines including hand warmers, leather goods, sunglasses, writing instruments, and the new utility lighter line.

Zippo has produced over 450 million Windproof lighters since its founding in 1932. Except for improvements in the flint wheel and modifications in case finishes, the company's original design remains virtually unchanged today.

Zippo has expanded its sales operations nationally and internationally through a wide network of sales representatives. In more than 160 countries throughout the world, Zippo is synonymous with American made quality and craftsmanship. Zippo exports approximately 50% of all the lighters it makes. Zippo employs over 500 people in the USA in good paying, clean jobs.

General Comments on the CPSC Database

ZMC would like to commend the CPSC staff for its work in attempting to create a publically searchable database that makes it easier for consumers to obtain important, relevant and factually correct information about consumer products.

Zippo

However, when this database goes public, consumers will be encouraged to post *anonymous, unverified* complaints about any consumer product in the database, including photos, video or other media to accompany the complaint.

ZMC appreciates the attempt to integrate a level of simplicity with the database by only requiring consumers to click on a button attesting that the information is "true and accurate" to the best of the consumer's knowledge. However, the staff is not requiring any evidence or proof of any kind that the information is true and accurate. The problem is exacerbated because the proposed rule provides that ZMC and other manufacturers will only be given 10 days to respond to the notice of the complaint – even though it may not have any information about the complaining consumer or the event. It is not possible to do even a minimal investigation in ten days and if the consumer chooses to remain anonymous it is essentially impossible to investigate the complaint. If the CPSC staff does not choose to withhold publication of the complaint or make modifications to the complaint, the complaint, however incomplete, inaccurate and false, will be posted to the database.

I note that Section 212 (a) (b) (5) of the proposed rule states that the CPSC shall provide notice to users of the database that:

> "[t]he Commission does not guarantee the accuracy, completeness or adequacy of the contents of the database."

What this means is that the Commission itself recognizes that the database is not reliable and will not stand behind it! While I laud the Commission's honesty, the fact it feels compelled to make this part of the regulation verifies the weakness of the proposal.

Zippo is a domestically produced product and the company is proud of its product and works hard to protect the integrity of its brand name. Regrettably, Zippo products have been copied and counterfeited by unscrupulous foreign manufacturers with look-alike and usually substandard products. These cheap imitations fool many consumers into believing that they have a genuine Zippo lighter; in reality, they possess a cheap imitation. Consequently, consumers often erroneously report that a fire, or similar injury, is "caused" by a Zippo lighter, when, in fact, it is the lookalike product that does the damage. Consumers report these incidents to CPSC, leading the staff to believe that ZMC manufacturers the product. Likewise, Zippo has had to defend product liability cases when, in fact, the product is

not genuine. What protection will there be for manufacturers against completely false product claims? None!

Given the severe competitive situation that manufacturers in the USA find themselves in, competing against very low cost Asian products, this database creates another compelling reason to abandon the United States. This is not good.

While the intent of this database is to provide an unencumbered process for consumers to publish consumer product complaints, the database will likely result in a platform for potential plaintiff's attorneys or competitors to infuse the database with false or misleading information to be used in future lawsuits. This could include consumer groups with ulterior motives or plaintiff lawyers attempting to build increase their client base, and building a body of evidence against a manufacture such as ZMC. This is particularly troublesome with certain Asian countries which have a well deserved reputation for falsifying information and engaging in widespread cyber-attacks as part of competing. Do you think they will not flood this database with false information to hurt their competitors?

Currently, the CPSC maintains the National Electronic Injury Surveillance System (NEISS), which collects data involving product-related incidents from hospitals and places them into a searchable database. Consider how plaintiffs use NEISS data in courtrooms. On a number of occasions, plaintiff's lawyers have used data from the NEISS system against manufacturers. Missing from the proposed database is a requirement for a verified injury result, as is the case with NEISS. There is no requirement that the injury be proven or shown by objective evidence. In addition, the proposed database would not preclude placing a false and extraneous qualitative or performance related statement parallel with a reported injury. At least the NEISS data comes from health care providers which have strict ethical guidelines and concern actual injuries. Even so, it frequently contains inaccurate data.

If the courts now consider NEISS based data is sufficient to provide "constructive notice" of a potential product-related problem, then the new searchable database would certainly be used in a similar manner, even though there will be no protections whatsoever to verify the information.

While the proposed product injury database is *intended* to serve a defined public service by providing more information to consumers regarding potential harm of defective consumer products, the submission of inaccurate information regarding a consumer product has the clear potential to create irrevocable harm to a company's reputation and the sales of its products. Moreover, inaccurate information

submitted to the database about a product that poses no harm, will likely mislead and confuse consumers in their purchasing decisions.

This situation is particularly pernicious for an internationally known small company like Zippo because its brand name is so well-known it has become a household name for a flip top, refillable lighter.

Because the procedures for filing an incident report on the database are so simple, uncomplicated and unverified, the potential for posting inaccurate product information is greatly increased. Such reports have the potential of: (1) misidentifying the manufacturer or product model; (2) creating incentives for competitors to file false reports to gain commercial advantage; and (3) potential manipulation of the database to threaten the reputation of a company as leverage in a product liability lawsuit.

There is also no doubt that the new database will likely be populated quickly with information from private consumer advocacy groups, in most cases with good intention. But, such a group might unwittingly supply false and misleading data regarding a destructive fire allegedly started with a look alike counterfeit Zippo cigarette lighter. Without the ability to verify tests or information, this information from a consumer advocacy group would receive the imprimatur of the CPSC as a government entity. But such a report *would not* be a reliable source of consumer reporting events regarding products, as that imprimatur might suggest.

A relevant example would be a report originating from U.S. PIRG (Public Interest Research Group) and its state affiliates. U.S. PIRG has reported on potentially defective toys and other consumer products for over two decades. PIRG has a webpage, a Facebook page, a twitter account, and an iPhone application for accessing the organization's database and a widget for reporting to U.S. PIRG.

Because CPSC has greatly expanded its social media outreach, the agency will likely make the database accessible through a webpage, social media, Twitter, Flickr and other widgets designed to create as much access as possible. This substantially increases the liability exposure of companies like ZMC who must constantly fight against inaccurate information regarding its products.

Regrettably, the proposed database does not incorporate even minimal safeguards to prevent this type of behavior, especially since the protection accorded is merely a computer generated question asking if the information is true and accurate to the best of the consumer's knowledge. In addition, it does not appear that there is any

zippo

restriction on how many times a data proponent could submit data in a particular day. A plaintiff's attorney could fabricate a submission of product related data and could literally create multiple reported events by manipulating computer input.

When confronted with false and inaccurate data submissions or with injuries caused by a counterfeit Zippo lighter ZMC has argued that the evidence submitted is irrelevant, unreliable hearsay, and highly prejudicial both in terms of CPSC's imprimatur and unverifiable data. Given the proposed requirement for the CPSC staff to notify manufacturers of "reported events" but with no realistic way for the manufacturer to refute false claims, such information becomes a powerful tool for plaintiff attorneys to use in punitive damages arguments in cases where the NEISS database contains no relevant information.

When the CPSC solicited comments as of the CPSC Public Hearing on refining the database proposal, ZMC submitted the following recommendations:

- "The Commission should require any person submitting an incident report to the database to include a verification statement that the information they have submitted is accurate. Such a verification statement should include appropriate civil or criminal penalties for filing a false or inaccurate allegation or incident.

- "The Commission should develop a transparent system of internal due diligence to verify the accuracy and validity of the information being submitted by consumers to the database, including a requirement that the manufacturer have the opportunity to examine the product in question and to compare the product with special markings normally placed on manufactured products of that company.

- "The Commission should develop a transparent and efficient process for removing a report from the database when a manufacturer demonstrates that the information submitted is inaccurate or inaccurate. While Section 212(c) (3) provides for a mechanism for designating information as confidential, it does not provide a procedure to allow a manufacturer to request the Commission not to post the information on the database because it contains inaccurate information.

- "The Commission should develop an "industry portal" with a mechanism for a manufacturer to specifically "red flag" information it believes to be proprietary or inaccurate, such as a lighter Zippo believes to be a counterfeit.

Zippo

- "The Commission should develop a transparent and efficient mechanism to remove promptly temporarily, any information from the database during the Commission staff's investigation to determine whether information on the database is indeed inaccurate."

ZMC commends the Staff for incorporating some of these suggestions, such as becoming more transparent, creating a manufacturers portal for submission of confidential information, a manufacturer's ability to "flag" inaccurate or misleading information for the CPSC staff and a more transparent process for removing information and data that is inaccurate or misleading. However, unless the inaccurate information is removed pending outcome of a staff determination, it is possible prolonged public exposure could damage the reputation of a company. If the Commission cannot remove the information on a temporary basis, the Commission should develop a transparent system of expeditious staff investigation.

Considering the seriousness of the issues involved, ZMC reiterates its request that the staff incorporate the following recommendations:

1. Restrict the scope of persons who are qualified to submit reports of harm to individuals directed related to the product injury or potential harm.

2. Provide a more vigilant system of verifying the identity of the individual submitting reports of harm and whether those reports are, in fact, materially accurate.

3. Provide a manufacturer with an opportunity to determine whether or not the product related to the data report is, in fact, a product actually manufactured by the company.

4. Include a warning to individuals that submission of inaccurate or false information could result in legal sanctions.

5. Any response to a submission by CPSC should not under any circumstance affirmatively state or imply that the agency guarantees the accuracy of the data submitted. In fact, the CPSC should include a strongly worded disclaimer that the inclusion in the database should not be construed as a validation the accuracy of the data submitted.

Zippo Manufacturing Company prides itself on designing safety into its products and responding to product related problems expeditiously. For this reason, ZMC is not alone in expressing these concerns about the proposed database. Other similarly

Zippo

situated companies continue to face similar problems counterfeiting, look-alike products and product misidentification.

Thank you for taking our concerns into consideration.

Sincerely,

[redacted]

Charles J. Duke, General Counsel

Safety Research & Strategies, Inc.
340 Anawan Street / Suite 200
Rehoboth, MA 02769
Ph. 508-252-2333, Fax 508-252-3137
www.safetyresearch.net

July 23, 2010

TO: Office of the Secretary
Consumer Product Safety
Commission, Room 502, 4330 East West
Highway, Bethesda, MD 20814;

FR: Sean Kane

RE: Docket No. CPSC–2010–0041

Attached are Safety Research & Strategies comments regarding the questions raised by CPSC with respect to the development of a Product Safety Incident Database (Docket No. CPSC-2010-0041; 75 FR 29156, May 24, 2010).

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Publicly Available Consumer Product Safety Information Database
Proposed Rule, May 24, 2010

Below are Safety Research & Strategies comments regarding the questions raised by CPSC with respect to the development of a Product Safety Incident Database (Docket No. CPSC-2010-0041; 75 FR 29156, May 24, 2010).

Proposed Subpart B – Content Requirements

CPSC requested comments as to the Commission's ability to seek demographic data, such as race, as part of other categories of voluntary information. We support the Commission's ability to request demographic data from consumers as long as those requests are clearly optional so that they do not discourage consumers from submitting incident reports.

#8 We support the Commission's intention to build a variety of data reporting options into the system that will enable users to build queries and export their data sets into a variety of standard file formats. We request that the entire data set be available for download in as an open format, delimited, ASCII text file, as well. SRS has commented previously about the importance of having the data available in a format for stakeholders in industry and the safety community. Providing access to raw data in real time creates a stronger partnership between the commission and NGOs involved in product safety research and injury prevention. Further, the mission of the CPSC is best served when it embraces outside partners in prevention and surveillance.

#10 With respect to designing the report form so that it can be filled out with relative ease, we reiterate building into the code the ability to review and edit the form at any point throughout the reporting process. This allows consumers to insert additional information as they may recall it throughout the reporting process.

#11 The Commission indicates they are considering various functions for the manufacturer portal to the database, including the ability to "flag information." We support the ability of manufacturers' ability to flag records for their internal record-keeping, but we reiterate that it is our firm belief that questioning the accuracy of the

product problem described by the consumer is NOT the purview of the agency or manufacturers. *Complaints should not be blocked, removed or otherwise flagged when a manufacturer claims the problem is not accurately described by the complainant.* If this is allowed, the database becomes moot. Given the agency staff and budget, it is not feasible, or advisable, for the agency to become the arbiter of right and wrong between consumer and manufacturer allegations. There is a natural conflict between the consumer view of the product problem and the manufacturer's view.

#12 With respect to incorporating manufacturer comments into incident reports, we reiterate our position that determining the accuracy of the product problem as described by the consumer, or allowing manufacturer comments on the consumer description, creates a conflict that can't be resolved in the context of this database. The database is simply consumer reporting tool and the basis for surveillance activities. The database and the complainants' reports do not alone serve as determinants of defect. Careful review of the data, in conjunction with other methods of product safety investigation, is still required.

We also reiterate that incident reports should remain in the database indefinitely and should not be removed after a certain amount of time. Further, any structural changes to the database should be made in such a way as to not alter prior data structures (i.e., new variables should be added as the last column in the database, not affecting previous variable order).

#15 We support the Commission's decision to include free text fields for incident description and product description in addition to the proposed specific production identification fields. For ease of description, we recommend providing specific prompts to consumers – product category (e.g., blender, crib, etc.) and detailed product description, asking specifically for a brief description of the appearance of the product (i.e., size, color, markings on product).

#18 As stated above, while we support the ability of manufacturers to "flag" records for their own reference, we oppose any comments or flags created by manufacturers in response to incident reports becoming part of the public database. We also request that any records flagged by manufacturers for CPSC review because they are believed to contain confidential information remain in the public database during the review period. This eliminates the ability for manufacturers to use such flagging to temporarily keep records out of the public realm.

#19 We support the incorporation of CPSC technical research, reports on emerging hazards, and other staff-generated research into the public database.

#26 and #27 We discourage the Commission from withholding reports that manufacturers have flagged as being materially inaccurate or containing confidential information until such determinations are made. Again, it is our firm belief that questioning the accuracy of the product problem described by the consumer is NOT the purview of the agency or manufacturers. Complaints should not be blocked, removed or otherwise flagged when a manufacturer claims the problem is not accurately described by the complainant.

The recent problems associated with unintended acceleration in Toyota and Lexus models provide a good example of how a company and its customers can be at odds. Toyota claims that these events are precipitated by errant and poorly designed floor mat interference with the accelerator pedals. However, many consumer reports do not support Toyota's theory. If, in this instance, complaints were said to be materially inaccurate by the manufacturer (or even NHTSA) if the consumer concluded floor mats were not the cause, then many of the complaints could be excluded preventing further analyses of the problems and potential root causes.

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Docket: CPSC-2010-0041
Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0018
Comment from Gibson Vance

Submitter Information

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Submitter's Representative: Sarah Rooney
Organization: American Association for Justice

General Comment

Please see attached comments.

Attachments

CPSC-2010-0041-0018.1: Comment from Gibson Vance

AMERICAN ASSOCIATION for JUSTICE
Formerly the Association of Trial Lawyers of America (ATLA®)

July 23, 2010

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD 20814

Re: Publicly Available Consumer Product Safety Information Database

Dear Sir or Madam:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA), hereby submits comments in response to the Consumer Product Safety Commission's (CPSC) Proposed Rule regarding the publicly available consumer product safety information database. *See* 75 Fed. Reg. 29156.

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, promote injury prevention, and foster the disclosure of information critical to public health and safety. AAJ applauds the CPSC's efforts to promote transparency and product safety by developing a new, more publicly accessible database. AAJ believes that the new database will protect consumer safety more vigorously than the current system. Furthermore, AAJ believes the CPSC has correctly interpreted the intent of Congress by allowing all consumers to submit reports of harm.

A. The Product Safety Information Database Will Increase Transparency and Public Safety

AAJ supports the CPSC's implementation of Section 212 of the Consumer Product Safety Improvement Act. Section 212 required the Commission to establish and maintain a publicly available, searchable, and Internet accessible website on the safety of consumer products and substances. AAJ supports the creation of such a database and believes that the CPSC should release as much incident data as possible to the public. The faster manufacturers and the general public are made aware of incidents, the faster incidents are resolved, increasing public safety. A more publicly available database gives consumers the option of avoiding purchasing products or services from a company with unsafe business practices. The mere existence of the database will encourage manufacturers to make safety a priority. For example, in the case of Chinese toxic drywall, had this database been available, both the CPSC and American consumers likely would have been able to determine that there was, in fact, a systemic

problem with drywall from China and stopped using it.[1] Without this database in place, it took the CPSC and the general public approximately three years to conclude that there was in fact a problem with Chinese drywall.[2]

B. The CPSC Has Properly Defined Who May Submit Reports of Harm

The CPSC has defined who may submit reports of harm in the public database broadly. AAJ agrees with this interpretation and believes that it is consistent with the intent of Congress. In order to determine whether the CPSC's regulations on who may submit reports of harm to the Product Safety Information Database are consistent with the underlying statute, one must look to the intent of Congress. If the intent of Congress is unambiguous, the agency must implement the law expressed thusly.[3] Moreover, an agency decision interpreting a statute must be set aside if it conflicts with the plain meaning of the statute.[4]

In order to determine whether Congress has directly spoken to the question at hand one "must look 'to the particular statutory language at issue, as well as the language and design of the statute as a whole, and, where appropriate, its legislative history.'"[5] In this case, Congress stated, "Reports of harm relating to the use of consumer products, and other products or substances regulated by the Commission, that are received by the Commission from consumers, local, State, or Federal government agencies; health care professionals; child service providers; and public safety entities."[6] Congress did not specify a certain subset of "consumers" or in any

---

[1] Since 2006, countless homeowners have experienced sickness and property damage due to faulty Chinese drywall that had been installed in their homes. Homeowners have suffered persistent nosebleeds, itchy eyes, skin rashes, headaches and severe asthma as a result of chemicals being emitted from the drywall of their homes. Additionally, these chemicals have corrosive properties which cause extensive damage to copper and silver, destroying electrical wiring, air conditioning systems and any other components of a home that contain copper or silver. *See CPSC Ties Drywall, Corrosion*, Wall Street Journal, November 24, 2009, Melanie Trottman and M.P. McQueen.

[2] *Id.*

[3] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

[4] *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1999) (an agency "does not have the power to adopt a policy that directly conflicts with its governing statute"); Chevron, 467 U.S. at 843 n.9 (courts "must reject administrative constructions which are contrary to clear congressional intent").

[5] *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 198-99 (2d Cir. 2004); *see also Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007) (the court may "look to 'structure, purpose, and history' to determine whether these construction devices can convincingly resolve).

[6] 15 U.S.C. § 2055(a).

way limit the term "consumers" in the statute. Furthermore, there is no indication in the statute that Congress intended to limit which consumers can submit information to the Product Safety Information Database. As such, the CPSC's expansive definition is appropriate.

AAJ appreciates this opportunity to submit comments in response to publication of the Agency's Proposed Rule on the implementation of the publically available consumer product safety information database. If you have any questions or comments, please contact Sarah Rooney, AAJ's Regulatory Counsel at (202) 944-2805.

Sincerely,

C. Gibson Vance, President
American Association for Justice

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0019
Comment from Ed Desmond

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Organization: Toy Industry Association

General Comment

Attached is the Toy Industry Association's comments on Publicly Available Consumer Product Safety Information Database; Document ID CPSC-2010-0041.

Thank you.

Attachments

CPSC-2010-0041-0019.1: Comment from Ed Desmond

Toy Industry Association, Inc.

www.toyassociation.org

July 23, 2010

Via Electronic Mail
Office of the Secretary
Consumer Product Safety Commission, Room 502
4330 East West Highway
Bethesda, MD 20814

Re: Comments on the Proposed Rule on the Publicly Available Consumer Product Safety Information Database/ Docket No. CPSC-2010-0041

The Consumer Product Safety Commission ("CPSC") has requested comments on its proposed rule interpreting the scope of reporting and posting of data pursuant to Section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), [*See* 75 Fed. Reg. 29156 (May 24, 2010); *See also* CPSIA.] [1] The Toy Industry Association ("TIA" or "the Association") is submitting these comments in response to the Commission's request for comment on its Notice of Proposed Rulemaking ("NPR") regarding its proposal to add a new Part 1102 to Title 16 of the CFR to establish a Publicly Available Consumer Product Safety Information Database as required under Section 212 of the CPSIA. TIA appreciates the opportunity to provide feedback and input with respect to the issues raised in the NPR. On behalf of its more than 550 U.S. toy manufacturers and importers, the Toy Industry Association ("TIA") offers the following comments. TIA reserves the right to supplement or amend its comments as appropriate.

I. The Proposed Enumerated Submitters Under the NPR Goes Beyond the Statutory Scope.

Under Staff proposed 16 CFR 1102.10(6)), it is inappropriate to allow "attorneys, professional engineers, investigators, non-governmental organizations, consumer advocates and consumer advocacy organizations and trade organizations" to be among the list of entities permitted to submit incident information to the database. Such inclusion goes beyond what is specifically set forth under the CPSIA and contradicts the existing regulations that require incident reports to be verified by those with personal knowledge.

The CPSC has recommended that the list of entities who may submit reports of harm for inclusion in the database be expanded to include not only the specified entities set forth in the CPSIA, which are: Consumers, Local State or Federal Government agencies, Health Care professionals, Child Service providers and Public Safety Entities.

The proposed rule, however, would also permit the database entries to be submitted by:

[1] The Notice of Proposed Rulemaking document is available on the CPSC's website at http://www.cpsc.gov/businfo/frnotices/fr10/databaseNPR.pdf

"Others, including but not limited to, attorneys, professional engineers, investigators, non-governmental organizations, consumer advocates and advocacy organizations and trade associations".

The express statutory language in Section 212 of the CPSIA does not allow or require the CPSC to expand the scope of designated reporting parties. This proposal would have the effect of reducing the database to a blog, made up of hearsay reports from those without personal knowledge, and who have a vested interest in increasing the number and severity of negative reports involving a product.

The CPSIA limited express designation to those who may submit reports under amended CPSA §§ 6A(b)(1)(A)(i)-(v). This is an exclusive list, as indicated by the fact that Congress considered who should be permitted to submit reports for inclusion on the database and only chose to identify specific reporting parties. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (stating that the cannon of statutory construction that the expression of one thing suggests exclusion of the others "depends on a series of two or more terms or things that should be understood to go hand in hand, which [is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded") (citation omitted); *United States v. Johnson*, 529 U.S. 1114, 1118 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth"). The Commission cannot add to that list.

By adding an "other" category, the Commission has acted outside the authority Congress granted it in the statute. Congress specifically delineated five categories of reporters who may submit reports for inclusion on the public incident database. The Commission is within its authority to define those categories as it has done in ***16 C.F.R. §§ 1102.10(a)(1)-(5)***. But nowhere does CPSA § 6A(b)(1) grant the Commission the authority to enumerate additional categories of reporters, much less one that negates all of the categories Congress took care to delineate.

Such *ultra vires* action is contrary to the plain meaning of the statute. It is a cardinal rule of statutory interpretation that a statute must not be interpreted in a manner that would render other provisions of the statute superfluous or unnecessary. *See, e.g., Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.). Here, the Commission's addition of a catch-all "other" category makes the categories of reporters Congress specifically delineated entirely superfluous because the "other" category is so broad as to encapsulate every category of reporter, thus making any specific designation unnecessary.

Finally, the addition of an "other" category is unreasonable and contrary to sound public policy. Congress intended that the database advance public safety by better informing consumers of potential product hazards. *See* Cong. Rec. H7586 (2008) ("It requires the CPSC to create a searchable and user-friendly public database on deaths and serious injuries resulting from consumer products so that parents have access to the information they need to protect themselves and their children."). Congress selected reporters who

would contribute to that purpose—those who use or observe the use of the consumer product (and thus the resulting harm or risk of harm) and those who may be involved in treating or responding to the harm. Congress did not include in its list of reporters those who may be commercially or financially motivated to submit reports of harm. By allowing *anyone* who wants to submit a report for inclusion in the database to do so, the Commission has opened the flood gates to those who may be motivated to "salt" the database such as attorneys and competitors. Opening up the database to these and other groups will not serve Congress's intent to advance product safety. Instead, it will decrease the database's accuracy and integrity, making it unreliable for consumers attempting to obtain information about potential product hazards and looking to make a decision as to whether to purchase a product.

A. A Limited Scope of Reporting Entities is Supported by the Legislative History

When various versions of the statute ultimately enacted as the CPSIA were being proposed, the two main bills contained substantially different provisions as to what information should be included in the database.

The Senate bill contained a requirement that the CPSC set up a publicly searchable database that would allow consumers and other specified groups of people to submit reports of incidents. The House bill, on the other hand, required the CPSC to study ways to make the information that the CPSC already had more available to the public through a database, and to consider whether it would be appropriate to allow consumer complaints, hospital reports and warranty claims to be included in such a database. The pertinent language from each of these bills, and the final, reconciled language of the CPSIA are set forth in ***Attachment A***.

The Senate version originally included a provision that would permit "other non governmental sources" to submit reports to the CPSC for inclusion in the database. This provision did not survive in the final version of the CPSIA, Section 212. The final version of the statute, as passed, permits the database to include reports to be submitted from: *"(i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities"*.

The final, reconciled, version of the statute did not permit reports from, *"other non governmental sources"* to be included in the database, as had been originally proposed in the Senate version of the bill.

While Section 212(b)(3) of the CPSIA allows the CPSC to include information in the database, *"in addition to the reports received under paragraph (1)"* the language of the CPSIA does not permit the CPSC to add an entirely new category of persons who would be entitled to submit reports for inclusion in the database, particularly when such language was removed from previous versions of the statute before passage.

With the exception of consumers, the list of entities who are permitted to submit reports to the CPSIA database comprise entities such as health care professionals, police, child service providers, all of which have various legal obligations to accurately and objectively record and report safety incidents, injuries, suspected child abuse as part of

their professional responsibilities. These entities have no political or personal interest in the incident information reported.

Permitting attorneys and consumer advocacy groups to submit hearsay reports of incidents for which they have no personal knowledge for inclusion in the database would defy the CPSC's current requirements that information it publishes must be verified. When Congress decided to require a searchable database, which must include consumer incidents, there is no indication that Congress intended to override the CPSC's long standing requirements for verification of information before the CPSC allows the information to become public

The CPSC currently, at minimum, requires a submitter of incident information it proposes to release to the public to be one of a certain identified group of people, and requires a submitter to confirm the accuracy of the incident report in writing. The language of the regulation is included in ***Attachment B***. Under the current regulations, an incident report submitted by an attorney or representative of an NGO group who did not have firsthand knowledge of the facts surrounding the safety incident or who did not witness the safety incident would not fit the criteria for public release.

Allowing attorneys, NGOs and other entities without direct firsthand knowledge of an incident to submit incident reports for inclusion in the database exceeds what is required under the CPSIA and goes beyond the CPSC's established practice of requiring verification from eyewitnesses or those with direct knowledge of the incident.

II. Collecting and Using Anonymous, Incomplete Reports is Inappropriate.

Section 1102.10(h) of the proposed rule provides that, "Any information received by the Commission that does not meet the requirements for submission or publication will not be published but will be maintained for internal use."

The introductory comments to the Draft Proposed Rule indicate that the CPSC Staff would be recommending that the CPSC collect and maintain *"reports of harm even from anonymous submitters and reports that are incomplete"* to be used *"for appropriate Commission use"*. The comments to the proposed rule, at 75 FR 29159, column 2 also state that *"information received related to a report of harm that is incomplete because it does not meet the requirements for submission or publication will be maintained for appropriate Commission use"*. The term "*appropriate Commission use*" includes *"support for ... administrative and judicial proceedings for enforcement of the statutes, standards, and regulations administered by the Commission."*

The acceptance and use of incomplete and anonymous incident reports submitted through the database portal is not required or called for under the CPSIA. The veracity and trustworthiness of anonymous, unfounded reports cannot be confirmed and are by their nature suspect. In addition, using anonymous reports, submitted through the database portal, in any compliance or enforcement proceeding would be inherently unfair to the manufacturer whose product is the subject of such a report, who has no opportunity to investigate or refute the claim.

Similarly, we have a concern that consumers who are reporting incidents that do not meet the statutory and administrative minimum requirements for inclusion in the database will attempt to circumvent these requirements by posting these incidents and comments through the use of one of the Commissions other social media vehicles. The proposed rule does not squarely address this issue; however, it would be appropriate to obtain some assurances, that this will not be permitted.

A. The Statute Requires That the Submitter Must Also Supply a Model Name

The CPSC is not requiring the identification of a product name, model, manufacture date, date code, date of purchase or other descriptive information about the product. The CPSC instead is requiring that the description of the product, at minimum, include "a word or phrase that identifies the product as a consumer product, a component part of a consumer product or a product or substance regulated by the Commission," and the name of the manufacturer. Other information such as a brand name, purchase price, model, serial number, date of manufacture, date code or retailer is not mandatory.

The CPSIA, at Section 212(b)(4)(C) requires that the database be sortable and accessible by date, product description, model name and manufacturer's name to the extent practicable. This would appear to require that at least the product name *and* model number be submitted in order for an entry to be accepted for inclusion in the database.

If a product is poorly identified, this may form the basis for a manufacturer's comment to the effect that the lack of specificity makes it impossible to address the incident report. Requiring a model name or product name, as a minimum requirement would be consistent with the language of the CPSIA and would allow the incident information in the database to be more useful and less potentially misleading.

B. Language Requesting Permission to Disclose Consumer's Identity to the Manufacturer is Permissible

TIA's initial comments had suggested that the CPSC should encourage consumers to include their name and contact information, as that helps with the investigation process. The proposed rule, at 75 FR 29167, column 3 refers this suggestion, and indicates that the CPSC has designed the form to encourage users to supply additional information.

The CPSC, at Page 40 of the Draft NPR however, suggests that consumers should be asked the following questions:

> "**May we** include your report without your name and contact information in CPSC's Public Database?"
>
> "**Would you like us to** release your name and contact information to the product manufacturer or private labeler?"

These two questions should be structured in a more parallel fashion, i.e.

"**May we** include your report without your name and contact information in CPSC's Public Database?"

"**May we** release your name and contact information to the product manufacturer or private labeler?"

Using the language suggested above may serve to provide consumers with the encouragement to provide contact information to the manufacturer. The CPSC should encourage consumers to disclose their identities to the product manufacturers in the interest of enhancing product safety. Manufacturers will often need to obtain further information directly from the consumer to more fully understand a reported safety incident or a potential safety issue. Manufacturers who are unable to speak directly to the person who has information concerning a possible safety incident will be hampered in their ability to completely understand and quickly respond to a potential safety issue.

C. Actual or a Substantial Likelihood of Harm Should be Required

It would also be beneficial for the CPSC to further define a consumer product safety incident causing harm, as contemplated by the statute, as opposed to merely describing a product that does not meet the consumer's expectations. TIA member experience in processing CPSA Section 102 reporting is helpful and illustrative here. Often the apprehension of choking is determined to be distinguishable from an actual choking incident. CPSC's own reporting rules recognize this important distinction and the importance of factual delineation of an actual incident and injury data from concern about hypothetical harm. Similarly, CPSC has occasionally had to refute ungrounded allegation that exhibited the potential to mislead consumers about the safety of products. Accurate collection of data and a Verification Requirement for submitted reports (as previously noted) could reduce the reporting of inaccurate or misleading information [2].

As an initial means to categorize reports, for example, the software in the consumer portal could be structured to ask questions such as, "Did the incident result in actual personal injury, illness or death?" If the consumer answered, "Yes," to the first question indicating that there was a personal injury, illness or death, further choices could include a question such as, "Did the injury or illness require any treatment?" with the possible responses being:

(A) No treatment
(B) First aid treatment
(C) Treatment by a medical professional.

If the consumer answered, "No," to the first question, additional questions could follow, such as, "Did the incident result in a risk of injury, illness or death?"

[2] See for example 16 CFR 1117.3 which details with specificity as to what does or does not constitute a reportable choking hazard.

This could help eliminate inaccurate, false or misleading data, which has been determined to be a problem inherent in other reporting systems[3]. This would also permit the CPSC to more clearly understand whether a proposed entry describes harm or risk of harm caused by a product, and to identify, for exclusion, any entries that appear to be reflecting mere dissatisfaction with a product without any report of injury, illness or death, or risk of personal injury, illness or death. Recording this information in a systematic manner will also permit the CPSC and manufacturers to quickly identify and to provide more immediate focus on database entries in which serious harm or actual risk of serious harm has been reported.

The term "*any risk of injury*" as defined under proposed 16 CFR 1102.6 should be narrowly defined. As written, this definition would allow any concern to be included in the database regardless of the level of risk or the potential for injury. This will only serve to clutter the database and cause needless concern, sweeping in items that have near zero risk of causing injury. There are many examples of data that have been received by CPSC from consumers (and forwarded to companies) regarding unfounded speculations of risk by consumers, with products that do not involve any actual risk of injury[4].

The FR should counter any implication that the term "*Any*" implies that even the most insignificant of risks be included in the database. It should be stricken and replaced with a more appropriate term such as "substantial risk of serious injury" which has been historically used by the CPSC.

Clearly the Commission staff should separate reports that appear to describe only consumer dissatisfaction with a product from the "*reports of harm*" that Congress contemplated would be included in the database.

In addition, due to an inherent problem in assuring accuracy of reported data over lengthy periods of time, consideration should be given to limiting reporting of "old" or "stale" data not contemporaneously related to the occurrence of the incident alleged. Users should not be able to report an incident after a year has passed from the alleged incident, since data over time becomes inherently suspect.

III. Inaccurate Information Must be Omitted, Without Precondition and Regardless of Whether It Creates Substantial Confusion Among Users.

The statute permits manufacturers to make comments on information that is materially inaccurate. There is no requirement that the materially inaccurate information have the potential to cause confusion.

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[3] A 2006 article in the Official Journal of the American Academy of Pediatrics by Michael J. Goodman, PhD, and James Nordin, MD, MPH, found that many of the entries in VAERS were made in connection with pending litigation, presumably in an attempt to create the appearance of a causal connection between certain vaccines and medical conditions. Vaccine Adverse Event Reporting System Reporting Source: A Possible Source of Bias in Longitudinal Studies, 117 Pediatrics 387 (2006).

[4] Some examples include reports that *"The consumer said that a product has a metallic taste to it that resembles lead"; "The product smells toxic, there is no way this product is safe for children to be putting in their mouth"; "A claim that a product looks like it could in the reporters opinion, could a choking hazard to young children, even though there was no incident or injury involved and the product complied with 16 CFR 1501, et seq."*

The proposed rule provides as follows:

§ 1102.26 Designation of materially inaccurate information.
(a) For purposes of this section, the following definitions apply:
(1) Materially inaccurate information in a report of harm means information that is false or misleading in a significant and relevant way that creates or has the potential to create a substantially erroneous or substantially mistaken belief in a Database user about information in a report of harm relating to:
(i) The identification of a consumer product;
(ii) The identification of a manufacturer or private labeler; or
(iii) The harm or risk of harm related to use of the consumer product.

While it is clear that the CPSC would prefer to just publish the consumer's report and the manufacturer's comments side by side, and not redact the inaccurate information from the consumer's report, this should not trump the manufacturer's right not to have inaccurate information about its products in a government sanctioned database. These preconditions create an inappropriate limitation on what can be claimed to be materially inaccurate. In addition, while we support fully the Commission's discretion to determine the existence of materially inaccurate information, if a prima facia claim of material inaccuracy is made, the Commission should retain the discretion not to publish information pending its confirmation of the veracity of the claim. In addition, the Commission should be required to act to correct false, misleading or inaccurate information within the same 10 day time period from submission required of manufactures to comment on the veracity of the claimed information. This will assure that detrimental, false, misleading or inaccurate information with the potential to impugn a Company, or brand reputation, is not posted, or if posted, is timely removed from such posting. The harm to reputation and brand can be significant and longstanding unless abated in a timely manner.

IV. Disclaimer Language Should be Stronger and an Attestation of Veracity Required by Complaintants

The CPSIA requires the Commission provide clear and conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database. The CPSC is recommending that the notice contain the exact language in the statute. The proposed rule provides as follows:

Subpart D—Notice and Disclosure Requirements
§ 1102.42 Disclaimers.

The Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the Consumer Product Safety Information Database, particularly with respect to the accuracy, completeness, or adequacy of information submitted by persons outside of the CPSC. The Consumer Product Safety Information Database will contain a notice to this effect that will be prominently and conspicuously displayed on the database and on any documents that are printed from the database.

The notice should more clearly advise that incident reports in the database are examples of information submitted by persons outside of the CPSC. The consumer report must include "verification by the person submitting the information, that the information submitted is true and accurate to the best of the person's knowledge, and that the person consents that such information be included in the database."

In the Report to Congress, the mock-up of a possible layout of the Webpage depicting the consumer portal for submission of incident reports does not require a consumer to affirmatively include such a verification with their report, nor does it even require the consumer to actively agree or disagree with this "verification." Instead, these words appear as a static, boilerplate part of a busy webpage, rather than representing a meaningful attestation or even an affirmation of the veracity of the information submitted. Consumers could easily be requested to attest to the accuracy of information on submittal portals. The notation of penalties for filing false reports together with a verification check off submittal box on the portal, could serve to deter the filing of false reports to the agency and help insure accurate information upon which it can act.[5]

The CPSC should require consumers to either affirmatively include the verification statement in their narrative description of the incident, or at least, to affirmatively choose to agree or disagree with the verification statement before continuing with the submission process. Consumers who are submitting unconfirmed and anonymous accounts of safety related incidents, should, at minimum, affirmatively acknowledge that they are standing behind their reports. The possible inclusion of this required "verification" statement on the standard, fixed text of the webpage does little to provide any acknowledgement that a consumer is truly "verifying" the facts contained in the consumer incident report.

TIA will gladly respond to any follow-up inquiry requested by CPSC Staff.

Sincerely,

Ed Desmond,
Executive Vice President, External Affairs

[5] Such verifications on form submittals are commonplace. For Example DHS I9, FTC FDCA Verification of Debt/Non Debt; U.S. INS Form I-9 Attestation upon filing. Another option is a clear statement on the website that persons providing information must provide false or misleading information not under penalty of law (18U.S.C. 1001).

Attachment A

Comparison of House Passed Version of HR 4040, Senate Passed Version of HR 4040 and CPSIA Section 212 regarding Database

House Passed version of HR 4040:

H.R.4040

Consumer Product Safety Modernization Act (Engrossed as Agreed to or Passed by House)

SEC. 206. PUBLICLY AVAILABLE INFORMATION ON INCIDENTS INVOLVING INJURY OR DEATH.

(a) Evaluation- The Commission shall examine and assess the efficacy of the Injury Information Clearinghouse maintained by the Commission pursuant to section 5(a) of the Consumer Product Safety Act (15 U.S.C. 2054(a)). The Commission shall determine the volume and types of publicly available information on incidents involving consumer products that result in injury, illness, or death and the ease and manner in which consumers can access such information.

(b) Improvement Plan- As a result of the study conducted under subsection (a), the Commission shall transmit to Congress, not later than 180 days after the date of enactment of this Act, a detailed plan for maintaining and categorizing such information on a searchable Internet database to make the information more easily available and beneficial to consumers, with due regard for the protection of personal information. Such plan shall include the views of the Commission regarding whether additional information, such as consumer complaints, hospital or other medical reports, and warranty claims, should be included in the database. The plan submitted under this subsection shall include a detailed implementation schedule for the database, recommendations for any necessary legislation, and plans for a public awareness campaign to be conducted by the Commission to increase consumer awareness of the database.

Senate Passed version of HR 4040:

H.R.4040

CPSC Reform Act (Engrossed Amendment as Agreed to by Senate)

SEC. 7. PUBLIC DISCLOSURE OF INFORMATION.

`(9) PUBLICLY AVAILABLE DATABASE OF REPORTED DEATHS, INJURIES, ILLNESS, AND RISK OF SUCH INCIDENTS-

`(A) IN GENERAL- Not later than 1 year after the date of enactment of the CPSC Reform Act, the Commission shall establish and maintain a publicly available searchable database accessible on the Commission's web site. The database shall include any reports of injuries, illness, death, or risk of such injury, illness, or death related to the use of consumer products received by the Commission from--

`(i) consumers;

`(ii) local, State, or Federal government agencies;

`(iii) health care professionals, including physicians, hospitals, and coroners;

`(iv) child service providers;

`(v) public safety entities, including police and fire fighters; and

`(vi) other non-governmental sources, other than information provided to the Commission by retailers, manufacturers, or private labelers pursuant to a voluntary or required submission under section 15 or other mandatory or voluntary program.

CPSIA Section 212 as passed by both House and Senate:

H.R.4040

Consumer Product Safety Improvement Act of 2008 (Enrolled as Agreed to or Passed by Both House and Senate)

b) Content and Organization-

`(1) CONTENTS- Except as provided in subsection (c)(4), the database shall include the following:

`(A) Reports of harm relating to the use of consumer products, and other products or substances regulated by the Commission, that are received by the Commission from--

`(i) consumers;
`(ii) local, State, or Federal government agencies;
`(iii) health care professionals;
`(iv) child service providers; and
`(v) public safety entities.

Attachment B

Text of 16 CFR 1101.31 setting forth reasonable steps the Commission takes to ensure accuracy of information proposed for disclosure to the public

§ 1101.32 Reasonable steps to assure information is accurate.

(a) The Commission considers that the following types of actions are reasonable steps to assure the accuracy of information it proposes to release to the public:

(1) The Commission staff or a qualified person or entity outside the Commission (e.g., someone with requisite training or experience, such as a fire marshal, a fire investigator, an electrical engineer, or an attending physician) conducts an investigation or an inspection which yields or corroborates the product information to be disclosed; or

(2) The Commission staff conducts a technical, scientific, or other evaluation which yields or corroborates the product information to be disclosed or the staff obtains a copy of such an evaluation conducted by a qualified person or entity; or

(3) The Commission staff provides the information to be disclosed to the person who submitted it to the Commission for review and, if necessary, correction, and the submitter confirms the information as accurate to the best of the submitter's knowledge and belief, provided that:

(i) The confirmation is made by the person injured or nearly injured in an incident involving the product; or

(ii) The confirmation is made by a person who, on the basis of his or her own observation or experience, identifies an alleged safety-related defect in or problem with such a product even though no incident or injury associated with the defect or problem may have occurred; or

(iii) The confirmation is made by an eyewitness to an injury or safety-related incident involving such a product; or

(iv) The confirmation is made by an individual with requisite training or experience who has investigated and/or determined the cause of deaths, injuries or safety-related incidents involving such a product. Such persons would include, for example, a fire marshal, a fire investigator, an electrical engineer, an ambulance attendant, or an attending physician; or

(v) The confirmation is made by a parent or guardian of a child involved in an incident involving such a product, or by a person to whom a child is entrusted on a temporary basis.

(b) The steps set forth below are the steps the Commission will take to analyze the accuracy of information which it proposes to release to the public.

(1) The Commission will review each proposed disclosure of information which is susceptible of factual verification to assure that reasonable steps have been taken to assure accuracy in accordance with § 1101.32(a).

(2) As described in subpart C, the Commission will provide a manufacturer or private labeler with a summary or text of the information the Commission proposes to disclose and will invite comment with respect to that information.

(3) If the Commission receives no comments or only general, undocumented comments claiming inaccuracy, the Commission will review the information in accordance with § 1101.32(a) and release it, generally without further investigating its accuracy if there is nothing on the face of the information that calls its accuracy into question.

(4) If a firm comments on the accuracy of the information the Commission proposes to disclose, the Commission will review the information in light of the comments. The degree of review by the Commission and the weight accorded a firm's comments will be directly related to the specificity and completeness of the firm's comments on accuracy and the accompanying documentation. Documented comments will be given more weight than undocumented comments. Specific comments will be given more weight than general comments. Further steps may be taken to determine the accuracy of the information if the Commission determines such action appropriate.

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Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0020
Comment from Steve Pfister

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Submitter's Representative: Jonathan Gold
Organization: National Retail Federation
Government Agency Type: Federal
Government Agency: CPSC

General Comment

Attached please find the comments of the National Retail Federation regarding Docket No. CPSC-2010-0041.

Attachments

CPSC-2010-0041-0020.1: Comment from Steve Pfister

National Retail Federation®
The Voice of Retail Worldwide

July 23, 2010

Todd A. Stevenson
Secretary
Consumer Product Safety Commission
4330 East-West Highway
Room 502
Bethesda, MD 20814

RE: Publicly Available Consumer Product Safety Information Database; Proposed Rule (Docket No. CPSC-2010-0041)

Dear Mr. Stevenson:

The following comments are submitted on behalf of the National Retail Federation (NRF) in response to the Consumer Product Safety Commission's (CPSC) *Federal Register* Notice titled - Publicly Available Consumer Product Safety Information Database; Proposed Rule (Docket No. CPSC-2010-0041). NRF appreciates the opportunity to submit comments about the proposed database. We believe if developed correctly with the appropriate protections for both business and consumers, the database will provide the agency, consumers and businesses with useful information. Our comments will focus on questions raised by the CPSC to date as well as other questions we have about the functionality of the database.

As the world's largest retail trade association and the voice of retail worldwide, the National Retail Federation's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. and more than 45 countries abroad. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of $2.3 trillion.

Overview

While the Consumer Product Safety Information Database has been mandated by Congress under Section 212 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), we appreciate the opportunity to comment on the proposal. It is critical that CPSC continue to reach out to industry as the database is developed to make sure it is done correctly. CPSC needs to ensure that the database actually provides useful information for consumers to make decisions about products and not publish false, unverified information that could lead to confusion for consumers and have negative impacts for manufacturers and retailers.

One of the biggest challenges we anticipate for both the CPSC and business will be the staffing requirements for each in monitoring and responding to consumer reports filed in the database. We know that CPSC will need a significant increase in staffing in order to be able to review each complaint that is filed within the five day requirement to

ensure that all of the required information is contained within the report. It is critical that only verified accurate information be allowed to be published in the database. In addition, businesses will need to look at hiring additional staff to monitor and respond to reports filed in the database. Typically it could take weeks for a manufacturer or retailer to be able to fully respond to a consumer complaint as they conclude a thorough investigation into the complaint. Under the proposed rule, businesses are only given 10 days to fully respond before a complaint is published in the database. While the manufacturer/retailer can post comments after the report is published, companies would prefer to get CPSC a response before a report is published, especially if it contains inaccurate or false information.

With regards to the draft rule as published, NRF has the following comments:

§ 1102.10(a) Who May Submit – Section 6A(b)(1)(A) of the Consumer Product Safety Act (CPSA) identifies the types of individuals or parties who would be allowed to submit reports to the database. The CPSC has sought to expand the types of individuals by adding an additional category of "others". While not being an expansive list, we are concerned that this additional category will not include those individuals with "first hand knowledge" of the report of harm from the use of a consumer product. The CPSA limited the parties who can submit reports of harm to the following groups: Consumers; local, State, or Federal government agencies; health care professionals; child service providers; and public safety entities. We believe that the ability to submit a report of harm should be limited to those entities identified by Congress and not include the additional category of "others".

§ 1102.10(d)(1) Description of the consumer product – In order for a report of harm to be considered for publication, it is critical that the minimum requirements be met. This includes an accurate description of the consumer product in question. At a minimum, the description must include accurate and specific information that correctly identifies the consumer product in question. Not having this information hinders potential investigation by affected companies and would confuse consumers. Consumers should be required to include traceability information in their complaint and if the traceability information does not match to the importer, manufacturer or retailer records, the importer, manufacturer and retailer of the product should not appear in the database without further investigation and proof that the product does belong to the importer, manufacturer or retailer being named in the compliant.

§ 1102.10(d)(5) Verification – We strongly support the requirement that a submitter has to verify that the report of harm is true and accurate. We question how the CPSC will verify that the submitter is actually an existing entity who is able to submit such a report. Will the CPSC validate that a mailing address included in the report is a valid address? Similarly, will the CPSC validate an email address included in the report? If neither the mailing address or email address are valid, we do not believe the CPSC should publish a report of harm.

§ 1102.10(f) Information not published – This section identifies information which will not be published in the database. The primary information which the CPSC identifies which will not be published is the name and contact information of the submitter of a report of harm. We believe that this information should be collected

(including an accurate and working email address) but should also be made available if requested by the retailer/manufacturer identified in the report of harm. Allowing the retailer/manufacturer to contact the individual who filed the report of harm will help the named retailer/manufacturer conduct an investigation into the validity of the filed report. Without this knowledge, the named company might not be able to conduct a full investigation into the report of harm.

§ 1102.10(h) Incomplete reports of harm – It is critical that a report of harm that contains incomplete information not be published in the database. We question whether the individual who posted the incomplete report will be identified and allowed an opportunity to correct the report to make it complete and whether or not a retailer/manufacturer will be notified if an incomplete report is filed.

§ 10102.26(b) Request for designation of materially inaccurate information – As mentioned above, we strongly believe that "any person" who can request that a manufacturer comment be excluded or corrected should be limited to those "persons" who have direct or first-hand knowledge of the issue or incident with the consumer product in the original report of harm. We do not believe this should be expanded to include the category of "other" as identified in the proposal.

§ 1102.44 Applicability of sections 6(a) and (b) of the CPSA – NRF strongly agrees with the comments in the *Federal Register* notice under question 20 about what information should not be included in the database. We agree with the commenters who stated that reports received under 15(b) of the CPSA should be excluded as well as information received from retailers/manufacturers/private labelers under other mandatory or voluntary reporting programs. We urge the CPSC to specifically clarify that these reports will not be included in the database.

Other Issues

As the CPSC continues to develop the Consumer Product Safety Information Database, we have numerous questions that we believe CPSC needs to address. These include:

- How will CPSC fully educate the business community about the database and the need to register?
- Will only those retailers/manufacturers/private labelers who are registered with the database receive notification about reports of harm in which they are named? If not, how will those not registered receive notification about reports of harm?
- Is registration in the database limited to domestic companies or is registration open to foreign based companies as well?
- If both a retailer and a manufacturer are identified in a report of harm, will both be notified? Will comments from both be accepted to the report?
- How will CPSC deal with multiple registrations from companies? Are companies limited as to how many registrations they want included in a notification list?
- What kind of verification technology will the CPSC be using to ensure legitimate parties are filing reports of harm? Will this technology be able to prevent mass postings from unauthorized parties?

- If a manufacturer or retailer are able to discuss the report of harm with the party who files a report of harm and can resolve the issue identified, is there an option for the party to withdraw the report of harm from the database?

Conclusion

NRF welcomes the opportunity to share our thoughts on the Consumer Product Safety Information Database. We encourage CPSC to continue to work with the business community and others to ensure the development of a database that will properly work for the agency, consumers and businesses alike.

We appreciate the opportunity to provide input on this important issue. If you have any questions, please contact Jonathan Gold (goldj@nrf.com), NRF's Vice President, Supply Chain and Customs Policy in the NRF office.

Sincerely,

[redacted]

Steve Pfister
Senior Vice President
Government Relations

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Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0021
Comment from Gregg Ublacker

Submitter Information

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Submitter's Representative: Gregg Ublacker
Organization: The Yankee Candle Company Inc.

General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0021.1: Comment from Gregg Ublacker

YANKEE CANDLE
America's Best Loved Candle

July 23, 2010

Transmitted electronically to
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Todd A. Stevenson
Office of the Secretary
U.S. Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland 20814

Re: Publicly Available Consumer Product Safety Information Database (Docket No. CPSC-2010-0041 [75 Fed. Reg. 29156])

Dear Mr. Stevenson:

The Yankee Candle Company Inc. (Yankee Candle) supports the important mission of the Consumer Product Safety Commission (Commission) to protect the public from unreasonable risk of injury. Yankee Candle appreciates the opportunity to submit comments about the proposed database. Yankee Candle believes that a properly designed and implemented database would be of significant value to both the public and the CPSC as a means of identifying potentially unsafe consumer products. However, the database as currently proposed lends itself to potential abuse along with the posting of inaccurate and unsubstantiated information that could mislead consumers, unfairly defame manufacturers of safe products, and undermine the integrity of the database and the CPSC.

While the Consumer Product Safety Information Database has been mandated by Congress under Section 212 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), we appreciate the opportunity to comment on the proposal. It is critical that CPSC continue to reach out to industry as the database is developed to make sure it is done correctly. CPSC needs to ensure that the database actually provides useful information for consumers to make decisions about products and not publish false, unverified information that could lead to confusion for consumers and have negative impacts for manufacturers and retailers.

One of the biggest challenges we anticipate for both the CPSC and business will be the staffing requirements for each in monitoring and responding to consumer reports filed in the database. We anticipate that CPSC will need a significant increase in staffing. Otherwise, the Commission will not be able to review each complaint that is filed within the five day period to ensure that all of the required

information is contained within the report. It is critical that only verified accurate information be allowed to be published in the database. In addition, businesses like ours will need additional staff to monitor and respond to reports filed in the database. Typically it takes weeks to be able to fully respond to a consumer complaint as we conclude a thorough investigation into the complaint. Under the proposed rule, businesses are only given 10 days to fully respond before a complaint is published in the database. While the manufacturer/retailer can post comments after the report is published, companies like ours, would prefer to get CPSC a response before a report is published, especially if it contains inaccurate or false information.

With regards to the draft rule as published, Yankee Candle has the following comments:

§ 1102.10(a) Who May Submit **– Section 6A(b)(1)(A)** of the Consumer Product Safety Act (CPSA) identifies the types of individuals or parties who would be allowed to submit reports to the database. The CPSC has sought to expand the types of individuals by adding an additional category of "others". While not being an expansive list, we are concerned that this additional category will not include those individuals with "first hand knowledge" of the report of harm from the use of a consumer product. The CPSA limited the parties who can submit reports of harm to the following groups: Consumers; local, State, or Federal government agencies; health care professionals; child service providers; and public safety entities.

§ 1102.10(d)(1) Description of the consumer product – In order for a report of harm to be considered for publication, it is critical that the minimum requirements be met. This includes an accurate description of the consumer product in question. At a minimum, the description must include accurate and specific information that correctly identifies the consumer product in question. Not having this information hinders potential investigation by affected companies and would confuse consumers. Also, Additional fields should be added to the report submission. At a minimum, fields should be added to indicate the approximate date and location of the product purchase, and the UPC code number, to help identify the product in question. This is critical for manufacturers whose product lines are extensive and/or who sell products with widely varying shelf and usage lives, and/or distinctive geographic distribution patterns. The inclusion of the UPC code is especially important in helping differentiate similar products or products with similar brand names.

§ 1102.10(f) Information not published – This section identifies information which will not be published in the database. The primary information which the CPSC identifies which wont' be published is the name and contact information of the submitter of a report of harm. We believe that this information should be collected (including an accurate and working email address) but should also be made available if requested by the retailer/manufacturer identified in the report of harm. Allowing the retailer/manufacturer to contact the individual who filed the report of harm will help the named retailer/manufacturer conduct an investigation into the validity of the filed report. Without this knowledge, the named company might not be able to conduct a full investigation into the report of harm.

§ 1102.10(h) Incomplete reports of harm – It is critical that a report of harm that contains incomplete information not be published in the database. We question whether the individual who posted the incomplete report will be identified and allowed an opportunity to correct the report to make it complete and whether or not a retailer/manufacturer will be notified if an incomplete report is filed.

§ 10102.26(b) Request for designation of materially inaccurate information – As mentioned above, we strongly believe that "any person" who can request that a manufacturer comment be excluded or corrected should be limited to those "persons" who have direct or first-hand knowledge of the issue or incident with the consumer product in the original report of harm. We do not believe this should be expanded to include the category of "other" as identified in the proposal.

§ 1102.44 Applicability of sections 6(a) and (b) of the CPSA – Yankee Candle strongly agrees with the comments in the *Federal Register* notice under question 20 about what information should not be included in the database. We agree with the commenter's who stated that reports received under 15(b) of the CPSA should be excluded as well as information received from retailers/manufacturers/private labelers under other mandatory or voluntary reporting programs. We urge the CSPC to specifically clarify that these reports will not be included in the database.

The Yankee Candle Company Inc. appreciates the opportunity to provide input on this important issue. If you have any questions, please do not hesitate to contact me at 413-665-8306, Ext. 4444 or Gregg.Ublacker@YankeeCandle.com.

Respectfully Submitted,

Gregg Ublacker
Director of Regulatory Affairs

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Document: CPSC-2010-0041-0022
Comment from Cary Silverman

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Submitter's Representative: Cary Silverman
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General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0022.1: Comment from Cary Silverman

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July 23, 2010

Via Electronic Filing

Office of the Secretary
Consumer Product Safety Commission
4330 East West Highway, Room 502
Bethesda, MD 20814

Re: CPSC Docket No. CPSC-2010-0041; Comments on the Publicly Available Consumer Product Safety Information Database Notice of Proposed Rulemaking

We are counsels for and writing on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). We are pleased to submit these comments in response to the Consumer Product Safety Commission's ("CPSC's" or "Commission's") notice of proposed rulemaking (NPRM or proposal) that was published in the Federal Register on May 24, 2010, with respect to the "Publicly Available Consumer Product Safety Information Database" required by Section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA").

The U.S. Chamber of Commerce ("the Chamber") is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. Many of its members are manufacturers, wholesalers, distributors, and retailers of consumer products that will be affected by the proposed regulations. ILR is an affiliate of the Chamber, representing the nation's business community, with the critical mission of making America's legal system simpler, fairer and faster for everyone.

The Chamber provided public comments to the Commission at its November 10, 2009 public hearing on the Establishment of a Public Consumer Product Safety Incident Database. We are pleased to find that the NPRM, in some respects, is responsive to the Chamber's concerns. Most significantly, the proposed rule includes a mechanism for manufacturers to identify, and the CPSC to investigate, inaccurate information submitted to the database. In addition, the proposed rule would alert consumers that the information contained in the database is unverified by including a prominent disclaimer to that effect on every page and printed report.

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

I. Summary of Concerns With the Proposed NPRM

After carefully reviewing the NPRM, the Chamber continues to have concern in several areas. As discussed in more detail below, the NPRM:

- adds to those who may file a report, a new category called "others," which may lead to duplicative reports, reports filed by those without first-hand knowledge, or filings by individuals or organizations with a political agenda or financial motivation;

- does not require specific product identification, such as the model name or number, which may tarnish a manufacturer's entire product line without offering useful information to consumers;

- allows irrelevant, inappropriate, and extraneous information that is not related to product safety to remain in the database;

- includes recall notices in the database, potentially confusing users as to what information is and is not verified;

- restricts businesses from contacting the consumer to resolve the reported concern, even when the consumer consents to providing his or her contact information to the manufacturer;

- limits manufacturers from commenting on a report one year after it is filed, while allowing the filing of reports at any time after the injury or identification of a potential hazard;

- favors the posting of reports containing information identified as materially inaccurate by manufacturers when the Commission is unable to verify the information within the ten-day notification period; and

- lacks sufficient assurance that inaccurate information identified by a manufacturer *after* publication will be promptly removed.

The Chamber's comments discuss these continuing areas of concern and recommend changes to address these issues. The Chamber's comments are presented below in the order in which these issues appear in the proposed regulation.

II. Specific Areas of Concern and Suggested Revisions

1. Proposed § 1102.10(a) – Who May File Reports

The CPSIA provides that consumers, government agencies, health professionals, child service providers, and public safety entities may file reports through the online database. Proposed Section 1102.10(a)(6) includes an additional category, "others," which is not supported by the statutory text and explicitly would include attorneys,

professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations.

The Chamber is concerned that authorizing these additional individuals and groups to file reports increases the possibility of duplicative reports for the same injury or risk of harm. In addition, permitting those beyond individuals who themselves have been harmed by a product, government agencies that have a statutory obligation to protect the public, licensed health professionals, and child care service providers, diminishes the reputability of information contained in the database. Such filers would rely on information obtained by others, rather than personal experience. Moreover, by allowing essentially anyone to file a report, Section 1102.10(a)(6) may provide an opportunity for individuals or groups to use the database to promote their personal or political agendas, to take retaliatory action against a company, or to further financial motivations. The "others" category, Section 1102.10(a)(6), should not be included in the final rule.

2. *Proposed § 1102.10(d)(1) – Product Identification*

Proposed Section 1102.10(d)(1) requires an individual who files a report to provide basic information including a description of the product, identification of the manufacturer, a description of the harm or risk of harm, contact information, verification that the information is true and accurate, and consent to include the report in the public database. It provides that the description must include a word or phrase sufficient to distinguish a product identified in the report of harm as a consumer product or a component of a consumer product or substance regulated by the Commission. Other information, such as the name of the product, model, serial number, manufacture date, date of purchase, price, photograph or description, or retailer, is not required. It is merely considered "helpful" information, according to the NPRM.

Under proposed Section 1102.10(d)(1), an individual or group may report a product as posing a risk of harm by merely identifying a manufacturer, type of product, and alleged harm or risk of harm, i.e., Mr. Coffee coffee maker may leak. Such vague descriptions could tarnish a manufacturer's entire product line and provides little value to consumers. The Chamber urges the Commission to revise Section 1102.10(d)(1) to require the model name or number of the product at issue among the minimum requirements for publishing a submitted report. The drop-down menus that the CPSC plans to incorporate into the database should assist those submitting reports in providing this necessary information.

3. *Section 1102.10(f) – Inappropriate Information Contained in Reports*

During the November 2009 hearing, the Chamber raised concern that reports could include information that is not necessarily "materially inaccurate," but has no place in the database. The Commission properly "recognizes that the scope of the database is

limited to reports of harm." It suggests that "instructions and guidance throughout will prompt the submitter to adhere to this scope." While such mechanisms may help discourage posting of improper information, it is likely that some reports will pertain to products outside of CPSC jurisdiction or concern extraneous issues not related to harm or risk of harm from a consumer product. Such reports or information should not appear in the CPSC database.

In response, Section 1102.10(f)(8) provides the CPSC with discretion not to publish information contained in a report if it "is not in the public interest to publish" and provides four factors that the Commission would consider to determine whether information serves a product safety purpose. The Commission states that reports outside of CPSC jurisdiction will be referred to the appropriate agency. These provisions and responses do not adequately address the Chamber's concern. While user prompts and drop-down menus will attempt to guide users into focusing on harm or risk of harm, should inappropriate comments such as product quality, satisfaction, or service appear in a report alongside a product hazard, it is likely that such information will remain online indefinitely. The Chamber urges the Commission to remove statements not related to product safety that appear in a report.

4. Proposed § 1102.14 – Recall Notices in the Database

Proposed § 1102.14 provides for inclusion of voluntary and mandatory recall notices in the online database. This provision appears to implement the CPSIA mandate that the database include "[i]nformation derived by the Commission from notice under section 15(c) or any notice to the public relating to a voluntary corrective action taken by a manufacturer, in consultation with the Commission, of which action the Commission has notified the public."

Unless implemented properly, the mixing of recall information with self-reported and unverified reports could cause confusion. Recall notices stem from verified product hazards. Including this information among unverified consumer reports could both lead consumers to give allegations in reports undue weight or discount the seriousness of verified recall notices. For this reason, the Chamber recommends presenting information in the database related to recalls in a manner that clearly identifies its nature.

5. Proposed § 1102.20 – Restriction on Contacting Consumers

When filing a report, Section 1102.20(a)(1) provides consumers with the option of checking a box expressly consenting to the Commission sharing their contact information with the manufacturer. Nevertheless, proposed Section 1101.20(b) provides that a manufacturer may not contact a consumer "for any other purpose other than verification of information contained in a report of harm" such as his or her identity, the product model, the harm or risk of harm, and the incident leading to the filing of a report.

"Verification of information contained in a report of harm must not include activities such as sales, promotion, marketing, warranty, or any other commercial purpose."

The Chamber suggests that once a consumer affirmatively consents to contact by the manufacturer, neither should be restricted from attempting to completely resolve the concern raised by the consumer. In particular, manufacturers should not be precluded from offering a consumer who submits such a report a repair, replacement, or exchange of the product at issue or a credit or reimbursement of the purchase price. The current language of Section 1102.20(b) does not appear to provide sufficient flexibility to manufacturers to take such actions.

6. *Proposed § 1102.20(g) – One-Year Limitation on Manufacturer Comments*

Proposed Section 1102.20(g) provides that the Commission may choose not to publish manufacturer comments that are received more than one year after a consumer files a report. This appears to be a double standard. There is nothing to prohibit a consumer (or lawyer or advocacy group) from filing a report any time after identifying a hazard or potential hazard. Nor does the NPRM require the CPSC to remove stale reports from the database, allowing reports to remain online even after the product is no longer sold. For these reasons, it would appear only fair and equitable to allow manufacturers to respond to reports so long as they remain online.

7. *Proposed § 1102.26 – Designation of Materially Inaccurate Information*

Although the CPSIA provides that the Commission must not publish materially inaccurate information, the statute does not provide a specific procedure or established timeline for ensuring its accuracy. Given the click-of-a-mouse speed at which users may submit reports and the short ten-day period in which the CPSIA requires publication of a report submitted online, it is inevitable that incorrect information will be disseminated to the public. It is important that the Commission provide a mechanism to promptly address such errors.

In November 2009, the Chamber proposed that the Commission provide manufacturers with the ability to "flag" inaccurate information through the website's "industry portal" *before* it is published online. We are pleased the Commission appears to have included such a system in proposed Section 1102.26; however, we continue to have serious concerns.

According to Section 1102.26(d), a manufacturer's flagging a report as containing materially inaccurate information would trigger Commission review and provide the Commission with the discretion to withhold publication during this review period. If the Commission is unable to verify the accuracy of the information in a very short ten-day

time frame after transmitting a report of harm, then it may nevertheless post the potentially inaccurate information. ("[T]he Commission *may* withhold a report of harm from publication in the Database until it makes a determination. *Absent such a determination*, the Commission will generally publish reports of harm on the tenth business day after transmitting a report of harm."). Section 1102.26(i)(2) provides a means for requesting expedited determinations of claims of materially inaccurate information, but Section 1102.26(c)(1) provides a default rule favoring publication of information of questionable accuracy.

The Chamber urges the Commission to withhold publication of reports flagged as containing materially inaccurate information until it has completed its investigation and verified the information or made the necessary corrections. This is the only responsible course of action.

In addition, proposed Section 1102.26(h) does not sufficiently address how the Commission will resolve information flagged as inaccurate *after* it is posted online. The NPRM recognizes that the CPSIA provides that information that the Commission has found to be inaccurate must be removed from the database, or corrected, within seven business days. The CPSIA, however, provides no set time period for *initiating or completing* an investigation of whether the information is inaccurate and reaching a determination that would trigger the seven-day period for removal. For these reasons, unless otherwise addressed in the NPRM, it would appear that inaccurate information may remain online for a prolonged time, potentially indefinitely.

In November 2009, the Chamber recommended establishing a reasonable time frame for conducting such an investigation and removing already-posted information flagged as inaccurate pending investigation. The NPRM does not include this recommendation. At the very minimum, posted information that is challenged as inaccurate, if not removed from the database during investigation, should be labeled for database users as potentially inaccurate and undergoing CPSC verification.

8. Proposed § 1102.42 – Disclaimers

Proposed Section 1102.42 provides that the database would "prominently and conspicuously" place the CPSIA-required disclaimer on the database and on any documents printed from the database. The Commission makes clear in its response to comments that, at minimum, the disclaimer would appear on the entrance screen, all search result displays, and all reports printed from the public database. The Chamber supports this approach. Such treatment is needed to alert users that information included in the database is user-submitted and not verified for accuracy by the Commission. We note, however, that such a disclaimer is not a substitute for the CPSC's responsibility to act prudently to ensure that it does not convey inaccurate information to the public.

III. Conclusion

Again, the Chamber thanks the CPSC staff for actively soliciting information and providing interested parties the opportunity to comment. Please do not hesitate to contact us if the Chamber may be of assistance to you as the Commission considers this important matter.

Sincerely,

[redacted]

Victor E. Schwartz
Cary Silverman

PUBLIC SUBMISSION

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0023
Comment from Kyle Pitsor

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General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0023.1: Comment from Kyle Pitsor

Setting Standards for Excellence

KYLE PITSOR
Vice President, Government Relations

SUBMITTED VIA FEDERAL E-RULEMAKING PORTAL

July 23, 2010

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Room 502
Bethesda, MD 20814

Re: Publicly Available Consumer Product Safety Information Database – Proposed Rule (Docket No. CPSC-2010-0041), 75 F.R. 29156 (May 24, 2010)

The National Electrical Manufacturers Association (NEMA) welcomes the opportunity to submit comments on behalf of its member companies to the docket for the U.S. Consumer Product Safety Commission's (CPSC) proposed rule establishing a Publicly Available Consumer Product Safety Information Database.

NEMA is the association of electrical and medical imaging equipment manufacturers. Founded in 1926 and headquartered near Washington, D.C., NEMA's approximately 450 member companies manufacture products used in the generation, transmission and distribution, control, and end use of electricity. These products are used in utility, industrial, commercial, institutional, and residential applications. Some of the products within NEMA's scope are consumer products regulated by the Consumer Product Safety Act. Worldwide sales of NEMA-scope products exceed $120 billion. In addition to its headquarters in Rosslyn, Virginia, NEMA also has offices in Beijing and Mexico City.

NEMA is offering general comments on the proposed rule, followed by comments on specific sections and other issues for consideration. In summary, NEMA expresses the following views:

- Misuse and abuse of the database seems inevitable. Additional precautions against misuse and abuse are appropriate
- The Proposed Rule does not delineate how CPSC will determine "harm" or "report of harm" and it does not define "risk."
- The date of the reported harm should be included as part of the mandatory description of harm.

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- CPSC should require the submitter to state that the product included all of its original parts and was not altered, and that the product was installed and maintained per the manufacturer's instructions
- CPSC should include a notice to submitters to ensure that spoliation does not occur so that manufacturers have an opportunity to investigate claims. This is also important to the issue noted below with respect to reports of harm involving counterfeit products.
- Proposed Section 1102.24 relating to the designation of confidential information is flawed because it assumes that a manufacturer will have the name of the submitter.
- CPSC staff that are responsible for evaluating materially inaccurate information should have expertise in the product area.
- The Proposed Rule does not address how the CPSC will ensure that reports of harm do not include reports involving counterfeit product.
- The Final Rule should include a provision for sunsetting or deleting reports of harm from the database after a period of time has expired.

General Comments

NEMA recognizes that in requiring the CPSC to establish the "Publicly Available Consumer Product Safety Information Database," Congress set forth specific content, procedures, and search requirements for the database in Section 6A of the Consumer Product Safety Act (CPSA), as amended by the Consumer Product Safety Improvement Act of 2008 (Public Law 110-314), that the CPSC must follow in promulgating the rule. NEMA commends the CPSC for working with the stakeholder community to solicit feedback on how it should interpret the congressional mandate, as well as parts of the database for which the CPSC has greater flexibility to administer.

Despite the work the CPSC has done to address potential problems that could arise because of inaccurate information being included in the database, the inevitability of misuse or abuse of the database remains. NEMA is concerned that the database, rather than becoming an objective repository of information important to public safety and public policy for the protection of consumers, could become a tool for excessive reporting of unsubstantiated and uninvestigated reports of harm motivated by pecuniary interest. The database could be misused by consultants whose technical views enjoy no or virtually no support among peers, by claimants whose claims have no traction or merit.

Without proper processes in place to limit access to confidential information or ensure accuracy, the database may be open to misuse by those submitting fraudulent reports, including competitors of companies named, or otherwise contribute to a significant increase in the likelihood of litigation. In this last regard, any such litigation might also present a high likelihood of requiring CPSC testimony regarding information it elected to or not to publish. In addition, contractors looking for reasons not to use/specify a product or allow it on a job could use the information contained in the database to

prevent a certain manufacturer from bidding on a project, which could lead to sole-source project specifications.

It is also worth noting that some issues are greatly misunderstood by consumers and could be misreported in the database. While there may be no proven health risks associated with a particular product, media sensationalization of a presumed risk could lead consumers to report every incident associated with such product. For example, compact fluorescent lamps (CFLs) contain a miniscule amount of mercury necessary to produce energy-efficient lighting. Despite a lack of substantial health risk or hazard associated with this product, sensational media reports about broken CFLs could lead to consumers reporting every such incident and thereby damage the reputation of this energy-efficient product line and undermining public policy promoting energy efficiency.[1]

NEMA also is concerned that the proposed rule fails to address how the database will handle consumer misapplication issues, i.e., product problems that result from the consumer misusing or misapplying the product. This issue will be explored further in NEMA's comments on Subpart B of the proposed rule. The database must incorporate robust controls to prevent fabrications and misstatements made by participants that would give the appearance of being endorsed by the federal government through publication in a government database.

In the advance notice of proposed rulemaking, the CPSC asked "what, if any, measures should the agency employ to prevent the submission of fraudulent reports of harm while not discouraging the submission of valid reports." NEMA is pleased that the CPSC agrees that "preventing fraudulent reports is a high priority in the development of the public database" (75 FR at 29164). The CPSC should be commended for considering implementing safeguards to ensure that incident report forms are not being generated by an automated computer and for examining technical options to detect if multiple reports are submitted from the same IP address. Numerous submissions from a single source should be reviewed for verification to avoid inappropriate use of the database. In addition to using technology to prevent spamming and to flag multiple complaints from the same submitter, NEMA recommends that the CPSC make database downloads solely available in PDF format so they cannot be easily edited or manipulated.

NEMA believes CPSC will be equally concerned about the potential for abuse or misuse of the database, because of its potential to undermine CPSC as a credible source of information about consumer product safety.

Proposed Subpart A—Background and Definitions

NEMA is concerned with the definitions of "harm" and "report of harm" in proposed Subpart A of the proposed rule and seeks clarification from the CPSC. Proposed §1102.6(b)(5) defines "harm" as "any injury, illness, or death, or any risk of injury, illness, or death, *as determined by the*

[1] This is a real-world concern as documented by two scientists at Lawrence Berkeley National Laboratory. See http://www.lamprecycle.org/public/images/docs/LD+A%20August%202009.pdf

Commission" [emphasis added]. Similarly, proposed §1102.6(b)(8) states that "report of harm" means "any information submitted to the Commission...regarding an injury, illness, or death, or any risk of injury, illness, or death as *determined by the Commission* [emphasis added], relating to the use of a consumer product."

The proposed rule fails to specify how the CPSC will make such determinations. How will the CPSC determine whether actual harm occurred, based on these definitions? The rule seemingly requires publication of the submitted report of harm in the database so long as the submitter meets the minimum content requirements specified in proposed Subpart B of the rule. The "harm," then, appears to be determined by the submitter, not the CPSC, with the CPSC accepting such information for publication with minimal, if any, investigation of the reported incident. The definitions of "harm" and "report of harm" do not seem to support the process or premise on which the database is constructed.

While the proposed rule seemingly outlines a "burden of proof" standard for manufacturers making claims of confidential business information or materially inaccurate information, there does not appear to be a similar burden of proof on submitters of reports of harm. Due to the limited screening proposed and the broad range of individuals who can submit to the database, there are limited restrictions on the allegations that can be made. Unfortunately, simply posting a manufacturer's comment in response to a posted report of harm will not be sufficient to undo harm caused by any misstated, exaggerated, or fabricated report of harm that may be included in the database.

The proposed rule also misses an opportunity to define the word "risk." The CPSC indicates that the definitions of Section 3 of the Consumer Product Safety Act (15 U.S.C. 2052) apply to the database. Section 3(a)(14) defines "risk of injury" as "a risk of death, personal injury, or serious or frequent illness." For purposes of the proposed rule, however, the term "risk" should be further clarified and defined. For example, if a consumer drops a light bulb or a ceramic coffee mug and it shatters, there is a "risk" of personal injury because the individual could cut himself on the broken shards while disposing of the product. Under the current definitions of CPSA and the proposed rule, this incident would qualify for reporting to the database even though it is not a result of an inherent product defect or malfunctioning. The database would become unwieldy very quickly if every incident of a shattered ceramic or glass item was reported for its "risk" of personal injury.

Proposed Subpart B—Content Requirements

Reports of Harm (§ 1102.10)

NEMA acknowledges that Congress, through CPSA Section 6A amendments enacted by CPSIA, identified potential submitters of reports of harm and outlined certain minimum required criteria for information to be provided. However, the CPSC has the latitude to solicit information from submitters of reports of harm beyond that required by statute, and has exercised its ability to do so in the proposed rule.

NEMA appreciates that the CPSC elaborated on the minimum content requirements in proposed §1102.10(d) of the proposed rule in an effort to solicit as much information as possible from submitters about the alleged incident or risk being reported. Section 1102.10(d)(3) of the proposed rule provides that a "report of harm" must include "[a] brief narrative description of an illness, injury, or death, or risk of illness, injury, or death related to use of the consumer product." However, at the time the report is filed, the report is an *allegation* of illness, injury, or death, or risk of injury, illness, or death, and should be identified as such. It is important that consumers and other persons accessing the database understand that the information contained therein, particularly information generated from third party reports outside the CPSC, has not been proven.

NEMA commends the CPSC for requiring disclaimers (§1102.42) in the database stating that the Commission does not guarantee the "accuracy, completeness or adequacy" of the database, "particularly...information submitted by persons outside of the CPSC," but the disclaimer is undercut if the regulation (and subsequent reporting form) do not make clear that "reports of harm" are, in fact, allegations. The alleged injuries and illnesses may or may not have occurred as stated in the reports, or may be overstated, and may or may not be related to use of the identified consumer product.

NEMA recommends that §1102.10(d)(3) be amended to identify reports as reports of "alleged" illness or injury, or risk of illness or injury "allegedly" related to use of a product. The CPSC also should make clear, throughout the regulation wherever reference is made to reports of harm, that these reports are allegations, "particularly...information submitted by persons outside of the CPSC." Reports of harm that are based on voluntary or mandatory recalls may be separately characterized as such.

Section 1102.10(d)(3) also states that a report "may, but need not, include the date on which the harm occurred or manifested itself" [emphasis added]. NEMA believes that the CPSC errs in not requiring the date on which the harm occurred or manifested itself to be included as part of the mandatory "description of harm." While we recognize that persons reporting incidents of alleged harm may not know the exact date on which the incident occurred, we believe that the regulation should encourage the reporting of dates when this information is known. Knowing the date on which the harm occurred, even if stated in broad terms or approximated, can help database users evaluate the report and assist manufacturers in isolating and identifying problems. In addition, requiring the submitter to report the date of harm or risk of harm would reduce the likelihood of bogus or "spam" reports being added to the database. NEMA recommends that the CPSC require the submitter to identify the date of the alleged incident and to publish the date on which the report of harm is made.

Accordingly, NEMA recommends that §1102.10(d)(3) be amended to read as follows:

> "(3) Description of the harm. A brief narrative description of an **alleged** illness, injury, or death, or risk of illness, injury, or death **allegedly** related to the use of a consumer product. Examples of a description of **alleged** harm or risk of harm include but are not limited to:

> death, asphyxiation, lacerations, burns, abrasions, contusions, fractures, choking, poisoning, suffocation, amputation, or any other narrative description relating to a bodily harm or risk of bodily harm. Incident reports that relate solely to the cost or quality of a consumer product, with no discernable bodily harm or risk of bodily harm, do not constitute "harm" for purposes of this part. **Whenever possible**, a description of **alleged** harm ~~may, but need not,~~ **should** include the date **or approximate date** ~~on which~~ **when** the harm occurred or manifested itself, and the severity of any **alleged** injury and whether any medical treatment was received. **If the date is unknown, the report should so state.**"

Proposed §1102.10(d)(5) includes a requirement that reports of harm be verified as "true and accurate to the best of the submitter's knowledge, information, and belief" (75 FR at 29177). NEMA believes this is critical. It is also important that submitters filing reports should be advised that persons knowingly filing false reports may be subject to fines and imprisonment. Even with the requirement for verification, the reporting process is vulnerable to fraud. Putting individuals filing reports on notice that sanctions are attached to fraudulent reports may further discourage false and malicious reporting.

NEMA recommends that the following text be added to the requirement in §1102.10(d)(5): "*The incident report form and the CPSC's Internet Web site shall advise persons filing reports that Title 18, United States Code 1001, makes it a criminal offense, punishable by fines or imprisonment, or both, knowingly to make a false statement or representation to any Department or Agency of the United States, as to any matter within the jurisdiction of any Department or Agency of the United States, and that this includes any statement which is knowingly incorrect or knowingly incomplete or misleading in any important particular.*"

Proposed §1102.10(e) describes the ability of the CPSC to seek other categories of voluntary information. In the notice of proposed rulemaking, the CPSC requested comment as to whether additional categories should include "...additional data about the product in question, such as whether the product still contained all of its original parts, or had been altered in any way not according to a manufacturer's instructions." Not only should the CPSC solicit additional information on whether the subject product contained all of its original parts or had been altered, the CPSC should require the submitter of harm to affirmatively verify that the product was installed, maintained and/or used per the manufacturer's instructions. Manufacturers' instructions detail safe use information and generally provide warnings about potential dangers from anticipated misuse or misapplication of a product.

Manufacturer Comments (§ 1102.12)

The database established by the rule could lead to a significant number of reports of harm for which manufacturers may choose or be expected to comment. The database could quickly become untenable for the CPSC to manage if this scenario occurs. This is particularly true when claims of

confidential information or materially inaccurate information, which require CPSC review and determination, are made.

In our industry's experience, manufacturers often need to see the electrical product in question in order to understand whether it has been misapplied, misused, or abused, or is otherwise defective in its design or operation. Without a physical examination of the product, the information provided by the user/consumer in most cases cannot be responded to in any meaningful manner. For that reason, NEMA urges CPSC to strongly encourage submitters of report of harm to consent to the release of their contact information to manufacturers.

Proposed Subpart C—Procedural Requirements

Transmission of Reports of Harm to the Identified Manufacturer or Private Labeler (§ 1102.20)

Proposed §1102.20(a) outlines the procedural requirements for transmission of reports of harm to the identified manufacturer or private labeler, and specifies that the name and contact information for the submitter of the report of harm will not be provided to the manufacturer, unless the submitter provides express written consent. While NEMA understands the importance of guarding consumers' personal information and the need for safeguards against misuse of such information, legitimate product issues can only be resolved when manufacturers are able to investigate the alleged harm or incident.

In the section of the *Federal Register* notice titled "Comments on the Publicly Available Database and CPSC's Responses," the CPSC indicates that the incident report form will "inform the user about the purpose, use, and protection of information being collected by the CPSC and how the manufacturer might use the information provided he or she should choose to release it to the manufacturer" (75 FR at 29167). NEMA recommends that in addition to providing a description of how the manufacturer may find it beneficial to contact the consumer to investigate the incident further and examine the product, the CPSC also should recommend that submitters consenting to the release of their contact information to the manufacturer should retain the product, samples, and/or evidence for the manufacturer to analyze.

NEMA remains concerned with the restrictive timing of the transmission of reports of harm to manufacturers (within five days of their receipt) and publication in the database (no later than 10 business days after the report of harm is transmitted to the manufacturer). While NEMA understands that these timeframes were mandated statutorily by Congress in the CPSA, manufacturers will have limited ability to provide any comments prior to publication of the reports of harm in the database, particularly where the manufacturer is not easily identified or has not been provided the name or contact information for the submitter of the report of harm to conduct appropriate examination or investigation of the alleged incident.

Designation of Confidential Information (§ 1102.24)

NEMA commends the CPSC for providing manufacturers the opportunity to "flag" reports of harm that may contain confidential business information for CPSC review. However, §1102.24 of the proposed rule is flawed because subparagraph (4) assumes that the manufacturer will have access to the name of the submitter of the report of harm, which would not be the case if the submitter fails to consent to its release.

Proposed §1102.24(b) states that "Each requester seeking such a designation of confidential information bears the burden of proof and *must* [emphasis added]...(4) State the company's relationship with the victim and/or submitter of the report of harm and how the victim and/or submitter of the report of harm came to be in possession of such allegedly confidential information". While a manufacturer may be able to tell from examining the report's description of harm that it could contain confidential information, a manufacturer or private labeler could not meet the criteria outlined in §1102.24(b)(4) without identifying a specific relationship to the victim or submitter. Should the submitter choose not to consent to the release of his/her name and contact information, the manufacturer could not meet this point of criteria and the CPSC subsequently might determine that the manufacturer has not met the burden of proving confidential information.

Designation of Materially Inaccurate Information (§ 1102.26)

In the proposed rule and public statements, the CPSC has indicated it "shall favor correction and addition to correction over exclusion of entire reports of harm and manufacturer comments where possible" (proposed §1102.26(i)(1)). NEMA understands the desire of the CPSC to protect the integrity of the database and ensure that it meets its intended purpose, but believes that there should be some limits on the CPSC's ability to determine claims of materially inaccurate information and make corrections. At a minimum, NEMA seeks assurances that the CPSC staff charged with making such determinations and corrections will be well-versed in the product in question. For example, manufacturers making claims of materially inaccurate information contained in reports of harm involving electrical products should reasonably expect that such claims and reports will be reviewed by CPSC staff with expertise in electrical engineering or electrical safety.

NEMA also recommends that CPSC make clear both in the rule and in any contemplated media campaign the penalties applicable to the intentional filing of false information and consider an accelerated penalty structure for such activity when part of any anti-competitive practices. CPSC should highlight in the final rule and outreach campaigns that the intentional submission of materially inaccurate information may be referred for administrative or criminal proceedings, if warranted, including to the Federal Trade Commission (FTC) and/or Department of Justice (DOJ), as appropriate where anti-competitive or criminal behavior is suspected. Providing this disclaimer would discourage the intentional submission of materially inaccurate information.

Although proposed §1102.26 would allow for the removal of materially inaccurate information in a report of harm, it is unclear how the time frame associated with such a request relates to the relatively short time period for the CPSC to review a report and any related manufacturer's comments prior to publication in the database. Subparagraphs (g) and (h) make it clear that CPSC contemplates instances in which materially inaccurate information would have to be removed prior to or after publication. However, for a manufacturer whose reputation may be seriously impacted by a fraudulent report, rectification after publication may be too late to prevent significant brand damage.

Other Issues

Reports of Harm Involving Counterfeit Products

In the proposed rule, the CPSC fails to address how it would handle reports of harm that may result from counterfeit products. It is possible that the product involved in a reported incident may appear to the average consumer to have a legitimate manufacturer name and/or model number, but could, in fact, still be a counterfeit product. Manufacturers of legitimate consumer products often can tell by a physical examination of a product if it is theirs or a counterfeit good, but without the guaranteed ability for manufacturers to retrieve the product subject to the report of harm for examination, there is a possibility the database could contain many reports of harm involving counterfeit goods, leaving manufacturers to defend a report that doesn't even involve their products. Such reports would denigrate the brands and reputations of legitimate manufacturers without cause. In issuing a final rule, the CPSC should consider how it will handle reports of harm for which it is suspected that the subject product is counterfeit.

NEMA submits this comment, because as the CPSC knows, NEMA members and Underwriters Laboratories have brought unsafe counterfeit electrical products to the attention of the CPSC, which have subsequently been the subject of recall activity.

Limits on Time Reports of Harm Available in the Database

The proposed rule does not place any time limits on the length of time such reports will remain in the publicly available database. As the database grows over time, it could become so large and unwieldy as to yield few practical uses for consumers. In promulgating a final rule, NEMA recommends that the CPSC impose reasonable limits on the amount of time the reports of harm will be actively available in the publicly searchable portion of the database. After such time, the reports should be archived for the CPSC's use.

The proposed rule also appears to allow "old" incidents to be reported, regardless of the date of occurrence. This could lead to thousands of outdated incidents, including some of which have been resolved or fixed, being included in the database in perpetuity. NEMA recommends that the CPSC limit acceptance of reports of harm to incidents that have occurred within the past 12 months. If the

CPSC determines that such limits contravene the requirements of the CPSA as enacted by Congress, then NEMA recommends that the CPSC, at a minimum, (1) require the submitter of the report of harm to identify the date of the alleged incident; and (2) publish the date of the alleged incident, as well as the date on which the report of harm was made, in the database.

Thank you for providing NEMA the opportunity to comment on the Publicly Available Consumer Product Safety Information Database proposed rule. Should you have any questions regarding any of these comments, please contact Sarah Owen of my staff at sarah.owen@nema.org or (703) 841-3245.

[redacted]
Vice President, Government Relations

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Comment from Stacey-Ann Taylor

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Organization: American Coatings Association

General Comment

July 23, 2010

Office of the Secretary
Consumer Product Safety Commission (CPSC), Room 502
4300 East West Highway
Bethesda, MD 20814

RE: Consumer Product Safety Commission – Product Incident Safety Database
Docket No. CPSC – 2010 – 0041

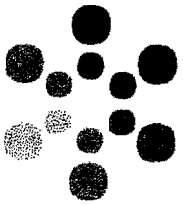
Dear Mr. Stevenson:

The American Coatings Association (ACA, formerly the National Paint and Coatings Association, NPCA) represents a $20 billion dollar industry in the United States, operating in all 50 states, and employing over 60,000 people engaged in the manufacture and distribution of paints and coatings. Annually over 706 million gallons of industry products are sold for application on architectural surfaces, in homes, offices and public buildings, by professional applicators and by homeowners and property owners who subscribe to the "do-it-yourself" approach. Not widely known but a fact of commercial production and manufacturing of consumer goods, the coatings industry's products are applied to over 70 percent of the U.S. Gross National Product. From

automobiles and appliances, to toys and electronic components, the continued availability of paints and coatings to protect and enhance these consumer products is critical to a large segment of the U.S. economy. As a result of this widespread use of consumer paints and paints applied to consumer goods, ACA on behalf of its members, is very much interested in the proposed product incident database, and is submitting these comments to assist the CPSC in advancing an effective initiative that avoids potential problems from unwarranted use of the database by entities not contemplated in the enabling legislation.

Attachments

CPSC-2010-0041-0024.1: Comment from Stacey-Ann Taylor



American Coatings
ASSOCIATION

July 23, 2010

Office of the Secretary
Consumer Product Safety Commission (CPSC), Room 502
4300 East West Highway
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RE: Consumer Product Safety Commission – Product Incident Safety Database
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Dear Mr. Stevenson:

The American Coatings Association (ACA, formerly the National Paint and Coatings Association, NPCA) represents a $20 billion dollar industry in the United States, operating in all 50 states, and employing over 60,000 people engaged in the manufacture and distribution of paints and coatings. Annually over 706 million gallons of industry products are sold for application on architectural surfaces, in homes, offices and public buildings, by professional applicators and by homeowners and property owners who subscribe to the "do-it-yourself" approach. Not widely known but a fact of commercial production and manufacturing of consumer goods, the coatings industry's products are applied to over 70 percent of the U.S. Gross National Product. From automobiles and appliances, to toys and electronic components, the continued availability of paints and coatings to protect and enhance these consumer products is critical to a large segment of the U.S. economy. As a result of this widespread use of consumer paints and paints applied to consumer goods, ACA on behalf of its members, is very much interested in the proposed product incident database, and is submitting these comments to assist the CPSC in advancing an effective initiative that avoids potential problems from unwarranted use of the database by entities not contemplated in the enabling legislation.

As described in the May 24, 2010 Federal Register notice, the Consumer Product Safety Improvement Act (CPSIA) requires the Commission to establish and operate a product safety information database that is accessible to the general public. The database is intended to collect information relative to the safety of consumer products and other products or substances regulated by the Commission. The proposed rule also describes the Commission's interpretation of the various statutory requirements concerning information submission, manufacturer notices, and other aspects associated with publishing and maintenance of the proposed database. The proposed rule also seeks to address confidential business information (CBI) claims and how the Commission will address inaccurate information.

Under the requirements of Section 212 of the CPSIA, the database is to include "reports of harm relating to the use of consumer products", reports the Commission expects to receive from a number of listed entities. These "reports" are to include, among other things, a description of the product; identification of the manufacturer or private labeler; a description of the harm related to

the use of the product; and contact information. The statute also requires the database to be searchable by interested parties seeking to find information on the safety of consumer products. The following are ACA comments regarding Commission structure and implementation of a product incident safety database.

Statutory Language Restricts Who May Report To the Product Incident Safety Database

The CPSIA itself directs the proposed amendments to the CPSA regulations, specifically with respect to those entities who may submit reports of harm for inclusion in the public incident database: (i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities (see CPSA §§6A(b)(1)(A)(i)-(v)). This is an exclusive list that clearly reflects the intent of Congress, and clearly limits the Commission's authority to add to that list. ACA is concerned with the provision of the proposed rule (see 16 CFR § 1102.10), where the Commission has moved to add "others (authorized reporters) including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." The addition of this "other" category is improper and should be removed in the final rule for the following reasons:

- First, by adding an "other" category, the Commission has acted outside the authority Congress granted it in the statute. Congress specifically delineated five categories of reporters who may submit reports for inclusion on the public incident database. The Commission is within its authority to define those categories listed in the statute as it has done in 16 CFR §§ 1102.10(a)(1)-(5). But nowhere does CPSA § 6A(b)(1) grant the Commission the authority to enumerate additional categories of reporters, much less ones that Congress took care to exclude.
- Second, the Commission's proposal is contrary to the plain meaning of the statute, and reflects an interpretation that is arbitrary, and renders other provisions of the statute superfluous or unnecessary. The Commission's addition of a catch-all "other" category makes the categories of reporters Congress specifically delineated superfluous because the "other" category can be interpreted so broadly as encompass every potential reporter, making any specific designation "unnecessary".
- Third, the addition of an "other" category is unreasonable and contrary to sound public policy. Congress intended that the database advance public safety by better informing consumers of potential product hazards (See Cong. Rec. H7586 (2008)), by requiring "the CPSC to create a searchable and user-friendly public database on deaths and serious injuries resulting from consumer products so that parents have access to the information they need to protect themselves and their children". Congress selected reporters who would contribute to that purpose—those who use or observe the use of the consumer product (and thus the resulting harm or risk of harm) and those who may be involved in treating or responding to the harm. Congress did not include in its list of reporters those who may be commercially or financially motivated to submit reports of harm. By allowing anyone who wants to submit a report for inclusion in the database to do so, the Commission has opened the flood gates to those who may be motivated to corrupt the database such as attorneys and even competitive product manufacturers.

Opening up the database to other groups will not serve Congress's intent to advance product safety. Instead, it will decrease the database's accuracy and integrity, making it unreliable for consumers attempting to obtain information about potential product hazards and looking to make a decision as to whether to purchase a product. Because the Commission's action in adding the "other" category to those permitted to submit reports for inclusion on the public incident database is outside the scope of its statutory authority and contrary to the plain meaning of CPSA § 6A, and is unreasonable on its face, ACA urges the Commission to remove the category when it issues the final rule.

Confidential Information/Materially Inaccurate Information

The protection of confidential business information (CBI) is a priority issue for ACA members who have invested considerably in the development of new products and technologies that integrate consumer safeguards while advancing product performance. The success of the new product safety incident database will hinge on the careful management of any such information that manufacturers are required to offer to address appropriate public incident reporting. In short, industry must be confident that their CBI will be protected.

Before the enactment of the CPSIA, the Consumer Product Safety Act (CPSA) required that the Commission follow the notice provisions of Section 6 of the CPSA before publicly disclosing any information that allowed the public to readily ascertain the identity of a manufacturer or private labeler of a consumer product. Section 6 of the CPSA contains requirements for giving notice of such information to the manufacturer or private labeler and providing an opportunity to comment on the information prior to public disclosure. Section 6 of the CPSA also requires the Commission to take reasonable steps to assure that disclosure of such information is accurate, fair in the circumstances and reasonably related to effectuating that purpose of the CPSA (as noted in the Federal Register notice, the Commission has issued regulations interpreting Section 6 at 16 CFR part 1101). The public also has access to incident data through reports and studies published by the Commission or through Freedom of Information Act (FOIA) requests. The Commission further notes that new Section 6(A) of the CPSA (as amended by the CPSIA) specifically excludes any report submitted pursuant to the public database provisions from the notice requirements of Section 6(a) and (b) of the CPSA.

The exclusion of specific reports submitted pursuant to the public data base provisions from Section 6(a) and (b) of the amended CPSA, while statutorily required, must be carefully reviewed and managed. Given that the efficacy of the eventual database cannot be adequately evaluated *a priori*, ACA believes that further guidance and detail from the Commission on all of the provisions of Section 6 that address confidentiality determinations is necessary. Toward that end, ACA urges the consideration of, among other options, coded identifiers and other devices to protect CBI.

Verifying the accuracy and veracity of information provided in reporting is the fundamental element underpinning a credible and viable incident database. It is critical the Commission direct all necessary efforts to avoid false and/or misleading reports as well as incident reports created based on mere rumor. The accuracy and completeness of factual circumstances are very important to the incident report, and are essential to any attempt to demonstrate incident patterns. The Commission should ensure that thorough and descriptive data fields are developed

to accomplish the objective of securing accurate and complete information. The following additional information should be required to be part of the report of harm: 1) the date the harm occurred or manifested itself; 2) where the product was being used by a consumer (e.g. in their home, school, office, etc.); and 3) whether the manufacturer has already been contacted by the consumer regarding the harm (which the CPSC should encourage reporters to do). The database must also have a clear and reliable mechanism for addressing false and inaccurate reports.

Information Quality, Gathering and Maintenance

The US paint industry manufactures some 800 million gallons of architectural paints per year, with average household use of paint exceeding 2.2 gallons annually. As a result of this volume of business and widespread household use, it is reasonable to assume that there will be consumer concerns about paint, and potentially regular filings to the proposed database. ***Even if one-tenth of one percent of paint sales*** generated a consumer filing, our industry alone would need to respond to 800,000 complaints per year. A large consumer paint company could conceivable receive over 200 filings per day, and assuming that a single filing requires one-half day (4 hours) of staff time to read, evaluate, respond and otherwise undertake required follow-up, the proposed database would likely require such a company to hire 100 new people. With attendant salary and benefits costs of $60K per year on average, an annual single, large company cost in excess of $6 million is not unrealistic (and that does not take into consideration legal costs for spurious lawsuits that emerge from the Commission's proposed inclusion of "others" reporting). Add to this the CPSC staff burden, and the fact that eventually most filings will be found to be unsubstantiated, it is apparent the proposed economic impact of the database has been largely underestimated by the Commission and therefore needs to be "re-focused".

Refocusing the database will require the Commission to try and educate the reporting entities authorized by statute as to the purpose of the database and what constitutes reportable concerns regarding "harm". Also, CPSC should make it clear that the database should not be used in emergency situations (call 911), or in non-emergency situations requiring professional medical advice. Once the database is refocused to emphasize proper and useful reporting, a mechanism must be established for both the Commission staff and product manufacturers to review submitted reports prior to their being made available on the public database. Without these efforts, unchecked and unsubstantiated reports will burden both regulators and product manufacturers and do little for public safety.

ACA encourages the Commission to utilize best practices in creating the database that are consistent with the databases that manufacturers and others currently utilize to collect information and data from consumers and product users. ACA also encourages the Commission to focus the scope of the database on issues that are core to its mission of protecting public safety in this era of limited resources.

The statutory timelines for a manufacturer's response to a report are relatively short, and to facilitate efficient responses to reports given the timelines, it will be imperative that a process for timely delivery, correct contacts and receipt be established. Large companies must have the ability for multiple people to receive the reports, and for multiple people to be authorized to

respond (e.g., representing different business units of the same company). Proper notice and posting of the comments as soon as practicable after the report may pose significant time and process issues for the Commission.

ACA urges careful attention to these issues and the potential burdens they may present for all involved parties. Clarification as to the requirements for challenging a report as false or inaccurate inside the response window is essential, as is the process for filing such challenges if the relevant information comes to light outside the response time.

ACA strongly urges the consideration of these comments and appreciates the attention of the Commission to these issues. Should you or your staff require further assistance please contact us at (202) 462-6272.

Sincerely yours,

[redacted]

[redacted]

Stephen R. Sides
Vice President
Science, Technology and Environmental Policy

Stacey-Ann M. Taylor
Counsel
Government Affairs

Comments submitted online via regulations.gov

PUBLIC SUBMISSION

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Docket: CPSC-2010-0041
Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0025
Comment from Robert Waller

Submitter Information

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Submitter's Representative: Michael Dwyer
Organization: Juvenile Products Manufacturers Association
Government Agency Type: Federal
Government Agency: CPSC

General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0025.1: Comment from Robert Waller

July 22, 2010

Via Electronic Mail
Office of the Secretary
Consumer Product Safety Commission, Room 502
4330 East West Highway
Bethesda, MD 20814

Re: Comments on the Proposed Rule on the Publicly Available Consumer Product Safety Information Database/ Docket No. CPSC-2010-0041

The Juvenile Products Manufacturers Association is a not-for-profit trade association representing the producers, importers, or distributors of a broad range of childcare articles that provide protection to infants and assistance to their caregivers.

The Consumer product Safety Commission ("CPSC") has requested comments on its proposed rule interpreting the scope of reporting and posting of data pursuant to Section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), [*See* 75 Fed. Reg. 29156 (May 24, 2010); *See also* CPSIA.] [1] The Juvenile Products Manufacturers Association ("JPMA" or "the Association") is submitting these comments in response to the Commission's request for comment on its Notice of Proposed Rulemaking ("NPR") regarding its proposal to add a new Part 1102 to Title 16 of the CFR to establish a Publicly Available Consumer Product Safety Information Database as required under Section 212 of the CPSIA. JPMA appreciates the opportunity to provide feedback and input with respect to the issues raised in the NPR on behalf of its more than 250 members. The Association reserves the right to supplement or amend its comments as appropriate.

I. The Proposed Enumerated Parties Eligible to Submit Data Under the NPR is Beyond the Statutory Scope Permitted.

Under Staff proposed 16 CFR 1102.10(6)), it us inappropriate to allow "attorneys, professional engineers, investigators, non-governmental organizations, consumer advocates and consumer advocacy organizations and trade organizations" to be among the list of entities permitted to submit incident information to the database. Such inclusion goes beyond what specifically set forth under the CPSIA and contradicts the existing regulations that require incident reports to be verified by those with personal knowledge.

The CPSC has recommended that the list of entities who may submit reports of harm for inclusion in the database be expanded to include not only the specified entities set forth in the CPSIA (which are: Consumers, Local State or Federal Government agencies, Health

[1] The Notice of Proposed Rulemaking document is available on the CPSC's website at http://www.cpsc.gov/businfo/frnotices/fr10/databaseNPR.pdf

care professionals, Child Service providers and Public Safety Entities) but also submission by:

"Others, including but not limited to, attorneys, professional engineers, investigators, non-governmental organizations, consumer advocates and advocacy organizations and trade associations".

The express statutory language in Section 212 of the CPSIA does not permit the CPSC to expand the scope of designated reporting parties. This proposal would have the effect of reducing the database to an unfiltered blog, made up of hearsay reports from those without personal or direct firsthand knowledge. This could result in an arbitrary capricious slanted database with information unfairly weighted by those who have a vested interest in increasing the number and severity of negative reports involving a product.

The CPSIA limited express designation those who may submit reports under amended CPSA §§ 6A(b)(1)(A)(i)-(v) is an exclusive list, as indicated by the fact that Congress considered who should be permitted to submit reports for inclusion on the database and only chose to identify specific reporting parties. A sensible, plain inference is that delineated parties reasonably identified the scope of the parties permitted to report and that those who were excluded were intended to be excluded.

Congress specifically delineated five classifications of parties authorized to submit reports for inclusion on the public incident database. The Commission is within its authority to define these parties as it has done in ***16 C.F.R. §§ 1102.10(a)(1)-(5),*** but should not under CPSA § 6A(b)(1) create and enumerate additional categories of reporters. Such *ultra vires* action is contrary to the plain meaning of the statute. It is a cardinal rule of statutory interpretation that a statute must not be interpreted in a manner that would render other provisions of the statute superfluous or unnecessary. Here, the Commission's addition of a catch-all "other" categories undermines congressional intent that qualified parties likely to possess relevant firsthand knowledge are to comprise the reporting class that is most likely to contribute accurate information about incidents or injuries.

Finally, the addition of an "other" category is unreasonable and contrary to sound public policy. Congress intended that the database advance public safety by better informing consumers of potential product hazards. *See* Cong. Rec. H7586 (2008) ("It requires the CPSC to create a searchable and user-friendly public database on deaths and serious injuries resulting from consumer products so that parents have access to the information they need to protect themselves and their children."). Congress selected and identified parties who would contribute to that purpose — those who use or observe the use of the consumer product (and thus the resulting harm or risk of harm) and those who may be involved in treating or responding to the harm. Congress did not include in its list those persons that may be commercially or financially motivated to submit "alleged" reports of harm. This would diminish the integrity of the database.

While Section 212(b)(3) of the CPSIA allows the CPSC to include information in the database, *"in addition to the reports received under paragraph (1)"* the language of the CPSIA does not permit the CPSC to add an entirely new classes of persons entitled to submit reports for inclusion in the database.

This in and of itself is an important safeguard, when authorized submitting parties are not legally required, under penalty of perjury, to accurately and objectively record and report safety incidents, injuries, and suspected child abuse as part of their professional responsibilities. Permitting submission of hearsay reports of incidents for which the submitting party has no direct personal knowledge would undermine the CPSC's current requirements that information it publishes must be verifiable. When Congress required a searchable database, there they did not intend to override the CPSC's long standing requirements for verification of information before the CPSC allows such information to become public. A submitter without firsthand knowledge of the facts surrounding the safety incident or who did not witness the safety incident does not generate information that fit the criteria for public release in that the information submitted is hearsay and prone to material inaccuracy.

II. Collecting and Using Anonymous, Incomplete Reports is Inappropriate.

Section 1102.10(h) of the proposed rule provides that, "Any information received by the Commission that does not meet the requirements for submission or publication will not be published but will be maintained for internal use."

The introductory comments to the Draft Proposed Rule indicate that the CPSC Staff would be recommending that the CPSC collect and maintain *"reports of harm even from anonymous submitters and reports that are incomplete"* to be used *"for appropriate Commission use"* The comments to the proposed rule, at 75 FR 29159, column 2 also state that *"information received related to a report of harm that is incomplete because it does not meet the requirements for submission or publication will be maintained for appropriate Commission use."* The term *"appropriate Commission use"* includes *"support for... administrative and judicial proceedings for enforcement of the statutes, standards, and regulations administered by the Commission."*

The acceptance and use of incomplete and anonymous incident reports submitted through the database portal is not required or called for under the CPSIA. The veracity and trustworthiness of anonymous, unfounded reports cannot be confirmed and are by their nature suspect. In addition, using anonymous reports, submitted through the database portal, in any compliance or enforcement proceeding would be inherently unfair to the manufacturer whose product is the subject of such a report, who has no opportunity to investigate or refute the claim.

Similarly, we have a concern that consumers who are reporting incidents that do not meet the statutory and administrative minimum requirements for inclusion in the database will attempt to circumvent these requirements by posting these incidents and comments through the use of one of the Commissions other social media vehicles. The proposed rule does not squarely address this issue; however, it would be appropriate to obtain some assurances, that this will not be permitted.

A. The Statute Requires a Model Name

The CPSC is not requiring the identification of a product name, model, manufacture date, date code, date of purchase or other descriptive information about the product. The CPSC instead is requiring that the description of the product, at minimum, include "a word or phrase that identifies the product as a consumer product, a component part of a consumer product or a product or substance regulated by the Commission," and the name of the manufacturer. Other information such as a brand name, purchase price, model, serial number, date of manufacture, date code or retailer is not mandatory. Such information, to the extent available, should be required to avoid confusion or unfair misidentification of a product

The CPSIA, at Section 212(b)(4)(C) requires that the database be accessible by date, product description, model name and manufacturer's name to the extent practicable. This would appear to require that at least the product name *and* model number be submitted in order for an entry to be accepted for inclusion in the database.

If a product is poorly identified, this may form the basis for a manufacturer's comment to the effect that the lack of specificity makes it impossible to address the incident report. Requiring a model name or product name, as a minimum requirement would be consistent with the language of the CPSIA and would allow the incident information in the database to be more useful and less potentially misleading.

B. Disclosure of Consumer's Identity to the Manufacturer Upon Consent

CPSC should encourage consumers to include their name and contact information as that helps with the investigation process. The proposed rule, at 75 FR 29167, column 3 refers this suggestion, and indicates that the CPSC has designed the form to encourage users to supply additional information.

The CPSC should encourage consumers to disclose their identities to the product manufacturers in the interest of enhancing product safety. Manufacturers will often need to obtain further information directly from the consumer to more fully understand a reported safety incident or a potential safety issue. Manufacturers who are unable to speak directly to the person who has information concerning a possible safety incident will be hampered in their ability to completely understand and quickly respond to a potential safety issue. Such follow-up can add to the construction of a more accurate database.

C. *Actual or a Substantial Likelihood of Harm Should is Required*

CPSC should further define a consumer product safety incident causing harm, as contemplated by the statute, as opposed to merely describing a product that does not meet the consumer's expectations. For example experience in processing CPSA Section 102 reporting is helpful and illustrative here. Often the apprehension of choking is determined to be distinguishable from an actual choking incident. CPSC's own reporting rules recognize this important distinction and the importance of factual delineation of an actual incident and injury data from concern about hypothetical harm. Similarly CPSC has occasionally had to refute ungrounded allegation that exhibited the potential to mislead consumers about the safety of products. Formatting that helps assure accurate collection of incident and injury data and a Verification Requirement for submitted reports could reduce the reporting of inaccurate or misleading information[2].

This would reduce inaccurate, false or misleading data, which has been determined to be a problem inherent in other reporting systems[3]. This would also permit the CPSC to more clearly understand whether a proposed entry describes harm or risk of harm caused by a product, and to identify, for exclusion, any entries that appear to be reflecting mere dissatisfaction with a product without any report of injury, illness or death, or risk of personal injury, illness or death. Recording this information in a systematic manner will also permit the CPSC and manufacturers to quickly identify and to provide more immediate focus on database entries in which serious harm or actual risk of serious harm has been reported.

Furthermore, the term "*any risk of injury*" as defined under proposed 16 CFR 1102.6 should be narrowly defined to avoid unfounded speculation or apprehension of risk by reporting parties, with products that do not involve an actual risk of injury[4].

The definition should clearly advise that insignificant of risks should not be included in the database. Appropriate qualifying terms such as "substantial risk of serious injury" as

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[2] See for example 16 CFR 1117.3 which details with specificity as to what does or does not constitute a reportable choking hazard.

[3] A 2006 article in the Official Journal of the American Academy of Pediatrics by Michael J. Goodman, PhD, and James Nordin, MD, MPH, found that many of the entries in VAERS were made in connection with pending litigation, presumably in an attempt to create the appearance of a causal connection between certain vaccines and medical conditions. Vaccine Adverse Event Reporting System Reporting Source: A Possible Source of Bias in Longitudinal Studies, 117 Pediatrics 387 (2006).

[4] Some examples include reports that *"The consumer said that a product has a metallic taste to it that resembles lead"; "The product smells toxic, there is no way this product is safe for children to be putting in their mouth"; ""choking hazard reports that did not involve actual choking hazards and occurred despite the fact that there was no incident or injury involved and the product complied with 16 CFR 1501, et seq."; wholesale mischaracterized reports of injury attributed to cribs, when I fact other products such as adult textile goods and bedding were actually the proximate cause of the incident or fatality"; abundant report data that mischaracterizes and fails to distinguish injuries directly caused by toys from those not caused by them."*

historically used by the CPSC should be used in such definition. The Commission staff should scrub reports that appear to describe only consumer dissatisfaction with a product rather than the "*reports of harm*" that Congress sought to be included in the database.

In addition, due to an inherent problem in assuring accuracy of reported data over lengthy periods of time consideration should be given to limiting reporting of "old" or stale" data not contemporaneously related to the occurrence of the incident alleged. Users should not be able to report an incident after a year has passed from the alleged incident since data over time becomes inherently suspect.

III. Inaccurate Information Must be Omitted, Without Precondition.

The statute permits manufacturers to make comments on information that is materially inaccurate. There is no requirement that the materially inaccurate information have the potential to cause confusion. The proposed rule under ***§ 1102.26 Designation of materially inaccurate information*** unfairly limits the definition of *"materially inaccurate information"* as relating to "*(i) The identification of a consumer product;(ii) The identification of a manufacturer or private labeler; or (iii) The harm or risk of harm related to use of the consumer product".*

Publication of a consumer's report and the manufacturer's comments side by side, without adequate redaction of the inaccurate information from such report, eliminates a manufacturer's right not to have inaccurate information about its products in a government sanctioned database. The narrow definition of this rule inappropriately limits what will be considered materially inaccurate by use of narrow definitions. While we fully support the Commission's discretion to determine the existence of materially inaccurate information, if a prima facia claim of material inaccuracy is made, the Commission should retain the discretion not to publish information pending it's verification of the claim. The Commission should be required to act to affirmatively correct false, misleading or inaccurate information within the same 10 day time period from submission required of manufactures to comment on the veracity of the claimed information. This will assure that detrimental false misleading or inaccurate information with the potential to impugn a Company or brand reputation is not posted or if posted is timely removed from such posting. In addition as part of its review process the Commission should act to assure that the integrity of confidential and proprietary information is maintained. The release of confidential commercial information is a violation of 18 U.S.C. § 1905 and potentially can do serious competitive harm to a firm. Protection of such data is a paramount interest also protected by section 6(a) of the CPSA, 15 U.S.C. 2055(a). The harm to reputation and brand can be significant and longstanding unless data is adequately checked prior to posting and abated in a timely manner.

IV. Disclaimer Language Should be Stronger and an Attestation of Veracity Required by Complainants

The CPSIA requires the Commission provide clear and conspicuous notice to users of the data base that the Commission does not guarantee the accuracy, completeness or adequacy of the contents of the database. The CPSC is recommending that the notice contain the exact language in the statute. The proposed rule provides as follows:

Subpart D — Notice and Disclosure Requirements § 1102.42 Disclaimers.
The Commission does not guarantee the accuracy, completeness or adequacy of the contents of the Consumer Product Safety Information Database, particularly with respect to the accuracy, completeness, or adequacy of information submitted by persons outside of the CPSC. The Consumer Product Safety Information Database will contain a notice to this effect that will be prominently and conspicuously displayed on the database and on any documents that are printed from the database.

The notice should more clearly advise that incident reports in the database are examples of information submitted by persons outside of the CPSC. The consumer report must include "verification by the person submitting the information that the information submitted is true and accurate to the best of the person's knowledge and that the person consents that such information be included in the database."

In the Report to Congress, the mock-up of a possible layout of the Web page depicting the consumer portal for submission of incident reports does not require a consumer to affirmatively include such a verification with his report, nor does it even require the consumer to actively agree or disagree with this "verification." Instead, these words appear as a static, boilerplate part of a busy web page, rather than representing a meaningful attestation or even an affirmation of the veracity of the information submitted. Required verification is important to weed out false claims, so an attestation under oath or affirmation would help encourage honest reporting. Consumers could easily be requested to attest to the accuracy of information on submittal portals. The notation of penalties for filing false reports together with a verification check off submittal box on the portal, could serve to deter the filing of false, misleading or unfair reports to the agency and help insure accurate information upon which it can act.[5] Another option is a clear statement on the web site that persons providing information must not under penalty of law (18U.S.C. 1001 and applicable provisions) provide false or misleading information.

The CPSC should require consumers to either affirmatively include the verification statement in their narrative description of the incident, or at least, to affirmatively choose to agree or disagree with the verification statement before continuing with the submission process. Consumers who are submitting unconfirmed and anonymous accounts of safety related incidents, should, at minimum, affirmatively acknowledge that they are standing

[5] Such verifications on form submittals are commonplace. For Example DHS I9, FTC FDCA Verification of Debt/Non Debt ; U.S. INS Form I-9 Attestation upon filing.

behind their reports. The possible inclusion of this required "verification" statement on the standard, fixed text of the web page does little to provide any acknowledgement that a consumer is truly "verifying" the facts contained in the consumer incident report.

Thank you for this opportunity to comment.

[redacted]

President

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0026
Comment from Ann Staron

Submitter Information

Name: Ann Staron

General Comment

Joint Comments of American Honda Motor Co., Inc., Arctic Cat Inc., Bombardier Recreational Products Inc., Kawasaki Motors Corp., U.S.A., Polaris Industries Inc., and Yamaha Motor Corporation, U.S.A.

Attachments

CPSC-2010-0041-0026.1: Comment from Ann Staron

BEFORE THE
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

JOINT COMMENTS

OF
AMERICAN HONDA MOTOR CO., INC.,
ARCTIC CAT INC.,
BOMBARDIER RECREATIONAL PRODUCTS INC.,
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POLARIS INDUSTRIES INC., and
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Publicly Available Consumer Product Safety Information Database	)	
Notice of Proposed Rulemaking	)	**Docket No. CPSC-2010-0041**
75 Fed. Reg. 29,156 (May 24, 2010)	)	

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INTRODUCTION

These joint comments are submitted on behalf of American Honda Motor Co., Inc., Arctic Cat Inc., Bombardier Recreational Products Inc., Kawasaki Motors Corp., U.S.A., Polaris Industries Inc., and Yamaha Motor Corporation, U.S.A. (the "Companies") in response to the U.S. Consumer Product Safety Commission's ("Commission" or "CPSC") notice of proposed rulemaking ("NPR") that would establish a publicly available consumer product safety information database pursuant to Section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). 75 Fed. Reg. 29,156 (May 24, 2010). The Companies are manufacturers, importers and/or distributors of all-terrain vehicles and other motorized recreational products.

1. The Commission lacks authority to expand Section 6A to include reports of harm submitted by "others."

Section 6A(b)(1)(A) of the Consumer Product Safety Act ("Act") expressly limits those who may submit reports of harm for inclusion in the Publicly Available Consumer Product Safety Information Database (the "database") without compliance with the requirements of Section 6(a) and (b) of the Act to five categories: (1) consumers; (2) local, State or Federal government agencies; (3) healthcare professionals; (4) child service providers; and (5) public safety entities. A provision in the proposed rules would, however, dramatically and impermissibly expand this limited authorization to submit reports of harm to include an additional, broad catch-all category, entitled "others." *See* 75 Fed. Reg. 29,176 (proposed 16 C.F.R. § 1102.10(a)(6)) (proposing to authorize, among others, attorneys, professional engineers, investigators, non-governmental organizations ("NGOs"), consumer advocates, consumer advocacy organizations, and trade associations to submit reports). As is shown below, the Commission lacks authority to rewrite and expand the statute in this way. The proposed new catch-all category would also improperly evade the public interest standard and other statutory

safeguards that Congress established for additional information that is included in the database, undermining both its integrity and usefulness. Accordingly, proposed Section 1102.10(a)(6) must be rejected and not included in the final rule.

a. The plain language of the statute identifies only five categories of persons and entities who are authorized to submit reports of harm for inclusion in the database.

The starting point for interpreting any statute is its plain language. *Ardestani v. INS*, 502 U.S. 129, 135 (1991). In interpreting statutory language, it is presumed that Congress "meant precisely what it said" and no more. *See Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001); *see also Nat'l Res. Def. Council, Inc. v. CPSC*, 597 F. Supp. 2d 370, 381 (S.D.N.Y. 2009) (rejecting agency's interpretation as an impermissible expansion where the statute's plain text was unambiguous).

Section 6A(b)(1), titled "Contents," specifies the scope of reports of harm that are to be included in the database, stating, in pertinent part, that "[e]xcept as provided in subsection (c)(4), the database *shall* include the following" reports of harm from five, and only five, specific categories of persons and entities: consumers, government agencies, healthcare professionals, childcare providers and public safety entities. 15 U.S.C. § 2055a(b)(1)(A) (emphasis added). Similarly, subsection (c)(4) requires the Commission to decline to include or to correct materially inaccurate information contained in any reports of harm received from these five categories of persons and entities.

This statutory language is plain and unambiguous, and refers to persons and entities that are readily identifiable and logically connected to consumer products and potential incidents involving them (i.e., consumers themselves and individuals with defined public safety and/or reporting responsibilities regarding incidents of harm or risk of harm involving consumer products). Where a statutory term is undefined, the term should be given its ordinary meaning.

Asgrow Seed Co. v. *Winterboer*, 513 U.S. 179, 187 (1995). The NPR itself acknowledges that these categories have ordinary, easily ascertainable meanings and that the proposed "others" category is extra-statutory: "[t]he proposal would *add* a category . . . to include those persons who may not clearly fit within the *statutorily identified* categories." 75 Fed. Reg. at 29,158 (emphasis added).

Because the plain language of the statute unambiguously identifies the five categories of persons and entities authorized to submit reports of harm for inclusion in the database, the Commission has no authority to expand the scope of the provision to include "others" who, as the NPR correctly admits, do not "clearly fit" within these "statutorily identified categories" – and thus were not intended to be included by Congress. This is especially the case since Congress did not add any language to indicate that the categories are exemplary or inclusive of other categories. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.") (citation and internal quotation marks omitted).

b. The statutory framework further confirms that Congress did not intend for "others" to be added to the five categories specified in Section 6A(b)(1)(A).

In tandem with the plain language of a statute, the "language and design of the statute as a whole" is an additional interpretive tool. *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999) (*citing Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997)); *Am. Fed'n of Gov't Employees, Local 2782 v. Fed. Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("It is a generally accepted precept of interpretation that statutes or regulations are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.'") (citation omitted). And, where Congress has chosen to include language in one section of a statute omitted from the act's other sections, there is a presumption that Congress drafted the

divergence intentionally. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We would not presume to ascribe this difference [in language] to a simple mistake in draftsmanship.").

The sections of the Act surrounding Section 6A(b)(1)(A) confirm that Congress intended to limit the reports of harm contained in the database to the five identified categories of authorized submitters. Most notably, Section 6A(b)(3) gives the Commission discretion to include in the database information concerning alleged harm associated with a consumer product – in addition to reports of harm from the submitters expressly identified in Section 6A(b)(1)(A) – but with two significant restrictions. First, the Commission must make a threshold determination that inclusion of such additional information is "in the public interest." Second, and equally important, Section 6A(b)(3) expressly subjects any such additional information to the advanced notice requirements and other safeguards governing public disclosure of information set forth in Section 6(a) and (b) of the Act. Thus, prior to including such additional information in the database, the Commission must (1) give identified manufacturers and private labelers notice and opportunity to comment on such information; and (2) engage in an analysis of accuracy, fairness, and effectuation of statutory purposes required by Section 6(b).

While Section 6A(b)(3) may authorize the Commission to include in the database information concerning harm or risk of harm associated with a consumer product that is received from attorneys, engineers, investigators, consumer groups, trade associations, and other persons and entities who would be encompassed by the broad catch-all category of "others" proposed in the rule, Congress could not have been clearer in requiring that the Commission can do so only after determining it is "in the public interest" and complying with the requirements of Section 6(a) and (b). In contrast, Section 6A(f)(1) exempts reports of harm submitted by the five categories of persons and entities identified in Section 6A(b)(1)(A) from the requirements of

Section 6(a) and (b). By adding a catch-all category of "others" to Section 6A(b)(1)(A), the proposed rule would improperly evade and render superfluous the statutory standard (i.e., "public interest") and other safeguards (i.e., Section 6(a) and (b)) that Congress imposed for including any such additional information in the database. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (Statutory language should be interpreted "so that no part [of the statute] will be inoperative or superfluous, void or insignificant.") (citation omitted).

Moreover, the subpart immediately following Section 6A(b)(1)(A) shows that Congress knows how to include language in a provision when it intends to authorize the Commission to expand on statutorily-identified categories. Specifically, Section 6A(b)(2) charges the Commission with implementation of the database and, in subpart (b)(2)(B)(i)-(iv), specifies four categories of information that should "at a minimum" be contained in reports of harm in order for them to be included in the database. The "at a minimum" language reveals a congressional intent to permit the Commission to require additional specified information in the reports that it deems appropriate or necessary for posting in the database. The absence of any similar language in Section 6A(b)(1)(A) shows that Congress did not intend to give the Commission authority to rewrite the provision to add categories of persons or entities eligible to submit reports of harm. Had Congress intended to give the Commission such authority, it plainly knew how to do so. *See Russello*, 464 U.S. at 23 (Congress's decision to include statutory language in one provision and not another is presumed to be intentional and must be given proper effect.).

In sum, although the NPR suggests that the "breadth of the entities listed in the statute" leads the Commission to "conclude that the list is intended to be nonrestrictive," 75 Fed. Reg. at 29,162, that view cannot be reconciled with either the plain language of Section 6A(b)(1)(A) and (b)(3) or the requirements and safeguards that Congress expressly imposed for additional

information that is included in the database from any other such sources. A federal agency does not have authority to expand or revise a statute's plain language in order to further policy goals, or based on the agency's understanding of the statute's purpose. *See Nat'l Res. Def. Council*, 597 F. Supp. 2d at 379 ("[A]n agency decision interpreting a statute must be set aside if it conflicts with the plain meaning of the statute."); *see also Norfolk S. Rwy. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (finding where the statute's text did not support the agency's proposition, "the statute's remedial purpose cannot compensate for the lack of a statutory basis"); *Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009) ("[N]either courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes.").

c. Congress intentionally excluded additional categories of persons and entities authorized to submit reports of harm from Section 6A(b)(1)(A).

Congress was well aware of the existence of attorneys, professional engineers, investigators, NGOs, consumer advocates, consumer advocacy organizations, and trade associations when it drafted language identifying the persons and entities who are authorized to submit reports of harm for inclusion in the database under Section 6A(b)(1)(A). It must be presumed that Congress deliberately chose not to include any of those "other" categories of persons and entities as potential submitters under the statute. *See AT&T Corp. v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) ("If Congress had wished to require actual customer authorization . . . it would have written the statute to prohibit such changes 'without the authorization of the subscriber.' Elsewhere in the Communications Act, Congress has expressly imposed [this] requirement.") (citation omitted); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("If Congress meant to make [a party] like Jericol liable, it could have done so clearly and explicitly.").

In fact, a Senate version of the bill included a sixth category of "other non-governmental sources" as authorized submitters to the database. *See* CPSC Reform Act, S. 2663, 110th Cong. § 7 (2008). This provision, which is very similar to the "others" category proposed in Section 1102.10(a)(6), was affirmatively *deleted* from the Senate version prior to the conference report, further confirming that Congress intended to limit authorized submitters to the five categories of persons and entities identified in Section 6A(b)(1)(A).

d. Restricting authorized submitters to the five categories identified in Section 6A(b)(1)(A) will promote the integrity and usefulness of the database, as Congress intended.

Congress intended for the database to include "potentially life-saving information . . . which would better equip [consumers] to assess product safety risks and hazards." 154 Cong. Rec. S7868 (July 31, 2008) (statement of Sen. Inouye); 154 Cong. Rec. S7873 (July 31, 2008) (statement of Sen. Boxer) (purpose of database is "so consumers can be better informed" about dangerous products). Restricting reports of harm to the five categories of submitters identified in Section 6A(b)(1)(A) is consistent with that purpose and will promote the accuracy, usefulness and integrity of the database.

Specifically, a "consumer" is one who personally uses, consumes or enjoys a consumer product. *See* Office of General Counsel Advisory Opinion #240 (1976). As purchasers and users of products, consumers would have personal knowledge of a product and any safety-related concerns about it, making them appropriate and logical submitters of reports of harm under the statutory scheme. The other four categories of persons and entities identified in Section 6A(b)(1)(A) likewise include persons who (1) are most likely to interact with a product user and product at or near the time of an incident; and/or (2) have both defined public care and safety responsibilities and contemporaneous recordkeeping and reporting duties. Limiting reports of

harm to these submitters is again both appropriate and necessary to promote the accuracy and completeness of information that is provided in the database to the public.

In contrast to the five categories of submitters carefully and logically chosen by Congress in Section 6A(b)(1)(A), the broad catch-all category of "others" proposed in the NPR would include individuals and entities who lack direct or personal knowledge of a product or the circumstances of its usage underlying a report of harm. This could likewise open the door of the database to persons and groups with private advocacy agendas, related financial or competitive interests, or other undisclosed reasons for submitting reports of harm. These are precisely the reasons Congress directed the Commission to restrict such reports that are ultimately added to the database to ones that it determines are "in the public interest" and that are properly reviewed for accuracy pursuant to Section 6(b) of the CPSA. Including reports of harm from "others" in the database under Section 6A(b)(1)(A), rather than through the express mechanisms established by Congress in other provisions of the Act for adding additional information, would undermine the integrity and accuracy of the information and severely reduce the usefulness of the database to consumers.

In addition, the Commission has several duties under Section 6A(c) and the proposed rules in relation to the database. Among other things, the Commission must evaluate the completeness of a report of harm, and transmit the report to an identified manufacturer or private labeler for comment within five business days. And, if requested, the Commission must publish the manufacturer's or private labeler's comments after the Commission evaluates and confirms that the comments meet minimum specified requirements. *See* 75 Fed. Reg. at 29,178 (proposed 16 C.F.R. § 1102.12(a), (c)-(d)). Moreover, any person or entity reviewing a report or a comment, either before or after publication, may also inform the Commission that it contains

materially inaccurate information, and the Commission is required to evaluate and act upon any such comment. *See id.* at 29,179-80 (proposed 16 C.F.R. § 1102.26). As shown above, expanding the scope of the database to include reports of harm from a catch-all category of "others" will necessarily increase submissions by persons who lack direct personal knowledge of an incident, which, in turn, will significantly increase the costs and burdens on both the Commission and manufacturers and distributors of consumer products to review, verify, and respond to the filings.

For all of these reasons, the proposed catch-all category of "others" in 16 C.F.R. § 1102.10(a)(6) should be rejected by the Commission and omitted from the final rule.

2. Reports with no discernable harm or risk of harm cannot constitute "reports of harm" for inclusion in the database.

Proposed Section 1102.10(d)(3) makes a very important and proper distinction by providing that incident reports that relate solely to the cost or quality of a consumer product, with no discernable bodily harm or risk of bodily harm, do not constitute "harm" for purposes of the regulations governing the database. This is especially important for categories of products, such as motorized recreational vehicles, that are subject to warranty claims. In many cases, such claims involve cosmetic or financial issues which have nothing to do with safety. In some instances, a dissatisfied consumer may submit through the database portal an incident report based on such a warranty dispute with the manufacturer that is not safety related. In order to more clearly address such situations, the final rule should explicitly provide that incident reports that relate solely to the cost or quality of a consumer product, or a warranty dispute with the manufacturer, with no discernable bodily harm or risk of bodily harm, do not constitute "reports of harm" for purposes Section 1102.10 and will not be included in the database as such.

In addition, Section 1102.6(b)(5) of the proposed rule sets forth a definition of "harm" in this context that simply repeats the statutory language: "[H]arm means – (1) injury, illness or death; or (2) risk of injury, illness or death, as determined by the Commission." *See* 15 U.S.C. § 2055a(g). Where there has been no actual injury or illness, a report must thus involve a "risk of injury" in order to constitute a "report of harm" for inclusion in the database. The phrase "as determined by the Commission" indicates that CPSC is responsible for reviewing such a report before posting it to ensure that it does involve a risk of injury, and implies that it should establish criteria for making such determinations.

Reports that include only speculative assertions or unsubstantiated opinions that a consumer could have been injured, without any supporting factual information indicating a nexus between the product or incident and a discernable and credible risk of injury, cannot provide CPSC the necessary basis for making the required determination in order for the reports to be posted as reports of harm on the database. Similarly, the Commission may be unable to make this determination where the submitter of a report has only third-hand knowledge of the circumstances, or there are other indicia that the asserted risk of injury is highly questionable. CPSC should develop criteria to guide staff members in identifying and excluding such reports where there is no discernable and credible risk of injury.

Absent such criteria, the determination of what constitutes an adequately described discernable and credible risk of injury will rest solely with the individual staff member reviewing a particular submission. As a result, that individual's sense of what constitutes a risk of injury will prevail by default, even though others might ultimately disagree with his or her assessment. Unfortunately, relying on an "I know it when I see it" standard is impractical, unhelpful, and ultimately creates muddled results. Moreover, relying on staff members' individual discretion

will mean that the database will lack consistency from report to report with regard to what constitutes a risk of harm, again degrading the quality of the database. That, in turn, will provide little guidance to the public about what they should expect from consumer products or to distributors or manufacturers about what constitutes a risk of harm that should be avoided or advised of when placing products into the chain of commerce.

Moreover, without a quantitative or qualitative screen to provide guidance to potential reporters and filter out speculative and tenuous claims, the volume of submissions to the Commission for inclusion in the database will be much greater than the volume that would exist if criteria were provided. This means, in turn, that CPSC staff will have to unnecessarily spend time and resources reviewing and filtering claims that criteria for what constitutes a discernable and credible risk of injury would have discouraged in the first instance. Undoubtedly as well, manufacturers and distributors will feel obligated to submit comments and objections to reports in an attempt to influence the Staff's conclusion whether a report adequately sets forth a risk of injury, again increasing the Staff's workload. While the Commission's budget and head count have been increased in the past two years, those increases do not justify needlessly wasting the Staff's time or the Commission's budget.

3. Reports of harm should be required to contain additional information to enhance the integrity and utility of the database.

Section 6A(b)(2)(B) of the statute directs CPSC to establish a requirement that a report of harm submitted for inclusion in the database must include, at a minimum, a description of the product, identification of the manufacturer, a description of the harm, and contact information for the submitter of the report. From this, it is apparent that CPSC has authority to specify additional required minimum elements of a report of harm in order for it to be included in the database. The following required elements for reports of harm should be added in the final rule.

a. The date and location of the incident or observed event.

In keeping with the statute, proposed Section 1102.10(d)(3) would require that in order to be included in the database, a report of harm include a "description of the harm." The section indicates that "[a] description of harm may, but need not, include the date on which the harm occurred . . . and the severity of any injury . . . ." The date and location of the event or observation that is the subject of a report of harm should be a required, rather than a discretionary, element of the report of harm for it to be posted in the database.

Without the inclusion of the date upon which, and the location where, harm occurred, a risk exists that multiple reports regarding a single incident of harm may be mistakenly construed to be reports about multiple, separate incidents of harm. This outcome is one that the Conference Committee on the CPSIA indicated in its Joint Explanatory Statement should be avoided: "the Conferees intend that the Commission prevent duplicative reports from being added to the publicly available database." Joint Explanatory Statement of the Committee of Conference, July 28, 2008, at 6. Including such duplicative reports in the database could, in turn, mislead the public and the Commission about the actual risks presented by a product. Including the location and date of an incident that created the harm or risk of harm places no significant burden on reporters and would minimize the possibility of such confusion as the likelihood of the same harm independently manifesting itself multiple times on a single day in a single location for a single product is quite low. In addition, without information regarding the date and location of the incident, it will be almost impossible for a manufacturer to determine whether particular reports are duplicates within the 10-day period provided for review. Finally, the mandatory inclusion of the date and location of harm will better ensure that the reporter actually has

personal knowledge of the information contained in the report and that the manufacturer can gather information to better understand and potentially comment on the report.

b. The severity of the risk should be required in a report of harm.

A description of the severity of any injury received also should be a required factor in a report of harm because, without it, there is no way for the public, the Commission, or a manufacturer to judge the magnitude of the risk presented and, in turn, the appropriate scope of any response to that risk.

c. The submitter's contact information should be required to include an electronic mail address and/or phone number to allow for timely contact and verification regarding a report of harm.

Section 1102.10(d)(4) of the proposed rule provides that submitters may, but are not required to, provide an electronic mail address and a phone number as part of their contact information when submitting a report of harm. Where the submitter authorizes release of its contact information to the manufacturer, requiring only a mailing address will not allow the manufacturer a realistic opportunity to verify information contained in the report in the 10 days before its publication in the database. The absence of such information will also not allow CPSC staff to efficiently and in a timely manner contact the submitter where claims of material inaccuracy are made regarding certain information in the report of harm. The final rule should accordingly specify that the submitter of a report of harm must provide an electronic mail address or a telephone number as part of the required contact information.

4. The category of the submitter should be provided to the manufacturer and published in the database with respect to each report of harm.

Proposed Section 1102.10(d)(5) would require submitters of reports of harm to indicate into which of the five authorized categories of submitters they fall. However, this provision goes

on to state that this information will not be published in the database. It is also not clear whether this information will be provided to the manufacturer as part of its review of the report of harm.

CPSC needs to have this information in order to confirm that the submitter is in fact authorized to submit the report of harm. However, such information would also be of interest and utility to manufacturers and database users because it would indicate the submitter's expertise and perspective and thereby aid in their understanding of the report of harm.

The NPR furnishes no explanation – much less any justification – as to why manufacturers and database users should be deprived of this information. The final rule should explicitly provide that information regarding the category of the submitter of a report of harm shall be provided to the manufacturer as part of its review of the report and published with the report in the database.

5. The proposed definition of "materially inaccurate information" with respect to a report of harm or a manufacturer comment is inappropriately restrictive and must be revised.

Section 6A of the Act requires CPSC, if it determines that information in a report of harm or manufacturer comment is materially inaccurate, to either decline to add the materially inaccurate information to the database, remove it if it has already been posted, or correct the materially inaccurate information in the report or comment and post it on the database. 15 U.S.C. § 2055a(c)(4). However, the statute fails to provide a specific definition for such materially inaccurate information.

Proposed Section 1102.26(a) would define "materially inaccurately information" in this particular context as information that is "false or misleading in a significant and relevant way that creates or has the potential to create a substantially erroneous or substantially mistaken belief in a Database user," and further relates to three specific topics in the case of a report of

harm and five specific overlapping but broader topics in the case of a manufacturer comment. Unfortunately, this proposed definition is both internally redundant and inherently subjective. In addition, it inappropriately and unreasonably restricts the type and scope of inaccurate information which CPSC must remove or correct in reports of harm or manufacturer comments that are posted on the database.

The American Heritage College Dictionary (2007) defines "materially" as "to a significant extent or degree; substantially." *The Merriam-Webster Desk Dictionary* (1995) similarly defines "material" as "highly important: significant." The proposed definition is therefore correct to the extent that it defines "materially inaccurate information" as information that is "false or misleading in a significant and relevant way." Indeed, to be false or misleading "in a significant and relevant way," the information must relate to the key elements of the report of harm – that is, the description of the consumer product, the identity of the manufacturer, the events or observations that created or gave rise to the harm or risk of harm, or the description of the harm or risk of harm – or to the manufacturer's comments on any of these key topics.

By going further to require that, to fall within this category, the information must also "create or have the potential to create a substantially erroneous or substantially mistaken belief in a Database user," the proposed definition sets additional criteria which are in the first instance redundant. The fact that such information must be false or misleading "in a significant and relevant way" can only mean that it has the potential to create an erroneous or mistaken belief in a database user as to the understanding and use of key information in the report of harm or manufacturer comment. Further, by requiring that any such belief be not only erroneous or mistaken but "substantially" so, the proposed definition sets an additional unreasonably restrictive criterion which has no basis in the statute, is not defined in the proposed rule, and

inappropriately narrows the types of false or misleading information which would be considered "materially inaccurate" and thus subject to excision or correction in the database.

In addition, requiring CPSC to make a determination in each instance as to whether the false or misleading information has the potential to create a belief in a database user that is "substantially" erroneous or mistaken injects into such decisions an inherently subjective element of degree as to which there can be no objective assessment, only supposition. This will inevitably lead to arbitrary decisions whether to remove or correct information that is concededly false and misleading, especially since the proposed rule contains no criteria or procedures that spell out how the Commission staff will make such determinations. If the Commission elects to leave this provision in the final rule, it should specify how the evaluation will be made and what qualifications the Commission staff must have to be assigned to make such a determination.

Finally, by specifying that, to fall within the category of materially inaccurate information, erroneous or misleading information must relate to one or more of three specific categories in the case of a report of harm, and one or more of five specific categories in the case of manufacturer comments, the proposal again unnecessarily and perhaps even unintentionally limits the situations in which excisions or corrections can be sought. For example, it appears that a statement that the incident occurred in June 2010 when in fact it occurred five years earlier would not necessarily fall within the definition. At a minimum, if these criteria remain in the final rule, they should be expanded to include the events or observations that created or gave rise to the harm or risk of harm.

We respectfully suggest that "materially inaccurate information" in a report of harm or manufacturer comment be defined simply as "information that is false or misleading in a significant and relevant way." We believe that this is a simpler and more straightforward

definition which would be easier to understand and apply and would encompass all those situations envisioned by the current proposal, as well as other potential situations where the erroneous or misleading information may prevent a database user from having a correct understanding of matters addressed by the report of harm or manufacturer's comment.

6. The NPR's specification of "liability" as an area in manufacturer comments that is subject to claims of material inaccuracy may lead to unproductive disputation over a denial that the product is defective.

The proposed rule specifies that one category of information in manufacturer comments that is subject to claims of material inaccuracy is information relating to the "nature, scope, liability, or cause of a harm or risk of harm related to the use of a consumer product." *See* 75 Fed. Reg. at 29,179 (proposed 16 C.F.R. § 1102.26(a)(2)(i)). If this proposed subsection is retained in the final rule, the inclusion of the topic of "liability" should be reconsidered and the word removed.

The CPSC's interpretative regulations regarding substantial product hazard reports under Section 15(b) of the Act have long provided that a company may specifically deny in its report that the information it submits reasonably supports the conclusion that its product contains a defect which could create a substantial product hazard. *See* 16 C.F.R. § 1115.12(a). Manufacturers in many cases may likewise wish to make the point in comments on a report of harm to be included in the public database that the information in the report does not reasonably support the conclusion that the product contains a defect.

Because such a comment may be viewed as relating to the manufacturer's "liability," it would appear to be open to challenge by either the submitter or some other interested party as being "materially inaccurate information" on the grounds that the product is in fact defective. This in turn would have the effect of setting up a "mini-litigation" in which CPSC is essentially

being asked to make a defect determination regarding the product in the guise of making a determination regarding the material inaccuracy claim, rather than through the appropriate mechanism of conducting a preliminary investigation of the potential product hazard. Not only is this clearly not the appropriate venue for the Commission to be making a defect determination, it will also have the collateral impact of both complicating and bogging down material inaccuracy determinations regarding manufacturer comments, many of which are likely to make this same point.

The reference to "liability" in proposed Section 1102.26(a)(2)(i) should accordingly be deleted.

7. Reports of harm should not be included in the public database until pending claims that they contain materially inaccurate information have been resolved.

The public database is designed and intended to provide consumers, manufacturers and entities concerned with public safety, including CPSC, with accurate and useful information regarding the safety of consumer products. To the extent that materially inaccurate information finds its way into the public database, it will destroy the utility of the database to all these groups. Where a report of harm has been transmitted to a manufacturer, and the manufacturer has made a claim that it contains materially inaccurate information, the report should not be included in the database until the pending claim has been resolved by CPSC in order to prevent the potentially inaccurate information from being seen and relied upon by users of the database.

a. Including inaccurate information will undermine the integrity of the database.

Proposed Section 1102.26(d) indicates that a report of harm will generally be included in the database on the tenth business day after transmittal to the manufacturer, even where the manufacturer has made a claim that the report contains materially inaccurate information, and the Commission has not yet resolved the pending claim. Such situations will inevitably lead to the

posting on the database of materially inaccurate information in some reports of harm for indefinite periods of time. The subsequent correction or removal of such reports will not serve to cure the material misinformation previously conveyed to and downloaded or printed by database users through the posting of these inaccurate reports.

The Commission has statutory authority to protect the database from the inclusion of such materially inaccurate information by withholding a report of harm until a pending claim that it contains materially inaccurate information has been resolved. Section 6A(c)(3)(A) of the Act specifies that "[e]xcept as provided in paragraph (4)(A)," the Commission shall make a report available on the database not later than the tenth business day after it transmits the report to the manufacturer. Paragraph (4)(A) (Section 6A(c)(4)(A) of the Act), in turn provides that the Commission shall correct or omit the report if it determines prior to making it available on the database that it contains materially inaccurate information.

This indicates that the circumstance in which CPSC is considering a pending claim of material inaccuracy represents an exception to the requirement that a report of harm be included in the database no later than 10 days after being sent to the manufacturer. Proposed Section 1102.30(a)(2) provides that manufacturer comments would not be included in the database until any pending claim that they contain materially inaccurate information have been resolved. This shows that CPSC recognizes the importance of determining whether challenged information is in fact materially inaccurate before posting it in the database.

The proposed rule does not explain why reports of harm will generally be posted in the database after 10 days even when a claim of material inaccuracy is pending. If it is based on concern that a manufacturer might seek to delay posting of a report by filing a frivolous claim that it contains materially inaccurate information, we can only note that the Commission, rather

than the manufacturer, controls the timing of the resolution of the claim. The Commission may act as quickly or as slowly as it chooses. We believe the detriment associated with leaving potentially materially inaccurate information on the database for an indefinite period of time far outweighs any benefit of posting such a report of harm sooner rather than later. In fact, withholding the posting of challenged reports may provide Commission staff with an incentive to resolve claims of material inaccuracy more quickly than would otherwise be the case.

The final rule should accordingly provide that a report of harm will not be included in the database until any pending claim that it contains materially inaccurate information has been resolved.

b. "Expedited" determination of a claim of material inaccuracy.

In the event that CPSC does not revise the final rule to provide that a report of harm that is subject to a pending claim of material inaccuracy will not be included in the database until the claim is resolved, it must provide a workable process for an expedited determination of such a claim within the 10 days before the report is posted. As currently drafted, the proposed rule fails to do so.

Proposed Section 1102.26(c) "strongly recommends" that requesters seeking an "expedited review" of claims of materially inaccurate information limit the length of the request to no more than five pages, including attachments, to allow for expedited review. However, the proposed rule does not specify any deadline for CPSC to complete such an expedited review. In particular, it does not provide that such a request for expedited review will ensure that the claim of materially inaccuracy will be resolved prior to inclusion of the report of harm in the database. In addition, requiring that the request be limited to five pages, including attachments, is unreasonably restrictive.

The final rule should provide that where a manufacturer limits the length of its claim that the report of harm contains materially inaccurate information to no more than 10 pages, including attachments, and submits the request within five days of receiving the report of harm for review, CPSC will in turn render an expedited determination of the claim of material inaccuracy within an additional five days, i.e., before the report of harm is posted in the database.

8. Disclaimer where a report of harm in the database is subject to a pending claim of material inaccuracy.

Section 1102.26(d) of the proposed rule discusses the timing for the submission of claims regarding material inaccuracy and the timing of any Commission response. The rule acknowledges that, if it receives such a claim, the Commission *may* withhold the report of harm from publication in the database until it makes a determination as to the validity of the claims. Absent such a determination, the rule provides that the Commission will generally publish the report of harm in the database on the tenth business day after transmitting it to the manufacturer, despite the pending request for a determination that it contains materially inaccurate information.

At the outset, it is not in anyone's interest – not that of the public, the Commission, nor manufacturers whose products are the subject of reports of harm – to have inaccurate information publicly disseminated in the database. For this reason, and as our comments above suggest, the Commission should, absent extraordinary circumstances, withhold such reports from publication until it has resolved any claim of material inaccuracy. However, if the Commission chooses not to take this position in the final rule and adopts the currently proposed regimen of posting the challenged report after 10 days, we offer the following alternative suggestions for revisions in the process for handling claims of material inaccuracy where an expedited determination is not requested and acted upon.

First, if the Commission's initial review of a claim of inaccuracy indicates that the claim may have merit but requires additional investigation, the Commission should extend the time for posting the complaint on the database by 10 additional business days. If it has not resolved the accuracy issue by that time, the Commission may, but is not required to, publish the complaint subject to the limitations discussed below

Second, if the Commission elects to publish in the database a report of harm that is subject to an unresolved claim of material inaccuracy, the Commission should include on every page of the report itself (or at least on pages where the accuracy of information is disputed) a disclaimer informing users of the database that the report of harm is subject to a pending request for a determination of material inaccuracy which has yet to be resolved by CPSC. Informing users of such a pending unresolved claim is obviously important to warn them that the report may be subject to deletion or revision and cannot be relied upon until the staff has made its final determination. After that determination, if the report remains on the database either in its original or in a revised form, the disclaimer can be removed.

Finally, the proposed rule sets no deadline within which the Commission staff must make a determination concerning the validity of a claim of material inaccuracy. If the Commission's experience with administering Section 6(b) of the Act is any guide, the lack of availability of staffing, the volume of requests for such determinations, and the complexity of such claims create the potential for indefinite delays in resolving them. To address this, the final rule should be revised to specify a 20 business day deadline for the resolution of a claim of material inaccuracy after publication of a disputed report of harm in the database along with the disclaimer discussed above. If the Commission is unable to resolve the claim within 20 days, the report should be withdrawn from the database until the claim is resolved. While this is less than

an optimal solution, it at least promotes timely consideration of a pending request and should provide impetus for quick resolution.

9. Correction or addition of information on the Commission's own initiative should be reviewed with the submitter or manufacturer prior to publication.

Sections 1102.26(f)-(k) of the proposed rule discuss the Commission's response to requests for determinations of material inaccuracy. We believe that the subsections 1102.26(f) and (j) of the rule requiring the Commission to notify requesters for such determinations of the resolution of their requests are positive and appropriate measures. If the Commission determines that a claim of inaccuracy is valid, the notice to the requester should include the text of any proposed redaction, correction, or addition to the text of the disputed report of harm. In this connection, as a general rule, unless editorial changes are simple and straightforward and are necessary to permit publication of a report of harm in the database, we believe the Commission should not attempt to rewrite the text of documents and instead should simply redact disputed information. Taking this approach will assure that additional issues concerning accuracy do not arise.

In addition, subsection 1102.26(k) of the proposed rule provides that the Commission may review a report of harm or manufacturer comment for materially inaccurate information on its own initiative and make corrections or additions. While it may be the intent of the proposed rule, the final rule should make it clear that, if the Commission chooses to do so, it will review the correction or addition with the submitter or manufacturer prior to publication of the corrected document in the database.

10. It is crucial that any document that is printed from the database prominently and conspicuously display the disclaimer that the Commission does not guarantee its accuracy or completeness.

Section 1102.42 of the proposed rule provides that the database will contain a notice that the Commission does not guarantee the accuracy, completeness or adequacy of its contents, particularly with respect to information submitted by persons outside of CPSC, and that this notice will be prominently and conspicuously displayed on the database and on any documents that are printed from the database.

While it may be the intent of the proposed rule, the final rule should specifically make it clear that this notice will be prominently and conspicuously displayed on each document in the database when it is displayed for electronic review, as well as if and when the document is printed from the database, even if such printing occurs remotely on non-governmental printers outside the agency. Including such a disclaimer on printed documents from the database is crucial because of the prospect that they may be viewed as self-authenticating public records under federal and state rules of evidence.

11. Freedom of Information Act considerations

The proposed rule is silent on whether the Commission will retain as agency records the originals of documents which have subsequently been modified or excluded from the database because of claims of material inaccuracy. We believe that the structure of the database provisions of the law require that the originals be purged as records of the agency. If they are not acceptable for public dissemination, they are inherently unreliable for any other regulatory purpose. If, however, the agency disagrees or it believes that the Federal Records Act requires that those documents be maintained, the Commission should make it clear that the documents are still subject to Sections 6(a) and (b) of the Act. Thus, the documents, or those parts that the agency has determined are inaccurate, may not be disclosed to the public under Section 6(b).

Inasmuch as the manufacturer of the documents has already commented on them, there will be no need for additional communication with the manufacturer prior to withholding the documents, for example, in response to a Freedom of Information Act request.

12. The final rule should provide that a report of harm posted on the database must indicate whether the submitter's contact information was provided to the manufacturer.

Contact information regarding the submitter is one of the statutorily dictated minimum requirements for a report of harm to be eligible for inclusion in the database. *See* 15 U.S.C. § 2055a(b)(2)(B)(iv). While CPSC will thus receive such information, the statute prevents it from being provided to the manufacturer by CPSC without the expressed written consent of the submitter. *Id.* § 2055a(b)(6).

Whether the submitter consented to transmittal of contact information to the manufacturer is significant and relevant information which should be available to all database users as they review and assess each report of harm. In particular, the absence of such consent may be a factor in explaining the absence of a manufacturer comment on the report, and may further indicate a lesser capability for and degree of verification.

The preamble states that CPSC proposes a complete report for posting in the public database include "an indication as to whether consent has been given regarding the submitter's contact information being shared with the manufacturer or private labeler." 75 Fed. Reg. at 29,163. The companies agree with and support CPSC's stated recognition that this is important information which should be provided with the report in the public database. However, a review of the proposed rule itself indicates that it contains no such provision, in either Section 1102.10 or Section 1102.20.

A provision should be added to the final rule specifying that reports of harm posted in the database will include an indication whether consent has been given for the submitter's contact information to be shared with the manufacturer.

13. Manufacturer comments on a report of harm that meet the requirements of Section 1102.12(c) must be published in the database regardless of when they are received by CPSC.

The proposed rule would authorize CPSC "in its discretion, where it determines it is in the public interest," not to publish a manufacturer comment that is received more than one year after transmission of the report of harm to the manufacturer. *See* 75 Fed. Reg. at 29,178-79 (proposed 16 C.F.R. § 1102.20(g)). However, the proposal provides no explanation or justification as to why publication of a manufacturer comment that meets all the requirements of Section 1102.12(c) can be denied simply because it was received 12 months and one day after transmission of the report of harm when publication of the same comment would be required if it had been received two days earlier. The fact that publication would be required in that circumstance is based upon the principle that a manufacturer comment which meets these requirements should be made available to serve the interest of all database users. The mere fact that such a comment is received more than 12 months after transmission of the report to the manufacturer does not negate this principle.

More importantly, the statute expressly requires publication of such a manufacturer comment regardless of when it is received by CPSC. Section 6A(c)(3)(b) of the Act provides that "if the Commission receives a comment" from the manufacturer, it "shall make such comment available in the database" where the manufacturer requests it at the same time as the report of harm, or "as soon as practicable thereafter." The statute sets no deadline of cutoff for

the receipt of such comments by the Commission in order for them to be subject to this directive that they "shall" be made available in the database where the manufacturer requests it.

The proposed 12 month deadline may be based upon the supposition that in such circumstances the manufacturer is simply being dilatory. On the contrary, there are many circumstances in which a manufacturer may receive relevant information more than 12 months after transmission of the report of harm. For example, in many cases where reports of harm concern personal injuries, there will be subsequent litigation against the manufacturer arising from the incident. The statute of limitations for commencing such litigation may be two years or more in many states. The manufacturer may receive significant information during the discovery phase of such litigation which relates to the underlying report of harm and supports submission of a comment under Section 1102.12, and should not be prevented from having the comment added to the database to serve the interest of all users.

Moreover, giving CPSC unbridled discretion to reject the publication of such a comment received after more than 12 months on the amorphous ground that it is "in the public interest," without any standards to govern such determinations, will inevitably lead to arbitrary decisions and is both unfair and inappropriate, as well as contrary to the statutory directive. Posting of manufacturer comments that meet the requirements of Section 1102.12(c) serves the interest of all users of the database and is statutorily required regardless of when such comments are received by CPSC. Proposed Section 1102.20(g) should therefore be deleted from the final rule.

14. Manufacturer comments should accompany and be displayed simultaneously with the reports of harm that they address.

Section 1102.30 of the proposed rule makes it clear that the Commission will publish in the database manufacturer comments that satisfy the requirements for such comments that the Commission has established in Section 1102.12(c). The proposed rule does not, however,

address the issue of whether these comments will be displayed when someone seeks to access the underlying report of harm. Absent such a requirement, the risk exists that a search of the database might reveal a report of harm without also revealing a related comment. To address this, the rule should make it clear that the Commission will link such comments to the relevant complaints in a manner that assures that both are displayed together when either is accessed by the public.

CONCLUSION

The Companies appreciate the opportunity to submit these comments, and believe that the Commission's incorporation of the revisions, interpretations, explanations and clarifications noted is critical to the integrity and potential utility of the database, consistent with the requirements and objectives of Section 212 of the CPSIA.

Respectfully submitted,

[redacted]

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Comment On: CPSC-2010-0041-0001
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Comment from Joanne Mattiace

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General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0027.1: Comment from Joanne Mattiace

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July 22, 2010

Ms. Mary Kelsey James
Director, Information Technology Policy and Planning
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4330 East West Highway
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Re: Publicly Available Consumer Product Safety Information Database
16 CFR 1102
Docket No. CPSC-2010-0041

Dear Ms. James:

Please accept this communication as responsive to the Commission's request for written comments regarding the above.

As a longtime product safety practitioner advising numerous retailers, manufacturers and distributors, I am concerned with a number of interpretations regarding the Congressional statutory direction regarding this database. While a publicly searchable database can be of great benefit to members of the public, to the government, and to responsible industry members, it is essential that it be designed such that it provides information that is ***meaningful.*** Care must be taken to ensure that the database does not unnecessarily and unfairly harm companies involved in the marketing of consumer products. Should it be unnecessarily clogged with complaints that are not legitimate or are otherwise spurious, its beneficial impact will be considerably lessened.

Further, as currently proposed, not only will the beneficial impact of the new database be lessened, the very integrity of the Section 15 voluntary reporting process will be compromised. Care must be given to ensuring that companies not are discouraged from making such reports and in engaging in corrective action. To this end, any database must not include any information relating to a Section 15 report but for the official public press release.

Though an incredible amount of product-related information already exists on the Internet, including consumer complaints relating to a purportedly bad experience with a given product, this new database will carry the imprimatur of the Commission. Information retrieved from the database will be given a great deal of weight. Care needs to be taken now so that the database becomes a "first alert" to the Commission of product issues rather than a portent tool of disgruntled individuals and the Plaintiffs' bar.

While our concerns with the proposed public database are many, we direct your attention to the following:

- **The ability for complaints to be filed without the complainant furnishing identification information.** It is absolutely essential that each and every complaint come from an identifiable individual. While that individual's identity need not be disclosed on the database, it must be provided to the Commission in order to ensure that only legitimate complaints are made by persons actually involved with the use of a product and not, for example, by a disgruntled employee or a troubled individual. *Put simply, Anonymous complaints should neither be entered into the database (nor otherwise considered by the agency staff) and anonymous reports must not be retrievable from the database.*

  In those situations in which the complainant agrees to allow his/her name disclosed to a company, the Commission should routinely do so in order to allow for better evaluation of the complaint. Because conferring with an actual product user and/or examining the subject product can be so important, the Commission should encourage that individuals provide for the release of identifying information.

  Moreover, a requirement as to identity disclosure to the Commission at least will minimize the making of multiple complaints based upon but a single product experience. For this reason, in its final rule the Commission should require that each submitter of information provide his/her identity and sign off on a statement that the complaint is based upon that individual's good faith belief in its truth. Further, a mechanism should be provided whereby spurious complaints can be promptly removed from the database, once such is suspected. In no circumstances should computer generated complaint(s) be accepted into the database.

- **Section 6(b) procedural protections will be violated.** Notwithstanding Congressional direction for this database, Section 6 of the Consumer Product Safety Act (CPSA) still applies. **Section 6(b) of the CPSA was not repealed by the CPSIA.**

  Section 6(b) mandates that the Commission take reasonable steps to ensure, for example, that information released is "accurate and fair in the circumstances." As the past three plus decades of Commission activity has so vividly shown, there is a reason for such procedural protections. The requirement of accuracy does far

more than simply provide company protection from the release of inaccurate information. Instead, the accuracy protection afforded by Section 6 contributes to the ultimate release of information that consumers can reasonably rely upon. It is shortsighted to choose *speed over accuracy*. Fundamental fairness too dictates that identifiable companies are given an adequate opportunity to review and comment upon complaints. In some situations a company will be able to supply information which might not have been available previously to the Commission or to the user. That information may well resolve a given complaint or point to the need for corrective action. But in order for a company to be able to comment upon such, it needs the time to review its files, retrieve tests reports, confer with its many suppliers, etc. In short, a meaningful comment period is essential to the development of a meaningful consumer compliant database. A routine, 10 day response time is simply not going to be sufficient all the time.

Finally, the Commission needs to recognize that Congress anticipated problems with the public database and specifically provided that "... The Commission shall provide clear and conspicuous notice to users of the database, that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database." While the very effectiveness of this disclaimer is in question, as noted above, the Commission should repeat it at every chance, on the database, on any intake complaint forms, on the release of information, etc.

Thank you for allowing us this opportunity to offer these comments.

Respectfully Submitted,

/s/

Joanne E. Mattiace

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Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0028
Comment from Jim Pauley

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General Comment

Please see the attached comments.

Attachments

CPSC-2010-0041-0028.1: Comment from Jim Pauley

Schneider Electric

July 23, 2010

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Room 502
Bethesda, MD 20814

Subject: Publicly Available Consumer Product Safety Information Database – Proposed Rule (Docket No. CPSC-2010-0041), 75 F.R. 29156 (May 24, 2010)

On behalf of Schneider Electric USA, the following comments are offered to the docket for the U.S. Consumer Product Safety Commission's (CPSC) proposed rule establishing a Publicly Available Consumer Product Safety Information Database.

Schneider Electric is a manufacturer of electrical equipment and has worked with the CPSC on numerous issues including significant concerns about counterfeit electrical products that have been found in the market over the last decade.

Lack of Detailed Information

We have significant concern regarding the lack of necessary details that will likely occur from reports submitted by consumers. We know from experience that in order to fully understand and resolve product issues that are raised by our customers, we have to obtain much more detail about the specifics on how the product was used and installed and what events led to the particular concern. This is particularly true of electrical products.

One example of this can be illustrated using a Ground Fault Circuit Interrupter (GFCI) which is an electrical device that has saved countless lives from electrocution. A properly installed GFCI will detect ground faults above the established thresholds and open the circuit to prevent electrocution of a human that may have ended up in the current path due to a damaged tool, appliance or other electrical failure. However if the same human came in contact with the line conductor and the neutral conductor (not ground) the GFCI would not function and is not intended to function in this situation. The person actually experienced a line to neutral fault and not a ground fault. It is not difficult to see this same consumer submitting a report to the database that simply says,

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there was a GFCI on the circuit and that they received an injury from electric shock and they go on to state that the GFCI did not function. The fact that they were subjected to a line to neutral fault and not a ground fault is a level of detail that they would not readily understand.

We would need much more data and information than what would likely be supplied in the database in order to respond to such a report. We would need to know if the GFCI was properly installed. Was the test/reset function working? What was the sequence of events that occurred that led to the shock? Was the person standing on an insulated surface versus a grounded surface?

Without this information, we are now faced with attempting to respond to the allegation of a non working GFCI that was in fact operating exactly as intended. Users of the database are left with the impression that the product doesn't function properly because we cannot obtain enough information to make any determination. Perhaps even worse is that they leave with the impression that GFCIs are not useful safety devices – a view that could begin to undermine all of the work that the CPSC has done to educate users of the importance of GFCIs for electrical safety.

It is our view that if there is not enough information to make a determination of why the particular events occurred, the CPSC should not post those reports in the database. This is the only way to ensure that misleading and inaccurate information does not continue to exist in the database.

Counterfeit Products

We have worked with the CPSC on numerous occasions with respect to the counterfeiting of electrical products. From this experience we know that there are many counterfeit products that look nearly identical to the legitimate brand name product on the outside, but pose significant safety risks on the inside. We also know that we frequently have to actually inspect the product itself to determine whether or not it is counterfeit.

This poses a significant dilemma. A consumer alleges some type of injury from an electrical product that was counterfeited. They make a report to the CPSC database that the product caused harm and they utilize the brand name of manufacturer in the report. Without physical examination of the product, it would be impossible to determine that this was indeed a counterfeit product. The manufacturer is left with attempting to

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respond to an issue that was not caused by their product and the database continues to perpetuate that a product caused harm when in fact it was a counterfeit of the original. Significant damage to the brand name manufacturer's reputation could result.

The only way to resolve the issue is to release the contact information of the submitter of the report to the manufacturer so that further follow-up and investigation can be completed. If that information is refused to be released, then the report should not be posted in the database.

We recognize and agree with the objectives intended with the database. However, there will need to be a much more robust interaction between the submitter of the report and the manufacturer of the product in order for the database to be of any value and for it not contain false and misleading information.

Sincerely,

[redacted]

Jim Pauley, P.E.
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Publicly Available Consumer Product Safety Information Database

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Comment from Christine Hines

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Government Agency: CPSC

General Comment

Attached are comments submitted by Consumers Union * Consumer Federation of America * Kids in Danger * National Research Center for Women & Families * Public Citizen * U.S. Public Interest Research Group (U.S. PIRG) * regarding the Publicly Available Consumer Product Safety Information Database, Notice of Proposed Rulemaking. Please contact me with any questions or concerns regarding these submitted comments.

Christine Hines, Consumer and Civil Justice Counsel, Public Citizen's Congress Watch. 215 Pennsylvania Ave., SE | Washington, D.C. 20003, T: (202) 454-5135 | F: (202) 546-5562, http://www.citizen.org

Attachments

CPSC-2010-0041-0029.1: Comment from Christine Hines

*** Consumers Union * Consumer Federation of America ***
*** Kids in Danger * National Research Center for Women & Families ***
*** Public Citizen * U.S. Public Interest Research Group (U.S. PIRG) ***

July 23, 2010

Docket No. CPSC-2010-0041
Office of the Secretary
Consumer Product Safety Commission
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Via http://www.regulations.gov

Comments of Consumers Union, Consumer Federation of America, Kids in Danger, National Research Center for Women & Families, Public Citizen, and U.S. PIRG Regarding the Publicly Available Consumer Product Safety Information Database, Notice of Proposed Rulemaking, 75 FR 29156 *et seq.* May 24, 2010

Introduction

Our groups, Consumers Union, Consumer Federation of America, Kids in Danger, National Research Center for Women & Families, Public Citizen, and U.S. PIRG respectfully submit these comments on the Consumer Product Safety Commission's proposed rule regarding the establishment and maintenance of a publicly available consumer product safety information database. Section 212 of the Consumer Product Safety Improvement Act of 2008 (CPSIA),[1] created a new section 6A of the Consumer Product Safety Act (CPSA)[2] to establish a searchable and accessible database through the Consumer Product Safety Commission (CPSC) Web site. As we have commented previously, the database, if implemented properly, will enhance consumer protection against potential and actual product hazards and will expedite the release of potentially life-saving product safety information to the public.

In September 2009, the CPSC submitted a database plan to Congress[3] to satisfy requirements under the CPSIA.[4] Subsequently, the agency held a hearing[5] and a two-day workshop[6] to receive public comments. Our organizations testified at the hearing, participated in the workshop, and submitted comments. We appreciate the Commission's efforts to provide forums to discuss the database implementation. Currently, we are generally supportive with the Commission's approach to establishing the database, but would like to further comment on some of the agency's proposals, as follows:

Comments on Proposed Rules

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[1] Pub. Law 110-314.
[2] 15 U.S.C. §§ 2051–2089, at § 2055a.
[3] 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 (SaferProducts.gov), September 10, 2009.
[4] 15 U.S.C. § 2055a(a)(2).
[5] 74 Fed. Reg. 54,552 (Oct. 22, 2009).
[6] 74 Fed. Reg. 68,055 (Dec. 22, 2009).

Proposed 1102.10(f) (8)
Definition of public interest – The Commission has reserved the discretion to publish or not to publish certain information (such as photographs or other information) onto the database based on a determination of whether the information is in the public interest.

> "The Commission's determination shall consider whether the information is related to a product safety purpose served by the Database including whether or not the information helps database users to: (i) Identify a consumer product; (ii) Identify a manufacturer or private labeler of a consumer product; (iii) Understand a harm or risk of harm related to the use of a consumer product; or (iv) Understand the relationship between a submitter of a report of harm and the victim."

The "public interest" definition is sufficiently broad to ensure that a wide variety of information will be allowed and published onto the database.

Proposed 1102.10
Incomplete reports of harm – We agree that the Commission should refrain from publishing incomplete reports onto the database. We do not object if the Commission maintains incomplete reports for its own use. However, submitters should be granted an opportunity to return easily to the database to complete, previously incomplete reports of harm for publication onto the database. We suggest that users who submit an incomplete report be sent an email with a link to the Web site where they may complete and submit the full report.

Detecting multiple reports from the same IP address – The Commission received suggestions to run system checks to determine whether multiple reports are received from the same person, so as to identify spam, frivolous reports, or other unwelcome submissions. The Commission announced that it would examine options to detect if multiple reports are submitted from the same IP address. The Commission should also be aware that it is possible in certain situations that valid reports would come from the same person, or IP address, such as those from persons in government, health facilities, and consumer organizations. The Commission should structure the database to accept comments from such submitters.

Proposed 1102.12
Manufacturer verification (c) (3) – We are pleased that the Commission proposes to require submitters of manufacturer comments to verify the truth and accuracy of their submissions (similar to the requirement for submitters of reports of harm). This rule as applied to all stakeholders will help ensure the accuracy and integrity of the information in the database.

Manufacturer comments and other changes to a published report of harm – The CPSIA allows for various changes to reports of harm published onto the database, whether to correct or remove materially inaccurate information or to add manufacturer comments. It may be in the best interest of the public for the Commission to provide notification on its Web site that reports of harm may be updated, revised or corrected, but in a manner that will not chill submissions by consumers. The Commission should also provide submitters of reports of harm with the opportunity to receive updated information regarding their submitted report. We suggest that this notification be sent automatically to submitters via email.

Proposed 1102.14
Recall notices – We strongly agree with this rule that all information from voluntary or mandatory recall notices should be made available and searchable in the database. We also agree that relevant recall notices should be made available to submitters of reports of harm where the submitted report is related to a recalled product.

Proposed 1102.16
Additional information –The Commission has received numerous suggestions from public comments on the types of additional information that would be appropriate for the database. Other than recall notices, the proposed rulemaking has declined to commit to adding any other content for inclusion in the database. The agency has said it is studying whether to add "CPSC technical research, reports on emerging hazards, and other staff-generated research into the public database." These reports and staff research are important items appropriate for public review and the database. We urge the Commission to act expeditiously and add these and other relevant information to the database.

Proposed 1102.20 (b)
Limitation on use of submitter's contact information – The CPSIA specifically limits the use of submitters' contact information after it is voluntarily released to manufacturers and private labelers.[7] The proposed rulemaking states that a manufacturer or labeler who receives the name and contact information for the submitter of a report of harm must not use the information for any other purpose other than verification of the report. The Commission states that the "verification" does not include "activities such as sales, promotion, marketing, warranty, or any other commercial purpose." The Commission should also specifically discourage any harassment or intimidation of the submitter of the report of harm by manufacturers, retailers, distributors, and their representatives.

Misuse – We previously have urged the Commission to protect consumers' private contact information by including in its rulemaking an affirmative statement that it will enforce the provision to discourage the misuse of submitters' contact information in the possession of manufacturers and private labelers. The Commission stated in the proposed rulemaking that it "may, at its discretion, determine means by which it will enforce this provision."[8] It is a well-known fact that manufacturers use consumer information without explicit permission for their various business purposes. Reacting to the misuse of consumers' private information after it has already occurred will not alleviate the harm resulting from the misuse. The Commission has the opportunity now to set an expectation of serious consequences if this type of activity should occur. It should do so.

Proposed 1102.24 (d)
Designation of confidential information – We agree with the Commission that requests for designation of confidential information must be received in a timely manner. We suggest that timeliness of confidentiality designations can only be carried out to the day that the report of harm is published onto the database. Once the information is published onto the database, it should no longer qualify as "confidential." We also caution the Commission to be wary of attempts by

[7] 15 U.S.C. § 2055a(b)(6).
[8] Publicly Available Consumer Product Safety Information Database, Notice of Proposed Rulemaking, 75 FR 29156 *et seq* at 29170.

manufacturers, private labelers and others to mark an overly broad amount of information as "confidential" in order to avoid public sharing of safety hazards.

Proposed 1102.26 (a) (1)
Definition of "materially inaccurate information in a report of harm" – The Commission defines materially inaccurate information as "information that is false or misleading in a significant and relevant way that creates or has the potential to create a substantially erroneous or substantially mistaken belief in a Database user about information in a report of harm relating to: (i) The identification of a consumer product; (ii) The identification of a manufacturer or private labeler; or (iii) The harm or risk of harm related to use of the consumer product."[9] We have no objection to the definition, which appears to cover material information, and not superficial, non-substantive errors. We also urge the Commission to audit claims of "material inaccuracy" to ensure that manufacturers, distributors, and others are making material inaccuracy claims in good faith instead of frivolous claims to block public disclosure of critical safety hazard information.

Proposed 1102.26 (b)
Request for designation of materially inaccurate information – The Commission has set forth requirements for requesting the designation of materially inaccurate information. Specifically, (b)(4) requires that the party seeking the designation to "provide evidence" to support removal or correction of the reported information. We agree that the party claiming that information is "materially inaccurate" bears the burden of adequately demonstrating to the Commission that the information is indeed materially inaccurate – not the Commission.

We applaud the Commission for, whenever possible, favoring correction and addition of information to address reports of harm with "materially inaccurate information," instead of the complete exclusion or removal of the reports from the database.

Respectfully submitted,

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[9] 75 FR 29179.

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Publicly Available Consumer Product Safety Information Database

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Comment from Julia Hughes

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General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0030.1: Comment from Julia Hughes

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July 23, 2010

Mr. Todd A. Stevenson, Secretary
Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway, Room 502
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Re: Comments on Proposed Rulemaking Concerning the Publicly Available Consumer Product Safety Information Database, Docket No. CPSC-2010-0041

Dear Mr. Stevenson:

The United States Association of Importers of Textiles and Apparel ("USA-ITA"), on behalf of its member companies, respectfully submits the following comments in response to the U.S. Consumer Product Safety Commission ("CPSC") Notice of Proposed Rulemaking published to the Federal Register on May 24, 2010, as identified by the above referenced docket number. The rulemaking concerns CPSC's plan to establish the Publicly Available Consumer Product Safety Information Database (the "Database") required pursuant to Section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). The following expresses a few of the concerns about the Database that are widely held among USA-ITA's membership and offers recommendations to improve its administration, integrity and utility for both consumers and the business community.

USA-ITA represents a broad cross-section of retailers and apparel producers that import and sell textiles and apparel, from large, nationally-recognized brands to smaller companies. The association represents the industry before Congress, the Administration, the business community and the public, as well as industry groups and governments around the world. In addition, USA-ITA endeavors to provide its members access to the information they need to do business and understand and comply with complex laws and regulations governing commerce in the United States and abroad.

Who May Submit a Report of Harm

Proposed § 1102.10(a) of the CPSC regulations purports to explain what persons or entities may submit reports of harm for publication in the Database. These are provided in six broad categories corresponding to the categories enumerated in Section 6A(b)(1)(A) of the Consumer Product Safety Act ("CPSA," as amended by the CPSIA), including: consumers; local, State, or Federal government agencies; health care professional; child service providers; and public safety entities. The sixth category would be a new "other" category, to include individuals and entities that do not fall within the other five categories, such as "attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations."

USA-ITA is concerned that Proposed § 1102.10(a) defines too broadly the scope of persons and entities eligible to submit reports of harm, and this is likely to harm the integrity and usefulness of the database. The purpose of the Database is to provide consumers with reliable information about consumer product incidents. To ensure accuracy of information in the Database it is critical that only those closely connected to consumer product incidents be permitted to publicize reports of harm in the Database. Many of the persons or entities eligible to file reports of harm under proposed § 1102.10(a), simply are not likely to have reliable, complete information about consumer product incidents. This includes observers of products being used, friends of individuals harmed by consumer products, and consumer advocacy organizations, among others. USA-ITA respectfully requests that CPSC amend proposed § 1102.10(a) to limit reports of harm to those that have a direct connection and are most familiar with the circumstances of the incident that caused the harm. Inaccurate, incomplete or otherwise false reports of harm will cause undue damage to U.S. companies, mislead consumers, and vitiate the purpose of the Database.

Submission of Reports of Harm

Proposed § 1102.10 imposes no requirement, as a precondition to publication in the Database, that the report of harm be submitted within any period of time following the reported incident. USA-ITA recommends CPSC consider amending proposed § 1102.10 to include a time limit for submitting reports of harm. Such a provision would help to ensure that information in both the report of harm and comments by the manufacturer or private labeler is accurate and complete. Certainly, the longer the time lag between the incident and the report of harm, the more difficult it is for CPSC to verify the information in the report of harm and for manufacturers and private labelers to investigate and respond adequately to the incident reported.

Manufacturer and Private Labeler Notification and Comments

The CPSIA affords manufacturers and private labelers 10 business days from receipt of a report of harm to submit responsive comments for such comments to be published concurrently with the report of harm in the Database. In this limited window of time, a manufacturer or private labeler must evaluate the claims in the report of harm, investigate such claims, and prepare responsive comments. Although USA-ITA is aware that the timeline for publication of reports of harm is mandated by the CPSIA, CPSC should be cognizant of the heavy burdens this imposes on manufacturers and private labelers, and consider adopting provisions for exceptions and extensions of the statutory timeline, perhaps to 30 days, where the affected manufacturer or private labeler clearly cannot respond within 10 days and publication within the timeline would be manifestly unfair.

In light of the limited time provided for manufacturers and private labelers to respond to reports of harm, it is critical that notices of reports of harm reach the correct recipients in a timely manner. For that reason, we urge CPSC to adopt procedures to confirm that the correct manufacturers and private labelers are identified in reports of harm, and to actively promote registration by U.S. companies with CPSC to ensure that reports of harm reach the correct individual within the recipient company or family of companies. CPSC should also request companies that believe they are the unintended recipient of a report of harm to immediately notify CPSC.

Materially Inaccurate Information

Proposed § 1102.26 sets forth the procedures CPSC will follow to identify and treat materially inaccurate information submitted for publication in the Database either in reports of harm

or responsive comments. That provision states that any person may request CPSC to exclude from the database materially inaccurate information. It further states that CPSC will, where possible, expedite its determination of a manufacturer's or private labeler's claim of material inaccuracy. USA-ITA strongly urges CPSC to implement specific procedures for handling expedited claims of material inaccuracy that aim to resolve such claims of material inaccuracy within one to three business days of receipt of the claim. False and misleading information in reports of harm threaten to cause irreparable damage to U.S. companies, and CPSC should prioritize resolving these issues quickly and fairly.

CPSC Outreach

Finally, USA-ITA urges CPSC to commit resources for educational outreach and training concerning use of the Database and to publish official guidance tailored specifically to manufacturers and private labelers.

USA-ITA appreciates your consideration of the foregoing comments. Should you have any questions or require clarification, please do not hesitate to contact me.

Sincerely,

[redacted]

Julia Hughes
President
USA-ITA

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Comment from Stephanie See

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General Comment

Attached, please find IAAPA's comment on the proposed rule on the Publicly Available Consumer Product Safety Information Database (Docket No. CPSC-2010-0041).

Attachments

CPSC-2010-0041-0031.1: Comment from Stephanie See

IAAPA

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2010 EVENTS

Euro Attractions Show
October 6-8
Rome, Italy

IAAPA Attractions Expo
November 15-19
Orlando, Florida, USA

2011 EVENTS

Asian Attractions Expo
21-24 June
Singapore

By Federal eRulemaking Portal

July 23, 2010

Office of the Secretary
Consumer Product Safety Commission
Room 502
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Bethesda, MD 20814

Re: Docket No. CPSC-2010-0041

The International Association of Amusement Parks and Attractions (IAAPA) is the largest international trade association for permanently situated amusement facilities and attractions. IAAPA represents more than 4,100 facility, supplier, and individual members from more than 90 countries. Member facilities include amusement/theme parks, waterparks, attractions, family entertainment centers, arcades, zoos, aquariums, museums, science centers, resorts, and casinos. IAAPA welcomes the opportunity to comment on the Proposed Rule on the Publicly Available Consumer Product Safety Information Database under the Consumer Product Safety Improvements Act.

The accuracy and integrity of the database are critical to achieving Congress' intent to provide a useful consumer database. IAAPA is concerned that the lack of specific information in the reports of harm coupled with the difficulties a consumer could encounter in correctly identifying a specific product's manufacturer could create a large database filled with misleading information. At best this could be confusing to consumers and at worst harmful to both consumers and manufacturers. IAAPA is also concerned that the process of contacting the manufacturer, providing information to them, and the time frameworks provided for responding before a report of harm is made public are inadequate to give manufacturers the opportunity to thoroughly investigate the reports and respond in a manner which is useful and beneficial to the public. IAAPA's comments seek to improve the quality of information in the database.

Proposed 16 CFR Section 1102.10(a)(6)—*Reports of Harm: Who May Submit; Others*

The CPSIA specifically enumerates the groups who should be allowed to submit reports of harm. This list includes: consumers; local, state or Federal government agencies; health care professionals; child service providers and public safety entities. Expanding the list of who may submit beyond this group is going beyond the scope of the statute and is needlessly diluting the information received. Information derived first hand will be most accurate. The groups enumerated in the statute have first hand information of the incident or are specifically tasked with identifying public safety and/or health hazards. It is critical to the success and accuracy of the database that the group of submitters is not expanded to a larger group. Not only does expanding beyond this list exceed the CPSC's statutory authority, it also needless dilutes the information that Congress wants made available in the database. Section 1102.10(a)(6) should be eliminated from the proposed rule.

Proposed 16 CFR Section 1102.10(d)—*Reports of Harm: Minimum requirements for publication*

The House and Senate Conferees noted their intention that the Commission, "prevent duplicative reports from being added to the publicly available database."[1] This is a critical point in ensuring that the public has accurate information. The proposed rule appears to be premised on the fact that the submitter of the report of harm is the same as the harmed party. But, because the proposed rule seeks information, not just from the person harmed but from a designated list of other possible sources, any one incident is likely to elicit multiple reports of harm. The proposed rule does not specifically address this issue. IAAPA believes that in order to avoid duplicate reports of harm, causing confusion and over reporting, the CPSC should require the harmed party's identity be provided (this can remain unpublished). Requiring the harmed party's name will ensure that the CPSC can accurately cross check the database and prevent duplicate reports. The public may benefit by having the additional information provided from multiple sources, as noted in the conference report, but only if it is clear that the information pertains to the single report of harm. An incident date would be another useful piece of information to ensure that reports of harm clearly identify the incident, but date alone is not enough. The name of the person harmed remains critical to ensuring duplication does not exist. The proposed rule should add this as an additional requirement to Section 1102.10(d).

Proposed 16 CFR Section 1102.10(d)(5)—*Reports of Harm; Minimum requirements for publication; Verification*

IAAPA also believes the database will be enhanced if each submitter is required to identify which of the aforementioned groups he or she belongs to when filing a report (e.g., a victim or health care provider). This will provide context to the reader. Different weight will be placed if the submitter is the actual harmed individual or a medical professional. Both views are important but knowing the perspective from which someone is reporting adds valuable and necessary insight to the reader.

Proposed 16 CFR Section 1102.10(d)—*Reports of Harm; Minimum requirements for publication*

In an effort to maintain accurate information and reports, there should be a requirement that reports of harm be filed within one year of the incident's occurrence. The likelihood of inaccuracies occurring after that length of time is greatly enhanced.

[1] Joint Explanatory Statement of the Committee of Conference, July 28, 2008, page 6.

Proposed 16 CFR Section 1102.10(f)(3)—*Reports of Harm; Minimum requirements for publication; Information not published*

The scope of the database must be limited to reports of harm and not to reports relating to general product quality, service issues, or other types of quality complaints. The harm must relate to the use of the consumer product, or the database should be limited to the information the Commission determines is reasonably related to the safety of consumer products as indicated by specific reports of harm caused by those products. The CPSC should add a section specifying that information that does not do this will not be published.

The CPSC should also clarify that photos should be limited to whole product only. Photos beyond this scope such as photos of injuries, product components or people are not in the public interest and will not be published. The proposed rule should make clear that photos submitted are for product identification purposes.

Anonymous reports which cannot be verified and incomplete reports should not be accepted and/or published in the database.

Proposed 16 CFR Section 1102.10(g)—*Reports of Harm; Minimum requirements for publication; Reports of harm from persons under 18*

IAAPA strongly believes that reports of injuries to minors should be submitted by parents or guardians rather than the minor themselves. This will ensure a degree of maturity in the reporter and will likely increase the accuracy of the report. This requirement should be amended to state that the minimum age to report an incident should be 18.

Proposed 16 CFR Section 1102. 12—*Manufacturer Comments*

Manufacturers and private labelers are likely different for a given product. IAAPA has many questions about how reports about these products will be treated:

- How will CPSC identify the correct entity to respond?
- Will the notification be sent to both simultaneously?
- Will both be alerted to the other's interest?
- If there is a manufacturer and a private labeler, should the entities be given a few more days to respond?
- Will both set of comments be posted?
- Who takes precedence in responding to incident reports?
- If licensors are considered private labelers, then what about products with multiple licenses on them?

The CPSC should work with industry to clarify these issues and ensure that the appropriate entity has adequate time to accurately respond to reports of harm prior to publication.

The Commission should "restart" the statutory timeframes if notification goes to the wrong manufacturer or private labeler, if incomplete information is provided in the report form, or if the submitter corrects the original report form, especially where information in a required field has been changed.

Proposed 16 CFR 1102.26(d)—*Designation of materially inaccurate information; Timing of Submission*

Generally the timeframe for challenging a report as materially inaccurate before publication is too short. Better and more thorough information is often more useful than incomplete information obtained quickly.

The Commission should work with industry to identify realistic time limits for businesses to accurately and thoroughly respond in the case of "materially inaccurate information." Consumers and manufacturers will be better served by accurate fulsome information.

Miscellaneous comments

Unfortunately, intellectual property theft is an issue for the attractions industry. Despite the best efforts of IAAPA members, government officials and law enforcement officers, counterfeit products do make their way into the market.

How will manufacturers know whether the product is a counterfeit? Counterfeit products are often difficult to identify, will the reports of harm provide the manufacturer with ample information to determine this?

In order to prevent fraud or the malicious filing of false reports, IAAPA believes there should be a mechanism to detect if multiple reports are being filed from the same IP address, and those reports should be flagged for further inspection prior to posting them for the public.

Regulatory Flexibility Act

IAAPA disagrees that the proposed rule will have "little or no impact" on small businesses.

Unlike large businesses, who may have in-house counsel, engineers and testing facilities, small businesses will likely need to contract these services out, which would take more than "a few hours" and place a significant financial burden on these small firms. Furthermore, "a few hours" is multiplied by the number of small businesses subject to this law, the time burden is substantial.

IAAPA believes the Commission should do a complete RFA review on the economic impact of this rule prior to implementation.

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Document: CPSC-2010-0041-0032
Comment from Matthew Hall

Submitter Information

Name: Matthew Hall

General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0032.1: Comment from Matthew Hall

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July 23, 2010

Todd Stevenson, Secretary
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Re: Docket No. CPSC-2010-0041

Dear Mr. Stevenson:

On behalf of E-Z-GO Division of Textron Inc. ("E-Z-GO" or "the Company"), these comments are submitted to the U.S. Consumer Product Safety Commission ("CPSC") regarding the CPSC's May 24, 2010 notice of proposed rulemaking ("NPRM") concerning the creation of a consumer product information database that allows for public submission and retrieval of "reports of harm," 75 *Federal Register* 29156-21981. E-Z-GO, located in Augusta, GA, is a manufacturer of electric and gasoline engine powered golf cars and personnel carriers, products that are employed to transport golfers and perform maintenance on golf courses, for transporting people at airports, hotels and other settings, and by individuals for personal use.

E-Z-GO's comments center upon the NPRM's procedures for CPSC handling of reports of harm. The Company recognizes, of course, that the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), with limited exceptions, establishes a 10 business day period between when the CPSC transmits a report of harm to a manufacturer, and when the report is published in the database. E-Z-GO likewise is aware that the CPSC believes that its discretion to delay publication of a report of harm upon expiration of the 10 business day period is severely restricted by the CPSIA's text.

Should the CPSC maintain that strict interpretation, however, the database likely will include, at least on a temporary basis, inaccurate and potentially damaging information about E-Z-GO products that may injure the Company's commercial reputation and potentially impact product sales. Similarly, E-Z-GO is concerned that unverifiable reports of harm could be used to unfairly burden the Company with new reporting obligations under Section 15 of the Consumer Product Safety Act ("CPSA"). Accordingly, E-Z-GO requests that the CPSC clarify that (i) reports of harm will not be published in the database until after the CPSC resolves a

manufacturer's claims of material inaccuracy and (ii) transmitted reports of harm will not trigger any CPSA reporting requirements.

A. Obstacles to Investigating Reports of Harm

Under the NPRM, anyone 18 years of age or older may submit a report of harm for inclusion in the CPSC database and create a public record of an alleged incident involving an E-Z-GO product – whether valid or not – unless the Company can demonstrate to the CPSC's satisfaction within 10 business days that the report contains materially inaccurate information. E-Z-GO is concerned that, because of the information and time restrictions imposed by the CPSIA and the NPRM, the Company could be falsely associated with multiple inaccurate injury reports.

The ability of E-Z-GO to meaningfully investigate a report of harm within the 10 business day window is limited by several factors. The fact that the CPSC may not disclose the identity of an individual who submits a report of harm, absent express consent to do so, places a severe constraint on any investigation. Unless the report includes other details, such as a particular location of the alleged incident, when it occurred, *etc.*, the absence of any contact information for the person who submits a report of harm is a complete barrier to an investigation through any source (*e.g.*, police department) and prevents E-Z-GO from correcting materially inaccurate information.

Even where the CPSC discloses to E–Z-GO the contact information of the person submitting a report of harm, the Company has limited resources in which to investigate the report to determine, for example, basic information such as whether the alleged incident even involved an E-Z-GO product. The logistical challenges involved in identifying the circumstances surrounding a report of harm, or determining how it may have occurred, easily may require more than 10 business days. Accordingly, in many cases E-Z-GO would be hard pressed to investigate the matter and timely submit comments to the CPSC identifying materially inaccurate information.

These concerns are not alleviated simply because the NPRM allows for a manufacturer to submit comments demonstrating that a report of harm contains materially inaccurate information after publication of the report. While this avenue should remain available in order to correct previously published reports, damage to E-Z-GO's reputation occurs as soon as an incorrect report becomes publically available. Once a materially incorrect report is made available for public download from the database, the report takes on a new, independent existence, with no restriction to guarantee it will not reappear in some other forum.

B. CPSC Discretion to Withhold Publication of a Report of Harm

E-Z-GO observes that the CPSC is aware of some of the difficulties inherent to investigating and correcting reports of harm within the 10 business day period after notice is provided to the manufacturer. For example, the CPSC's December 22, 2009 public workshop notice raised several questions regarding the processing of material inaccuracy claims. 74

Federal Register 68053, 68056. In response to comments that it should withhold publication of a report of harm until it resolves a manufacturer's claim of material inaccuracy, however, the CPSC offers an ambiguous response in the NPRM:

> We propose that if a claim of materially inaccurate information is timely submitted, the Commission may withhold the report of harm from publication in the public database until a determination is made regarding such claim. Absent such a determination, the Commission will generally publish reports of harm on the tenth business day after transmitting a report of harm.

75 *Federal Register* 29170. The first sentence indicates that the CPSC will delay publication of a report of harm until after it resolves a claim that the report contains materially inaccurate information, and implies that the CPSC has the discretion to delay publication of the report in such a situation. The second sentence, however, reverses course and implies that the CPSC will not systematically exercise this discretion. Unless the CPSC makes its determination within the 10 business day window – a speculative proposition because the CPSC is not required to decide such questions within any specified time – the second sentence simply indicates that the CPSC in due course will publish a report of harm on the 10th business day after it transmits the report to the manufacturer.

E-Z-GO is also concerned with the statement in proposed section 1120.26(i)(2) characterizing as a "statutorily mandated publication date" the condition that the CPSC will publish a report of harm on the 10th business day after transmitting it to the manufacturer unless it has determined that the report contains material inaccuracies. 75 *Federal Register* 29180. Instead, E-Z-GO believes that the CPSIA provides substantial discretion on this very issue.

Section 6A(c)(3)(A) of the CPSA states as follows:

> REPORTS.—Except as provided in paragraph (4)(A), if the Commission receives a report described in subsection (b)(1)(A), the Commission shall make the report available in the database not later than the 10th business day after the date on which the Commission transmits the report under paragraph (1) of this subsection.

15 U.S.C. 2055a(c)(3)(A). The phrase "Except as provided in paragraph (4)(A)" establishes that the 10 business day time constraint is not applicable in all cases. The referenced "paragraph 4(A)" addresses how the CPSC shall address a manufacturer's pre-publication claim that a report of harm contains materially inaccurate information:

> (4) INACCURATE INFORMATION.—
> (A) INACCURATE INFORMATION IN REPORTS AND COMMENTS RECEIVED.—If, prior to making a report described in subsection (b)(1)(A) or a comment described in paragraph (2) of this subsection available in the database, the Commission determines that the information

> in such report or comment is materially inaccurate, the Commission shall—
>
> (i) decline to add the materially inaccurate information to the database;
> (ii) correct the materially inaccurate information in the report or comment and add the report or comment to the database; or
> (iii) add information to correct inaccurate information in the database.

15 U.S.C. 2055a(c)(4)(A). The phrase "prior to making a report described in subsection (b)(1)(A) or a comment described in paragraph (2) of this subsection available in the database," recognizes that the CPSC may complete its determination of a claim of material inaccuracy before publishing a report of harm. And the exception language set forth by CPSA section 6A(c)(3)(A) establishes that this determination and subsequent publication of a corrected report (or no report) may occur more than 10 business days after transmitting the report to the manufacturer.

E-Z-GO requests that the CPSC's final rule clarify that the CPSC has discretion under section 6A of the CPSA to withhold publication of a report of harm until it resolves a manufacturer's claim that the report is materially inaccurate, even where this determination does not occur until more than 10 business days after transmitting the report. E-Z-GO also recommends that, in light of the potential business injury to a manufacturer that could result from the publication of a materially inaccurate report, the CPSC's final rule also state that where the manufacturer has demonstrated a good faith process for timely investigating reports of harm, the CPSC shall exercise this discretion to delay publication of such reports until claims of material inaccuracy are resolved.

C. Use of Reports of Harm

Related to its concerns about the publication of unverifiable and/or inaccurate reports of harm, E-Z-GO has reservations about how such reports may affect a manufacturer's other obligations under the CPSA. In particular, the Company is concerned that the receipt of reports of harm may be used to trigger CPSA Section 15 reporting obligations. E-Z-GO believes that such use of reports of harm would be improper, due to the nature of the database's content and its purpose, and therefore requests that the CPSC clarify that reports of harm have no consequence on CPSA reporting requirements.

As discussed, the Company's ability to investigate reports of harm may be severely restricted, particularly when the report submitter does not consent to disclosure of his/her identity. In such cases, it will be impossible for E-Z-GO to confirm or correct the information contained in a report of harm. As a result, it seems inevitable that the database will include materially inaccurate reports about E-Z-GO products. Indeed, the CPSC appears to acknowledge this inevitability, as proposed section 1120.42 notes that the database will include a prominent disclaimer that the CPSC does not guarantee the accuracy of any database information.

E-Z-GO also notes that the overall purpose of the database is to provide a tool for consumers to obtain reliable information, rather than be a source of information to manufacturers

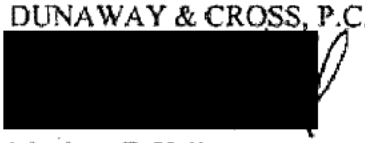
about potential product issues. CPSA section 6A(b)(4) provides that the database shall be organized to facilitate "easy use by consumers." Section 6A(e) likewise calls for a GAO evaluation of the utility of the database for consumers, and recommendations for increasing use of the database by consumers and the public generally.

Without clarification regarding the uses of reports of harm exercised by the CPSC, E-Z-GO is concerned that the CPSC's receipt of such reports at some future time may be referenced to alone impart a Section 15 reporting obligation. For that reason, the Company requests that the CPSC's final rule clarify that the transmission or publication of reports of harm will not carry CPSA implications aside from the directed public information use in the consumer product database.

E-Z-GO appreciates the opportunity to comment on the CPSC's May 24, 2010 NPRM concerning the establishment of a consumer product information database. Please feel free to contact me if you have any questions regarding E-Z-GO's comments in this matter.

Respectfully submitted,

DUNAWAY & CROSS, P.C.



Matthew F. Hall
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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0033
Comment from Kimberly Billoni

Submitter Information

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General Comment

Written comments on behalf of the Society of Product Licensors Committed to Excellence (SPLiCE)
Docket Number CPSC-2010-0041

Attachments

CPSC-2010-0041-0033.1: Comment from Kimberly Billoni

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SPLiCE is a 501(c) 6 under the
Federal Income Tax Guidelines

July 23, 2010

Via Electronic Mail

Mr. Todd A. Stevenson
Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD 20814

Written comments on behalf of the Society of Product Licensors Committed to Excellence (SPLiCE)
Docket Number CPSC-2010-0041

Dear Mr. Stevenson:

INTRODUCTION

The Society of Product Licensors Committed to Excellence ("SPLiCE") is pleased to submit comments in response to the request by the Consumer Product Safety Commission ("CPSC" or "Commission") for public comment on the notice of proposed rulemaking regarding the establishment of a publically available consumer product safety information database ("Database") pursuant to Section 212 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). SPLiCE reserves the right to supplement or amend its comments as appropriate.

SPLiCE is a professional association founded in 2004 with the vision to continuously improve brand licensing. Our mission is to act responsibly as a community of product licensors to share best practices for protecting, promoting and enhancing brand integrity. Our members are composed of business and nonprofit organizations. SPLiCE members represent thirty-two industry sectors including aerospace, automotive, consumer products, construction, digital technology and electronics, entertainment, farming, fashion, food and beverage, footwear and apparel, government, health and beauty, household goods and house wares, industrial and commercial equipment, infant and juvenile products, motorcycling, nonprofit, publishing, sports/sporting goods, toys and games, transportation and wellness. With over thirty-five member companies, SPLiCE represents seventeen percent of the Dow Jones Industrial Average. As product licensors, our members currently have licensing arrangements with over

20,000 licensee companies with sales exceeding $30 billion USD. SPLiCE member companies align brand equity with licensees to produce goods and services for consumers worldwide. Our members' brands are widely recognized by consumers who trust the quality and integrity of their trademark.

We understand many individuals and organizations have submitted comments to the CPSC in regards to the Database. However SPLiCE is in the unique position to offer comments from the perspective of product licensors; companies who are not the manufacturers or the private labelers of products but are the owners of the intellectual property (*i.e.*, characters, logos, etc.) and/or brand names displayed on the manufacturer's products. SPLiCE is concerned that the proposed rulemaking and the establishment of the consumer product database does not take into account the vast number of licensed products currently available to the consuming public. Accordingly, we believe that a significant portion of the reports of harm submitted by consumers for inclusion in the Database will contain materially inaccurate and misleading information since most consumers will misidentify the licensor as the manufacturer or private labeler of the product.

As stated in the CPSC's Report to Congress regarding the implementation of a searchable consumer product safety database (the "CPSC Report"), one of the objectives of the Database is to provide the CPSC and the American public with a powerful new tool to report, analyze and quickly respond to consumer products that pose potential hazards. (See "Consumer Product Safety Commission Report to Congress," dated September 10, 2009, page 3). The CPSC Report also states that some of the benefits of the Database will be to increase public access to product incident and recall data by making consumer product safety information available more rapidly, and to enhance the quality, value, and accuracy of the data collected by the CPSC. However, the proposed Database does not take into account the fact that many products in the marketplace today are licensed products manufactured by entities other than the brand owner. This oversight will lead to a great deal of confusion as consumers will quite naturally submit inaccurate information to the CPSC when they misidentify the licensor as the product manufacturer. In addition, the misidentification of the manufacturer will cause unnecessary delays in responding to the consumer complaints since the proposed Database only allows manufacturers and private labelers, not licensors, to submit comments regarding the reported harm. Further, the proposed rule establishing the Database does not allow licensors to assist the CPSC in identifying the correct manufacturer so that timely responses can be made to the submitted report of harm. The omission of input from licensors in the proposed rule establishing the Database will only serve to create inaccurate reports of harm, misidentification of product manufacturers, delays in responding to the consumer's complaint, and the collection of inaccurate information on product safety. SPLiCE recommends that the CPSC amend the proposed rule establishing the Database to incorporate input and comments from the licensor community so that timely and accurate notification can be made to the actual product manufacturer and more rapid responses can be generated by the manufacturer regarding the reported harm. It is only through the inclusion of comments from the licensor that the stated goals of the proposed database will be accomplished.

1. CONSUMERS WILL SUBMIT INACCURATE INFORMATION TO THE DATABASE BY MISIDENTIFYING LICENSORS AS THE MANFACTURERS OF THE PRODUCTS

In today's society, the use of licensing arrangements in the production and marketing of goods is increasingly prevalent. In 2009, the worldwide retail sale of licensed merchandise exceeded $190 Billion, with $105 Billion sold in the U.S. alone. Licensing, in its simplest form, involves an arrangement whereby the owner of a product or trademark (the "licensor") outsources the actual manufacture of the product (the "licensed product") to another company (the "Licensee"). The licensee, most often in exchange for the payment of royalties to the licensor, is permitted to manufacture, distribute and sell the licensed product that bears the licensor's brand or intellectual property. The licensor may "license" to another party the right to manufacture and sell a product which the licensor has developed or it may simply license the use of its brand or intellectual property on a product developed by the licensee. The licensee benefits from the brand name recognition of the licensor while the licensor receives profit from the sale of its goods without having to devote its time and resources to the actual manufacture of the licensed product(s). In most cases, the licensor is not a private labeler since the name of the licensee or manufacturer also appears on the product. In the typical licensing arrangement, the licensor neither designs, manufacturers, imports, nor distributes the licensed product and therefore, bears no responsibility or legal liability for the safety of the licensed product. In fact, in the typical licensing agreement, the licensor contractually binds the licensee with the responsibility of producing a quality product and ensuring that the product meets all applicable product safety laws and standards.

A. <u>The Misidentification Of The Manufacturer Will Lead To Materially Inaccurate Reports</u>

SPLiCE is concerned that a licensor may be misidentified as the manufacturer of the identified consumer product since most consumers do not understand the licensing arrangement and will erroneously identify the brand owner as the product manufacturer. It is sometimes difficult for consumers to identify the manufacturer of a product, and SPLiCE is concerned that incidents may be posted in the Database that improperly identify entities other than the manufacturer as the responsible party for the product. Often, the consumer will quickly discard the product packaging which identifies the actual manufacturer. The consumer usually has no basis on which to identify the actual manufacturer once the product packaging is discarded. Even the Commission staff has been known to misdirect consumer complaints to licensors when the product incident report submitted by a consumer clearly identified the product manufacturer. If the Commission staff cannot correctly identify the product manufacturer what is the probability that the consumer will make the correct identification of the manufacturer?

While it is clear that the Commission would like to be able to publish a consumer's report in the Database without having to verify the accuracy of the manufacturer's identification, to do so is to deny the licensor's right not to have demonstrably false information about its licensed products posted in a government sanctioned database. The proposed rule contains no mechanism that

requires the Commission to verify the accuracy of the consumer's identification of the manufacturer before the complaint is posted in the Database. The proposed rule simply states that manufacturers and private labelers may correct materially inaccurate information by pre-registering their products with the publicly available database. However, the damage will have already been done to the licensor's reputation when the licensor's name is sullied by the false accusation. Moreover, the damage will be compounded when the false accusation appears in a government-run database. It will be very hard to "unring the bell" once the false information appears in a database maintained by the federal government.

B. The Proposed Rule Contains No Mechanism To Provide Timely Notice to The Actual Manufacturer or Private Labeler

The actual manufacturer may not receive notice of the consumer's complaint due to the misidentification of the manufacturer by the consumer. In addition, if the manufacturer or private labeler failed to pre-register its product with the Commission, the materially false claim may go unnoticed by all parties, and no adequate resolution will be reached with the consumer. As stated previously, Commission staff should systematically review and verify all claims of harm to ensure that the correct manufacturer or private labeler has been identified. If the licensor is incorrectly identified as the manufacturer or private labeler the Commission staff should contact the licensor and seek the licensor's assistance in identifying the actual manufacturer. In many cases, there may be numerous manufacturers of a licensed product. The Commission should take the time to contact the licensor and provide the licensor with whatever information has been supplied by the consumer so that an accurate identification of the product and the manufacturer can be made. Only after the actual manufacturer has been identified and notified should the CPSC begin the 10-day comment period.

C. The Proposed Rule Does Not Contain a Mechanism For the Licensor to Correct Inaccuracies In The Database

Since the proposed rule does not envision a licensing arrangement it is not surprising that it contains no mechanism for the licensor to be notified when a consumer files a report of harm regarding a licensed product. The proposed database contains no provisions for the licensor to be notified of the report of harm, nor does it create a mechanism for the licensor to correct the record. Proposed section 1102.6(b)(7) defines a "manufacturer comment" as a comment made by a manufacturer or private labeler in response to a report of harm received through the public database and transmitted by the CPSC to the manufacturer or private labeler. Therefore, only the manufacturer or private labeler can provide a comment regarding the claim of harm. Nowhere in the 16 CFR Section 1102 is there a provision for anyone other than the manufacturer or private labeler to provide information regarding issues of materially inaccurate information in the Database. In addition, the proposed rule does not provide a mechanism for the licensor to register on the Database so it can comment on reports of harm. Without an opportunity to register on the Database, licensors cannot assist the CPSC in identifying the correct manufacturer.

Product licensors take product safety very seriously and they are keenly aware of the impact a product recall of a licensed product can have on their brand image. Licensors should be given an opportunity to correct inaccuracies in the Database and to work with the CPSC to correctly identify the manufacturer of a licensed product. Licensors are often the first to receive a consumer's complaint regarding a perceived problem with a licensed product. That is why licensors closely monitor consumer complaints to ensure that the licensee or manufacturer is producing a safe, high quality product that reflects well on the licensor's brand. Licensors frequently work closely with licensees to verify the quality and safety of licensed products and to ensure that consumer complaints are quickly addressed and resolved. SPLiCE recommends that licensors be allowed to register as "Licensors" on the Database and that the CPSC send licensors the report of harm regarding licensed products.

The CPSC should also refrain from posting the report of harm on the Database until the licensor has had an opportunity to assist the CPSC to identify the actual manufacturer. Sufficient time will be required for the CPSC to research the consumer's report of harm and to properly identify and notify the actual manufacturer of the product. Prior to that time, the report of harm should not be posted on the Database because it will be materially inaccurate.

2. **EXPANDING THE SCOPE OF PARTIES WHO MAY SUBMIT REPORTS OF HARM TO THE DATABASE THREATENS THE QUALITY OF THE INFORMATION IN THE DATABASE.**

The CPSIA specifically enumerates the groups who should be allowed to submit reports of harm to the proposed database. That list includes consumers, local, state or federal government agencies, health care professionals, child service providers and public health entities. However, in section 1102.10 of the proposed rule, the CPSC greatly expands that list and introduces the concept of "others" who may submit incident information in the Database. According to the proposed rule, "others" may include, without limitation, "attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." Expanding the list of those who may submit reports is going beyond the scope of the statute. Congress did not authorize the CPSC to solicit reports from the enumerated group in proposed section 1102.10.

By adding the "Other" category to those entitled to submit reports of harm, the CPSC is also introducing potentially unreliable, second hand information to the Database. SPLiCE is concerned that those with ulterior motives, other than mischievous consumers, may provide inaccurate and unreliable information to the Database. Such persons could include competitors, disgruntled employees and former licensees/manufacturers that may have lost their licensed contracts due to the inability to sustain good manufacturing processes. SPLiCE recommends that the parties entitled to submit reports of harm to the Database be limited to those parties with the most accurate firsthand knowledge of the product – those who have used or observed the use of the product (and thus the resulting harm) and those who were involved in treating or responding to the harm.

3. **THE PROPOSED RULE DOES NOT ADEQUATELY PROTECT AGAINST FALSE REPORTS OF HARM CAUSED BY CONTERFEIT PRODUCTS.**

The CPSC is well aware that the American marketplace is flooded with counterfeit products that do not meet the strict safety requirements of the CPSA. It is estimated that over $600 Billion USD is generated annually from the sale of counterfeit goods globally at a cost to U.S. businesses between $200 and $250 Billion USD. (*See,* The International Anti-Counterfeiting Coalition Report at http://www.iacc.org/counterfeiting/counterfeiting.php). Product licensor's are particularly victimized by counterfeiters who replicate popular brands that consumers desire. These products have been known to cause serious injury and death. However, the proposed rule does provides neither a method nor sufficient time to verify whether the product in question is a counterfeit product before the report of harm is entered in the database. Obviously, the manufacturer of counterfeit products will not pre-register with the CPSC. Therefore, there will be no way to solicit a manufacturer's comment when a report of harm regarding a counterfeit product is entered in the Database. Under the proposed rule, the report of harm will simply be listed without comment. Moreover, once the counterfeit product is listed on the Database, retailers may take note of the posting and decide to remove all similar products from their store shelves. A potential harm may arise if retailers remove true, conforming products from store shelves because of the counterfeit product posting in the Database. Such a situation damages the reputation of both the licensor and the legitimate licensee.

If a counterfeit product is the subject of a report of harm, the CPSC will not have sufficient time to recognize that the product is a forgery before posting the incident on the Database. SPLiCE recommends that the CPSC only post reports of harm involving genuine products. To do that, the CPSC must contact the company owning the brand or intellectual property appearing on the product and allow the brand owner to canvas its licensees to determine if the product is a fake. Only after the product has been verified as a true product should the report of harm be entered in the Database.

In conclusion, the CPSC should provide a mechanism for the product licensor to register with the Commission to adequately identify the product manufacture before a report of harm is entered in the Database. Early communication between the licensor, the actual product manufacturer, and the CPSC is critical to ensuring that the information collected by the CPSC for the Database is quickly accessed, evaluated, investigated, and acted upon. This will result in increased effectiveness and greater productivity, as well as earlier product safety hazard detection and more rapid warnings issued to the public.

SPLiCE will gladly respond to any follow-up inquiry requested by CPSC staff.

Sincerely,

Kimberly K. Billoni
Chief Executive

PUBLIC SUBMISSION

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0034
Comment from Christopher McLean

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General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0034.1: Comment from Christopher McLean

Consumer Electronics Retailers Coalition

www.ceretailers.org

July 23, 2010

Inez Moore Tenenbaum
Chairman
Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD 20814

Re: Docket No. CPSC-2010-0041; Comments on the Publicly Available Consumer Product Safety Information Database - Notice of Proposed Rulemaking
Dear Chairman Tenenbaum

Please accept the following comments from the Consumer Electronics Retailers Coalition (CERC) in response to the Federal Register notice issued by the Consumer Product Safety Commission on May 24, 2010. Comments relate to the publicly available Consumer Product Safety Information Database; Section 212 of the CPSIA of 2008; Docket No. CPSC-2010-0041.

INTRODUCTION

The Consumer Electronics Retailers Coalition (CERC) is a public policy organization consisting of the major retailers of consumer electronics products includingAmazon.com, Best Buy, K-Mart, RadioShack, Sears, Target, Wal-Mart, and the leading retail industry trade associations – National Retail Federation (NRF) and the Retail Industry Leaders Association (RILA).

All of our members are committed to the health, safety and satisfaction of their customers. CERC members take great pride and care selecting the products and services offered to our customers, especially products marketed to children. We share a desire to successfully implement the Consumer Products Safety Improvement Act (CPSIA) in a way that maximizing safety without unnecessarily disrupting commerce.

I would also add that CERC works on these issues with the National Association of Manufacturers (NAM) and is fully supportive of the information database comments which NAM has filed on behalf of the larger NAM Coalition.

Under the CPSIA, the Consumer Product Safety Commission (CPSC) is required to establish a searchable, publicly available database on the safety of consumer products under the jurisdiction of the CPSC. If properly implemented, that database can be helpful to consumers and retailers.

Certainly, when the CPSC makes a determination that a product is unsafe or should be recalled or an entity under the jurisdiction of the CPSC launches a voluntary recall, public information about the affected products should be included in the searchable database. However, CERC has concerns about overwhelming the database with unvetted information; protecting confidential and personal data; and the interaction of database information with existing CPSC rules and procedures.

PROVISIONS OF CONCERN

CERC would like to fully agree with the NAM Coalition comments by referencing the following provisions in the proposed rule which we view as highly problematic as currently drafted.

Proposed 16 CFR Section 1102.10(a)(6); Reports of Harm; Who May Submit; Others.

Section 6A(b)(1)(A) of the CPSA limits those who may submit reports of harm for inclusion in the public database. Submissions may be made by consumers; local, State or Federal government agencies; health care professionals; child service providers; and public safety entities. In its rule, however, CPSC added to sub-section 1102.10(a)(6) a new catch-all category: "others." This category would "include, but not [be] limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." This provision adds a virtually unlimited number or reporting parties to the express and limited categories of "reporters" allowed for by Congress.

CPSC explains this departure from the language of 6A as follows: "We note the breadth of the entities listed in the statute and conclude that the list is intended to be nonrestrictive." 75 Fed. Reg. 29162.

Unfortunately, this rationalization is supported neither by the express language of the law. Congress did not use a catch-all provision to allow the inclusion in the database of reports from anybody. It expressly limited those whose reports of harm might be included in the public database. Congress did not craft language in section 6A(b)(1)(A) suggesting that its list "included but not limited to" the listed submitters. Rather, it chose the word "and" between "child service providers" and "public safety entities." Clearly, the use of the word "and" creates a closed, exclusive list. There is no basis in the law for finding in a closed listing of reporting parties a legislative intent to make the listing of reporting parties infinitely inclusive.

The Commission interpretation runs afoul of all applicable rules of statutory construction. Given how precisely and narrowly the CPSC has chosen to read the CPSIA in the past, and its previous arguments that it lacks the discretion to depart from the express words of

Congress, it is surprising that the CPSC has proposed such an obvious departure from the express instructions of Congress in this provision.

Broadening the list of reporting parties does not serve the Congressional interest in providing accurate information to consumers about reports of harm. It is obvious why parties included in CPSC's proposed listing of "others" may not be reliable reporters of an incident. CPSC has added parties who are more likely to have an "agenda" that goes beyond merely advising CPSC of an incident. There is a real risk that some will misuse this database. The possibility that someone might attempt to seed the database with inaccurate or misleading information to damage a particular manufacturer or private labeler, or to provide support for lawsuits or other efforts is a real concern.

By broadening Congress' limited list of reporters, CPSC risks damaging the integrity of the database. Not only may some of the reporting parties have ulterior motives, but, many of the people who might be allowed to report would have little first-hand knowledge about the details of an incident. Therefore, they might be more prone to unintentionally provide inaccurate information. Finally, the possibility that broadening the list of reporting parties will create duplicative information is high, and the Conference Report makes it clear that Congress wished for CPSC to take steps to eliminate duplicative material. (H. Rept. 110-787)

The reference to "other" reporting parties and the open-ended enumeration of such parties should be eliminated in the final regulation.

16 CFR 1102.10(d); Minimum Requirements for publication.

Generally, CPSC tracks the statutory requirements in describing the contents of a report of harm that may be included in the database. Subsection (1) describes what is expected in a "description of the consumer product." It allows reporters to provide various potential bits of identification such as model number, serial number, date code, etc. However, it is not clear whether the reporter will provide sufficient information to allow someone later looking at the data to actually identify the product involved, distinguish a real product from a counterfeit, or to allow the CPSC to properly route the complaint to the appropriate manufacturer or private labeler.

It is unclear what criteria the CPSC staff would apply in determining whether to post that information and whether the staff will have the resources to even examine such reports closely enough to spot such issues. These are important questions if the database is to be accurate.

In subsection (3), CPSC states the "description of harm" may include, but does not have to include, the date on which the harm occurred, the severity of any injury, and whether any medical treatment was received. Insisting on this information, particularly the date would help eliminate multiple reports of the same incident. Duplication could occur because various parties report the same incident. The date of occurrence would be a key piece of information to use to identify such duplicates. Including hazard and treatment information would make it more likely that only real reports of harm would end up being

reported. These details, along with the date, would tend to eliminate less reliable reports. In addition, these details are more likely to be possessed by those who know what actually occurred; eliminating less reliable reports by third parties who are reporting only based on second or third hand information.

In subsection (4), CPSC does not require that consumers provide a method to contact them quickly. Consumers should be encouraged to provide contact information that allows quick contact with the consumer such as e-mail and phone number. Given the timeframes for verification, manufacturers, and in some cases CPSC staff, may wish to contact a consumer quickly to resolve issues that affect the completeness and accuracy of the submission.

Since verification is important to weed out exaggerated or false claims, an attestation under oath or affirmation would help encourage honest reporting. Another option is a clear statement on the web site that persons providing information must not under penalty of law (18 U.S.C. 1001 and any other applicable provisions) provide false or misleading information.

More generally, CERC would like to reinforce the following points regarding the information database and how it should function for the maximum benefit of the public.

Avoiding Consumer Confusion is Paramount. CERC applauds the CPSC for recognizing the importance of preventing fraudulent or inaccurate information from being posted to the data base. If the database becomes overwhelmed with unsubstantiated and false data, the utility of the database will be compromised and consumers will be confused. The database entry form should include a clear statement warning of the practical and legal consequences of knowingly filing false information and the importance of providing complete information.

Remote complaints and hearsay claims where the poster does not have personal knowledge of harm should be discouraged. Claims of harm which are inaccurate, fabricated, misidentified or otherwise invalid should be removed quickly from the public database. If for example a manufacturer can demonstrate that they did not make or otherwise sell the product in question, then at a minimum any reference to that manufacturer should be removed from the complaint and complaints which are fraudulent or false should be immediately removed.

The CPSC should also advise posters that complaints should be limited to claims of harm, not non-safety related performance or expectation issues. If a posting is made that does not involve a safety issue, it should be quickly removed.

Manufacturers and private label owners should be given sufficient opportunity to respond and to database postings. The label holder should have the option of responding regardless of whether the actual manufacturer responds or not. Private label holders may have multiple manufacturers. The label holder is the one with the most at stake and their ability to respond should be protected. The CPSC should also consider giving

respondents additional time to react to claims of harm. Given that the database could become large and unwieldy, affected parties need time to identify and respond to claims.

Confidential Information Should be Protected. Retailers submit reports to the CPSC under 15(b) of the CPSA and under other voluntary retailer reporting programs and these reports should not be included from the public Consumer Product Safety Information Database. The current confidentiality protections surrounding this data facilitate dialogue between retailers and the CPSC. If that level of trust is compromised or confidentiality reduced, it will likely affect the ability of the CPSC to have full and frank discussions with manufacturers and retailers. In the end the consumer will be hurt.

Similarly, there is a risk that individuals will be referenced in complaints without their permission or knowledge. A database filled with urban myths or friend of a friend reports will be of little value. Posters should be reminded that they should only post information where they have direct knowledge.

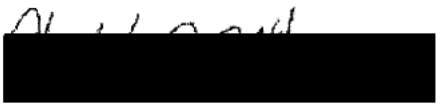
Posting on Database Should Not Affect Voluntary Recall Procedures. The voluntary recall procedures have served consumers, manufacturers and retailers well. They have provided a means to quickly identify and act on products that do not perform as they should. Postings to the new database should not affect, trigger, interact or otherwise limit options under the voluntary recall rules. The two procedures should be kept separate and one should not trigger action with the other. It is important for the CPSC to preserve and protect options under the voluntary recall. If a posting or postings were to limit the ability to launch a voluntary recall, consumers would be harmed.

CONCLUSION

CERC understands that the proposed database is required by federal statute. A well vetted database could serve consumers and even help retailers evaluate products it stocks or plans to stock. For that utility to be a reality, data in the database needs to be specific, actionable and clear.

CERC appreciates the opportunity to comment on the Commission's notice and looks forward to constructively working with the Commission as it creates and implements the Database.

Sincerely,



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PUBLIC SUBMISSION

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Docket: CPSC-2010-0041
Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0035
Comment from Michele Pittenger

Submitter Information

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Submitter's Representative: Nate Herman
Organization: Travel Goods Association (TGA)
Government Agency Type: Federal
Government Agency: CPSC

General Comment

Please find attached a written submission from Michele Marini Pittenger, President of the Travel Goods Association (TGA), to the Consumer Protection Safety Commission (CPSC) regarding Docket No. CPSC-2010-0041 □□□ May 24, 2010 Federal Register notice regarding Publicly Available Consumer Product Safety Information Database (75 FR 29156).

Thank you for your time and consideration in this matter.

Attachments

CPSC-2010-0041-0035.1: Comment from Michele Pittenger

Travel Goods Association
601 N Harrison St., #413 | Princeton, NJ 08540-3513
PH 877-TGA-1938 | FAX 877-842-1938 | www.travel-goods.org

July 23, 2010

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland, 20814

RE: Docket No. CPSC–2010–0041 - May 24, 2010 *Federal Register* notice regarding Publicly Available Consumer Product Safety Information Database (75 FR 29156)

To Whom It May Concern:

I am writing on behalf of the Travel Goods Association (TGA), the national association of the manufacturers, distributors and retailers of luggage, leather goods, business and travel accessories, business and computer cases, handbags, backpacks, courier bags and other products for people who travel. Thank you for the opportunity to submit comments to the Consumer Product Safety Commission (CPSC or "the Commission") regarding proposed 16 CFR Part 1102 – Publicly Available Consumer Product Safety Information Database (database).

TGA and its members appreciate that the CPSC has provided the public multiple opportunities for comment and that the proposed rule reflects many comments voiced by interested stakeholders. However, we are still very concerned that improper implementation of the *Consumer Product Safety Improvement Act* (CPSIA) database requirement could be disastrous for businesses, an ineffective tool for consumers and, ultimately, a detriment the database's overall success.

Above all, we believe the database must be a credible source of reliable information that appropriately reflects its "dot gov" Web address. As Chairman Tenenbaum stated in her February 17, 2010 ICPHSO address, "...Don't believe everything you read on the Internet, except what you read on Web sites that end in dot gov." By this statement, Chairman Tenenbaum is pointing out that government websites are held to the highest standards as a resource. People expect government websites to provide credible information and the database should be no different – even *with* a disclaimer. Materially inaccurate information serves no one, can be detrimental to businesses, will ultimately damage both the credibility and overall success of the database and damage the credibility of the agency itself. The proposed rulemaking does not go far enough to ensure that the information posted is correct and the CPSC must take steps to better confirm that the posts are both in the public interest and reliable.

We further believe that it is crucial for the CPSC to begin implementing the database in the narrowest scope possible and to gradually expand it.[1] This is one of the easiest ways to achieve information

[1] The CPSC can roll out implementation in a number of ways. One suggestion is to start with specific product categories like those that present the most risk and gradually open up the Database to other types of categories.

reliability and to ensure the long term success of the database. Starting with a narrow scope will minimize mistakes, minimize the impact of mistakes and give the CPSC more flexibility to make changes as the database develops. A narrowly implemented database at the outset will reduce the burden on CPSC resources. The CPSC estimated that the database will amount to 37,129 hours of agency burden. In order to fulfill this burden, 22 CPSC employees will need to be dedicated to database maintenance.[2] These 22 employees will be dedicated entirely to sorting through reports of harm, manufacturer comments, requests to treat information confidential and requests to treat information as materially inaccurate. As an agency that is intended to protect consumer health and safety, this is not an efficient allocation of resources. Narrow implementation of the Database will reduce the burden on the agency and give the agency time to work out more efficient means of handling the paperwork as the database expands.

Narrowing the scope at the outset will also open up the opportunity for the CPSC to continue to engage all stakeholders in discussion on how to improve the database and work through the problems as they arise. We believe the database should include a forum for this type of discussion.[3] Encouraging dialog as the database develops further helps achieve the Chairman's stated objective of "creating a more open and accessible CPSC."[4]

Finally, rolling out database implementation is consistent with Congressional intent. In fact, the CPSIA and the Conference Report directs the GAO "to study the general utility of the database and provide recommendations for measures to increase use of the database." (H. Rept. 110-787). Congress recognized that the database will likely need to be modified and improved as time progresses. Narrowing the scope of the database at the outset will make any changes recommended by the GAO or other stakeholders easier to implement thereby making the database itself a much more useful and successful tool.

With regard to the specific provisions of the proposed rulemaking, TGA urges the CPSC to fully address the following critical before proceeding with the implementation of the database.

Section 1102.6(b)(8) Definitions – Report of Harm

The proposed rulemaking states that "report of harm" means "any information submitted to the Commission through the manner described in Section 1102.10(b) regarding an injury, illness, or death, ***or any risk*** of injury, illness, or death as determined by the Commission, relating to the use of a consumer product" (emphasis added). TGA and its members are ***extremely*** concerned the proposed rulemaking includes "risk of harm" in the types of reports of harm that may be submitted and strongly recommend the CPSC remove this language. Risk of harm is an arbitrary assessment that would require more CPSC resources to determine if the report presents a legitimate risk. Furthermore, reports of risk of harm will likely include reports of products "violating" inapplicable product safety standards. For example, someone could observe a child using a general use product, like a computer,

[2] This number was calculated by dividing 37,129 hours by 250 days (the total number of days per year an employee works assuming a 5-day work week and 10 vacation days) which equals 148.516 hours/day. An average employee works 7-hour days so 148.516 divided by 7 hours totals 21.217 – the total number of employees needed to fulfill the hourly burden.

[3] Facebook followed a similar model in its development – starting with a few colleges and gradually opening up to everyone. Facebook users were instrumental in its development in that creators worked with users to fix the kinks along the way.

[4] Chairman Inez Tenenbaum, Keynote Address, ICPHSO/International Cooperation on Product Safety, Toronto, Canada, October 28, 2009. http://www.cpsc.gov/pr/tenenbaum102809.html.

test the computer for lead content, and make an arbitrary determination that the computer's lead content presents a risk of injury – even if the computer is not subject to the lead standard. The Commission is in charge of determining what is "safe" and "unsafe" – *not* the general public and any reports of risk of harm on the database should come ***only*** from the Commission (through voluntary recall notices or other official Commission statements). Reports of risk of harm will likely result in additional burden on the CPSC, overpopulation of reports that are not in the public interest, and cause damage to both the database's and the CPSC's credibility. However, we certainly believe that the CPSC should still collect reports of risk of harm for their own regulatory purposes.

Section 1102.10(a) Reports of harm – Who may submit

The proposed rulemaking goes far beyond CPSIA language with regard to who may submit reports of harm for the database. The CPSIA lists out, "(i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities" as a finite list of people who can submit reports of harm to the CPSC. The proposed rulemaking's list expands the definition of "consumers" to "including but not limited to, users of consumer products, family members, relatives, parents, guardians, friends, and observers of the consumer products being used" and adds an additional category, "others including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." Including additional categories of submitters that are outside the scope of the CPSIA will dilute the effectiveness of the database and result in extra burden on Commission resources.

Overall, the additional categories of submitters will likely result in more materially inaccurate information and duplicative reports.[5] For example, the CPSC expanded the "consumers" category to "family members, relatives, parents, guardians, friends, and observers of the consumer products being used." These are not the individuals who were injured by the consumer product and are therefore not reliable reporters of an incident. These individuals are far less likely to have first-hand knowledge of the product, the nature of injury, the manufacturer or other important information. Moreover, casual observers or second-hand reporters may not have access to the consumer product at the time of reporting and might not be able to identify or accurately remember important identification information further opening up possibilities of inaccurate reporting. We recommend that the CPSC continue to collect information from these sources for the agency's own data collection and product hazard analysis purposes, but not use the information for the database therefore minimizing the fact-checking burden on the agency and helping to ensure material accuracy.

Finally, the proposed rulemaking's "other" category expands the pool of potential submitters to include individuals who do not have the same vested interest in product safety as consumers do and are likely to have ulterior motives. The proposed rulemaking's stated purpose is to provide information on the, "safety of consumer products and other products or substances regulated by the Commission." The "others" category opens the database up to parties that are likely to misuse the database for their own agenda and may submit information with the intent to provide support for a

[5] Congress stated in the Conference Report that the CPSC should ensure that the Database does not include duplicative reports of the same incident (H. Rept. 110-787).

lawsuit, damage a manufacturer or private labeler, or other reasons. Not only does this compromise the credibility of the database, but the Commission will likely have to use additional resources as these sources are more likely to submit inaccurate and duplicative information. However, we still believe that the CPSC should encourage these individuals to submit product hazard information to the agency for other hazard analysis purposes.

Section 1102.10(d) Reports of Harm – Minimum Requirements for Publication

We strongly believe the minimum requirements for publication are not detailed enough and encourage the CPSC to require more information from submitters. More detailed reports will make manufacturer identification easier, will be more beneficial for the database user, will make finding materially inaccurate information easier for the Commission, will result in fewer intentionally misleading reports (as the details will be harder to fabricate), and will improve the efficiency of the database. For example, the rulemaking should explicitly state that the description of the consumer product should be detailed enough so that the CPSC, the manufacturer, and a user of the database would be able to identify the product. Furthermore, requiring more detailed information about the incident will reduce duplicative reports. We believe the database is not just a tool to keep consumers more informed about consumer product safety incidents, but also a tool to encourage consumers to be more engaged in CPSC activities and to become active stakeholders in product safety regulation. Requiring more detailed information automatically results in greater engagement and investment on behalf of the submitter. This is beneficial for the database as a whole as engaged participants will result in better quality information and continued use of and interaction with the database.

We also believe that as submitters become engaged stakeholders in product safety regulation through the database, they assume a certain responsibility for their report of harm. As a result, the CPSC should make clear that any party submitting intentionally false, misleading or exaggerated claims may be subject to penalties. Honest reporting is a vital element of the success of the database. Furthermore, a submitter who intentionally posts false information can cause a business irreparable damage. The CPSC must take an aggressive stance to discourage maliciously false information from being reported on the database.

Section 1102.25 Designation of Materially Inaccurate Information

Materially inaccurate information is the biggest threat to the database's success and we are extremely concerned that the proposed rulemaking does not go far enough to prevent materially inaccurate information from being posted on the database. First, the proposed rulemaking defines "materially inaccurate information" as, "information that is false or misleading in a significant and relevant way that creates or has the potential to create a substantially erroneous or substantially mistaken belief in a Database user about the information in a report of harm..." Including adjectives like "significant," "relevant," and "substantially" are unnecessary and makes a materially inaccurate determination arbitrary. ***Any*** form of incorrect information – be it substantial or slight – damages the credibility of the database and the CPSC should, to the extent practicable, ensure that the database ***only*** includes accurate information.

Moreover, we firmly believe that the proposed rulemaking does not go far enough to delay the publication of a report of harm if a manufacturer submits a request for designation of materially inaccurate information. The proposed rulemaking suggests that, "the Commission will generally publish reports of harm on the tenth business day after transmitting a report of harm where either the recommended page limit of comments has been exceeded or where the Commission has been otherwise unable to make a determination regarding a claim of material inaccuracy prior to the statutorily mandated publication date." The proposed rulemaking suggests that manufacturer comments and requests to determine information materially inaccurate be limited to five pages including attachments. Given the information that may be required to show material inaccuracy, manufacturers will likely always exceed five pages and therefore length of comments should not be a qualifier in a Commission decision to delay a potentially inaccurate report of harm. Furthermore, given the resources required to maintain the database and to make a material inaccuracy determination, the CPSC may not be able to dedicate the personnel and time required to make a fair determination before the ten day time frame expires. Publication of materially inaccurate reports of harm will be extremely damaging to manufacturers. Incorrect information **never** benefits consumers. Furthermore, removing the incorrect information, once published, offers no remedy as the report has already been made public. The rulemaking must give greater consideration to comments from manufacturers with legitimate claims of material inaccuracy before the report is made public.

Conclusion

In conclusion, we would like to reiterate the importance of ensuring the database is a reliable and credible resource that appropriately reflects it's "dot gov" Web address. Just as companies go the extra length to make sure that dangerous products do not enter stream of commerce, the CPSC should go to extra lengths to make sure dangerous information does not enter the database. We strongly believe that significantly narrowing the scope of the database at implementation and gradually building it up with the input of all interested stakeholders would be the best way to ensure its long term success and utility.

Thank you for your time and consideration in this matter. Please contact Nate Herman of my staff at 703-797-9062 or nate@travel-goods.org if you have any questions or would like additional information.

Sincerely,

Michele Marini Pittenger
President

PUBLIC SUBMISSION

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Docket: CPSC-2010-0041
Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0036
Comment from Sara Mayes

Submitter Information

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Fax: 703-522-6741
Submitter's Representative: Nate Herman
Organization: Fashion Accessories Shippers Association (FASA)
Government Agency Type: Federal
Government Agency: CPSC

General Comment

Please find attached a written submission from Sara Mayes, President of the Fashion Accessories Shippers Association (FASA), to the Consumer Product Safety Commission (CPSC) regarding Docket No. CPSC-2010-0041 □□□ May 24, 2010 Federal Register notice regarding Publicly Available Consumer Product Safety Information Database (75 FR 29156).

Thank you for your time and consideration in this matter.

Attachments

CPSC-2010-0041-0036.1: Comment from Sara Mayes

July 23, 2010

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland, 20814

RE: Docket No. CPSC–2010–0041: May 24, 2010 *Federal Register* notice regarding Publicly Available Consumer Product Safety Information Database (75 FR 29156)

To Whom It May Concern:

I am writing on behalf of the Fashion Accessories Shippers Association, Inc. (FASA) – the national association of the fashion accessories – handbag, belt, small leather goods, glove, umbrella and luggage accessory – businesses. Thank you for the opportunity to submit comments to the Consumer Product Safety Commission (CPSC or "the Commission") regarding proposed 16 CFR Part 1102 – Publicly Available Consumer Product Safety Information Database (database).

FASA and its members appreciate that the CPSC has provided the public multiple opportunities for comment and that the proposed rule reflects many comments voiced by interested stakeholders. However, we are still very concerned that improper implementation of the *Consumer Product Safety Improvement Act* (CPSIA) database requirement could be disastrous for businesses, an ineffective tool for consumers and, ultimately, a detriment the database's overall success.

Above all, we believe the database must be a credible source of reliable information that appropriately reflects its "dot gov" Web address. As Chairman Tenenbaum stated in her February 17, 2010 ICPHSO address, "…Don't believe everything you read on the Internet, except what you read on Web sites that end in dot gov." By this statement, Chairman Tenenbaum is pointing out that government websites are held to the highest standards as a resource. People expect government websites to provide credible information and the database should be no different – even *with* a disclaimer. Materially inaccurate information serves no one, can be detrimental to businesses, will ultimately damage both the credibility and overall success of the database and damage the credibility of the agency itself. The proposed rulemaking does not go far enough to ensure that the information posted is correct and the CPSC must take steps to better confirm that the posts are both in the public interest and reliable.

We further believe that it is crucial for the CPSC to begin implementing the database in the narrowest scope possible and to gradually expand it.[1] This is one of the easiest ways to achieve information reliability and to ensure the long term success of the database. Starting with a narrow scope will minimize mistakes, minimize the impact of mistakes and give the CPSC more

[1] The CPSC can roll out implementation in a number of ways. One suggestion is to start with specific product categories like those that present the most risk and gradually open up the Database to other types of categories.

Fashion Accessories Shippers Association, Inc. ● Gemini Shippers Association
Tel 212.947.3424 Fax 212.629.0361 350 Fifth Avenue, Suite 2030 New York, NY 10118 www.accessoryweb.com

flexibility to make changes as the database develops. A narrowly implemented database at the outset will reduce the burden on CPSC resources. The CPSC estimated that the database will amount to 37,129 hours of agency burden. In order to fulfill this burden, 22 CPSC employees will need to be dedicated to database maintenance.[2] These 22 employees will be dedicated entirely to sorting through reports of harm, manufacturer comments, requests to treat information confidential and requests to treat information as materially inaccurate. As an agency that is intended to protect consumer health and safety, this is not an efficient allocation of resources. Narrow implementation of the Database will reduce the burden on the agency and give the agency time to work out more efficient means of handling the paperwork as the database expands.

Narrowing the scope at the outset will also open up the opportunity for the CPSC to continue to engage all stakeholders in discussion on how to improve the database and work through the problems as they arise. We believe the database should include a forum for this type of discussion.[3] Encouraging dialog as the database develops further helps achieve the Chairman's stated objective of "creating a more open and accessible CPSC."[4]

Finally, rolling out database implementation is consistent with Congressional intent. In fact, the CPSIA and the Conference Report directs the GAO "to study the general utility of the database and provide recommendations for measures to increase use of the database." (H. Rept. 110-787). Congress recognized that the database will likely need to be modified and improved as time progresses. Narrowing the scope of the database at the outset will make any changes recommended by the GAO or other stakeholders easier to implement thereby making the database itself a much more useful and successful tool.

With regard to the specific provisions of the proposed rulemaking, FASA urges the CPSC to fully address the following critical before proceeding with the implementation of the database.

Section 1102.6(b)(8) Definitions – Report of Harm

The proposed rulemaking states that "report of harm" means "any information submitted to the Commission through the manner described in Section 1102.10(b) regarding an injury, illness, or death, ***or any risk*** of injury, illness, or death as determined by the Commission, relating to the use of a consumer product" (emphasis added). FASA and its members are ***extremely*** concerned the proposed rulemaking includes "risk of harm" in the types of reports of harm that may be submitted and strongly recommend the CPSC remove this language. Risk of harm is an arbitrary assessment that would require more CPSC resources to determine if the report presents a legitimate risk. Furthermore, reports of risk of harm will likely include reports of products "violating" inapplicable product safety standards. For example, someone could observe a child using a general use product, like a computer, test the computer for lead content, and make an arbitrary determination that the computer's lead content presents a risk of injury – even if the computer is not subject to the lead standard. The Commission is in charge of determining what is "safe" and "unsafe" – *not* the general public and any reports of risk of harm on the database should come ***only*** from the Commission (through voluntary recall notices or other official Commission statements).

[2] This number was calculated by dividing 37,129 hours by 250 days (the total number of days per year an employee works assuming a 5-day work week and 10 vacation days) which equals 148.516 hours/day. An average employee works 7-hour days so 148.516 divided by 7 hours totals 21.217 – the total number of employees needed to fulfill the hourly burden.

[3] Facebook followed a similar model in its development – starting with a few colleges and gradually opening up to everyone. Facebook users were instrumental in its development in that creators worked with users to fix the kinks along the way.

[4] Chairman Inez Tenenbaum, Keynote Address, ICPHSO/International Cooperation on Product Safety, Toronto, Canada, October 28, 2009. http://www.cpsc.gov/pr/tenenbaum102809.html.

Reports of risk of harm will likely result in additional burden on the CPSC, overpopulation of reports that are not in the public interest, and cause damage to both the database's and the CPSC's credibility. However, we certainly believe that the CPSC should still collect reports of risk of harm for their own regulatory purposes.

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The proposed rulemaking goes far beyond CPSIA language with regard to who may submit reports of harm for the database. The CPSIA lists out, "(i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities" as a finite list of people who can submit reports of harm to the CPSC. The proposed rulemaking's list expands the definition of "consumers" to "including but not limited to, users of consumer products, family members, relatives, parents, guardians, friends, and observers of the consumer products being used" and adds an additional category, "others including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." Including additional categories of submitters that are outside the scope of the CPSIA will dilute the effectiveness of the database and result in extra burden on Commission resources.

Overall, the additional categories of submitters will likely result in more materially inaccurate information and duplicative reports.[5] For example, the CPSC expanded the "consumers" category to "family members, relatives, parents, guardians, friends, and observers of the consumer products being used." These are not the individuals who were injured by the consumer product and are therefore not reliable reporters of an incident. These individuals are far less likely to have first-hand knowledge of the product, the nature of injury, the manufacturer or other important information. Moreover, casual observers or second-hand reporters may not have access to the consumer product at the time of reporting and might not be able to identify or accurately remember important identification information further opening up possibilities of inaccurate reporting. We recommend that the CPSC continue to collect information from these sources for the agency's own data collection and product hazard analysis purposes, but not use the information for the database therefore minimizing the fact-checking burden on the agency and helping to ensure material accuracy.

Finally, the proposed rulemaking's "other" category expands the pool of potential submitters to include individuals who do not have the same vested interest in product safety as consumers do and are likely to have ulterior motives. The proposed rulemaking's stated purpose is to provide information on the, "safety of consumer products and other products or substances regulated by the Commission." The "others" category opens the database up to parties that are likely to misuse the database for their own agenda and may submit information with the intent to provide support for a lawsuit, damage a manufacturer or private labeler, or other reasons. Not only does this compromise the credibility of the database, but the Commission will likely have to use additional resources as these sources are more likely to submit inaccurate and duplicative information. However, we still believe that the CPSC should encourage these individuals to submit product hazard information to the agency for other hazard analysis purposes.

[5] Congress stated in the Conference Report that the CPSC should ensure that the Database does not include duplicative reports of the same incident (H. Rept. 110-787).

Section 1102.10(d) Reports of Harm – Minimum Requirements for Publication

We strongly believe the minimum requirements for publication are not detailed enough and encourage the CPSC to require more information from submitters. More detailed reports will make manufacturer identification easier, will be more beneficial for the database user, will make finding materially inaccurate information easier for the Commission, will result in fewer intentionally misleading reports (as the details will be harder to fabricate), and will improve the efficiency of the database. For example, the rulemaking should explicitly state that the description of the consumer product should be detailed enough so that the CPSC, the manufacturer, and a user of the database would be able to identify the product. Furthermore, requiring more detailed information about the incident will reduce duplicative reports. We believe the database is not just a tool to keep consumers more informed about consumer product safety incidents, but also a tool to encourage consumers to be more engaged in CPSC activities and to become active stakeholders in product safety regulation. Requiring more detailed information automatically results in greater engagement and investment on behalf of the submitter. This is beneficial for the database as a whole as engaged participants will result in better quality information and continued use of and interaction with the database.

We also believe that as submitters become engaged stakeholders in product safety regulation through the database, they assume a certain responsibility for their report of harm. As a result, the CPSC should make clear that any party submitting intentionally false, misleading or exaggerated claims may be subject to penalties. Honest reporting is a vital element of the success of the database. Furthermore, a submitter who intentionally posts false information can cause a business irreparable damage. The CPSC must take an aggressive stance to discourage maliciously false information from being reported on the database.

Section 1102.25 Designation of Materially Inaccurate Information

Materially inaccurate information is the biggest threat to the database's success and we are extremely concerned that the proposed rulemaking does not go far enough to prevent materially inaccurate information from being posted on the database. First, the proposed rulemaking defines "materially inaccurate information" as, "information that is false or misleading in a significant and relevant way that creates or has the potential to create a substantially erroneous or substantially mistaken belief in a Database user about the information in a report of harm..." Including adjectives like "significant," "relevant," and "substantially" are unnecessary and makes a materially inaccurate determination arbitrary. ***Any*** form of incorrect information – be it substantial or slight – damages the credibility of the database and the CPSC should, to the extent practicable, ensure that the database ***only*** includes accurate information.

Moreover, we firmly believe that the proposed rulemaking does not go far enough to delay the publication of a report of harm if a manufacturer submits a request for designation of materially inaccurate information. The proposed rulemaking suggests that, "the Commission will generally publish reports of harm on the tenth business day after transmitting a report of harm where either the recommended page limit of comments has been exceeded or where the Commission has been otherwise unable to make a determination regarding a claim of material inaccuracy prior to the statutorily mandated publication date." The proposed rulemaking suggests that manufacturer comments and requests to determine information materially inaccurate be limited to five pages including attachments. Given the information that may be required to show material inaccuracy, manufacturers will likely always exceed five pages and therefore length of comments should not

be a qualifier in a Commission decision to delay a potentially inaccurate report of harm. Furthermore, given the resources required to maintain the database and to make a material inaccuracy determination, the CPSC may not be able to dedicate the personnel and time required to make a fair determination before the ten day time frame expires. Publication of materially inaccurate reports of harm will be extremely damaging to manufacturers. Incorrect information **never** benefits consumers. Furthermore, removing the incorrect information, once published, offers no remedy as the report has already been made public. The rulemaking must give greater consideration to comments from manufacturers with legitimate claims of material inaccuracy before the report is made public.

Conclusion

In conclusion, we would like to reiterate the importance of ensuring the database is a reliable and credible resource that appropriately reflects it's "dot gov" Web address. Just as companies go the extra length to make sure that dangerous products do not enter stream of commerce, the CPSC should go to extra lengths to make sure dangerous information does not enter the database. We strongly believe that significantly narrowing the scope of the database at implementation and gradually building it up with the input of all interested stakeholders would be the best way to ensure its long term success and utility.

Thank you for your time and consideration in this matter. Should you require additional information on this submission or in connection with these industries, please contact Nate Herman at 703-797-9062 or via email at nherman@geminishippers.com.

Sincerely,

Sara Mayes
President

PUBLIC SUBMISSION

As of: July 26, 2010
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Status: Posted
Posted: July 26, 2010
Category: Trade Association
Tracking No. 80b1fad1
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Docket: CPSC-2010-0041
Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0037
Comment from Rosario Palmieri

Submitter Information

Name: Rosario Palmieri
Organization: National Association of Manufacturers

General Comment

See attached file(s)

Attachments

CPSC-2010-0041-0037.1: Comment from Rosario Palmieri

July 23, 2010

Via Regulations.Gov
Mr. Todd A. Stevenson
Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, MD 20814

Re: CPSC Docket No. CPSC-2010-0041; Comments on the Publicly Available Consumer Product Safety Information Database Notice of Proposed Rulemaking

Dear Mr. Stevenson:

We are submitting these comments on behalf of the National Association of Manufacturers and the undersigned organizations (hereinafter "Coalition") in response to the Notice of Proposed Rulemaking on the "Publicly Available Consumer Product Safety Information Database." This proposed rule would implement the new section 6A of the Consumer Product Safety Act (CPSA) created by section 212 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). That provision creates a publicly available, searchable database that includes "reports of harm" from specified sources relating to "consumer products" and other products regulated by the Consumer Product Safety Commission (CPSC) as well as certain product recall information. Section 6A(b)(1).

At the outset, we note that Congress wrote a provision that insured public awareness of safety information, but also attempted to achieve that goal without sacrificing the accuracy of the information in the database. False or inaccurate information does not serve the interests of consumers. Congress knew that counterfeit products are too common in the marketplace and may be confused with real brand name products. We have seen that there are some who use all means that are available to disparage competitors' products or to support litigation. Section 6A recognizes that manufacturers and private labelers of products have a legitimate interest in protecting their brands from inaccurate, defamatory, and intentionally false statements and in protecting trade secret and confidential commercial information.

While the CPSC proposal largely recognizes the tension between providing safety information to the public and assuring its accuracy, we are concerned that in some respects CPSC unnecessarily, and improperly, tips the balance in a way that favors availability over accuracy and fairness. This neither protects the public interest nor the interests of manufacturers and private labelers.

Our comments focus on a few of the areas of concern. However, at the outset, we must note that the regulation does not include crucial information about how this database will be implemented. Although the CPSC has shared some of its plans with the public, much is still not known. It is quite possible that the format for submitting reports of harm and the data input

techniques to be used for reporting, will have a major impact on the accuracy of the data in the database. In addition, the manner of registering and contacting manufacturers and private labelers will greatly affect their ability to comment in a timely fashion on the data. (Our first look at the registration system identified a number of significant issues that need to be addressed to insure that incident information will end up with the right manufacturer or private labeler.) Will the CPSC system be capable of distinguishing between two firms with the same name but different product lines? Will it be able to direct brand name imported products to the appropriate importer? Will it be able to distinguish the appropriate party to notify about products once a firm has been sold and liability split between two firms? Will it know who is responsible for a brand that applies to many different kinds of products and has been licensed to many different firms? How will CPSC insure that the correct, legally responsible manufacturer or private labeler who needs to receive a report of harm actually receives it? To insure that the database properly serves the intended purpose, the details of the database should be shared with the public for comment before it is implemented.

These comments will address several provisions of concern in the order in which they appear in the proposed rule.

Proposed 16 CFR Section 1102.10(a)(6); Reports of Harm; Who May Submit; Others.

Section 6A(b)(1)(A) of the CPSA limits those who may submit reports of harm for inclusion in the public database. Submissions may be made by consumers; local, State or Federal government agencies; health care professionals; child service providers; and public safety entities. In its rule, however, CPSC added to sub-section 1102.10(a)(6) a new catch-all category: "others." This category would "include, but not [be] limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." This provision adds a virtually unlimited number of reporting parties to the express and limited categories of "reporters" allowed for by Congress. CPSC explains this departure from the language of 6A as follows:

"We note the breadth of the entities listed in the statute and conclude that the list is intended to be nonrestrictive." 75 Fed. Reg. 29162.

Unfortunately, this rationalization is supported neither by the express language of the law, nor by logic. Congress did not use a catch-all provision to allow the inclusion in the database of reports from anybody. It expressly limited those whose reports of harm might be included in the public database. Congress did not craft language in section 6A(b)(1)(A) suggesting that its list "included but not limited to" the listed submitters. Rather, it chose the word "and" between "child service providers" and "public safety entities." Clearly, the use of the word "and" creates a closed, exclusive list. There is no basis in the law for finding in a closed listing of reporting parties a legislative intent to make the listing of reporting parties infinitely inclusive. The Commission interpretation runs afoul of all applicable rules of statutory construction as well as offending the rules of logic. Given how precisely and narrowly the CPSC has chosen to read the CPSIA in the past, and its previous arguments that it lacks the discretion to depart from the express words of Congress, it is surprising that the CPSC has proposed such an obvious departure from the express instructions of Congress in this provision.

Broadening the list of reporting parties does not serve the Congressional interest in providing accurate information to consumers about reports of harm. It is obvious why parties included in CPSC's proposed listing of "others" may not be reliable reporters of an incident. CPSC has added parties who are more likely to have an "agenda" that goes beyond merely advising CPSC of an incident. There is a real risk that some will misuse this database. The possibility that someone might attempt to seed the database with inaccurate or misleading information to damage a particular manufacturer or private labeler, or to provide support for lawsuits or other efforts is a real concern. By broadening Congress' limited list of reporters, CPSC risks damaging the integrity of the database. Not only may some of the reporting parties have ulterior motives, but, many of the people who might be allowed to report would have little first-hand knowledge about the details of an incident. Therefore, they might be more prone to unintentionally provide inaccurate information. Finally, the possibility that broadening the list of reporting parties will create duplicative information is high, and the Conference Report makes it clear that Congress wished for CPSC to take steps to eliminate duplicative material. (H. Rept. 110-787)

The reference to "other" reporting parties and the open-ended enumeration of such parties should be eliminated in the final regulation.

16 CFR 1102.10(d); Minimum Requirements for publication.

Generally, CPSC tracks the statutory requirements in describing the contents of a report of harm that may be included in the database. Subsection (1) describes what is expected in a "description of the consumer product." It allows reporters to provide various potential bits of identification such as model number, serial number, date code, etc. However, it is not clear whether the reporter will provide sufficient information to allow someone later looking at the data to actually identify the product involved, distinguish a real product from a counterfeit, or to allow the CPSC to properly route the complaint to the appropriate manufacturer or private labeler. It is unclear what criteria the CPSC staff would apply in determining whether to post that information and whether the staff will have the resources to even examine such reports closely enough to spot such issues. These are important questions if the database is to be accurate.

In subsection (3), CPSC says the "description of harm" may include, but does not have to include, the date on which the harm occurred, the severity of any injury, and whether any medical treatment was received. Insisting on this information, particularly the date, would help eliminate multiple reports of the same incident. Duplication could occur because various parties report the same incident. The date of occurrence would be a key piece of information to use to identify such duplicates. Including hazard and treatment information would make it more likely that only real reports of harm would end up being reported. These details, along with the date, would tend to eliminate less reliable reports. In addition, these details are more likely to be possessed by those who know what actually occurred, eliminating less reliable reports by third parties who are reporting only based on second or third hand information.

In subsection (4), CPSC does not require that consumers provide a method to contact them quickly. Consumers should be encouraged to provide contact information that allows quick contact with the consumer such as e-mail and phone number. Given the timeframes for

verification, manufacturers, and in some cases CPSC staff, may wish to contact a consumer quickly to resolve issues that affect the completeness and accuracy of the submission.

Since verification is important to weed out exaggerated or false claims, an attestation under oath or affirmation would help encourage honest reporting. Another option is a clear statement on the web site that persons providing information must not under penalty of law (18 U.S.C. 1001 and any other applicable provisions) provide false or misleading information.

16 CFR 1102.10(f)(8); Information not published.

CPSC should clarify this provision to make clear that information that does not directly relate to a report of harm will be redacted from the report that is posted to the database. Portions of reports of harm that relate to matters such as cost, quality, service, and other matters are not relevant to the report of harm and, should be redacted.

16 CFR 1102.10(g); Reports of harm from persons under the age of 18.

Excluding submissions from children under 18 without parental or guardian consent makes sense. However, the regulation does not require the reporter to provide their age. While CPSC may intend to include this in the reporting form, age and consent were not included as requirements in the sub-section 1102.10(d)(4) requirements for "contacts."

16 CFR 1101.24(d); Timing of Submission.

This provision states that if a manufacturer has made a "request for confidential treatment in a timely fashion, the Commission *may, in its discretion,* withhold a report of harm from publication in the Database until it makes a determination regarding confidential treatment." [Emphasis added.] This is not a matter that should be left to the discretion of a CPSC staffer. Section 6A(c)(ii) requires the CPSC to provide the manufacturer an opportunity to make a claim and requires CPSC to "redact the [confidential commercial information] in the report *before* it is placed in the database." [Emphasis added.] Clearly, Congress intended to protect such confidential data. The release of confidential commercial information is a violation of 18 U.S.C. § 1905 and potentially can do serious competitive harm to a firm. Protection of such data is a paramount interest also protected by section 6(a) of the CPSA, 15 U.S.C. 2055(a). Once CPSC posts such confidential information on the database, CPSC has effectively destroyed this confidentiality. Irreparable harm to the manufacturer may result. CPSC cannot rationalize such disregard for protection of legitimate confidential data based on a public need to see a report of harm a short time sooner.

The CPSC is likely to receive a tremendous volume of reports of harm and comments from manufacturers. Undoubtedly, it will be difficult for it to review them in a timely manner. If the staff is given the discretion to do so, they will be tremendously tempted to post reports first and resolve claims of confidentiality later. However, the CPSC may not side-step the express instructions of Congress. It may not risk damaging manufacturers and private labelers by needlessly publishing confidential commercial or trade secret data. Redacting the data at some future time is virtually no remedy at all. Once this data is on the internet, it is available to the public. It is likely to be in search engines and in some databases forever. Once the CPSC

wrongfully posts such data, it has breached a firm's legitimate claims to confidentiality and the statutory protection for such data has been denied.

Obviously, most reports of harm will not include confidential commercial data. All confidentiality claims must include very specific information from manufacturers to support their claims. For that reason, if manufacturers make a claim and support it with the required information, the CPSC should be able to make a determination on the claim before posting the complaint. Given what is involved in supporting a confidentiality claim, manufacturers are not likely to abuse this provision to delay the posting of information. At any rate, if the CPSC determines that manufacturers and private labelers are abusing the confidentiality procedure, it can take remedial action to adjust its requirements at a later date.

16 CFR 1101.26(a)(1); Materially inaccurate information.

The first part of the definition of "materially inaccurate information" is "information that is false or misleading in a significant and relevant way." As a definition, this phrase is sufficient to explain what is meant. The second phrase: "that creates or has the potential to create a substantially erroneous or substantially mistaken belief in a Database user" adds nothing of value and potentially creates room for argument and subjective interpretation of what a database user may or may not think. Particularly, since the CPSC seems intent on limiting the scope of comments about reports of harm, nothing is gained by adding more factors that need to be addressed to show something is "materially inaccurate."

16 CFR 1101.26(b); Request for designation of materially inaccurate information.

CPSC has a legitimate interest in assuring that reports of harm posted on its database are accurate. However, the report and possibly manufacturer or private labeler comments about the report serve this function well. CPSC goes too far in creating a comment process that allows any person or entity reading the report of harm to challenge the accuracy of the information. There are many people, including class action attorneys, competitors, and others who might wish to further agendas or merely commit a little mischief. By inviting comments from such parties, CPSC is potentially creating a "free for all" atmosphere encouraging such people to collaterally battle about issues using the CPSC database as a weapon. This is extremely wasteful of the resources of the manufacturers and private labelers who will be forced to respond to such comments, no matter how misguided or frivolous. In addition, such battles likely will draw upon the resources of the CPSC forcing it to serve as referee. Given that it is highly unlikely that comments from third parties will add much to the accuracy of the report of harm, the value of inviting such comments is extraordinarily low. Because of these concerns, this provision should be stricken from the rule.

16 CFR 1101.26(d); Timing of submission.

This provision suggests that if information in a report is challenged as materially inaccurate before a report is published in the database, "the Commission *may* withhold a report of harm from publication in the Database until it makes a determination. *Absent such a determination*, the Commission will generally publish reports of harm on the tenth business day after transmitting a report of harm." [Emphasis added.] This provision—perhaps

unintentionally—suggests that the CPSC staff will have discretion to publish an inaccurate report and deal with it later. The CPSC should amend this provision to clearly state that if the CPSC receives a timely and adequate challenge to the accuracy of the report, it will not post its report until it has made its determination. To do otherwise would defeat the purpose of allowing manufacturers and private labelers an opportunity to comment.

As noted above, once data is published on the internet, it is out there, virtually permanently, for others to use or misuse. Even one false complaint can lead to a major news story or internet rumor that can do serious damage to a firm's product or reputation. CPSC should be focused on providing accurate information to the public. At the same time, it must preserve the manufacturer's right to challenge materially inaccurate statements and protect its product and reputation from falsehoods. Fixing misinformation after it has been posted does not provide the public with the most accurate, reliable information, nor does it protect manufacturers and private labelers.

16 CFR 1101.26(h); Commission determination of material inaccuracy after publication.

In some cases, CPSC may not succeed in providing timely notification to manufacturers or private labelers. In many matters, manufacturers may need time to investigate and evaluate reports of harm to determine accuracy before they can provide a reliable response. For these and other reasons, it will not always be possible for manufacturers to comment on accuracy before CPSC has posted data. Tracking the statute, this provision allows CPSC to correct material inaccuracies after the data is posted. After CPSC has made a determination the report is inaccurate, CPSC has 7 days to correct such misinformation.

Unfortunately, this provision does not insure that the CPSC will deal with such accuracy challenges in a timely manner. Conceivably, busy CPSC staff might take weeks, months, or even years to determine whether information that is posted on the database is materially inaccurate. This could not have been what Congress intended because it would pollute the database with a lot of false, uncorrected information. Misinforming the public is a significant concern, and the impact of a news story or other dissemination of such inaccurate information could be devastating to manufacturers or private labelers.

We recommend CPSC adopt one of the following approaches to resolve this problem. CPSC could set a tight time frame for it to make determinations regarding material inaccuracies once it has received a challenge. Such a procedure would improve the quality of the database and preserve its credibility. In the alternative, CPSC could pull, or block access to, any reports of harm that are challenged until it makes its determination. While this might withhold an incident report from the public in the short term, it would protect the integrity of the information on the database and the reputations of the firms and products named in the reports. Undoubtedly, this procedure would place the burden on CPSC to handle such disputes more quickly than it might otherwise do so. However, the effect would be to enhance the integrity of the CPSC database and the reputation of the agency.

16 CFR 1102.26(i); Commission Discretion.

CPSC suggests that it will attempt to expedite decisions on whether to post reports to the database that have been challenged as materially inaccurate if manufacturers or private labelers do not exceed recommended page limits in 1102.26(c)(1). If the Commission staff adopts our recommendation to decide such issues before posting reports to the database, this provision will be unnecessary.

While we understand the potential paperwork burden CPSC faces, the CPSC suggestion is misguided and unjustified. CPSC has asked firms who wish "expedited" treatment to submit no more than five pages including attachments. However, CPSC has demanded significant evidence to support claims that information is materially inaccurate in sub-section 1102.26(b). This creates a fundamental conflict for manufacturers and private labelers. To provide sufficient evidence to support a challenge, a manufacturer may need to provide more than 5 pages of information depending on the nature of the report and the nature of the inaccuracy. However, if a commenter did so, then CPSC will publish first, and resolve the challenge at some indefinite time in the future. This approach is fundamentally flawed.

As we have said earlier in this letter, CPSC needs to rethink its system to allow firms to adequately challenge the accuracy of reports before they are posted.

16 CFR 1102.42; Disclaimers.

This subsection says that the CPSC will provide a general disclaimer about "accuracy, completeness or adequacy" both on the database and print-outs. We have concerns about what such a disclaimer will say. The public database will be a collection of anecdotal information submitted mostly by untrained observers. Unlike NEISS, it is not statistically representative and, therefore, the data has very limited uses. It may be hard to distinguish reports involving very different products and models from one another. Reports in the database will be largely unverified, and based on the proposal, we fear it may be full of materially inaccurate reports.

At 75 Fed. Reg. 29164 in response to comments (Summary 8), CPSC states its intent to create database reporting options that will enable public users to extract data sets of published incident report information. Facilitating the creation of datasets is problematic. There is a real risk that reporters, bloggers, consumer groups, academics, and others will do data searches and be moved to use the data without a real understanding of their limitations. After all, this is "government data" and despite the general disclaimer users with a "government report" in hand may presume the data have more significance than they actually have. At the very least, it is critical that not only the database, but any reporting formats contain a realistic statement of the limitations of the data, and caution users about drawing any conclusions from it. The "Disclaimer" provisions referred to in sub-section 1102.42 do not go far enough in explaining the limitations of the data, particularly in such "data sets." The disclaimer should explain the anecdotal nature of the data, that it cannot be used for broad statistical purposes, as well as to clearly state the concerns about accuracy, completeness or adequacy. It should plainly explain the lack of verification by CPSC of the "facts" in the reports. A disclaimer should caution users against drawing conclusions about the named products based on these data.

Procedural and Due Process Concerns.

We understand that the CPSC has felt the pressure of the statutory deadline and is eager to get a regulation in place and the database in place within that deadline. However, this proposal is deficient, perhaps fatally so, in providing procedures to be used by CPSC to provide due process for manufacturers and private labelers. The proposal speaks in general terms about Commission determinations but it is unclear who the deciding parties will be and what procedures might apply. Who is going to make initial determinations about confidential commercial information or material inaccuracy claims based on the report of harm and manufacturer/private labeler comments? Will the reports of harm be posted without manufacturers having any opportunity to appeal? How, if at all, will manufacturers challenge such initial determinations? Who will the challenges be before? Will manufacturers have the opportunity to contribute to the record in such a process? Will they have an opportunity to make oral arguments or produce evidence before a second level decision maker? Or are manufacturers to assume that there are no administrative remedies and they must challenge initial determinations in U.S. District Court.

The lack of detail about procedures not only calls into question whether the CPSC has met the Constitutional obligation to provide procedural due process, but it undermines the credibility of the entire process. Is CPSC intending to make up procedures as they go along? Will those procedures be consistent? If manufacturers and private labelers have no real opportunity to challenge initial decisions by unknown decision-makers, how can the decisions of the CPSC have any credibility? The credibility of the entire database is only undermined by the absence of a credible process.

Given the many concerns about the reports of harm that have been raised these are fundamental procedural issues that must be addressed. If the CPSC fails to provide procedural due process, its proposal likely will not withstand judicial scrutiny, nor will its efforts have any credibility with the public.

The undersigned organizations appreciate the opportunity to comment on this database. We remain willing to answer questions and provide further information if that would assist the CPSC in completing a final rule and functioning database.

Sincerely,

ACMI (Art and Creative Materials Institute, Inc.)
Advertising Specialty Institute
Alliance for Children's Product Safety
American Apparel & Footwear Association
American Coatings Association
American Fiber Manufacturers Association
American Home Furnishings Alliance
American Pyrotechnics Association
Association of Home Appliance Manufacturers

Business and Institutional Furniture Manufacturers Association (BIFMA)
California Fashion Association
Coalition for Safe and Affordable Childrenswear
Consumer Electronics Retailers Coalition (CERC)
Consumer Specialty Products Association
Craft & Hobby Association
Fashion Accessories Shippers Association (FASA)
Fashion Jewelry and Accessories Trade Association
Footwear Distributors & Retailers of America (FDRA)
Gift and Home Trade Association (GHTA)
Halloween Industry Association
INDA, Association of the Nonwoven Fabrics Industry
International Association of Amusement Parks and Attractions
International Sleep Products Association
Juvenile Products Manufacturers Association
National Association of Manufacturers
National Bulk Vendors Association
National School Supply and Equipment Association
National Retail Federation
Power Tool Institute
Promotional Products Association International
Real Diaper Industry Association
Retail Industry Leaders Association
SMART (Secondary Materials and Recycled Textiles Association)
Society of Glass and Ceramic Decorated Products
Society of the Plastics Industry, Inc. (SPI)
Specialty Graphic Imaging Association
Sporting Goods Manufacturers Association
The Hosiery Association
Toy Industry Association
Travel Goods Association (TGA)
Window Covering Manufacturers Association

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0038
Comment from Rebecca Mond

Submitter Information

Name: Rebecca Mond
Organization: American Apparel & Footwear Association

General Comment

AAFA's comments are attached.

Attachments

CPSC-2010-0041-0038.1: Comment from Rebecca Mond

AAFA
american apparel &
footwear association

July 16, 2010

Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland, 20814

RE: May 24, 2010 FEDERAL REGISTER NOTICE OF PUBLICLY AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION DATABASE (75 FR 29156) DOCKET NO. CPSC-2010-0041

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association representing the apparel and footwear industry and its suppliers – I am writing in response to the request for comments by the Consumer Product Safety Commission (CPSC or "the Commission") regarding proposed 16 CFR Part 1102 – Publicly Available Consumer Product Safety Information Database ("the database").

AAFA and its members appreciate that the CPSC has provided the public multiple opportunities for comment and that the proposed rule reflects many comments voiced by interested stakeholders. However, we are still very concerned that improper implementation of Section 212 of the Consumer Product Safety Improvement Act (CPSIA) could have a significant, adverse effect on a wide variety of businesses, diminish the effectiveness of the database for consumers and, ultimately damage the database's overall success.

Above all, we believe the database must be a reliable source of credible information that appropriately reflects its "dot gov" Web address. As Chairman Tenenbaum stated in her February 17, 2010 ICPHSO address, "...Don't believe everything you read on the Internet, except what you read on Web sites that end in dot gov." By this statement, Chairman Tenenbaum is pointing out that government websites are held to the highest standards as public resources. People expect government websites to provide credible information and the database should be no different – even *with* a disclaimer. Materially inaccurate information serves no one, can be detrimental to businesses, will ultimately damage both the credibility and overall success of the database and damage the credibility of the agency itself. The proposed rulemaking does not go far enough to ensure the credibility of the information posted to the database and the CPSC must take steps to guarantee that the posts are both reliable and in the public interest.

We further believe that it is crucial that the CPSC limit the scope of the database at the outset and gradually expand it based on best practices and lessons learned.[1] This is one of the easiest ways to achieve information reliability and to ensure the long term success of the database. Starting with a more limited scope will minimize mistakes, minimize the potential impact of mistakes and give the CPSC more flexibility to make changes to the database as it develops. A narrowly implemented database at the outset will reduce the burden on CPSC resources. The CPSC estimated that the database will amount to 37,129 hours of agency burden. In order to fulfill this burden, 22 CPSC employees will need to be dedicated to

[1] The CPSC can roll out implementation in a number of ways. One suggestion is that the CPSC could phase-in implementation of the database similar to the format used by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) when APHIS announced the implementation schedule for the rollout of changes to the Lacey Act implemented in the 2008 Farm Bill. APHIS chose to implement new import documentation requirements under the Lacey Act on the "riskiest" categories of products first and then phase-in other products over a two-year period. APHIS also determined that certain products bear little or no "risk" under the new rules under the Lacey Act and exempted them from the two-year implementation schedule altogether. These products could be subject to the new Lacey Act documentation requirements in the future. For more information, please go to APHIS' website at http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml.

database maintenance.[2] These 22 employees will be dedicated entirely to sorting through reports of harm, manufacturer comments, requests to treat information confidential and requests to treat information as materially inaccurate. As an agency that is intended to protect consumer health and safety, this is not an efficient allocation of resources. Narrow implementation of the Database will reduce the burden on the agency and give the agency time to work out more efficient means of handling the paperwork as the database expands.

Limiting the scope at the outset will also allow the CPSC to engage all stakeholders in further discussions on how to improve the database and resolve problems as they arise. We believe the database should include a forum for this type of discussion.[3] Encouraging dialog as the database develops would further help achieve the Chairman's stated objective of "creating a more open and accessible CPSC."[4]

Finally, rolling out database implementation is consistent with Congressional intent. In fact, the CPSIA and the Conference Report directs the GAO "to study the general utility of the database and provide recommendations for measures to increase use of the database." (H. Rept. 110-787). Congress recognized that the database will likely need to be modified and improved as time progresses. Limiting the scope of the database at the outset will make any changes recommended by the GAO or other stakeholders easier to implement thereby making the database itself a much more useful and successful tool.

We also offer the following comments on specific provisions of the proposed rulemaking.

Section 1102.6(b)(8) Definitions – "Report of Harm"

The proposed rulemaking proposes to define "report of harm" as "any information submitted to the Commission through the manner described in Section 1102.10(b) regarding an injury, illness, or death, ***or any risk*** of injury, illness, or death as determined by the Commission, relating to the use of a consumer product" (emphasis added). AAFA and its members are ***extremely*** concerned the scope of the proposed rulemaking and strongly recommend that the CPSC remove the language, "or any risk of injury, illness, or death as determined by the Commission, relating to the use of a consumer product" from the proposed rule. Allowing reports of harm to include subjective submitter assessments of "risk" will result in the expenditure of more CPSC resources to evaluate the legitimacy of the submitter's arbitrary claim. For example, reports of risk of harm will likely include reports of products "violating" inapplicable product safety standards. Someone could observe a child using a general use product, like a computer, test the computer for lead content, and make an unfounded determination that the computer's lead content presents a risk of injury – even if the computer is not subject to the lead standard. The Commission is in charge of determining what is "safe" and "unsafe" – *not* the general public and any reports of risk of harm on the database should come ***only*** from the Commission (through voluntary recall notices or other official Commission statements). Reports of risk of harm from other sources will likely result in additional burden on the CPSC, overpopulation of reports that are not in the public interest, and cause damage to both the database's and the Commission's credibility. However, we certainly believe that the CPSC should still collect reports of risk of harm for their own regulatory purposes.

Section 1102.10(a) Reports of harm – Who may submit

The proposed rulemaking goes far beyond the CPSIA language with regard to who may submit reports of harm for the database. The CPSIA lists, "(i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities" as a finite list of people who can submit reports of harm to the CPSC. The proposed rulemaking expands the definition of "consumers" to "including but not limited to, users of consumer products, family members, relatives, parents, guardians, friends, and observers of the consumer products being used" and adds an additional

[2] This number was calculated by dividing 37,129 hours by 250 days (the total number of days per year an employee works assuming a 5-day work week and 10 vacation days) which equals 148.516 hours/day. An average employee works 7-hour days so 148.516 divided by 7 hours totals 21.217 – the total number of employees needed to fulfill the hourly burden.
[3] Facebook followed a similar model in its development – starting with a few colleges and gradually opening up to everyone. Facebook users were instrumental in its development in that creators worked with users to fix the kinks along the way.
[4] Chairman Inez Tenenbaum, Keynote Address, ICPHSO/International Cooperation on Product Safety, Toronto, Canada, October 28, 2009. http://www.cpsc.gov/pr/tenenbaum102809.html.

category, "others including, but not limited to, attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations." Including these additional categories of submitters that are beyond the scope of the CPSIA's explicit statutory language will dilute the effectiveness of the database and result in extra burden on Commission resources.

Overall, the additional categories of submitters will likely result in more materially inaccurate information and duplicative reports.[5] For example, the CPSC expanded the "consumers" category to "family members, relatives, parents, guardians, friends, and observers of the consumer products being used." These individuals are far less likely to have first-hand knowledge of the product, the nature of injury, the manufacturer or other important information. Moreover, casual observers or second-hand reporters may not have access to the consumer product at the time of reporting and might not be able to identify or correctly remember important identification information further opening up possibilities of inaccurate reporting. We recommend that the CPSC continue to collect information from these sources for the agency's own data collection and product hazard analysis purposes, but not include information from these sources in the database thereby minimizing the fact-checking burden on the Commission and helping to ensure material accuracy.

Finally, the proposed rulemaking's "other" category expands the pool of potential submitters to include individuals who do not have the same personal, vested interest in product safety as consumers do and may have improper motives. The proposed rulemaking's stated purpose is to provide information on the, "safety of consumer products and other products or substances regulated by the Commission." The "others" category opens the database up to parties who could misuse the database for their own agenda and may submit information with the intent to provide support for a lawsuit, damage the reputation of a manufacturer or private labeler, or other reasons. Not only does this compromise the credibility of the database, but the Commission would have to use additional resources as these sources could submit materially inaccurate and duplicative information. However, we still believe that the CPSC should encourage these individuals to submit product hazard information to the agency for other hazard analysis purposes.

Section 1102.10(d) Reports of Harm – Minimum Requirements for Publication

We strongly believe that the proposed minimum requirements for publication are not detailed enough and encourage the CPSC to require more information from submitters. More detailed reports will make manufacturer identification easier, will be more beneficial for the database user, will make finding materially inaccurate information easier for the Commission, will result in fewer intentionally misleading reports (as the details will be harder to fabricate), and will improve the efficiency of the database. For example, the rulemaking should explicitly state that the description of the consumer product should be detailed enough so that the CPSC, the manufacturer, and a user of the database will be able to identify the product. Furthermore, requiring more detailed information about the incident will reduce inadvertent posting of duplicative reports. We believe the database is not just a tool to keep consumers more informed about consumer product safety incidents, but also a tool to encourage consumers to be more engaged in CPSC activities and to become more active stakeholders in product safety and Commission activities. Requiring more detailed information automatically results in greater engagement and investment on behalf of the submitter. This is beneficial for the database as a whole as greater engagement of participants will result in better quality information and continued use of and interaction with the database.

We also believe that as submitters become engaged stakeholders in product safety regulation through the database, they assume a certain responsibility for their report of harm. As a result, the CPSC should make clear that any party submitting intentionally false, misleading or exaggerated claims may be subject to penalties. Honest reporting is a vital element of the success of the database. Furthermore, a submitter who intentionally posts false information can cause a business irreparable damage. The CPSC must take an aggressive stance to discourage maliciously false information from being reported on the database.

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[5] Congress stated in the Conference Report that the CPSC should ensure that the Database does not include duplicative reports of the same incident (H. Rept. 110-787).

Section 1102.25 Designation of Materially Inaccurate Information

Materially inaccurate information is the biggest threat to the database's success and we are extremely concerned that the proposed rulemaking does not go far enough to prevent materially inaccurate information from being posted on the database. First, the proposed rulemaking defines "materially inaccurate information" as, "information that is false or misleading in a significant and relevant way that creates or has the potential to create a substantially erroneous or substantially mistaken belief in a Database user about the information in a report of harm..." Including adjectives like "significant," "relevant," and "substantially" are unnecessary and improperly limits the circumstances that a materially inaccurate determination will be made by the Commission. ***Any*** form of incorrect information – be it substantial or slight – is "material" as it damages the credibility of the database and could well harm the reputation of the manufacturer or private labeler. As such, the CPSC should, to the extent practicable, ensure that the database ***only*** includes accurate information.

Moreover, we firmly believe that the proposed rulemaking does not do enough to delay the publication of a report of harm if a manufacturer submits a request for designation of materially inaccurate information. The proposed rulemaking suggests that, "the Commission will generally publish reports of harm on the tenth business day after transmitting a report of harm where either the recommended page limit of comments has been exceeded or where the Commission has been otherwise unable to make a determination regarding a claim of material inaccuracy prior to the statutorily mandated publication date." The proposed rulemaking suggests that manufacturer comments and requests to determine information materially inaccurate be limited to five pages including attachments. Given the information that may be required to show material inaccuracy, manufacturers will likely always exceed five pages and therefore length of comments should not be a qualifier in a Commission decision to delay a potentially inaccurate report of harm. Furthermore, given the resources required to maintain the database and to make a material inaccuracy determination, the CPSC may not be able to dedicate the personnel and time required to make a fair determination before the ten day time frame expires. Publication of materially inaccurate reports of harm will be extremely damaging to manufacturers. Incorrect information **never** benefits consumers. Furthermore, removing the incorrect information, once published, offers virtually no remedy as the report has already been made public. To preserve the credibility of the Database, the rulemaking must give greater consideration to comments from manufacturers with legitimate claims of material inaccuracy before the report is made public.

Conclusion

In conclusion, we would like to reiterate the importance of ensuring the database is a reliable and credible resource that appropriately reflects it's "dot gov" Web address. Just as companies must ensure that dangerous products do not enter stream of commerce, the CPSC must ensure that dangerous information does not enter the database. We strongly believe that significantly limiting the scope of the database at implementation and gradually expanding its scope with the input of all interested stakeholders would be the best way to ensure its long term success and utility.

Thank you for your consideration of and the opportunity to submit these comments. If you have any additional questions, please contact Rebecca Mond at rmond@apparelandfootwear.org.

Sincerely,

[redacted]

Kevin M. Burke
President and CEO

PUBLIC SUBMISSION

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Publicly Available Consumer Product Safety Information Database

Comment On: CPSC-2010-0041-0001
Publicly Available Consumer Product Safety Information Database

Document: CPSC-2010-0041-0039
Comment from Underwriters Laboratories

Submitter Information

Name: Claire Kammer
Address: United States,
Submitter's Representative: Claire A. Kammer
Organization: Underwriters Laboratories

General Comment

See Attached

Attachments

CPSC-2010-0041-0039.1: Comment from Underwriters Laboratories

LATE COMMENT

CPSC-2010-0041-0039

the standard in safety

Underwriters Laboratories

August 2, 2010

Ms. Mary Kelsey James
Director, Information Technology Policy and Planning
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

RE: CPSC Federal Register Notice; Docket No. CPSC 2010-0041; Publicly Available Consumer Product Safety Information Database; Proposed Rule

To Ms. James:
Underwriters Laboratories (UL) applauds the Commission's efforts pursuant to the requirements set forth by the Consumer Product Safety Improvement Act (CPSIA) to establish and maintain a product safety information database that is available to the public. As an independent, not-for-profit, product safety testing and certification organization with locations around the world, UL has earned a reputation as a global leader in product safety standards development, testing and certification. Amongst the work we do, we actively maintain systems for the reporting and investigating complaints on the safety performance for those products which we certify.

Based upon our experience with incident reporting, UL appreciates the CPSC's elaboration on the minimum content requirements in proposed §1102.10(d) of the proposed rule in order to solicit as much information as possible from submitters about the alleged incident or risk being reported. However, UL believes the CPSC should require the date on which the harm occurred or manifested itself to be included as part of the mandatory "description of harm." Knowing the date on which the harm occurred will assist the manufacturer in responding to or developing comments on the report, since it could make it easier to determine if the incident is a new or known issue for the product involved. In addition, requiring the submitter to report the date of harm or risk of harm would reduce the likelihood of counterfeit reports being added to the database. UL recommends that the CPSC require the submitter to identify the date of the alleged incident and to publish the date on which the report of harm is made.

Thank you for the opportunity to comment on the proposed rule regarding the consumer product safety information database. Should you have any questions, please contact me at (202) 296-8092 or by email at claire.a.kammer@us.ul.com.

Sincerely,

[redacted]

Claire A. Kammer
Manager, Global Government Affairs

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