



# MIM Reporter

THE REVIEW OF  
**MEDICAL INFORMATION MANAGEMENT**  
FOR LITIGATION

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## The Consumer Product Safety Commission’s Notorious Database

On March 11, 2011, the U.S. Consumer Product Safety Commission (CPSC) will launch a consumer-focused database that provides public access to critical product safety information. The controversial Consumer Product Safety Incident database is an online, government-sponsored database that provides consumers and manufacturers access to allegedly dangerous product information. In providing the ability to search by products or companies, the database provides consumers the opportunity to determine whether any other consumer has experienced incidents of risk of and/or actual injury. Although not yet released, the purpose and veracity of the database has been called into question by manufacturer/industry groups, and the anticipated information contained within the database has already been labeled a “blatant disregard for accuracy.”<sup>i</sup>

### BACKGROUND

On August 14, 2008, the Consumer Product Safety Improvement Act (“the Act”) became law and gave the CPSC new ways to protect consumers, including creation of a public consumer product safety database.<sup>ii</sup> The Act replaces a previous federal law that prohibited release of potentially dangerous product information without the product manufacturer’s consent.<sup>iii</sup>

Section 212 of the Act, as mandated by Congress, requires that the database be open to the public, searchable, and available through the CPSC’s website.<sup>iv</sup> Section 212 also provides that the database shall include reports of harm relating to the use of consumer products, notice of any corrective action taken by a manufacturer, and comments received in response to the report of harm.<sup>v</sup>

The database will not house information relating to automobiles, food and/or pharmaceuticals.

Reports of harm submitted for inclusion in the database are posted within 15 days of receipt, and must include, at a minimum, information that describes the consumer product, identification of the manufacturer or private labeler of the product, a description of harm allegedly related to use of the product, contact information for the person submitting the report, and a verification that the information submitted in the report is true and accurate to the best of his or her knowledge.<sup>vi</sup> Basic consumer information is sufficient for filing a report, and a report can be filed because of an actual incident or concern that an incident may occur. The reporter’s personal information is not released to the manufacturer or public without the reporter’s consent; similarly, anonymously submitted reports will not be visible on the web. The Act specifically prohibits

disclosing a reporter's identity to the named manufacturer unless authorized by the consumer.<sup>vii</sup>

A CPSC specialist then verifies this data and removes any protected health information (PHI) from the report before transmitting same to the associated manufacturer or private labeler. If the information cannot be verified, the report will not be posted to the database.<sup>viii</sup>

Despite this verification system, a notice has been posted on the CPSC web site that disclaims the accuracy, completeness or adequacy of the information in the database.<sup>ix</sup>

The database is searchable and sortable in multiple ways to ensure ease of use by consumers and public accessibility. Searches may be conducted by date of the information submitted, name of the consumer product, model name, and/or manufacturer's or private labeler's name.<sup>x</sup>

The CPSC must, within 5 days of receipt, transmit a report of harm to the manufacturer or private labeler identified in the report. This not only provides notice of the report to the manufacturer, but also affords the manufacturer an opportunity to review and comment on the report before it is posted to the database. The manufacturer has 10 days from transmission of the report by the CPSC to complete this process. This timeframe is "reset" if the wrong manufacturer is named by the consumer in the report of harm; if the CPSC is unable to determine the true manufacturer then the report is not published.<sup>xi</sup>

Further, after reviewing a report of harm, the manufacturer may request that confidential information contained in the report be removed prior to posting; a manufacturer may also request removal of materially inaccurate information, and may submit documentation in support of its request for consideration by the CPSC. The CPSC then determines whether to include or correct the inaccurate information prior to posting, or to replace inaccurate information with accurate information prior to posting.<sup>xii</sup>

Whenever possible, the manufacturer should point out the exact portion of the report in question, and upload supporting documentation to the portal that addresses the specific section in

the report. Finally, if the CPSC later determines that information already available in the database is inaccurate, within 7 days of this determination it may take similar steps to remove or correct the information, or add additional information to correct prior inaccurate information.<sup>xiii</sup>

## A HEATED DEBATE

In theory, the database functions as a necessary, centralized repository that allows the public to search for critical product safety information. Up to this point, however, the database has only served to polarize consumer-oriented groups and industry groups.

Those in support of the database claim that its creation is an important step forward to alerting the public of potential hazards and shielding them from allegedly faulty products – safer products equal safer consumers.<sup>xiv</sup> Consumers can now use database information in making informed decisions on whether or not to purchase a product based on other consumers' experiences. The CPSC also believes there are ample due process protections built-in to the proposed process as outlined above since industry-wide feedback is solicited and posted for public viewing.<sup>xv</sup>

Consumer advocates in favor of the database point out that, while information has always been available to the public through submission of a FOIA request, such a request could take weeks, months, even years to process before a consumer receives the product or manufacturer information he or she requested. Outside of submitting an official request for information, product information detailing potential problems with the product has only been made available to the public once a formal recall is declared. Gathering and storing product information in a publically accessible database serves to better inform the public. In this same vein, database opponents have been accused of attempting to shield manufacturers from greater public scrutiny. As Commissioner Bob Adler stated to The New York Times,

*“some folks are worried more about lost sales and not worried enough about lost souls.”<sup>xvi</sup>*

In reality, critics of the database view the database more as a punishment for profitable businesses than a protection for consumers from unsafe products.<sup>xvii</sup>

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First and foremost, manufacturers fear that the Act in general - and the database specifically - will not enhance product safety, but will instead increase litigation, undermine uniformity of enforcement, and create unnecessary burdens on U.S. companies.<sup>xviii</sup>

The Act broadens the definition of “consumer” to include all of the following: consumers; local, State or Federal government agencies; health care professionals; child service providers; and public safety entities.<sup>xix</sup> This broadened definition permits most anyone to submit a report of harm, regardless of whether or not he or she has firsthand information about the product in question, further bolstering the opposition’s position that the database will contain inaccurate information, causing more harm than good.

CPSC Commissioner and database-opponent Anne Northup explains that, “under the majority’s approach, the database will not differentiate between complaints entered by lawyers, competitors, labor unions and advocacy groups who may have their own reasons to ‘salt’ the database, from those of actual consumers with firsthand experience with a product.”<sup>xx</sup> This broadened definition sets the stage for inaccurate or misleading information to populate the database and be used to support groundless, frivolous lawsuits. Investigating false complaints or defending frivolous lawsuits will place an undue burden on businesses already struggling in the current economy.

As stated above, the CPSC acknowledges this concern and has disclaimed the accuracy of the reported consumer data.<sup>xxi</sup> However, because this is a government-sponsored database, manufacturers worry that consumers will nonetheless give weight and credibility to inaccurate information.<sup>xxii</sup> Reliance on inaccurate information defeats the database’s intended purpose of informing the public about potentially dangerous product.

Manufacturers are also concerned that the Act allows for immediate publication of trade secrets and materially inaccurate information while same is being reviewed or investigated by CPSC personnel. Further, competitors could potentially use the database to sabotage

a manufacturer by filing defaming and misleading reports, again creating unnecessary burdens on U.S. companies.<sup>xxiii</sup>

To be sure, consumer product safety is of the utmost importance to U.S. manufacturers, and industry groups are not opposed to the database in general:

*“We’re not opposed to a database ... we’re opposed to a database that’s full of inaccurate information.”<sup>xxiv</sup>*

Industry groups continue to work with the CPSC to ensure that the true mission of the database, consumer protection, is reached.

## NEXT STEPS FOR MANUFACTURERS AND PRIVATE LABELERS

The database is scheduled for official release on March 11, 2011, with a “soft” release planned for January 24, 2011. The current debate will likely continue up to and after the official release, and rules and procedures surrounding use of the database may or may not change. In order to fully appreciate the database as it exists today, manufacturers and private labelers should take the following steps prior to March 11:

1. Register for portal access: setup subaccounts for one’s legal team, office staff, marketing team, and other interested parties – a company can register as a manufacturer or private labeler, or as any combination of the industry “types” detailed on the portal web site. It is in every manufacturer’s or private labeler’s best interest to register for portal access in order to timely and effectively review reports of harm;
2. View both webcasts on the CPSC’s web site ([www.saferproducts.gov](http://www.saferproducts.gov)) and become familiar with database functionality;
3. View the “Frequently Asked Questions” (FAQ) section on [www.saferproducts.gov](http://www.saferproducts.gov), and visit it frequently for updates and changing and additional procedural information;
4. Develop an internal process for reviewing and responding to comments, including preparation of responsive statements.
5. Develop and implement an effective social media monitoring policy to ensure that all consumers’ comments, whether positive or negative, are reviewed, regardless through which form of media the comments are publicized.

Up-front preparation and planning should lessen the effects a report of harm, or other negative web-posted comments, have on one’s business.



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## ENDNOTES

- i Wood, Carter. "CPSC's Northrup: Database Will Show Blatant Disregard for Accuracy." *Shopfloor*. January 19, 2011. [www.shopfloor.org](http://www.shopfloor.org).
- ii *Consumer Product Safety Improvement Act of 2008* § 6A (a) (1).
- iii *Consumer Product Safety Act of 1972*, 16 CFR Part 1101 through 1406; 15 U.S.C. § 2055(a) (3).
- iv *Consumer Product Safety Improvement Act of 2008* § 6A (a) (1). See also 15 U.S.C. §2055.
- v *Id.* at (b) (1) (B).
- vi *Id.* at (b) (2) (B).
- vii *Id.* at (b) (6).
- viii Please note that information not posted to the database is still available to the public by submitting a Freedom of Information Act (FOIA) request.
- ix *Consumer Product Safety Improvement Act of 2008* § 6A (b) (5).
- x *Id.* at (b) (4).
- xi CPSC. "Business Focused Web Conference." *Saferproducts*. January 20, 2011. January 24, 2011., <http://saferproducts.gov>.
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- xxi Rappoport, Phil. "Product safety agency to launch database of dangerous product." *Examiner*. January 12, 2011. January 19, 2011. <http://www.examiner.com/product-recall-in-washington-dc>.
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- xxiii *Id.*
- xxiv *Id.*