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Insights into Recent Developments from the Consumer Product Safety Commission

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Challenges and Concerns Faced by the CPSC Consumer Complaint Database

First Lawsuit Filed Challenging the CPSC Consumer Complaint Database

A manufacturer recently chose to take legal action in response to a report submitted to the Consumer Product Safety Commission's (CPSC) SaferProducts.gov database pertaining to one of the manufacturer's products. This is the first legal challenge faced by the database. An unknown federal agency filed the report, alleging that the manufacturer's product caused injury to a child. The manufacturer, who is attempting to remain anonymous, filed suit in federal district court in Maryland on October 17, 2011, claiming that the report contains baseless allegations. The manufacturer, who is reported to be a maker and seller of consumer products, is seeking to prevent the CPSC from making the incident public and is also seeking to keep all litigation documents under seal. It argues that revealing its name and the nature of the suit would be the same as publishing the consumer complaint. While it has not filed an objection, the CPSC says it plans to oppose the manufacturer's motion to have the case sealed. Three consumer groups have already requested that the judge unseal the record, arguing that the case is of special interest of the public.

GAO Report Critical of SaferProducts.gov Database

Last month, the U.S. Government Accountability Office (GAO) issued a report entitled "Consumer Product Safety Commission: Action Needed to Strengthen Identification of Potentially Unsafe Products." The report highlights the problems that arise when a public database such as SaferProducts.gov publishes reports containing inadequate product identification information.¹

Reports may be submitted to SaferProducts.gov by almost anyone. To be eligible for publication in the database, federal law requires reports to contain certain pieces of information, such as a description of the product, the associated harm and a word or phrase sufficient to distinguish the product as one within the CPSC's jurisdiction. Although this information is required for publication, it is not required for submission and, in fact, a large percentage of reports submitted contain inadequate information for publication. The GAO's analysis of CPSC data showed that, as of July 7, 2011, only 38 percent of the 5,464 reports submitted to the CPSC contained the required information.

¹ Pursuant to the Consumer Product Safety Improvement Act of 2008, the CPSC launched a public database in March 2011 containing incident reports regarding consumer products regulated by the agency. The database is available to the public and can be accessed indirectly through the CPSC's website, www.cpsc.gov, or directly by visiting www.SaferProducts.gov.

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Notably, the model or serial number is not required in order for a report to be published. This is at least in part why the consensus among manufacturers is that the information required for publication is insufficient to determine whether the correct manufacturer is identified in the report. Additionally, some entities, not just manufacturers, have raised a number of concerns about the accuracy and usefulness of the new database, and the potential risk of unfairly tarnishing manufacturers' reputations. The GAO report states that of the 1,085 reports that have been published, 160 of those were claimed by manufacturers to have materially inaccurate information. This number does not include the unpublished reports manufacturers claimed to have materially inaccurate information. In response to some of these concerns, a new law was signed on August 12, 2011, providing that if a submitted report does not contain the model or serial number of the product, then the CPSC must attempt to obtain that information or at least a photograph of the product. The GAO report noted that this new requirement may pose a challenge to the CPSC because the method it employs to analyze submissions is not currently equipped to identify that specific information. The GAO has recommended to the CPSC that it adapt its analytic method so that it can better comply with this requirement.

There has been much criticism of the SaferProducts.gov database, this time highlighted by a government entity — the GAO. This criticism, along with the recently filed lawsuit, may force the CPSC to strike a better balance between providing safety information to consumers and providing protection to manufacturers by ensuring the information is accurate.

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Alston & Bird helps companies navigate the CPSC's complex regulations — from testing, to labeling, to recalls — and everything in between. We also help companies monitor and respond to complaints submitted to the CPSC's new consumer complaint database, www.SaferProducts.gov. For questions regarding the information in this advisory or questions about recalls, the SaferProducts.gov database or other CPSC issues, please email cpsc-questions@alston.com or visit the firm's website at <http://www.alston.com>.

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