CLIENT ALERT

The CPSC's Draft Final Rule Establishing a Publicly Available Product Safety Information Database Scheduled for Commission Vote on November 17

October 19, 2010

On October 14, 2010, the Consumer Product Safety Commission ("CPSC" or "Agency") published a draft final rule to establish a publicly available product safety information database ("Database") in accordance with Section 212 of the Consumer Product Safety Improvement Act of 2008, which requires the CPSC to establish and maintain a publicly accessible, searchable database "on the safety of consumer products." *See* 15 U.S.C. § 2055a(a)(1). This draft final rule updates the Agency's initial proposed rule (released on May 24, 2010). The Database will contain reports of harm relating to the use of products or substances regulated by the CPSC, as well as manufacturer or private labeler comments regarding these reports of harm, and information relating to publicly-announced voluntary product recalls. *Id.* § 2055a(b)(1). The Database must be made available to the public no later than March 11, 2011. *Id.* § 2055a(a)(2).

The CPSC's proposed rule – and now its draft final rule – provides a two-tiered framework for the Database. First, the Database will provide an arena for identified categories of individuals to submit reports of harm[1] caused by product safety incidents ("submitters"). Submitters include consumers; local, state or federal government agencies; health care professionals; child service providers; and public safety entities. Second, the Database will provide a portal for registered manufacturers and private labelers to comment on submitted incident reports.   In addition, the rule provides processes through which a manufacturer or private labeler can intervene if it deems reported information to be confidential, or materially inaccurate.

In crafting its draft final rule, the CPSC updated the May 24, 2010 proposed rule to incorporate comments received during a 60-day comment period. The changes resulting from those comments largely address three broad categories: (1) submitters; (2) minimum requirements for publication; and (3) material inaccuracy.

1. *Submitters*: The draft final rule eliminates the catchall category of "others" who can submit reports of harm. However, the definitions of "consumers" and "public safety entities" have been expanded to include the individuals and entities originally contemplated by the "others" category.

2. *Minimum Requirements For Publication*: In addition to the report requirements originally contemplated by the CPSC's proposed rule, the draft final rule requires that reports of harm identify the incident date, or an approximation of that date; and the category of submitter. As a result, manufacturers and private labelers can attempt to verify these items on a report of harm.

3. *Material Inaccuracy*: In the CPSC's draft final rule, the definition of material inaccuracy has been amended to delineate the high bar that manufacturers must clear to establish a material inaccuracy. The draft final rule additionally clarifies that the CPSC can publish a report of harm unless the Agency has affirmatively determined that the report contains a material inaccuracy. Lastly, the draft final rule imposes the burden on the manufacturer or private labeler to prove that

a material inaccuracy exists in a submitted report. This burden is intended to mirror a manufacturer's burden for demonstrating that information is confidential.

The CPSC is scheduled to vote on this draft final rule on November 17, 2010. If you have any questions regarding the CPSC's draft final rule or how to prepare for dealing with the new Database coming in March, please contact us for more information.

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[1]Under the rule, harm is defined as "injury, illness, or death; [] or *risk of* injury, illness, or death." 75 Fed. Reg. 29176 (emphasis added).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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