

# PRODUCT LIABILITY AND INTERNET PREVENTION: THE CPSC ONLINE CONSUMER DATABASE

*Leslie Cornell* \*

## INTRODUCTION

The Consumer Product Safety Commission (“CPSC” or “Commission”) is the independent federal regulatory agency responsible for the oversight of consumer products in the United States.<sup>1</sup> Specifically, the CPSC is charged with the protection of the public and consumers from products that may pose an unreasonable risk of injury or death.<sup>2</sup> In exploring the CPSC’s relationship to tort litigation, it is critical to evaluate the agency in terms of its responsibility to take a preventative, as opposed to a compensatory, approach to safety. For CPSC to meet the goals of a preventative agency, two elements are required: (1) quick action regarding the identification and sanctioning of dangerous products and (2) effective and timely dissemination of this information to consumers. This note addresses these elements in relation to the current state of the CPSC.

The CPSC is the federal entity responsible for the recall of consumer products in the U.S. marketplace.<sup>3</sup> Product recalls are primarily voluntary actions taken by manufacturing firms in accordance with CPSC oversight, rather than mandatory product withdrawals under a CPSC directive.<sup>4</sup> Accordingly, this note discusses why and how the CPSC struggles with their recall responsibilities.

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\* J.D. Candidate, May 2013, Loyola University Chicago School of Law.

<sup>1</sup> *Frequently Asked Questions*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/about/faq.html> (last visited Nov. 23, 2011).

<sup>2</sup> *CPSC Overview*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/about/about.html> (last visited Nov. 23, 2011).

<sup>3</sup> *Frequently Asked Questions*, *supra* note 1.

<sup>4</sup> *Id.*

In 2008, Congress took steps to modernize the existing framework of the CPSC by passing the Consumer Product Safety Improvement Act (“CPSIA”).<sup>5</sup> Among the changes instituted in the CPSIA was the creation of an online, publicly available, and searchable database of product-related injuries. Congress created this online consumer database to promote a more preventative approach to consumer safety, wherein consumers could gather near-immediate alerts to dangerous products and risks of harm.<sup>6</sup> This new online database was launched in March of 2011, pursuant to the deadline set in the CPSIA.<sup>7</sup>

This note will first discuss the history and creation of the CPSC, its mission and effectiveness as a safety agency. Then, a brief examination of the CPSIA will show how it intended to improve consumer safety in the U.S., specifically through the lens of product recalls and the new online consumer database. A further discussion of product-related injuries and remedial procedures in the U.S. will highlight the inefficiencies of the system and the influence the manufacturing industry wields in regulatory rulemaking. Finally, this note will explore the new online consumer database, its objectives, potential issues and the reactions of consumers and industry representatives. Specifically, this note will address the attacks faced via Congress and industry by the new database, the message this backlash sends about the place of consumer safety in this country, as well as the likely impact the database will have on the future of tort litigation and consumer safety.

## I. A BRIEF HISTORY AND OVERVIEW OF THE CPSC

Prior to the formation of the CPSC in 1972, federal legislation related to product safety was fragmented. The legislative framework at that time addressed only a narrow range of products and the regulatory statutes regarding consumer product safety were disconnected, producing ineffective sanctions.<sup>8</sup> Before the creation of the CPSC, most of the regulation concerning consumer products

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<sup>5</sup> U.S. CONSUMER PROD. SAFETY COMM’N, 2011-2016 U.S. CONSUMER PRODUCT SAFETY COMMISSION STRATEGIC PLAN 1 (2011) [hereinafter STRATEGIC PLAN], available at <http://www.cpsc.gov/cpscpub/pubs/reports/2011strategic.pdf>.

<sup>6</sup> Lyndsey Layton, *Consumer Product Safety Commission to launch public database of complaints*, WASH. POST, Jan. 10, 2011, [www.washingtonpost.com/wp-dyn/content/article/2011/01/09/AR2011010902730.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/09/AR2011010902730.html).

<sup>7</sup> Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).

<sup>8</sup> STRATEGIC PLAN, *supra* note 5, at 43.

occurred at a state level, and wide discrepancies arose among the differing sets of standards.<sup>9</sup> These state regulations were not only numerous, but often conflicted with one another, creating problems for manufacturers trying to improve safety while conforming to differing regulatory standards.<sup>10</sup> At the time, legal remedies concentrated on obtaining compensation after injuries from consumer products had occurred, rather than preventing injuries from occurring in the first place.<sup>11</sup> In response to mounting pressures arising from these issues, Congress enacted the Consumer Product Safety Act (“CPSA”) in 1972, which established the CPSC as an independent regulatory agency responsible for the oversight of consumer products.<sup>12</sup>

The CPSC is headed by five commissioners, nominated by the President and confirmed by the Senate for staggered seven-year terms.<sup>13</sup> Inez Tenenbaum, the current Chairman nominated by President Obama, was sworn into office on June 23, 2009 to a term that expires in October 2013.<sup>14</sup>

The Commission is charged with protecting the public from unreasonable risks of injury or death from a wide range of consumer products.<sup>15</sup> CPSC’s mission is to protect consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard or can injure children, including products such as toys, cribs, power tools, cigarette lighters, and household chemicals.<sup>16</sup>

CPSC has jurisdiction over more than 15,000 kinds of consumer products used in and around the home, in sports, recreation and schools.<sup>17</sup> The CPSC does not test or certify products before they reach the consumer market, nor does it have the legal authority to do so.<sup>18</sup> Moreover, the agency does *not* have jurisdiction over some categories of consumer products such as cars and other on-road vehicles, tires, boats, alcohol, tobacco, firearms, food, drugs,

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<sup>9</sup> *Consumer Product Safety Commission CPSC History*, U.S. RECALL NEWS (May 30, 2008), <http://www.usrecallnews.com/2008/05/us-consumer-product-safety-commission-cpsc.html>.

<sup>10</sup> *Id.*

<sup>11</sup> STRATEGIC PLAN, *supra* note 5, at 43.

<sup>12</sup> *Id.*

<sup>13</sup> *Frequently Asked Questions*, *supra* note 1.

<sup>14</sup> *Biographical Information – Chairman Inez Moore Tenenbaum*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/cpscpub/bios/tenenbaum.html> (last visited Nov. 23, 2011).

<sup>15</sup> *CPSC Overview*, *supra* note 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Frequently Asked Questions*, *supra* note 1.

<sup>18</sup> *Id.*

cosmetics, pesticides, and medical devices, which are all controlled by other federal regulatory agencies such as the Food and Drug Administration or the U.S. Department of Agriculture.<sup>19</sup>

As an independent federal regulatory agency, CPSC works to reduce the risk of injuries and deaths associated with consumer products by developing voluntary standards within industries, issuing and enforcing mandatory standards, or banning consumer products if no feasible standard would adequately protect the public.<sup>20</sup> The Commission estimates that its work to ensure the safety of consumer products contributed significantly to a 30% decline in the rate of deaths and injuries associated with consumer products over the past 30 years.<sup>21</sup> Its regulatory authority extends to manufacturers, distributors, retailers and importers of consumer products and the Commission maintains authority regardless of the size, number of employees or revenue of a business handling consumer products.<sup>22</sup> As mentioned above, the CPSC as an agency is also responsible for obtaining the recall of products or arranging for their repair, conducting research on potential product hazards, informing and educating consumers through the media, state and local governments, private organizations, and by responding to consumer inquiries.<sup>23</sup>

In addition to its legislative mandates under the CPSA, the CPSC is charged with administering six additional laws, each governing specific areas of consumer product safety: Flammable Fabrics Act (1953); Federal Hazardous Substances Act (1960); Poison Prevention Packaging Act (1970); Children's Gasoline Burn Prevention Act (2008); and the Virginia Graeme Baker Pool and Spa Safety Act (2008).<sup>24</sup>

#### *A. Budget Issues*

The Consumer Product Safety Commission continually struggles with budget issues. The range of products the Commission is responsible for is vast and the resources to accomplish its duties are small. The Commission employs only 400-600 staff members to monitor all 15,000 products for which the CPSC is responsible, only 90 of whom operate any type of field investigations into potentially

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *CPSC Overview, supra* note 2.

<sup>22</sup> STRATEGIC PLAN, *supra* note 5, at 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 4-5.

dangerous products.<sup>25</sup> A statement by Chairman Inez Tenenbaum in February of 2011 lays out the funding discrepancies and resulting issues faced by the agency:

Historically, CPSC has had to survive with significantly fewer resources than its sister health and safety agencies. FY2012 continues this trend. While agencies such as FDA and USDA routinely receive budget outlays in the billions of dollars, as recently as FY2007 the CPSC had a budget of less than \$63 million and fewer than 390 employees to regulate more than 15,000 types of consumer products, many of which are manufactured overseas. While we learned to do more with less over the years, this funding disparity was not without cost to the American consumer. During those lean times CPSC discovered, and Congress recently recognized, that the continued lack of sufficient funding and staff was beginning to make it nearly impossible for the agency to accomplish even the minimum that is required of a health and safety agency.<sup>26</sup>

In light of more recent developments, such as increased import volumes, the rise of Internet sales, and globalized supply chains, the CPSC's responsibilities are further extended, but low funding forces the CPSC to narrowly tailor their product investigations.<sup>27</sup> As a result, only a small number of products are ever investigated or tested by employees of the CPSC.<sup>28</sup>

### *B. Consumer Outreach*

To be effective as a preventative approach to consumer safety, the CPSC must ensure that information about potentially hazardous consumer products reaches the consumer. Therefore, one of the main priorities of the CPSC is to educate consumers both about product risks and the role of CPSC in ensuring consumer safety.<sup>29</sup> This role tends to be one of the most difficult to efficiently and successfully accomplish. Consumers, advocates, industry, and partner government

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<sup>25</sup> *Id.* at 6.

<sup>26</sup> Press Release, Consumer Product Safety Commission, Statement of Chairman Inez M. Tenenbaum and Commissioners Robert S. Adler and Thomas H. Moore Regarding the Fiscal Year 2012 Performance Budget Request (Feb. 14, 2011), *available at* <http://www.cpsc.gov/pr/tenenadlermoore02142011.pdf>.

<sup>27</sup> STRATEGIC PLAN, *supra* note 5, at 13.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 12.

agencies each desire useful and timely information about consumer product safety issues.<sup>30</sup> Further adding to the difficulty, these audiences have different information needs and each responds best to different methods of communicating information.<sup>31</sup>

In 2011, the Commission launched a new “Strategic Plan” to be implemented over five years.<sup>32</sup> The plan concentrates on five major goals including; Leadership in Safety, Commitment to Prevention, Rigorous Hazard Identification, Decisive Response, and finally Raising Awareness.<sup>33</sup>

According to the strategy laid out in this plan, to raise awareness, the CPSC will:

Use a wide array of communication channels and strategies to provide the public with timely and targeted information about safety issues and CPSC capabilities. This information will empower consumers to make informed choices about the products they purchase and how to safely use them, to be aware of hazardous products in the market, and to act quickly if they own a recalled product. Additionally, the information will make industry aware of the hazards they must address to maintain safe products.<sup>34</sup>

Recently, the CPSC has had limited success in educating the public through increased use of social media to communicate safety messages and through targeted campaigns such as “Safe Sleep” and “Pool Safely” that aim to reach the most vulnerable populations affected by certain product hazards.<sup>35</sup> Due in part to these efforts, visits to the CPSC website increased to approximately forty million in 2009 and fifty-four million in 2010.<sup>36</sup> As laid out above, educating consumers is a necessary element of preventing consumer product-related injuries and, therefore, in attaining the ultimate goal of regulatory-created consumer safety.

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<sup>30</sup> *Id.* at 21.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.* at 21.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

## II. CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

One of the major milestones in the CPSC's recent history is the enactment of the Consumer Product Safety Improvement Act ("CPSIA"). This Act became law on August 14, 2008.<sup>37</sup> Just prior to passage of the CPSIA, some significant high-profile product recalls in 2007, including numerous recalls involving lead paint in children's toys, powerful magnets falling out of toys, and dangerous cribs, led to the moniker "Year of the Recall."<sup>38</sup> These incidents brought renewed attention to the issue of consumer product safety.<sup>39</sup> In a probable reaction to media scrutiny, the 110th U.S. Congress enacted Public Law 110-314, the CPSIA, updating the original Consumer Product Safety Act (1972) and expanding the limited powers of the Commission.<sup>40</sup> The stated purpose of the new legislation was to renew efforts towards children's products and injury prevention and, additionally, to modernize the mandate of the CPSC.<sup>41</sup> Through the CPSIA, Congress bestowed new resources and responsibilities for consumer protection on CPSC.<sup>42</sup>

One of the major provisions of the CPSIA included the creation of a publicly searchable online database with reports of "injury, illness or death, or risks of injury, illness, or death" associated with consumer products.<sup>43</sup> In addition, the CPSIA conferred greater powers to the CPSC by allowing it to order mandatory recalls, prohibiting the sale or resale of recalled products and significantly increasing maximum civil penalties for violators of CPSC laws and enhanced criminal penalty provisions.<sup>44</sup>

In addition to the safety provisions listed above, the CPSIA legislation also authorized CPSC funding that nearly doubled the pre-CPSIA level, marking a turnaround in a decades-long decline in the agency's annual operating budget and number of assigned staff. The

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<sup>37</sup> Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).

<sup>38</sup> See STRATEGIC PLAN, *supra* note 5, at 5; see also 2007: *The Year of the Recall*, CONSUMERSUNION.ORG, [http://www.consumersunion.org/pub/core\\_product\\_safety/005079.html](http://www.consumersunion.org/pub/core_product_safety/005079.html) (last visited Nov. 23, 2011).

<sup>39</sup> STRATEGIC PLAN, *supra* note 5, at 5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 5.

<sup>44</sup> See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).

CPSIA also restored the Commission to its originally authorized size of five commissioners and allowed for expansion in the range and depth of its product safety expertise.<sup>45</sup>

Regarding recalls, the CPSIA grants the CPSC the authority to require the manufacturer, distributor or retailer of a consumer product that poses a “substantial product hazard” to provide public notice of such hazard and repair, replace, or refund of the product.<sup>46</sup> The CPSIA also expands the requirements of this provision allowing the CPSC to recall products that fail to comply with other rules and regulations, standards, or bans that the CPSC chooses to enforce under other statutes.<sup>47</sup> The CPSC can also order corrective actions of recall, repair or refund, thus taking the choice away from the manufacturer, and it can withdraw approval of corrective action plans and order amendments when recalls do take place.<sup>48</sup> Finally, CPSIA prohibits the sale and export of recalled products.<sup>49</sup> While the vast majority of recalls have been, and will continue to be, “voluntary” the CPSC, under the CPSIA, is in a stronger position to carry out negotiations concerning corrective action plans.<sup>50</sup>

The CPSIA increased both the regulatory strength of the CPSC and the responsibilities of the agency. Companies are likely seeing significantly more recalls under CPSIA, with attendant litigation risks.<sup>51</sup> There is not only a greater likelihood of regulatory violations and negligence per se claims, but there is increased exposure to state attorney general enforcement actions.<sup>52</sup> Further, more firms have become subject to such risk of litigation, as the prohibition on the sale of recalled products impacts retailers as well as manufacturers. The changes introduced by CPSIA should aid the CPSC in its efforts of injury prevention.

### III. PRODUCT-RELATED INJURIES

As mentioned above, two of the primary responsibilities of

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<sup>45</sup> *Id.* at § 201, 122 Stat. at 3038-39.

<sup>46</sup> *Id.* at § 214, 122 Stat. at 3052-55.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Frank Leone and Bruce J. Berger, *The Consumer Product Safety Improvement Act, Its Implementation And Its Liability Implications*, 76 DEF. COUNS. J. 312 (2009), available at [www.hollingsworthllp.com/media/pnc/0/media.260.pdf](http://www.hollingsworthllp.com/media/pnc/0/media.260.pdf).

<sup>52</sup> *Id.*

the CPSC are the collection of consumer product-related injury information and the recall authority of products determined to pose an unreasonable, substantial risk of harm.<sup>53</sup> To achieve effective prevention of product-related injuries, the CPSC must make immediate identifications of hazardous products and take the necessary steps to remove these products from the marketplace and from the consumer. In addition to educating consumers, the agency must employ effective standards and recall methods.

Statistically, nearly half of all Americans have owned at least one recalled consumer product.<sup>54</sup> From October 2008 to September 2009, approximately 15,201,097 hospital emergency room visits from consumers of all ages were associated with consumer products.<sup>55</sup> In the same time period from 2006-2007, sixty-eight children died from the use of children's nursery equipment, supplies or toys.<sup>56</sup> More than 8,000 deaths and 14 million injuries, annually, stem from recalled and unrecalled consumer products.<sup>57</sup>

To estimate the number of yearly injuries and deaths associated with consumer products, staff at the CPSC collects information about product-related injuries treated in hospital emergency rooms through the National Electronic Injury Surveillance System ("NEISS").<sup>58</sup> This system estimates product-related injuries from a probability sample of hospital emergency rooms. Annually, NEISS supplies more than 370,000 product-related cases from a sample of approximately 100 hospitals.<sup>59</sup>

Additionally, CPSC collects mortality data by purchasing, reviewing, and processing about 8,000 death certificates each year covering unintentional product-related deaths from all fifty states.<sup>60</sup> The Medical Examiners and Coroners Alert Project ("MECAP") collects and reviews approximately 5,500 additional reports from participating medical examiners and coroners throughout the country.

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<sup>53</sup> STRATEGIC PLAN, *supra* note 5, at 3.

<sup>54</sup> *Half the Country Has Had a Recalled Product*, Legal Research Web Site Says, 21(4) WESTLAW J. PROD. LIABILITY 12, 12 (2010) [hereinafter *Half the Country*].

<sup>55</sup> 2010 U.S. CONSUMER PROD. SAFETY COMM'N ANN. REP. at 5, <http://www.cpsc.gov/cpscpub/pubs/reports/2010rpt.pdf>.

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *Half the Country*, *supra* note 54, at 12.

<sup>58</sup> 2010 U.S. CONSUMER PROD. SAFETY COMM'N PERFORMANCE AND ACCOUNTABILITY REP. at 9, <http://www.cpsc.gov/cpscpub/pubs/reports/2010par.pdf> [hereinafter ACCOUNTABILITY REPORT].

<sup>59</sup> *Id.* at 1.

<sup>60</sup> *Id.*

CPSC staff also collects, reviews, and compiles information from about 6,600 news clips and 24,000 other reports of product-related injuries and deaths from consumers, lawyers, physicians, fire departments, and others in order to create a comprehensive understanding of product-related deaths.<sup>61</sup> Based primarily on information gathered by these methods, CPSC examines trends and repetitious incidents to determine if certain products pose substantial risks of injury.

When CPSC staff determines that a recall is necessary, compliance members undertake negotiations with the responsible manufacturer to seek a voluntary recall.<sup>62</sup> In 2010, CPSC staff completed 427 cooperative recalls involving millions of consumer product units that either violated mandatory standards or were defective and presented a substantial risk of injury to the public.<sup>63</sup> CPSIA requires companies to report dangerous products and related injuries, and if a company fails to do so, then the CPSC will seek civil penalties. In 2010, the CPSC negotiated out-of-court settlements in which five companies voluntarily agreed to pay \$1.85 million in civil penalties. In addition, one federal court settlement resulted in a civil penalty of \$2.05 million to the U.S. Treasury. This total is expected to increase in the future as the CPSIA amendments increase the total amount of civil penalties the CPSC may impose.<sup>64</sup>

#### *A. Voluntary Standards*

In general, the CPSC's statutory authority requires it to rely on voluntary standards to build safety into consumer products if the Commission determines that compliance with a voluntary standard is likely to result in the elimination or adequate reduction of the risk of injury identified and that there will be substantial compliance with the voluntary standard.<sup>65</sup> The agency has stated that voluntary standards are often faster and cheaper than mandatory standards yet offer similar safety protection.<sup>66</sup>

Voluntary standards for consumer products are developed based on consensus within voluntary Standards Development Organizations ("SDOs") that are composed of industry, agency, and

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<sup>61</sup> *Id.* at 9.

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 5.

<sup>66</sup> *Id.*

consumer representatives.<sup>67</sup> The CPSC has no direct regulatory authority to enforce adherence to these standards. When CPSC staff members identify the need for a voluntary standard, they submit a recommendation to an SDO based on consumer product incident data and analysis of that data. CPSC staff does not vote on proposed voluntary rule changes or new standards, but they provide expert advice, information and technical assistance based on data collected by the agency.<sup>68</sup> The process of submitting a proposal for a new voluntary standard to the implementation of that standard could take months or even years to be finalized. However, once the voluntary standard is approved, it usually becomes the recognized norm for that industry group and product type.<sup>69</sup>

### *B. Mandatory Standards*

Mandatory standards are federal rules, set by statute or regulation, that usually define the required performance standards consumer products must meet, or warnings consumer products must have, to be sold in the U.S.<sup>70</sup> The CPSC may create a mandatory standard only when it determines that compliance with a voluntary standard would not eliminate or adequately reduce a risk of injury, or it is unlikely that there will be substantial compliance with a voluntary standard.<sup>71</sup>

The CPSC may also promulgate a mandatory ban of hazardous products when it determines that no feasible voluntary or mandatory standard would adequately protect the public from an unreasonable risk of injury.<sup>72</sup> If the CPSC determines that a mandatory standard or ban is necessary, the Commission solicits comments from consumers, industry groups, government partners, and any other interested stakeholders. When a mandatory standard is instituted by the CPSC, it applies across the entire chain of distribution, including manufacturers, distributors, and retailers. Unlike voluntary standards, mandatory standards are enforceable by the CPSC, allowing the agency to regulate imports that do not meet federal requirements and to seek civil or criminal penalties for violations.<sup>73</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

Making a mandatory rule is a multi-step and often time-consuming process. The first step is the Advance Notice of Proposed Rulemaking (“ANPR”) in which the CPSC seeks input from all interested parties. Included in the ANPR is a summary of all regulation options that have been considered, an explanation of why the existing standard is insufficient and an invitation of notice of any relevant existing voluntary standards in the industry or intention to develop standards.<sup>74</sup>

Within twelve months of the ANPR, the Commission must publish the second step, the Notice of Proposed Rulemaking (“NPR”).<sup>75</sup> At this point, the Commission must show a cost-benefit analysis of the proposed rule, explain why the current rule is not adequate, describe reasonable alternatives, and again invite comments from the public and industry.<sup>76</sup> Sixty days after the NPR is released, the CPSC must either issue a final rule or withdraw the NPR.<sup>77</sup> If the Commission issues a final rule, it must state the degree and nature of risk in question, approximately how many products will be subject to the new rule, the effect the rule will have on the cost, utility and availability to consumers, and how it will disrupt manufacturers.<sup>78</sup> If the industry begins developing a voluntary rule at any point in this process, the CPSC must abandon its efforts and wait to see if the voluntary standard will adequately reduce the hazard.<sup>79</sup> As an additional burden, the agency also must “issue findings that the rule is reasonably necessary, that it is in the public interest, that the rule’s benefits bear a reasonable relationship to its costs, and that the rule is the “least burdensome” requirement that adequately reduces the risk at issue.<sup>80</sup>

This complex and bureaucratic process can take many years to finalize and gives significant power to industry, which is given a loud voice in the CPSC rulemaking process. Deference to manufacturer interests is clearly shown in the requirement that any mandatory rule be the “least burdensome” alternative presented by the CPSC. As a result, from 2004 and 2007, the agency participated in the creation of 141 voluntary rules and created only three

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<sup>74</sup> HELD BACK: UNFINISHED CONSUMER PRODUCT SAFETY COMMISSION RULES, CLASS OF 2007 at 5 (Public Citizen, Mar. 2008), available at <http://www.citizen.org/documents/CPSCClassof2007.pdf>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

mandatory rules.<sup>81</sup> These facts give some indication of the place consumer safety holds in the current marketplace. The task of CPSC is made increasingly difficult with the relations it must maintain with the manufacturing industry and the statutory restrictions that impede the Commission's ability to protect consumers.

### *C. Getting Hazardous Product Information to Consumers*

While statutory obstacles affect the first prong of CPSC's responsibilities, other problems are presented by the second element of effective injury prevention, which requires effective dissemination of information regarding dangerous products. CPSC achieves awareness primarily through its website, which is likely the best source for product recall information as it is updated frequently and allows for easy search functions.<sup>82</sup> New recalls are posted on the home page as soon as they are issued, and in the Recall section, consumers and other entities can search recalls by product type, name or description of the product, manufacturing company, or date of recall.<sup>83</sup> CPSC also operates an email subscription list in which recipients get CPSC's recall notices automatically the same day they are issued.<sup>84</sup>

Efforts to inform consumers have grown in recent years. In 2010 the CPSC "alerted" the public to hazardous products through 362 press releases and recall alerts, more than six million electronically distributed publications, and through the CPSC's website, consumer hotline, and the National Injury Information Clearinghouse.<sup>85</sup> Further, in 2010, the CPSC made available for the first time a web-based tool that third parties can feature on their webpages that displays brief summaries of the latest CPSC safety information. The presence of the CPSC's widget on other organizations' webpages accounted for an additional 42.8 million views of CPSC safety information in 2010.<sup>86</sup>

Nevertheless, information about product harms is not reaching large segments of the consumer population. In 2007, CPSC launched their "Drive to One Million" campaign, an effort to get one million

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<sup>81</sup> *Id.* at 6.

<sup>82</sup> See CPSC HOME PAGE, <http://www.cpsc.gov/> (last visited Nov. 23, 2011).

<sup>83</sup> See *Recalls and Product Safety News*, CPSC.COM, <http://www.cpsc.gov/cpsc/pub/prerel/prerel.html?tab=recalls> (last visited Nov. 23, 2011).

<sup>84</sup> See *On-line Form for CPSC Subscription Lists*, CPSC.COM, <https://www.cpsc.gov/cpsclist.aspx> (last visited Nov. 23, 2011).

<sup>85</sup> ACCOUNTABILITY REPORT, *supra* note 58, at 14-15.

<sup>86</sup> *Id.*

consumers registered to receive their recall alert emails.<sup>87</sup> By 2010, only approximately 300,000 consumers were registered to receive these emails.<sup>88</sup>

According to a retired CPSC Director of Field Operations, getting the word out to the public about recalled products has always been a problem.<sup>89</sup> There's neither a law, nor a provision in the CPSA or CPSIA that requires media outlets to carry recall information and the agency does not have the budget resources to purchase advertising.<sup>90</sup> Some newspapers, especially local and weekly newspapers, do have a recall section where they gather and publish recall information from CPSC and other regulatory agencies, but major news outlets have yet to adopt similar sections. Occasionally, depending on the hazard, number of products involved, and the history of the problem, CPSC will compel firms to do video news releases that are distributed to television stations across the country via satellite.<sup>91</sup> Again, depending on the circumstances, firms have placed paid advertising announcing recalls, usually in highly targeted media forums like magazines appealing to parents of babies and young children.<sup>92</sup> Generally, the issue is that major media outlets do not use the recall information specifically for the benefit of the consumer. For example, many CPSC recall announcements end up on the business page of the newspaper due to the possible effect of the recall on the firms' financial status.<sup>93</sup> This placement is less likely to be as effective as a warning system to parents and families regarding unsafe products than placement in other parts of the newspaper such as the general news or health sections.

Other entities with the capacity to reach targeted segments of consumers also appear to be untapped or unresponsive as disseminators of recall information. One such possibility for effectively distributing information related to children's products could be pediatrician's offices and daycare centers. According to the Senior Director of Prevention Programs and Advocacy for the Illinois chapter of the American Academy of Pediatrics ("AAP"), there are no mandates to put this information in the hands of consumers but

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<sup>87</sup> *Id.* at 95.

<sup>88</sup> *Id.*

<sup>89</sup> E-mail from Eric Ault, Eastern Division Regional Director, Consumer Product Safety Comm'n, to author (March 28, 2011) (on file with author).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

providers often post such recall information in their waiting rooms.<sup>94</sup> The National AAP sets policy guidelines for pediatricians on injury prevention guidance for different age groups and doctors and pediatrician groups are kept advised of recalls and product-related risks through monthly newsletters distributed by the AAP.<sup>95</sup> However, distributing these reports to patients is up to the discretion and responsibility of individual offices.<sup>96</sup>

#### *D. Secondary Markets*

Another significant obstacle faced by the CPSC, beyond the burdensome recall or mandatory rulemaking procedures, is that even when the Commission is successful in putting a mandatory standard in place or compelling a product recall, these products still infiltrate the marketplace via secondary markets. Secondary markets, like flea markets, antique shops and online consumer-based sales websites such as Craigslist and eBay, continue to sell and distribute products that the Commission has determinatively categorized as dangerous.

A CPSC study conducted in 1999 found that nearly 70% of resale stores sold at least one recalled or otherwise hazardous product.<sup>97</sup> In a sample of eight flea markets based in Illinois, only one market instituted any regulation of the types of children's products which vendors were allowed to sell on site.<sup>98</sup> A representative for this market, the Wolff Flea Market in Rosemont, IL, stated that vendors were not allowed to sell items such as strollers, cribs and high chairs because the market managers did not have the capacity to check each vendor's items for recalled products. Therefore, these types of items were simply banned.<sup>99</sup> However, the seven other markets sampled placed no restrictions on children's items and when asked about recalled products, overwhelmingly stated that the market operated on a "buyer beware" system.<sup>100</sup>

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<sup>94</sup> Telephone Interview with Jennie Pinkwater, Senior Dir. of Prevention Programs and Advocacy, Comm'n. on Inj. Prevention, Illinois. Chapter of the Am. Acad. of Pediatrics (Apr. 4, 2011).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Press Release, U.S. Consumer Prod. Safety Comm'n, CPSC Launches Resale Round-up Campaign to Keep Dangerous Recalled Products Out of Resale Stores and Off the Internet, (Aug. 6, 2009), available at <http://www.cpsc.gov/cpscpub/prerel/prhtml09/09299.html>.

<sup>98</sup> Telephone Interview with Flea Markets (various). Interview by author. (Apr. 4, 2011).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

Similarly, a search on Craigslist for “drop side cribs” in the Chicago area alone for the week of April 24-30, 2011, only weeks after the launch of the online consumer database, returned twenty-seven results.<sup>101</sup> In other words, for one of the most dangerous and highly publicized types of recalled items encountered in 2011, there were twenty-seven sellers advertising this product online in just one city, in just one week on one website. The publicity for this particular class of products has resulted in some increase in consumer knowledge, however. A search for “drop side crib” in the Chicago area for the week of November 4-11, 2011, returned 15 total results.<sup>102</sup> The good news for CPSC officers is that 10 of these results only referenced that the crib was *not* a drop side crib, and therefore, complied with safety regulations.<sup>103</sup> On the other hand, two of the additional results were giving away drop side cribs for free because they recognized the safety concerns.<sup>104</sup> This is a positive step for consumer awareness, but does not reflect the overall CPSC objective of removing these items totally from the consumer marketplace.

Clearly, the CPSC faces substantial statutory and consumer awareness obstacles both in (1) taking quick action regarding the identification and sanctioning of dangerous products and (2) in the effective and timely dissemination of this information to consumers. However, both of these elements may be substantially impacted by the new online consumer database, which has the potential to more immediately and efficiently notify consumers of product-related hazards and risks of harm.

#### IV. ONLINE COMPLAINT DATABASE

##### SEC. 6A. PUBLICLY AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION DATABASE

###### (A) Database Required —

- (1) In General — Subject to the availability of appropriations, the Commission shall, in accordance with the requirements of this section, establish and maintain a database on the safety of consumer products, and other

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<sup>101</sup> *Chicago Craigslist, Chicago Baby & Kid Stuff Classifieds “Drop Side Crib”*, CRAIGSLIST, [http://chicago.craigslist.org/search/bab?query=drop+side+crib&srchType=A&minAsk=&maxAsk=.](http://chicago.craigslist.org/search/bab?query=drop+side+crib&srchType=A&minAsk=&maxAsk=)

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

products or substances regulated by the Commission, that is—

- (A) publicly available;
- (B) searchable; and
- (C) accessible through the Internet website of the Commission.<sup>105</sup>

#### *A. Background*

An interactive online consumer database is mandated by 15 U.S.C. §2055a of the CPSIA.<sup>106</sup> The intent of the database is generally to collect consumer-generated reports of product-related injuries or risks and to make those reports available to the broader public, nearly immediately, through a searchable online forum.<sup>107</sup>

The database, which can be found at *www.SaferProducts.gov*, is one of the CPSC's most ambitious endeavors. The site officially launched in March 2011 and the first consumer reports were available to read online on April 1, 2011.<sup>108</sup> The database is designed with the needs of multiple types of users in mind; its creation was guided by a series of public hearings, focus groups and joint workshops with CPSC staff in order to determine how consumers, manufacturers, and consumer advocates expect to use the database and how they think it should function.<sup>109</sup>

Previously, reports of defective products collected by CPSC were shielded from public view. The only way for consumers to access safety complaints was to file a public records request with the CPSC. In response to such a request, the commission was then required by law to consult with the manufacturer before releasing information about products, and the company could protest or sue to stop disclosure.<sup>110</sup>

Now, CPSIA and its implementing regulations broadly define the scope and content of the searchable database. Consumers and other parties, such as government agencies, healthcare providers, child service providers, and public safety entities, are able to submit

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<sup>105</sup> See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 212, 122 Stat. at 3016, 3048-52 (2008).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Layton, *supra* note 6.

<sup>109</sup> *Id.*

<sup>110</sup> Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 212, 122 Stat. at 3048-52 (2008).

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reports detailing any harm associated with the use of a consumer product. “Harm” is defined as any “injury, illness, or death; or risk of injury, illness, or death.”<sup>111</sup> When a user logs into the database to report an injury, he or she will be prompted to enter product information into the system to determine whether the product in question falls under the CPSC’s jurisdiction. If it does, the user will be offered a range of methods to submit the report including e-mail, phone, postal mail, or directly, using an online form.<sup>112</sup>

In order to submit a product injury report, the consumer needs four key pieces of information:

- i. a description of the consumer product or substance;
- ii. the name of the manufacturer, importer, or private labeler of the product;
- iii. a description of an illness, injury, or death, or the risk of illness, injury, or death related to use of the product;
- iv. the date or estimated date when the incident occurred or when the consumer first became aware of the potential for the product to act in an unsafe manner.<sup>113</sup>

Additionally, when the report is filed, some identification and verification information is required including:

- i. a description of the submitter, for example, a consumer, health care professional, or government agency;
- ii. a name and mailing address. This is not posted on the database but is required for all reports posted on the website;
- iii. express permission to publish the submitted report;
- iv. verification that the report is true and accurate to the best of the submitter’s knowledge, information, and belief.<sup>114</sup>

When a report is filed using the online form, additional features allow the submitter to upload photos of the product, injuries, or damage to property, or provide supporting documentation.<sup>115</sup>

The manufacturer associated with any given report will also

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Report an Unsafe Product*, CPSC SAFERPRODUCTS.GOV, <https://www.saferproducts.gov/CPSRMSPublic/Incidents/ReportIncident.aspx> (last visited Nov. 23, 2011).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

receive a copy of the narrative.<sup>116</sup> Reports submitted by consumers were originally intended to be searchable within ten business days after submission, and it is in this timeframe that the product manufacturer was given the ability to directly respond to the report before it was posted in a searchable format.<sup>117</sup> On August 12, 2011, President Obama signed into law H.R. 2715, amending the Consumer Product Safety Act. One effect of this legislation is that CPSC will have the ability to spend an additional five business days to investigate claims of inaccuracy in the public database, and to seek additional information from consumers.<sup>118</sup> Meanwhile, manufacturers are also given an additional five business days to respond to these complaints.<sup>119</sup> The amendments in H.R. 2715 also require the CPSC to seek a model and serial number attached to the product involved in the reported incident, or a photograph if these are not available.<sup>120</sup> However, the lack of such information will not prevent the consumer report from appearing in the database.<sup>121</sup>

Upon receipt of a report, the product manufacturer is entitled to: (1) submit comments on the report for publication in the database or privately to the CPSC; (2) request that confidential or trade secret information be deleted from the report prior to its publication; and (3) challenge the accuracy of the report and request the deletion or exclusion of any “materially inaccurate information.”<sup>122</sup> A manufacturer or labeler may still submit comments for publication or seek the correction or deletion of materially inaccurate information even after a report is published in the database.<sup>123</sup> However, if a manufacturer seeks to have a report redacted after its publication in the database, then it must file an action in the United States district court.<sup>124</sup>

However, whether a company can prevent the report from being posted is not yet clear. One company has recently brought a suit that could redefine the parameters of the online postings. On Oct. 17, 2011 the company, whose identity is not publicly known, filed its suit in the U.S. District Court for the District of Maryland to block

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<sup>116</sup> Layton, *supra* note 6.

<sup>117</sup> *Id.*

<sup>118</sup> H.R. 2715, 112th Cong. (2011).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, §212, 122 Stat. at 3048-52 (2008).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

any posting of a consumer report filed against one of the company's products.<sup>125</sup> Showcasing the tenuous relationship between efforts to inform consumers and industry interests, "Company Doe" asked the court to seal all proceedings in the case.<sup>126</sup> Thus, Company Doe's true name and the facts of the case, including the report(s) of harm, will not be made public.<sup>127</sup> The case will remain under seal while the court considers the company's motion to have it permanently sealed.<sup>128</sup> If Company Doe is successful in sealing the case proceedings and in restricting the CPSC from posting the alleged report of harm, it will be a serious blow to the objectives of the Commission and the impact of the database.

The searchable database allows the public to determine whether products they already own, or are considering buying, are associated with safety hazards. Theoretically, implementation of the public database represents a new approach to consumer product safety in which consumers will play an important role in assisting the CPSC to identify problematic consumer products early through two-way information sharing. The new approach is meant to increase the Commission's focus on preventive efforts by more quickly identifying consumer product hazards and making safety-related information readily available to consumers instead of having to be carried through the burdensome recall process, which, as mentioned in Section IV, can take months or years to become public information.<sup>129</sup> The ability for manufacturers to stop or delay the posting of these reports, especially with anonymity, would undermine the goal of broadening consumer information.

Generally, the CPSC is not responsible for verifying the accuracy of submitted reports or screening them for confidential information.<sup>130</sup> The manufacturer or private labeler has the burden of identifying and seeking the exclusion of any inaccurate or confidential information before the reports are published within the twenty business day period.<sup>131</sup> Manufacturers of consumer products can register with the CPSC to receive more immediate notice of any

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<sup>125</sup> Ann Carrns, *Company Anonymously Challenges Consumer Web Site*, N.Y. TIMES BLOG (November 2, 2011, 3:16 PM), <http://bucks.blogs.nytimes.com/2011/11/02/company-anonymously-challenges-consumer-web-site/>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, §212, 122 Stat. at 3048-52 (2008).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

reports submitted to the database to ensure that the appropriate contact person receives the notice and to streamline the response and comment process.<sup>132</sup> However, reports of harm may be published even if the CPSC is considering whether the report contains a material inaccuracy.<sup>133</sup> The only way currently to prevent publication entirely is to demonstrate that it contains confidential, trade secret, or materially inaccurate information.<sup>134</sup> The manufacturer or labeler seeking to have part or all of a report deleted or excluded on these grounds bears the burden of proof in establishing the confidentiality or material inaccuracy of the information in question.<sup>135</sup> Moreover, if the litigation initiated by Company Doe is successful, then manufacturers may have another significant alternative to prevent the publication of consumer-generated reports.

### B. The Role of Industry in Consumer Safety Regulation

When the CPSIA originally passed Congress in 2008, support for the bill was nearly unanimous, with a 424 to 1 vote in the House of Representatives and an 89 to 3 vote in the Senate.<sup>136</sup> As mentioned above, CPSIA contained a mandate for the online searchable and publicly available database.<sup>137</sup> However, as the launch of the new database drew nearer, attempts were made to stall, abolish or de-fund the project by some members of Congress with backing from industry representatives. The National Association of Manufacturers expressed concerns that the database would be full of inaccurate information, burdening manufacturers in an “already difficult economic environment.”<sup>138</sup>

Specifically, the House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade was referred H.R. 1939 on May 23, 2011. Known as the *Enhancing CPSC Authority and Discretion Act of 2011*, the resolution seeks to modify the CPSIA in some fundamental respects.<sup>139</sup> Regarding the online database

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Inez Moore Tenenbaum, Robert Adler, & Thomas Moore, *Keeping a Strong Safety Net in Place for Children*, THE HUFFINGTON POST (Apr. 7, 2011, 1:06 PM), [http://www.huffingtonpost.com/inez-moore-tenenbaum/keeping-a-strong-safety-n\\_b\\_846002.html](http://www.huffingtonpost.com/inez-moore-tenenbaum/keeping-a-strong-safety-n_b_846002.html).

<sup>137</sup> See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 212, 122 Stat. at 3016, 3048-52 (2008).

<sup>138</sup> Layton, *supra* note 6.

<sup>139</sup> H.R. 1939, 112th Cong. (2011).

particularly, the draft legislation would alter the database in the following ways:

First, by revising the language pertinent to where reports of harm related to consumer products are coming from, specifically by restricting the reports to “persons who suffer harm or risk of harm related to the use of a product, their next of kin or members of their household, their legal representative or another person expressly authorized by any such person.”<sup>140</sup> Second, by mandating that when a report is filed, not only the name and contact information for the submitter are necessary but also the name and contact information for the person who suffered the harm or risk of harm related to the consumer product.<sup>141</sup> Third, by allowing manufactures to “notify” the Commission within a certain timeframe that information within the report is (1) insufficient to determine which of the manufacturers products is being referred to or (2) materially inaccurate. Further modifications state that if a manufacturer does “notify” the CPSC of either (1) or (2) then the Commission “shall not include in the database a report . . . until the product can be specifically identified and any material inaccuracy corrected.”<sup>142</sup>

The essential result of these modifications is (1) consumer product safety advocates and “watch” groups (as well as competing manufacturers or other malicious entities) would not be eligible to submit reports on the database unless they directly suffered harm from a product and (2) a manufacturer could constructively delay and potentially obstruct the publishing of a particular report by notifying the CPSC that the report contains insufficient information or a material inaccuracy. There is significant potential for this clause to be abused by manufacturers wishing to keep some reports of hazardous products out of the hands of consumers.

Commission Chairman Inez Tenenbaum and members Robert Adler and Thomas Moore responded to the Subcommittee and the draft legislation as stated in an article appearing online in the Huffington Post on April 7, 2011:

We understand that Congress must be mindful of the effect of regulations on the business sector. However, the reversal of several of the core provisions of the CPSIA would likely diminish the health and safety of our nation’s consumers. We cannot support such a reversal. Moreover, many responsible companies, especially here in the United States,

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

have already taken the steps necessary to meet the law's requirements, built safety into their products, and proven that manufacturers and retailers can thrive under this new and improved consumer product safety framework. It would be unfortunate, indeed, at this time to penalize those who have come into compliance with the law and to reward those less conscientious by undoing these safety features of the CPSIA.<sup>143</sup>

An additional obstacle to the database exists in part of the spending bill that passed the House on Feb. 19, 2011. Rep. Mike Pompeo (R-Kansas) won support for a measure to withhold money to implement the online database. Backed by groups representing manufacturers, Congressman Pompeo argued the database would be filled with fictitious or inaccurate claims and place new financial burdens on U.S. businesses, ultimately driving jobs overseas.<sup>144</sup>

The reality suggests an entirely different picture than these industry and legislative leaders portray. According to the latest data from the Consumer Product Safety Commission, 84% of reports filed in the database include such specifics as the model and serial number of the product in question.<sup>145</sup> Further, 82% percent of the consumers filing reports also gave permission for their contact information to be passed along to manufacturers, negating the implication that the database is abused by consumer advocates or other malicious entities.<sup>146</sup> Finally, of the approximately 1,600 complaints included in the database as of July 2011, only 194 were found to contain inaccuracies. Those reports found to be inaccurate, mostly involved submissions that mistakenly named the wrong manufacturer for a product.<sup>147</sup>

The pro-business maneuvers taken by Congressmen like Rep. Pompeo draw the ire of some consumer advocacy groups and introduce questions as to the industry's role in the regulation of consumer products. Last year, then-candidate Pompeo received \$80,000 in donations from Koch Industries and its employees, making him the top recipient of Koch-related money in the 2010

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<sup>143</sup> Tenenbaum et al., *supra* note 136.

<sup>144</sup> Dan Eggen, *GOP freshman Pompeo turned to Koch for money for business, then politics*, WASH. POST (Mar. 20, 2011), [http://www.washingtonpost.com/politics/pompeo-draws-liberal-groups-ire/2011/03/10/ABogK33\\_story.html](http://www.washingtonpost.com/politics/pompeo-draws-liberal-groups-ire/2011/03/10/ABogK33_story.html).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

elections.<sup>148</sup> Koch Industries is a manufacturing conglomerate with holdings in oil, paper and other interests.<sup>149</sup>

The contributions have placed the House freshman in the middle of a larger partisan battle over the role of corporate money in U.S. politics, which has gained urgency since last year's Supreme Court ruling in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), which allows unfettered spending on elections by corporate entities.<sup>150</sup> This decision is already impacting critical safety regulations and has President Obama and other democrats criticizing the decision as giving unfair advantage to business interests.<sup>151</sup>

In his first weeks in office, Congressman Pompeo proposed new legislation that could support the Koch Industries business interests, including a budget bill, approved in the House, to eliminate funding for the online consumer database.<sup>152</sup> Records show that, beyond Congressman Pompeo's involvement, Koch paid an outside lobbying firm \$220,000 to lobby against the database and other legislation in 2008.<sup>153</sup>

Finally, the House Appropriations Committee has approved a spending bill that cuts the already low budget for CPSC and abolishes all funding for the database of product-safety complaints.<sup>154</sup> Congresswoman Jo Ann Emerson chairs the financial services subcommittee of the House Appropriations Committee.<sup>155</sup> According to Congresswoman Emerson, CPSC funding should be used for other priorities of the agency rather than a poor and inaccurate resource for consumers because "the public deserves information from the government which is held to the highest standards, and the flaws in the database prevent it from serving the public interest."<sup>156</sup> However, the Congresswoman also has significant ties to industry representatives. In February 2011, the Congresswoman received an award for Manufacturing Legislative Excellence from the National Association of Manufacturers for her "consistent support of

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See* 130 S. Ct. 876 (2010).

<sup>151</sup> Eggen, *supra* note 144.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> David Lazarus, *What's behind GOP attack on product-consumer database?*, L.A. TIMES, July 5, 2011, <http://articles.latimes.com/2011/jul/05/business/la-fi-lazarus-20110705>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

manufacturers and their employees across the United States.”<sup>157</sup> The group honors lawmakers with voting records that line up with the position of the group at least 70% of the time.<sup>158</sup>

These actions by both industry, and members of Congress, raise concern about the future of the online database and the interests of consumers generally. The CPSC already faces substantial obstacles in the attempt to mitigate and prevent consumer product-related injuries, many of them implemented by a sometimes unfriendly Congress. Continued industry pushback through Congressional influence may further obfuscate the move toward injury prevention and consumer protection.

## V. THE FUTURE OF PRODUCT LIABILITY

The effects of the passage of the Consumer Product Safety Improvement Act in 2008 are still not fully realized. Most significantly, the online publicly available database could substantially impact both the immediacy and access to product risks that consumers require in order to prevent product-related injury. The database may make it easier for consumers and others to obtain information about product problems, but more importantly, information about particular product risks will be available for consumers to find months, and sometimes years, earlier than if they relied on CPSC official announcements and recalls, impeded by burdensome procedures within the CPSC framework. These results are dependent, however, on the rules laid out in the original legislation and could be hindered or stopped by continued legislative attacks.

Litigation will also likely see a short term increase. A possible consequence the database presents is the probability that consumer reports will be mined by aggressive plaintiff’s attorney’s seeking new products about which to file lawsuits and new groups of clients to represent in litigation. Thus, one unintentional effect of the database, though it is intended as a tool of prevention, may be an increase in product-related tort litigation brought by consumers.

Further, with new powers regarding recalls and a more stringent recall statute, CPSC will recall (or arrange the voluntary recall) of more consumer products. Retailers and manufacturers will now be held accountable for selling recalled products, opening the door to increased litigation. Though a majority of the litigation is

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

independent from the CPSC, the Commission will also continue to encounter increased litigation and settlements with industry representatives due to their expanded ability to seek civil penalties for a firm's failure to report dangerous products or disregard of mandatory standards.

As outlined at the beginning of this note, in order to be successful as a preventative agency, the CPSC would need to meet two elements: (1) quick action regarding the identification and sanctioning of dangerous products and (2) effective and timely dissemination of this information to consumers. It is clear the CPSIA legislation has improved CPSC's ability to achieve these two goals through the implementation of the online database.

Yet, the future of injury prevention is still unclear. This note touched on the immense impact that the manufacturing industry wields over statutory regulation and legislators related to consumer products. The CPSC, already plagued by insufficient resources, continues to be directly challenged by business interests with nearly unlimited funding on a regulatory level. On a rulemaking level, CPSC primarily relies on the voluntary actions of industry and collaboration with the agency itself in order to effectuate preventative safety measures and will continue to do so. If the current trend continues, the juxtaposition of the CPSC and industry will likely lead to a severe imbalance of power in favor of industry.

Ultimately, the CPSIA is increasing the total level of litigation related to product injuries and thus may impact the compensatory approach to tort injuries. However, through the launch of the new online consumer database and new rulemaking and recall powers granted to the CPSC, the prevention of consumer product-related injuries should become more efficient and effective, barring the shutdown of the database by congressional mandate. Now that the information will be available to consumers nearly immediately, the primary challenge faced by the CPSC in terms of injury prevention is two-fold; (1) defense against statutory attacks and (2) informing consumers that this information is available and how to use it. Until more consumers are made aware of the labors of the CPSC and until the CPSC gains some ground from business interests, the goal of being a "preventative" safety agency will be difficult to fully realize.