



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.

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 its "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,



Kevin M. Burke
President and CEO