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Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Room 502
Bethesda, MD 20814

Re: Publicly Available Consumer Product Safety Information Database – Proposed Rule (Docket No. CPSC-2010-0041), 75 F.R. 29156 (May 24, 2010)

The National Electrical Manufacturers Association (NEMA) welcomes the opportunity to submit comments on behalf of its member companies to the docket for the U.S. Consumer Product Safety Commission's (CPSC) proposed rule establishing a Publicly Available Consumer Product Safety Information Database.

NEMA is the association of electrical and medical imaging equipment manufacturers. Founded in 1926 and headquartered near Washington, D.C., NEMA's approximately 450 member companies manufacture products used in the generation, transmission and distribution, control, and end use of electricity. These products are used in utility, industrial, commercial, institutional, and residential applications. Some of the products within NEMA's scope are consumer products regulated by the Consumer Product Safety Act. Worldwide sales of NEMA-scope products exceed $120 billion. In addition to its headquarters in Rosslyn, Virginia, NEMA also has offices in Beijing and Mexico City.

NEMA is offering general comments on the proposed rule, followed by comments on specific sections and other issues for consideration. In summary, NEMA expresses the following views:

- Misuse and abuse of the database seems inevitable. Additional precautions against misuse and abuse are appropriate
- The Proposed Rule does not delineate how CPSC will determine "harm" or "report of harm" and it does not define "risk."
- The date of the reported harm should be included as part of the mandatory description of harm.

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- CPSC should require the submitter to state that the product included all of its original parts and was not altered, and that the product was installed and maintained per the manufacturer's instructions
- CPSC should include a notice to submitters to ensure that spoliation does not occur so that manufacturers have an opportunity to investigate claims. This is also important to the issue noted below with respect to reports of harm involving counterfeit products.
- Proposed Section 1102.24 relating to the designation of confidential information is flawed because it assumes that a manufacturer will have the name of the submitter.
- CPSC staff that are responsible for evaluating materially inaccurate information should have expertise in the product area.
- The Proposed Rule does not address how the CPSC will ensure that reports of harm do not include reports involving counterfeit product.
- The Final Rule should include a provision for sunsetting or deleting reports of harm from the database after a period of time has expired.

General Comments

NEMA recognizes that in requiring the CPSC to establish the "Publicly Available Consumer Product Safety Information Database," Congress set forth specific content, procedures, and search requirements for the database in Section 6A of the Consumer Product Safety Act (CPSA), as amended by the Consumer Product Safety Improvement Act of 2008 (Public Law 110-314), that the CPSC must follow in promulgating the rule. NEMA commends the CPSC for working with the stakeholder community to solicit feedback on how it should interpret the congressional mandate, as well as parts of the database for which the CPSC has greater flexibility to administer.

Despite the work the CPSC has done to address potential problems that could arise because of inaccurate information being included in the database, the inevitability of misuse or abuse of the database remains. NEMA is concerned that the database, rather than becoming an objective repository of information important to public safety and public policy for the protection of consumers, could become a tool for excessive reporting of unsubstantiated and uninvestigated reports of harm motivated by pecuniary interest. The database could be misused by consultants whose technical views enjoy no or virtually no support among peers, by claimants whose claims have no traction or merit.

Without proper processes in place to limit access to confidential information or ensure accuracy, the database may be open to misuse by those submitting fraudulent reports, including competitors of companies named, or otherwise contribute to a significant increase in the likelihood of litigation. In this last regard, any such litigation might also present a high likelihood of requiring CPSC testimony regarding information it elected to or not to publish. In addition, contractors looking for reasons not to use/specify a product or allow it on a job could use the information contained in the database to

prevent a certain manufacturer from bidding on a project, which could lead to sole-source project specifications.

It is also worth noting that some issues are greatly misunderstood by consumers and could be misreported in the database. While there may be no proven health risks associated with a particular product, media sensationalization of a presumed risk could lead consumers to report every incident associated with such product. For example, compact fluorescent lamps (CFLs) contain a miniscule amount of mercury necessary to produce energy-efficient lighting. Despite a lack of substantial health risk or hazard associated with this product, sensational media reports about broken CFLs could lead to consumers reporting every such incident and thereby damage the reputation of this energy-efficient product line and undermining public policy promoting energy efficiency.[1]

NEMA also is concerned that the proposed rule fails to address how the database will handle consumer misapplication issues, i.e., product problems that result from the consumer misusing or misapplying the product. This issue will be explored further in NEMA's comments on Subpart B of the proposed rule. The database must incorporate robust controls to prevent fabrications and misstatements made by participants that would give the appearance of being endorsed by the federal government through publication in a government database.

In the advance notice of proposed rulemaking, the CPSC asked "what, if any, measures should the agency employ to prevent the submission of fraudulent reports of harm while not discouraging the submission of valid reports." NEMA is pleased that the CPSC agrees that "preventing fraudulent reports is a high priority in the development of the public database" (75 FR at 29164). The CPSC should be commended for considering implementing safeguards to ensure that incident report forms are not being generated by an automated computer and for examining technical options to detect if multiple reports are submitted from the same IP address. Numerous submissions from a single source should be reviewed for verification to avoid inappropriate use of the database. In addition to using technology to prevent spamming and to flag multiple complaints from the same submitter, NEMA recommends that the CPSC make database downloads solely available in PDF format so they cannot be easily edited or manipulated.

NEMA believes CPSC will be equally concerned about the potential for abuse or misuse of the database, because of its potential to undermine CPSC as a credible source of information about consumer product safety.

Proposed Subpart A—Background and Definitions

NEMA is concerned with the definitions of "harm" and "report of harm" in proposed Subpart A of the proposed rule and seeks clarification from the CPSC. Proposed §1102.6(b)(5) defines "harm" as "any injury, illness, or death, or any risk of injury, illness, or death, *as determined by the*

[1] This is a real-world concern as documented by two scientists at Lawrence Berkeley National Laboratory. See http://www.lamprecycle.org/public/images/docs/LD+A%20August%202009.pdf

Commission" [emphasis added]. Similarly, proposed §1102.6(b)(8) states that "report of harm" means "any information submitted to the Commission...regarding an injury, illness, or death, or any risk of injury, illness, or death as *determined by the Commission* [emphasis added], relating to the use of a consumer product."

The proposed rule fails to specify how the CPSC will make such determinations. How will the CPSC determine whether actual harm occurred, based on these definitions? The rule seemingly requires publication of the submitted report of harm in the database so long as the submitter meets the minimum content requirements specified in proposed Subpart B of the rule. The "harm," then, appears to be determined by the submitter, not the CPSC, with the CPSC accepting such information for publication with minimal, if any, investigation of the reported incident. The definitions of "harm" and "report of harm" do not seem to support the process or premise on which the database is constructed.

While the proposed rule seemingly outlines a "burden of proof" standard for manufacturers making claims of confidential business information or materially inaccurate information, there does not appear to be a similar burden of proof on submitters of reports of harm. Due to the limited screening proposed and the broad range of individuals who can submit to the database, there are limited restrictions on the allegations that can be made. Unfortunately, simply posting a manufacturer's comment in response to a posted report of harm will not be sufficient to undo harm caused by any misstated, exaggerated, or fabricated report of harm that may be included in the database.

The proposed rule also misses an opportunity to define the word "risk." The CPSC indicates that the definitions of Section 3 of the Consumer Product Safety Act (15 U.S.C. 2052) apply to the database. Section 3(a)(14) defines "risk of injury" as "a risk of death, personal injury, or serious or frequent illness." For purposes of the proposed rule, however, the term "risk" should be further clarified and defined. For example, if a consumer drops a light bulb or a ceramic coffee mug and it shatters, there is a "risk" of personal injury because the individual could cut himself on the broken shards while disposing of the product. Under the current definitions of CPSA and the proposed rule, this incident would qualify for reporting to the database even though it is not a result of an inherent product defect or malfunctioning. The database would become unwieldy very quickly if every incident of a shattered ceramic or glass item was reported for its "risk" of personal injury.

Proposed Subpart B—Content Requirements

Reports of Harm (§ 1102.10)

NEMA acknowledges that Congress, through CPSA Section 6A amendments enacted by CPSIA, identified potential submitters of reports of harm and outlined certain minimum required criteria for information to be provided. However, the CPSC has the latitude to solicit information from submitters of reports of harm beyond that required by statute, and has exercised its ability to do so in the proposed rule.

NEMA appreciates that the CPSC elaborated on the minimum content requirements in proposed §1102.10(d) of the proposed rule in an effort to solicit as much information as possible from submitters about the alleged incident or risk being reported. Section 1102.10(d)(3) of the proposed rule provides that a "report of harm" must include "[a] brief narrative description of an illness, injury, or death, or risk of illness, injury, or death related to use of the consumer product." However, at the time the report is filed, the report is an *allegation* of illness, injury, or death, or risk of injury, illness, or death, and should be identified as such. It is important that consumers and other persons accessing the database understand that the information contained therein, particularly information generated from third party reports outside the CPSC, has not been proven.

NEMA commends the CPSC for requiring disclaimers (§1102.42) in the database stating that the Commission does not guarantee the "accuracy, completeness or adequacy" of the database, "particularly...information submitted by persons outside of the CPSC," but the disclaimer is undercut if the regulation (and subsequent reporting form) do not make clear that "reports of harm" are, in fact, allegations. The alleged injuries and illnesses may or may not have occurred as stated in the reports, or may be overstated, and may or may not be related to use of the identified consumer product.

NEMA recommends that §1102.10(d)(3) be amended to identify reports as reports of "alleged" illness or injury, or risk of illness or injury "allegedly" related to use of a product. The CPSC also should make clear, throughout the regulation wherever reference is made to reports of harm, that these reports are allegations, "particularly...information submitted by persons outside of the CPSC." Reports of harm that are based on voluntary or mandatory recalls may be separately characterized as such.

Section 1102.10(d)(3) also states that a report "may, but need not, include the date on which the harm occurred or manifested itself" [emphasis added]. NEMA believes that the CPSC errs in not requiring the date on which the harm occurred or manifested itself to be included as part of the mandatory "description of harm." While we recognize that persons reporting incidents of alleged harm may not know the exact date on which the incident occurred, we believe that the regulation should encourage the reporting of dates when this information is known. Knowing the date on which the harm occurred, even if stated in broad terms or approximated, can help database users evaluate the report and assist manufacturers in isolating and identifying problems. In addition, requiring the submitter to report the date of harm or risk of harm would reduce the likelihood of bogus or "spam" reports being added to the database. NEMA recommends that the CPSC require the submitter to identify the date of the alleged incident and to publish the date on which the report of harm is made.

Accordingly, NEMA recommends that §1102.10(d)(3) be amended to read as follows:

> "(3) Description of the harm. A brief narrative description of an **alleged** illness, injury, or death, or risk of illness, injury, or death **allegedly** related to the use of a consumer product. Examples of a description of **alleged** harm or risk of harm include but are not limited to:

> death, asphyxiation, lacerations, burns, abrasions, contusions, fractures, choking, poisoning, suffocation, amputation, or any other narrative description relating to a bodily harm or risk of bodily harm. Incident reports that relate solely to the cost or quality of a consumer product, with no discernable bodily harm or risk of bodily harm, do not constitute "harm" for purposes of this part. **Whenever possible**, a description of **alleged** harm ~~may, but need not,~~ **should** include the date **or approximate date** ~~on which~~ **when** the harm occurred or manifested itself, and the severity of any **alleged** injury and whether any medical treatment was received. **If the date is unknown, the report should so state.**"

Proposed §1102.10(d)(5) includes a requirement that reports of harm be verified as "true and accurate to the best of the submitter's knowledge, information, and belief" (75 FR at 29177). NEMA believes this is critical. It is also important that submitters filing reports should be advised that persons knowingly filing false reports may be subject to fines and imprisonment. Even with the requirement for verification, the reporting process is vulnerable to fraud. Putting individuals filing reports on notice that sanctions are attached to fraudulent reports may further discourage false and malicious reporting.

NEMA recommends that the following text be added to the requirement in §1102.10(d)(5): "*The incident report form and the CPSC's Internet Web site shall advise persons filing reports that Title 18, United States Code 1001, makes it a criminal offense, punishable by fines or imprisonment, or both, knowingly to make a false statement or representation to any Department or Agency of the United States, as to any matter within the jurisdiction of any Department or Agency of the United States, and that this includes any statement which is knowingly incorrect or knowingly incomplete or misleading in any important particular.*"

Proposed §1102.10(e) describes the ability of the CPSC to seek other categories of voluntary information. In the notice of proposed rulemaking, the CPSC requested comment as to whether additional categories should include "...additional data about the product in question, such as whether the product still contained all of its original parts, or had been altered in any way not according to a manufacturer's instructions." Not only should the CPSC solicit additional information on whether the subject product contained all of its original parts or had been altered, the CPSC should require the submitter of harm to affirmatively verify that the product was installed, maintained and/or used per the manufacturer's instructions. Manufacturers' instructions detail safe use information and generally provide warnings about potential dangers from anticipated misuse or misapplication of a product.

Manufacturer Comments (§ 1102.12)

The database established by the rule could lead to a significant number of reports of harm for which manufacturers may choose or be expected to comment. The database could quickly become untenable for the CPSC to manage if this scenario occurs. This is particularly true when claims of

confidential information or materially inaccurate information, which require CPSC review and determination, are made.

In our industry's experience, manufacturers often need to see the electrical product in question in order to understand whether it has been misapplied, misused, or abused, or is otherwise defective in its design or operation. Without a physical examination of the product, the information provided by the user/consumer in most cases cannot be responded to in any meaningful manner. For that reason, NEMA urges CPSC to strongly encourage submitters of report of harm to consent to the release of their contact information to manufacturers.

Proposed Subpart C—Procedural Requirements

Transmission of Reports of Harm to the Identified Manufacturer or Private Labeler (§ 1102.20)

Proposed §1102.20(a) outlines the procedural requirements for transmission of reports of harm to the identified manufacturer or private labeler, and specifies that the name and contact information for the submitter of the report of harm will not be provided to the manufacturer, unless the submitter provides express written consent. While NEMA understands the importance of guarding consumers' personal information and the need for safeguards against misuse of such information, legitimate product issues can only be resolved when manufacturers are able to investigate the alleged harm or incident.

In the section of the *Federal Register* notice titled "Comments on the Publicly Available Database and CPSC's Responses," the CPSC indicates that the incident report form will "inform the user about the purpose, use, and protection of information being collected by the CPSC and how the manufacturer might use the information provided he or she should choose to release it to the manufacturer" (75 FR at 29167). NEMA recommends that in addition to providing a description of how the manufacturer may find it beneficial to contact the consumer to investigate the incident further and examine the product, the CPSC also should recommend that submitters consenting to the release of their contact information to the manufacturer should retain the product, samples, and/or evidence for the manufacturer to analyze.

NEMA remains concerned with the restrictive timing of the transmission of reports of harm to manufacturers (within five days of their receipt) and publication in the database (no later than 10 business days after the report of harm is transmitted to the manufacturer). While NEMA understands that these timeframes were mandated statutorily by Congress in the CPSA, manufacturers will have limited ability to provide any comments prior to publication of the reports of harm in the database, particularly where the manufacturer is not easily identified or has not been provided the name or contact information for the submitter of the report of harm to conduct appropriate examination or investigation of the alleged incident.

Designation of Confidential Information (§ 1102.24)

NEMA commends the CPSC for providing manufacturers the opportunity to "flag" reports of harm that may contain confidential business information for CPSC review. However, §1102.24 of the proposed rule is flawed because subparagraph (4) assumes that the manufacturer will have access to the name of the submitter of the report of harm, which would not be the case if the submitter fails to consent to its release.

Proposed §1102.24(b) states that "Each requester seeking such a designation of confidential information bears the burden of proof and *must* [emphasis added]...(4) State the company's relationship with the victim and/or submitter of the report of harm and how the victim and/or submitter of the report of harm came to be in possession of such allegedly confidential information". While a manufacturer may be able to tell from examining the report's description of harm that it could contain confidential information, a manufacturer or private labeler could not meet the criteria outlined in §1102.24(b)(4) without identifying a specific relationship to the victim or submitter. Should the submitter choose not to consent to the release of his/her name and contact information, the manufacturer could not meet this point of criteria and the CPSC subsequently might determine that the manufacturer has not met the burden of proving confidential information.

Designation of Materially Inaccurate Information (§ 1102.26)

In the proposed rule and public statements, the CPSC has indicated it "shall favor correction and addition to correction over exclusion of entire reports of harm and manufacturer comments where possible" (proposed §1102.26(i)(1)). NEMA understands the desire of the CPSC to protect the integrity of the database and ensure that it meets its intended purpose, but believes that there should be some limits on the CPSC's ability to determine claims of materially inaccurate information and make corrections. At a minimum, NEMA seeks assurances that the CPSC staff charged with making such determinations and corrections will be well-versed in the product in question. For example, manufacturers making claims of materially inaccurate information contained in reports of harm involving electrical products should reasonably expect that such claims and reports will be reviewed by CPSC staff with expertise in electrical engineering or electrical safety.

NEMA also recommends that CPSC make clear both in the rule and in any contemplated media campaign the penalties applicable to the intentional filing of false information and consider an accelerated penalty structure for such activity when part of any anti-competitive practices. CPSC should highlight in the final rule and outreach campaigns that the intentional submission of materially inaccurate information may be referred for administrative or criminal proceedings, if warranted, including to the Federal Trade Commission (FTC) and/or Department of Justice (DOJ), as appropriate where anti-competitive or criminal behavior is suspected. Providing this disclaimer would discourage the intentional submission of materially inaccurate information.

Although proposed §1102.26 would allow for the removal of materially inaccurate information in a report of harm, it is unclear how the time frame associated with such a request relates to the relatively short time period for the CPSC to review a report and any related manufacturer's comments prior to publication in the database. Subparagraphs (g) and (h) make it clear that CPSC contemplates instances in which materially inaccurate information would have to be removed prior to or after publication. However, for a manufacturer whose reputation may be seriously impacted by a fraudulent report, rectification after publication may be too late to prevent significant brand damage.

Other Issues

Reports of Harm Involving Counterfeit Products

In the proposed rule, the CPSC fails to address how it would handle reports of harm that may result from counterfeit products. It is possible that the product involved in a reported incident may appear to the average consumer to have a legitimate manufacturer name and/or model number, but could, in fact, still be a counterfeit product. Manufacturers of legitimate consumer products often can tell by a physical examination of a product if it is theirs or a counterfeit good, but without the guaranteed ability for manufacturers to retrieve the product subject to the report of harm for examination, there is a possibility the database could contain many reports of harm involving counterfeit goods, leaving manufacturers to defend a report that doesn't even involve their products. Such reports would denigrate the brands and reputations of legitimate manufacturers without cause. In issuing a final rule, the CPSC should consider how it will handle reports of harm for which it is suspected that the subject product is counterfeit.

NEMA submits this comment, because as the CPSC knows, NEMA members and Underwriters Laboratories have brought unsafe counterfeit electrical products to the attention of the CPSC, which have subsequently been the subject of recall activity.

Limits on Time Reports of Harm Available in the Database

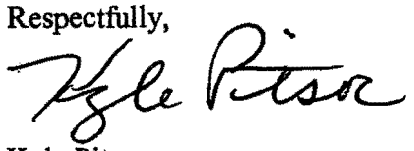
The proposed rule does not place any time limits on the length of time such reports will remain in the publicly available database. As the database grows over time, it could become so large and unwieldy as to yield few practical uses for consumers. In promulgating a final rule, NEMA recommends that the CPSC impose reasonable limits on the amount of time the reports of harm will be actively available in the publicly searchable portion of the database. After such time, the reports should be archived for the CPSC's use.

The proposed rule also appears to allow "old" incidents to be reported, regardless of the date of occurrence. This could lead to thousands of outdated incidents, including some of which have been resolved or fixed, being included in the database in perpetuity. NEMA recommends that the CPSC limit acceptance of reports of harm to incidents that have occurred within the past 12 months. If the

CPSC determines that such limits contravene the requirements of the CPSA as enacted by Congress, then NEMA recommends that the CPSC, at a minimum, (1) require the submitter of the report of harm to identify the date of the alleged incident; and (2) publish the date of the alleged incident, as well as the date on which the report of harm was made, in the database.

Thank you for providing NEMA the opportunity to comment on the Publicly Available Consumer Product Safety Information Database proposed rule. Should you have any questions regarding any of these comments, please contact Sarah Owen of my staff at sarah.owen@nema.org or (703) 841-3245.

Respectfully,



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