

PRODUCTS LIABILITY

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NEWS & DEVELOPMENTS

CPSC Proposes New Rules for Voluntary Recalls

The U.S. House of Representatives Subcommittee on Regulatory Reform, Commercial and Consumer product companies and their counsel must pay close attention to the U.S. Consumer Product Safety Commission's (CPSC) recently proposed regulations concerning voluntary recalls. Although these proposed rules are not yet final, it is vital to understand them now because they reflect many of CPSC's current internal practices and expectations for companies implementing a voluntary recall.

Generally, the new rules are intended to:

- 1) Formally put companies on notice that the agency may seek to mandate the implementation of an internal compliance program as part of a voluntary recall; and
- 2) Codify CPSC's principles and guidelines for the content and form of voluntary recall notifications informing consumers of a recall.

Compliance Programs

The CPSC recently imposed internal compliance programs as elements of civil penalty settlements with Kolcraft, Williams Sonoma, and Ross Stores. The core requirements contained in each civil penalty agreement included:

- Written standards and policies, including a policy on recordkeeping;
- A mechanism for confidential employee reporting of compliance-related concerns;
- Training programs for applicable CPSC regulations;
- Management oversight of compliance and appropriate personnel responsibility for implementing compliance.

Through the addition of this new subsection to 16 CFR § 1115, the CPSC is now proposing to shift the imposition and announcement of these compliance programs to the voluntary recall itself in certain circumstances. This would mean that some companies working with CPSC on the parameters of a voluntary recall might have to simultaneously negotiate the parameters of a compliance program and the description of such a program in the recall announcement. The proposed rule states the circumstances in which the agency may propose these kinds of programs would include:

- Multiple previous recalls and/or violations of CPSC requirements over a relatively short period of time;
- Failure to timely report substantial product hazards on previous occasions; and
- Evidence of insufficient or ineffectual procedures and controls for preventing the manufacturing, importation, and/or distribution of dangerously defective or violative products.

Chairman Tenenbaum and Commissioner Adler made it quite clear in a joint vote statement and subsequent vote statements that the imposition of compliance programs in these types of circumstances would start to become more commonplace. Commissioner Nancy Nord and other commentators have criticized this enforcement trend over the lack of a public forum to debate the merits of these compliance programs. It appears that the agency is now attempting to respond to that criticism by offering the regulated community an opportunity to comment on the imposition and substance of these compliance programs in the context of broadening their application to voluntary recall agreements.

Guidelines for Voluntary Recall Notices

The second major aspect of the proposal is agency guidelines for consumer notification of a voluntary recall. The proposed rule for voluntary recall notices largely mirrors the mandatory recall notice rule published in 2010 but differs in some noteworthy ways.

The proposal recognizes that some companies may not need to conduct a public recall announcement because the purchasers' contact information is known and the company can send direct notifications. However, where direct notification is not possible, the proposed rule lists press releases, recall alerts, in-store posters, and video/radio news releases as "the preferred means of disseminating recall information to broad audiences." The agency also relies on social media tools to assist a company "get out the word."

Other noteworthy and new guidelines contained in the proposed rule for voluntary recall announcements include:

- The listing of recalls on the recalling companies first website entry point in a prominent manner;
- The use of the *AP Stylebook* for the language and format of the voluntary recall notice;
- The use of other languages in addition to English, as appropriate;
- The use of the word "recall" rather than any other alternative term in the recall notice;
- Automatic identification of any "significant retailers" of the product;
- Description of any "compliance program" requirements, if applicable; and
- Other standard information, such as: the name(s) of the product, description(s) of the product, model name and number, SKU number, recall logistics provider, approximate number and average price of units affected, type of hazard at issue, description of the remedies available to consumers, and other basic information.

One of the points of debate at the commission's first meeting on this proposed rule was whether these new provisions would be turned into quasi-mandatory requirements without room for companies to negotiate the individual merits of the content and form of their voluntary recall notifications. Only time will tell whether the agency's application of the rule will allow for flexibility when it comes to individual voluntary recalls. One thing, though, is for certain—these proposed rules are a must read for anyone who might work with CPSC on a voluntary recall.

Keywords: litigation, products liability, Consumer Product Safety Commission, voluntary recall notices, compliance programs

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