

Opportunity Exists Until February 4 to Comment on CPSC's Effort to Toughen "Voluntary" Product Recall Process

January 2014

The U.S. Consumer Product Safety Commission (CPSC) has proposed new regulations that could dramatically impact the way companies conduct product recalls. The proposed rule would expand CPSC's existing interpretive rules for voluntary recalls and provide a more detailed outline of what is expected of companies. 78 Fed. Reg. 69793 (Nov. 21, 2013).

The most troubling changes could undermine the very "voluntary" nature of a recall. They would make a recall plan legally binding and enforceable in court and allow CPSC to mandate internal business process and policy changes. One likely result: if the rule is adopted as proposed, companies will likely be more cautious about voluntary recalls.

Since 2008, CPSC has had the power to force the removal of potentially harmful products from the market through a mandatory recall, but it has invoked the authority only once, to seek the recall of the now-discontinued Buckyballs magnetic toys. But that recall is still tied up in litigation. Instead, since its creation in the 1970s, CPSC has conducted voluntary recalls in cooperation with companies.

Companies' willingness to proceed "voluntarily" reflects, in no small part, CPSC's powerful negotiating position: CPSC can seek civil penalties from companies that fail to voluntarily recall and, perhaps more importantly, can publicly declare a product dangerous on its own, as it recently did with the Buckyballs magnetic toys. But companies also are more willing to participate voluntarily because—in theory—they retain much flexibility and control over a voluntary recall, making it the more attractive option.

The agreement between CPSC and a company underlying every voluntary recall is referred to as a Corrective Action Plan (CAP). The process of developing and implementing a CAP is well understood. CPSC and the recalling company work together to develop a detailed road map for how the recall is conducted. The CAP documents the nature of the problem and lays out the steps the company has agreed to undertake, including announcements and corrective actions such as replacements or refunds. Perhaps most importantly, CPSC and the recalling company must agree on the language and content of the CAP before the recall proceeds.

As would be expected, most companies take implementation of the CAP very seriously and do their best to complete all the elements to which they agree. But the CAP "has no legally binding effect," affording the company, and CPSC, the flexibility to adapt to unforeseen circumstances. 19 C.F.R. § 1115.20(a). This also means that when companies are unable, or unwilling, to implement all of the elements of the CAP, CPSC cannot take the company to court for violating the plan. To force compliance, CPSC would be required to utilize its mandatory recall powers or seek a civil penalty.

The new proposal would flip this balance on its head and make the CAP legally binding and enforceable. Thus, while it would still be "voluntary" for a company to agree to the CAP, compliance with each element of the CAP would no longer be voluntary. This likely will change the calculus for some companies of whether to engage in a voluntary recall, or whether to risk a mandatory recall or civil penalty.

CPSC also proposes to add compliance program implementation as an element of CAPs. Historically, these internal process improvement programs typically have only been included in settlements of civil penalty proceedings. Compliance programs can include such things as maintaining and enforcing a system of internal controls and procedures for reporting to CPSC; ensuring that reportable information is properly processed and reported to CPSC; and establishing an effective program to ensure compliance with CPSC regulations and laws; establishing written employee standards and policies, training and confidential reporting systems. CPSC could also require that the company provide written proof to CPSC that it has implemented the agreed-upon improvements.

While CPSC's proposal continues to term such compliance programs as "voluntary," the fact that the terms of the CAP would become legally binding makes them anything but. Under the proposed rule, CPSC would be able to go to court to enforce the compliance program elements of the CAP, not just those related to the product being recalled. This would give CPSC far more leverage to impose internal policy and process changes on companies as part of a voluntary recall.

The proposed rulemaking is open for public comment until February 4, 2014.