



# Strictly Speaking

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## CPSC Considering New Rules with Big Impact on Recalls and Compliance Programs

by Kenneth Ross



In my last article published in *Strictly Speaking* in December 2013, I mentioned that the U.S. Consumer Product Safety Commission ("CPSC") had approved a new interpretive rule dealing with corrective actions and compliance programs. In late November 2013, the CPSC published the proposed rule in the Federal Register (78 Fed. Reg. 69793) and requested comments from the public until February 4, 2014. See <http://www.regulations.gov/#/docketDetail;D=CPSC-2013-0040> for the comments submitted to the CPSC. After considering these comments, the commission will finalize the rulemaking and vote on its approval.

In this article, I will discuss in detail some of the specific proposals in this interpretive rule as well as discuss some of the comments received by the CPSC.

### Form and Content of Recall Notices

The original proposed interpretive rule sets forth, in part, principles and guidelines for the content and form of voluntary recall notices. The commission believes that this new rule will result in greater efficiencies during recall negotiations, greater predictability for regulated companies in working with the CPSC to develop recall notices and a timelier issuance of recall notices.

This new section describes the information that should be included in a voluntary recall notice and the manner in which the notice should be distributed. It applies to manufacturers, retailers and distributors of consumer products. Most of the provisions are similar to what is already required in the Recall Handbook and by the CPSC's Public Affairs group. However, there are some new provisions.

One of the new provisions deals with the way in which the notice is to be distributed. It says:

A direct voluntary recall notice shall be used for each consumer for whom a firm has direct contact information, or when such information is reasonably obtainable from third parties, such as retailers, or from the firm's internal records, regardless of whether the information was collected for product registration, sales records, catalog orders, billing records, marketing purposes, warranty information, loyal purchaser clubs, or other such purposes.

It will be interesting to see what information is considered "reasonably obtainable" from third parties. Also, membership retailers (i.e. Costco) can easily identify and communicate with a customer that bought a product under recall. But most retailers can't do that. Will they now be expected to set up a loyalty program or membership? And will the CPSC delve into the records that are available to the recalling company and determine whether they are using the most direct contact information?

Another new provision requires that recall notices for foreign products identify the

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U.S. importer and provide the legal name, city and country for the foreign manufacturer. Many importers and retailers consider this information proprietary and actually have the foreign manufacturer place the retailer's or distributor's name on the product.

The next important set of requirements in this portion of the rule involves principles and guidelines for developing the content and format of voluntary recall notices. The proposed rule includes a rationale for requiring a language in addition to English in the recall notice. It identifies factors such as indications that a significant number of individuals do not speak or read English.

This rule also makes it clear that recalling firms must use all means to communicate a voluntary recall notice including social media sites and mobile technology.

There are a number of additional requirements which, if enacted, will require recall notices to have much more information which the CPSC thinks will make them more effective and which manufacturers might think will be more intrusive and make the notices unnecessarily harmful or misleading.

The possible result of the passage of this new rule is that fights over recall notices could increase or could result in manufacturers not reporting to the CPSC in marginal situations. Instead the manufacturers would undertake some corrective action without going through the CPSC. This is possible as long as the manufacturer has a good argument that a 15(b) report is not necessary in that the product is not defective and, if it is defective, that it does not create a substantial product hazard.

#### Legally Enforceable Corrective Action Plans

In November 2013, the commission amended the proposed rule to require companies to adhere to the voluntary recalls they negotiate with the commission or to face court action. Thus, corrective action plans ("CAP") agreed to by a regulated company would now be enforceable in a court of law.

Originally, CAPs were voluntary and non-binding. The only exception was when the CPSC sought and obtained a binding consent agreement from the company. The CPSC commissioners sought the change for the following reasons:

[t]he Commission is prohibited from enforcing the terms of a corrective action plan if a recalcitrant firm violates the terms of its corrective action plan. In addition, the Commission has encountered firms that have deliberately and unnecessarily delayed the timely implementation of the provisions of their correction action plans.

In the 30 years that I have represented clients before the CPSC, I can't think of any reason why any company would agree to undertake a recall and then delay its implementation unnecessarily. That increases the risk of injury and would look terrible in any future product liability case. And looking back at the history of the CPSC, there have only been a handful of administrative lawsuits brought to force a manufacturer to do something that would allegedly make the recall more effective.

There have been significant objections raised to this specific proposal by many former CPSC attorneys and by manufacturers and trade associations. One of the main consequences of this proposal as envisioned by the objectors is that manufacturers would always need to hire attorneys to help evaluate the CAP and that this would slow down the process and increase the costs.

Alan Schoem and Mike Gidding, former CPSC attorneys, submitted comments and pointed out on this issue:

The Commission's proposal to require corrective action plans to be legally binding disregards the fact that the Commission already has an enforceable remedy if it believes a firm is failing to carry out a corrective action plan that it agreed to conduct. The Commission has the authority to issue an administrative complaint and to pursue an adjudication or a Consent Order agreement

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requiring specific action by the recalcitrant firm. Indeed, the Commission's existing interpretive rule already provides that if a corrective action plan submitted by a firm is not acceptable, the Commission can "[r]eject the plan and issue a[n administrative] complaint. 16 CFR 1115.20(a)(3(ii).

As would be expected, consumer groups favor this new provision and believe that it will allow the CPSC to more promptly and without additional expense enforce the implementation of an agreed upon program.

#### Compliance Programs

The new proposed rule would also allow the CPSC to include compliance programs that must be set up by the recalling firm as a component of a CAP in the following situations:

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

It is unclear how the CPSC will be able to evaluate the procedures and controls of the manufacturing or product seller and determine whether they are insufficient or ineffectual. Who will do it? When will they have time to do it? What is the basis of their determination? Will the recall be postponed until this analysis is done?

Next, the proposed rule details the types of provisions that may be included in a compliance program.

- Maintain and enforce a system of internal controls and procedures to ensure that the firm promptly, completely, and accurately reports required information about its products to the Commission;
- Ensure that information required to be disclosed by the firm to the Commission is recorded, processed, and reported, in accordance with applicable law;
- Establish an effective program to ensure the firm remains in compliance with safety statutes and regulations enforced by the Commission;
- Provide firm employees with written standards and policies, compliance training, and the means to report compliance-related concerns confidentially;
- Ensure that prompt disclosure is made to the firm's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to affect adversely, in any material respect, the firm's ability to report to the Commission;
- Provide the Commission with written documentation, upon request, of the firm's improvements, processes, and controls related to the firm's reporting procedures; or
- Make available all information, materials, and personnel deemed necessary to the Commission to evaluate the firm's compliance with the terms of the agreement.

The above language is similar to the compliance program language included in recent civil penalty settlement agreements that I've written about previously. See "CPSC Mandates Safety Programs for Manufacturers and Retailers – An Update," *Strictly Speaking*, December 23, 2013.

The staff described the rationale for this portion of the new rule as follows:

Negotiated corrective actions give the Commission the opportunity to tailor remedies to a particular situation and the associated health and safety risks presented. The proposed rule would include language that would permit, in appropriate situations and at the Commission's discretion, the Commission to pursue compliance program requirements in the course of negotiating corrective action plans. The proposed rule contemplates that if

appropriate, a corresponding reference to compliance program requirements may be included in the related voluntary recall notice. Inclusion of compliance program requirements as an element of voluntary corrective action plans would echo compliance program requirements incorporated as part of recent civil penalty settlement agreements.

As with the inclusion of compliance programs in settlement agreements, there are significant unknowns concerning the ability of the CPSC staff to become familiar with a company's compliance program, make suggestions for a future program and to audit compliance. Erika Jones stated in her comments to this proposed rule on behalf of the Bicycle Product Suppliers Association:

Moreover, this proposal would significantly slow down the negotiation of corrective action plans. Rather than focusing solely on the product safety issue and the appropriate remedy, the negotiation process would now include such things as the adequacy of the structure of the firm's internal management, the firm's written policies and procedures for handling product issues, the training that is offered to firm employees involved in product safety and quality, among many other items. Before staff can even begin the negotiation process and create a proposed structure for an appropriate "compliance plan," they will have to first inquire into and fully understand the operations of a company and its current compliance plans and product safety programs. This is a far greater administrative undertaking than gathering and reviewing the information required to be submitted with a Section 15 Report.

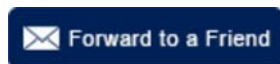
And, since the compliance program requirements will be set forth in the voluntary recall notice, the compliance program requirements will also be legally enforceable. That makes it even more important that the requirements be achievable and that the manufacturer can accomplish them without slowing down the primary task of recalling the product.

#### Conclusion

The vast majority of comments from the public to the CPSC were generally negative on most aspects of this new proposed rule. However, it is being pushed by the new Acting Chairman of the CPSC as well as a new commissioner. I would expect that this rule, in some form, will be passed by the Commission sometime this year.

How the CPSC will provide personnel who have the expertise to implement and enforce many of these provisions is a big open question. Whatever happens, companies should consider these potential requirements and consider the sufficiency of their programs in case they have to undertake a CAP in the future.

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