Legal Backgrounder

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Why CPSC Should Voluntarily Recall Its New Voluntary Recall Proposal

by Nancy Nord

For the past 40 years, voluntary safety recalls conducted by companies, with the cooperation and participation of the Consumer Product Safety Commission (CPSC), have been a primary tool for ensuring product safety in the marketplace. American consumers have benefited from a system that, for the most part, has operated effectively to remove unsafe products from store shelves and consumers' homes.

Unfortunately, CPSC now proposes to change the ground rules for conducting voluntary recalls. The proposed changes likely will make the process more difficult, costly, and unwieldy for companies conducting recalls. Moreover, CPSC's proposal seems to fall outside the boundaries of its governing statute. And in the end this ill-advised agency proposal will put consumers at risk. This Legal Backgrounder explores the shortcomings of CPSC's proposal[1] and its potential impact on the voluntary recall process.

The Current Recall Process. The basis for CPSC's recall authority is § 15 of the Consumer Product Safety Act[2]. Under the statute a product seller must notify the agency if it becomes aware that a product may present a substantial hazard to consumers. If the agency agrees that a hazard exists, or if it independently learns of a hazard, it may order public notice of the hazard and require that a product seller repair or replace the product or refund its purchase price. However the notice and remedy for a so-called mandatory recall may only come after a formal public hearing conducted by an Administrative Law Judge.

If the agency believes that a product is imminently hazardous and must be immediately removed from the marketplace, it may go to federal district court to seek an injunction against the sale or distribution of the product. This statutory scheme balances the need to protect the public from hazardous products against the need to ensure that the agency does not act prematurely or precipitously by taking unjustified actions against a reasonably safe product.

While the statute does not specifically recognize the voluntary recall device, over the years, CPSC has relied on the voluntary recall—the terms of which are negotiated between the product manufacturer or seller and the agency compliance staff—rather than on the more cumbersome procedure outlined above to conduct product recalls. To further streamline the process, in the mid-1990s the Clinton-era CPSC initiated the "fast-track" recall, under which the agency (i) will accept hazard reports from companies, (ii) will not do an independent investigation nor make any findings about the existence of a hazard, and (iii) will negotiate a final voluntary recall usually within 20 days of receiving the report from the company.

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[1] "Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices," 78 Fed. Reg. 69,793 (Nov. 21, 2013).
[2] 15 U.S.C. § 2064.

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In the past four years, the agency has negotiated well over 1,000 voluntary recalls while, in the same period, it has initiated only four(!) mandatory recalls. These mandatory proceedings were begun only after the voluntary process failed to reach consensus.[3] Ample experience shows that the voluntary recall has achieved consumer safety remarkably well—by quickly getting products off store shelves and out of consumers' hands with the buy-in and cooperation of the product seller.

Summary of Proposed Rule. Some years ago, the agency promulgated interpretive rules to set out its expectations for the content of voluntary recall notices.[4] These rules have been supplemented by the *Recall Handbook*, a staff document providing guidance to companies about expected recall practices which has been revised as needed over the years. It is these rules that CPSC now proposes to change. The proposed interpretive rule would add many more requirements to how recall notices are formatted and communicated to the public, removing these aspects of the recall from negotiation. The agency claims that these changes will result in more efficient recall negotiations, greater predictability for the regulated community, and timelier issuance of recall notices.

These changes range from the *innocuous* (press release font size) to the *silly* (requiring recall posters for all recalls) to the *objectionable* (requiring disclosure of proprietary business relationships). If finalized, the changes will result in recall press releases and public notices that reflect the agency demands for a formulaic and non-negotiated format rather than being tailored to the particular problem being addressed by the recall.

The proposal also makes very dramatic and policy-laden changes to the process that fall outside the three justifications given for the proposed rule. These changes include (i) making corrective action plans legally binding, (ii) requiring corporate compliance programs as a part of corrective action plans, and (iii) barring a company from disclaiming admissions of liability unless the agency agrees. The majority of commentators have focused their overwhelmingly negative feedback on these changes. If put into place, CPSC's proposal will change the nature of the voluntary recall process to make it more adversarial, more burdensome, and more costly—both in terms of resources devoted and time to negotiate. In addition, the proposal probably exceeds the agency's statutory authority.

Problems with Making Voluntary Recalls Legally Binding. Recognizing the voluntary nature of the process, the current rules explicitly state that the negotiated recall plan (*i.e.*, the "corrective action plan" or "CAP") has no legally binding effect and that CPSC may seek broader or different corrective actions at any time if public safety so warrants. The agency has presented no facts to support the need to make CAPs legally binding[5] other than to state generally that it has encountered unnamed firms that have delayed timely implementation of their plans.

CPSC argues, again without citing supporting instances, that it needs this authority to enforce a CAP if a recalcitrant firm violates its terms. However, the agency already has tools to police such conduct. For example, the agency currently has the authority to issue an administrative complaint if a corrective action plan is not sufficient or to seek a consent order requiring specific action[6] if the agency believes that a company is not carrying out its side of the bargain. Yet CPSC has not pointed to a single instance where existing authorities have not sufficed.

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[3] Of the four mandatory recalls initiated by the agency, three are still ongoing while one has been settled.

[4] 16 CFR § 1115.20.

[5] The proposed rule does not define what is meant by the term "legally binding." While the concept has its foundation in contract law, in this case there is no offer, acceptance or consideration so no enforceable contract exists. Presumably, the agency is trying to establish jurisdiction to go to court to seek specific performance of the terms of the corrective action plan and/or civil or criminal liability for companies that fail to honor the agency's ex post interpretation of the CAP.

[6] The agency has done this in at least one case. See Consent Decree, *United States v. Daiso Holding USA, Inc.*, Case No. 4:10-cv-00794-PJH (Doc. No. 5) (Mar. 4, 2010).

Making voluntary recall corrective action plans legally binding will add a degree of formality and protraction to a process that has worked well on an often-informal basis. Today, CAPs are often negotiated between agency compliance officers and company representatives. But if CAPs become legally binding and enforceable in court through specific performance, they likely will be negotiated by agency lawyers and outside counsel representing the company.

If finalized, this requirement will make negotiating a voluntary recall akin to negotiating a consent decree, with the attendant formality, time delays, and review by counsel. The non-adversarial nature of most current voluntary recalls will be radically altered, especially those now done under the fast-track system where speed trumps process and formality. By reverting to a protracted, legalistic, and adversarial process, the proposal removes the flexibility the agency now has to address problems that may be discovered, and so quickly adjust the plan, as the recall is rolled out. Under the agency's proposal, the parties' obligations will be as negotiated by the lawyers and fulfilled as described in the agreement—no more and no less. In such a system the consumer is the loser since dangerous products stay in the marketplace while lawyers haggle.

Problems with Imposing Compliance Plans as a Condition of CAP Approval. The proposal allows CPSC to condition acceptance of a CAP on the company's implementation of a compliance program. The proposal states that compliance programs can be imposed on firms that have "multiple previous recalls and/or violations of CPSC requirements … ; fail[ed] to timely report substantial product hazards on previous occasions; or … insufficient or ineffectual procedures and controls for preventing the manufacturing, importation, and/or distribution of dangerously defective or violative products."[7]

CPSC has imposed a compliance program requirement in several recent penalty settlement consent agreements.[8] While such a requirement presents a number of difficulties,[9] these settlement agreements result from individual negotiations with specific companies represented by counsel. Imposing this requirement more broadly raises a host of troublesome policy and practical issues.

As an initial matter, it is quite doubtful that the agency has the legal authority to impose such a requirement as a condition for the acceptance of a CAP. The Consumer Product Safety Act limits the agency's recall authority to public notice and repair, replacement, or refund. If voluntary recall negotiations between a company and the agency break down and the agency brings an administrative action to force a mandatory recall, its available remedies are those specified by the statute—that is, notice and repair, replacement, or refund. CPSC's proposed rule seeks to force a company to undertake actions which the agency has no authority to compel.

As a practical matter, this requirement does real damage to the voluntary recall system, especially the fast-track system. For years, the agency has sought to encourage reporting and recall of products even when the existence of a hazard is debatable. Many safety-conscious companies have been the quickest to report and undertake recalls without agreeing that a substantial product hazard exists. For some, reporting and recalling products out of an abundance of caution has been part of a compliance program. Now, however, past recalls, even those conducted under the fast-track system where no determination of hazard was made, will be viewed, not as evidence of cooperation and conscientiousness by these companies, but as evidence of their disregard for safety. This turns the current, successful fast-track system on its head and dramatically reduces any incentive to engage in a future recall until after a hazard has been substantiated.

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[7] 78 Fed. Reg. at 69,795.

[8] See Kolcraft Industries, Inc., Provisional Acceptance of a Settlement Agreement and Order, 78 Fed. Reg. 14,080 (Mar. 4, 2013); Williams-Sonoma, Inc., Provisional Acceptance of a Settlement Agreement and Order, 78 Fed. Reg. 27,190 (May 9, 2013); Ross Stores, Inc., Provisional Acceptance of a Settlement Agreement and Order, 78 Fed. Reg. 38,298 (June 26, 2013).

[9] See Statement of Commissioner Nord on the Commission's Decision to Provisionally Accept a Civil Penalty Settlement with Williams-Sonoma, Inc. (May 6, 2013).

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By incorporating compliance program requirements into corrective action plans, and by making CAPs legally enforceable, CPSC seeks to insinuate itself into companies' ongoing internal operations. Add to this the agency's recent attempt to expand the reach of the responsible corporate officer (RCO) doctrine to seek personal liability for corporate officials in administrative actions,[10] and it is unlikely that such requests will be agreed to lightly by counsel in negotiating a recall. At best, the new process will be protracted and costly for both CPSC and the companies. Consumer safety will not be advanced by adding these kinds of predictable but needless delays to the process.

Problems with Barring Disclaimers of Liability. At present, companies undertaking a recall may disclaim liability or the existence of a defect. The proposed rule seeks to give the CPSC staff the ability to veto such disclaimers, which could be viewed as evidence of defect in subsequent product liability litigation. Whether or not a product contains a defect and whether it should be recalled are not questions that are quickly or easily answered, especially if those answers might give rise to subsequent product liability lawsuits. Currently those questions are not answered in the voluntary recall context. In a fast-track recall, there is no determination that a defect exists; in other voluntary recalls, there may or may not be a preliminary determination of a defect, but the issue will not be finally determined before the recall is negotiated.

Giving staff the authority to determine when a disclaimer is or is not appropriate has nothing to do with safety. Instead it allows the agency to put its thumb on the scale of justice in an anticipated product liability action and marks a shift from CPSC's past practice of not taking sides in civil litigation. If this proposal is incorporated into any final rule, counsel for the product seller likely will insist (or, at least, should) on a full examination of the agency's theory of defect, thereby significantly delaying the recall. Again, this proposal does not advance the cause of quickly accomplishing recalls.

***Going Forward*.** Nothing in the Consumer Product Safety Act spells out the responsibilities of the parties in a voluntary recall situation. With this proposal, CPSC seeks to mandate the terms of a recall without having to honor the procedural safeguards for mandated recalls required in the statute. Labeling the proposal "Guidelines" for voluntary recalls does not change this attempted end-run around the statute.

Although companies have the legal obligation to immediately notify the agency if they believe that one of their products could pose a substantial product hazard, nothing requires them to engage with the agency in order to conduct a voluntary recall. One future strategy companies may wish to consider is to notify the agency of the potential hazard and then to proceed with a recall without CPSC's participation. If the agency disagrees with this course of action, it can certainly open negotiations for a different remedy and even proceed with an administrative action. However, if the product is off store shelves and an aggressive and good-faith attempt has been made to get the product out of consumers' hands, it would be difficult to show that a government-supervised recall is justified. Taking such an action would no doubt result initially in unpleasant blowback from the agency's communications department, but at the end of the day, that may be the best course for advancing consumer safety—and obviating the cumbersome new regime.

CPSC's proposal is both puzzling and troubling since it threatens to radically change a system that has worked remarkably well and that has protected consumers effectively. Abandoning this process with no demonstrated need is ill-advised and can only be motivated by an agenda other than consumer safety.

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[10] *In the Matter of Maxfield & Oberton Holdings, LLC*, CPSC Dkt. Nos. 12-1&12-2 (Doc. No. 29) (Feb. 11, 2013); [ed. note: see also Sheila A. Millar and Kathryn M. Biszko, "CPSC's Misuse of RCO Doctrine Bodes Ill for CEOs and Consumers," WLF Legal Backgrounder, Vol. 28, No. 11, August 23, 2013.]

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