

CLIENT ALERT

Consumer Product Safety: Compliance Programs and Risk Mitigation Strategies (VIDEO)

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Cheryl A. Falvey, former general counsel for the Consumer Product Safety Commission and a Washington, D.C.-based partner and co-chair of Crowell & Moring's Advertising & Product Risk Management Group, discusses compliance programs and risk mitigation strategies for consumer products companies in a three-part video series.

Scroll below to view these two-minute videos on Crowell.com in which Cheri discusses consumer product safety, including how to minimize risk of litigation during a recall, a common mistake companies can make in meeting their regulatory compliance obligation, and whether compliance programs actually work to mitigate government enforcement actions and penalties.

Cheri also discusses what steps corporate officers and directors can take to avoid enforcement action, when the federal government has pursued action against individual corporate officers or directors for individual liability, and whether corporate officers must be involved in the day-to-day workings of the safety organization to get the protection that a compliance program provides.

Part 1: What Every Consumer Product Company Needs to Know About Recalls and Compliance

Part 2: Compliance Programs That Avoid Penalties and Enforcement Actions for Consumer Product Companies

Part 3: Avoiding Individual Liability As A Corporate Officer or Director

Transcript

How can consumer product companies minimize risk of litigation during a recall?

You can minimize the risk of litigation during a recall in a number of different ways. Most importantly, you need to act quickly and decisively. Consumers expect rapid response; jurors expect the same when they are looking at your case. They want you to demonstrate a corporate commitment to finding defects and acting quickly to make the consumer whole.

More importantly, it is important to focus on picking the right remedy. You don't want to waste time deciding how much of a remedy to provide, because the more comprehensive the remedy, the more likely it is that you will forestall any class action litigation down the road. And finally, you want to focus on recall effectiveness.

It is easy to sit back and take a deep breath because you have moved forward with the recall and not focus on the details of making sure you've done enough consumer outreach to reach a sufficient number of the population of effective users of the product to try to make sure that you limit any class action liability down the road.

What's a common mistake companies can make in meeting their regulatory compliance obligations?

The government is looking for a robust compliance plan in order to meet your federal regulatory requirements. Not a paper plan that sits on shelf and gathers dust, but something that is integral to the business processes every day. They are looking for a single, responsible person who owns the issue with regard to compliance, whether that's compliance with security and privacy issues or safety and consumer products. Someone in the organization has to be responsible, and the government is particularly focused right now on board and senior management involvement in the corporate compliance program.

Do compliance programs actually work to mitigate government enforcement actions and penalties?

People are often concerned that they will put a compliance program in place, but it won't really help them to mitigate any kind of enforcement action or penalty when the government comes calling. We see the agencies across the board looking at compliance programs and indicating a willingness to mitigate penalties.

The FCC, Federal Communications Commission, came out with a consent decree where that was baked right in, and they specifically said that they would reduce the \$10 million fine against telecommunication carriers if they showed that they had put in place a program to protect consumer data and secure it from hackers and other intruders.

We're seeing the same thing at other companies. The FDA went after a penalty for a pharmaceutical company. While they still sought the penalty, they didn't require a corporate monitor to oversee the company's actions because they were pleased with the compliance program. Clearly the CPSC is looking for that. They are including a compliance program in their penalties as part of the overarching penalty program.

So, we think they are working, but it is important to make sure that you define what compliance program you'll have in place, rather than have the government come and tell you what compliance program they are expecting.

What steps can corporate officers and directors take to avoid enforcement action?

An officer trying to minimize his or her liability needs to engage in the compliance program. Ensure that all of the senior managers are trained and know their responsibilities. There is no more plausible deniability that an issue didn't reach senior management. That's not accepted by the agencies, and what they are looking for is strong leader who understands the compliance obligations and is pushing that through the organization. When they see that active engagement, they are much less likely to go after an individual.

When has the federal government pursued action against individual corporate officers or directors for individual liability?

A good example of when the government has gone after an individual corporate officer and director involves FDA enforcement actions, where they have gone into an organization, inspected, found noncompliance with the manufacturing processes, for example, then, gone again and again. And essentially, fed up with not seeing a consistent pattern of compliance, [they will] decide the only way to remedy the situation is to hold the individual responsible. That's when they'll typically go after an officer or director for liability.

Do corporate officers have to run the day-to-day workings of the safety organization to get the protection that a compliance program provides?

The senior management in an organization doesn't have to take responsibility and actually do the job, but he has to have in place the people that are running the company in a way that meets the regulatory obligation. It's not good enough to go into court and say, 'but I had others that were responsible for that and they didn't do their job.' The Supreme Court has said when it comes to the public health and safety in certain of these regulatory schemes, we are going to hold the CEO liable, because we want to know that they take that responsibility seriously.

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