

Executing Product Safety Recalls In The Age Of COVID-19

By **Cheryl Falvey and Matthew Cohen** (April 16, 2020, 6:08 PM EDT)

In ordinary times, a company facing a product safety recall has numerous issues to navigate. These issues include, among others, deciding upon a remedy to offer consumers who have purchased the product; mastering reverse logistics to have recalled products removed from shelves and inventory and then destroyed; and effectively communicating the recall details to consumers.

Although no two recalls are identical, any company that has undertaken a recall has likely spent many hours planning its execution, making difficult business decisions and addressing these common recall elements, all while interacting with the U.S. Consumer Product Safety Commission.

Today, however, as the country, and world, deal with COVID-19, a whole new set of issues has emerged for companies facing product recalls. Supply chains have been interrupted. Customer service call centers and company office buildings are closed. Retailers are trying to keep businesses afloat while their stores shutter. And consumers are focused on keeping their families safe from this deadly virus rather than on product recalls.

As all of these issues converge, many companies are wondering how the CPSC will respond to, and handle, forthcoming product safety recall announcements.

Recently, the CPSC provided some initial clues as to how it will handle recalls with companies seeking to coordinate with the agency. In recent guidance, the agency states that:

Due to extraordinary circumstances surrounding COVID-19, some of the remedies identified in recall press releases may not be available at this time. Consumers should check with recalling firms for further details. It is important to remember that CPSC and recalling firms urge consumers not to use recalled products.[1]

In fact, this guidance not only appears on the CPSC's homepage, but it also pops up when any consumer clicks on newly announced recalls. This message to consumers is notable, perhaps even unprecedented.

Ordinarily, when a company announces a recall, it must not only be positioned to offer consumers a replacement, repair or refund, but also be able to execute on that obligation immediately or within



Cheryl Falvey



Matthew Cohen

days. However, in these uncertain times, the agency appears to be providing some leeway to firms who are unable to execute immediately on their offered remedy.

Companies may face potential delays with respect to any of the above-stated remedies (i.e., replacement, repair or refund). For those companies offering consumers a replacement product or component part, interruptions in the supply chain may preclude the company from obtaining and stockpiling sufficient inventory to meet the needs of consumers participating in the recall, thus causing a delay in fulfillment.

This is particularly so when product is being imported from China. Or, for those companies offering consumers a refund, that remedy could conceivably be delayed, should call centers or company offices remain closed, leaving refund requests unable to be processed.

For repairs, many consumers who are self-isolating may not want a repairman entering their house to fix a product if that is the available remedy (and many repairmen may not want to visit multiple homes in certain virus hotspots). And some consumers face other logistical hurdles, such as returning a recalled product to a temporarily closed store, or even receiving a free shipping container from the recalling company and then travelling to a post office to mail it back.

To date, the CPSC has shown flexibility and cooperation, given the business challenges regulated parties face with the increasing number of state emergency orders and mandatory quarantines. This flexibility is undoubtedly rooted in practicality, and the precarious situation in which much of industry finds itself.

And the agency's practical guidance goes beyond just recalls. The CPSC has recently published information on how to keep homes safe while quarantining, on the agency's schedule and even on the handling of FOIA requests.

However, other issues remain unaddressed that are sure to arise if they have not already with respect to recalls. For example, will the CPSC require a recalling firm to reannounce the recall once the remedy becomes available, or if the recall effectiveness rate is low given current circumstances? Or will delaying the recall remedy anger consumers and lead to business complaints, negative social media campaigns, and even product liability or ineffective recall lawsuits? These are not out of the realm of possibility.

Perhaps, most importantly, will the agency be amenable to delaying recall announcements that do not involve the most serious potential injuries until some of the issues related to COVID-19 are resolved? The answer is likely yes — although the CPSC has already made clear that they may require firms to make a public safety announcement that warns consumers not to use the recalled product in the interim, particularly for those products that pose a higher risk of injury (or death) to the public.

Of course, the commission has also reminded all product safety stakeholders that reporting obligations under Section 15(b) of the Consumer Product Safety Act remain intact and unaffected.

It is yet to be seen how the CPSC plans to handle forthcoming recalls that involve some of these issues beyond the timing of a remedy provided to consumers. Nevertheless, as firms prepare to announce a recall, they should keep the following in mind.

Stay Safe

The health and safety of your employees, colleagues and business partners comes first. Many product

recalls involve very low incident rates and risks much less severe than what epidemiologists are tracking with COVID-19.

In most, if not all, cases, COVID-19 is a much greater immediate threat to public health and safety than a delay in executing on a recall of consumer products. Execute recalls with diligence — but do not risk employees' health and safety to do so.

Report

Conversely, as mentioned above, reporting a product safety hazard to the CPSC has not been stayed due to the COVID-19 pandemic. The commission's March 13 directive on procedures concerning COVID-19 reminds firms "of their statutory obligation to report under Section 15(b) of the Consumer Product Safety Act."

Communicate Frequently

Communication with the CPSC when facing a recall is always key. Inform the agency frequently about supply chain and workforce issues and timing challenges.

Similarly, effective and regular communication with other internal and external business partners is essential to executing a successful recall — whether it be with the C-suite; supply chain or retail partners; consumers; or any other stakeholder affected by the recall.

Be Creative

Use available technology, including email, voicemail messages, video and apps, to keep consumers informed of your effort to fulfill the recall and the status of their remedy. Document destruction of recalled products with photos and not just certificates of destruction, if CPSC field staff is unable to travel and witness product destructions.

It is important in these uncertain times that practitioners, advocates, industry and the CPSC communicate effectively about these and other issues of importance to the product safety community. In the meantime, we hope all remain safe.

Cheryl Falvey is a partner and Matthew Cohen is counsel at Crowell & Moring LLP.

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[1] CPSC Recall Remedy Notice Due to COVID-19,