

## CPSC Proposal Risks Delaying Recalls, Alienating Companies

By **Greg Ryan**

*Law360, New York (November 15, 2013, 8:50 PM ET)* -- The U.S. Consumer Product Safety Commission's surprise proposal to make voluntary recall agreements legally binding isn't the yawn-inducing "tweak" the agency's future leader makes it out to be, experts say: The measure is likely to drive up attorney involvement in recalls and keep potentially dangerous products on shelves and in homes longer.

Commissioner Robert Adler, who will take over as acting CPSC chairman at the end of the month, moved Wednesday to insert the measure in a notice of proposed rulemaking that lays out guidelines for companies and the agency to follow when issuing voluntary recall notices. Adler and two of his colleagues voted to include the amendment, over the objection of the agency's sole Republican.

Adler described the change as a "minor tweak" that most companies would "see and yawn and move on with." But the longtime CPSC man is in for a surprise, according to consumer product regulatory attorneys, who expect the agency to receive a flood of comments from companies in opposition to the proposal.

"It was a really nice balance, and that balance is going to change," said Cheryl Falvey, a Crowell & Moring LLP partner who served as CPSC general counsel under both the Bush and Obama administrations.

Federal regulations currently hold that a corrective action plan taken in connection with a voluntary recall "has no legally binding effect." This allows companies to recall potentially defective products quickly, without having to worry about entering into agreements that empower the CPSC to pull it into court, according to attorneys. No document needs to be signed by both parties, and in some cases, lawyers may not have to get involved at all, they said.

"There is no necessity to change that basic dynamic," said Mintz Levin Cohn Ferris Glovsky & Popeo PC member Chuck Samuels.

Under the proposal, a breach of contract claim would be a possibility if the CPSC disagreed with a company's handling of a recall. Lawyers say they will therefore have to spend more time poring over the agreements and going back and forth with the agency.

Outside of a costly court battle with the CPSC, companies have other concerns, according to Falvey. They may worry about the effect a legally binding agreement could have on future product liability litigation.

In addition, if the CPSC accuses the company of violating a legally binding agreement, the company may have to disclose the incident to shareholders in a securities filing, similar to companies regulated by the U.S. Food and Drug Administration, Falvey said.

"Many of the companies that are regulated by the commission are public companies. Once they're bound to an agreement with the federal government, there are consequences to that," Falvey said.

Samuels says the proposal could have unintended drawbacks for the agency as well. A company could refuse to take any action that isn't in the agreement, even if new information about its product suggests additional steps are necessary, he said. Others may leave the CPSC out of recalls to the greatest extent possible, giving the agency only the information they are required to report under the Consumer Product Safety Act.

"After all, this is voluntary, right?" Samuels said. "And then the commission would have to decide whether for some reason it was going to pursue you in court to do more, or something different."

The most surprising aspect of the proposal, attorneys say, is that the agency wants to change a system that seems to have worked well for decades. Harvard University and the Ford Foundation even recognized the CPSC's fast-track recall program with an Innovations in American Government Award in 1998. The program allows a company to forgo a defect evaluation by the CPSC if it provides the agency with a report detailing the problem with a product and the actions to be taken within 20 days to fix it.

"It basically unsettles over 30 years of highly effective practice that's been protective of consumers and extremely beneficial to the government," Samuels said.

Samuels' colleague Matthew Howsare, who served as chief of staff at the CPSC from 2010 until earlier this year, told Law360 he was surprised by Adler's amendment.

"I do not remember the enforceability of corrective action plans being an issue that caused major problems at the agency during my time there," he said.

In a blog post, Howsare pointed out that the CPSC had explicitly rejected the suggestion of requiring consent decrees and issue orders in a rulemaking during the Carter administration. He quoted the agency as saying corrective action plans "save considerable time and effort that would otherwise be devoted to negotiating the more complex details of and completing the paperwork necessary for a consent order agreement. As a result, the hazard is remedied faster, and the consumer is protected faster."

Miles & Stockbridge PC counsel Lee Bishop said that, though he had yet to see the amended proposal, he had questions about whether the CPSC would be able to carry it out.

"Aside from the obvious policy problems with this — companies are discouraged from reporting marginal risk issues, and lawyers now have to be concerned about every 'jot and tittle' in the corrective action plan — I'm not sure how this is authorized by the CPSA," he said. "I can't wait to see the language."

--Editing by Kat Laskowski and Katherine Rautenberg. All Content © 2003-2013, Portfolio Media, Inc.