

# 7 steps to prepare for and execute a successful food-related recall

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We all know that accidents and mistakes happen, and most of us govern our lives to minimize them. Food and beverage companies, like people, are not immune from these inevitabilities, and they too generally do their best to plan for unexpected accidents.

Even with the best planning and preventative efforts, food and beverage companies remain vulnerable to accidental contaminations or other problems that lead to product recalls.

When contamination occurs, every company in the supply chain may have the responsibility to remove the affected product from the market. Food companies typically plan for recall events by establishing sophisticated contingency and crisis management strategies, which includes focusing on contractual and insurance protections.

A strong recall strategy can minimize the cost and consequences of a recall. A well-crafted policy will help the company to act quickly and effectively at every stage of the process.

This commentary identifies seven key steps that every food and beverage company should consider in preparing for and implementing a product recall. By following these steps, these companies may significantly reduce the disruption and costs that a recall might cause.

## STEP 1: CREATE YOUR RECALL PLAN

Even before a crisis arises, food companies should engage with counsel to craft a detailed recall plan that lays out the critical early steps necessary to conduct the recall and mitigate economic loss.

Every recall plan should:

- Identify a team member responsible for undertaking each critical task, including that person's contact information.
- Involve counsel for all relevant aspects of the recall, including regulatory, defense and insurance elements of the recall.
- Provide for notifying all potentially responsible insurance companies, including identifying the person and address to which notice must be given.
- Utilize key consultants that include a public relations firm and other consultants to assist in the conduct of the recall.

- Prepare for customer reactions, including by establishing a call-in center if needed.
- Create a draft public relations statement with input from counsel, which then can be modified for quick release when a recall arises.
- Contain plans to mitigate any business interruption or supply chain disruption (identifying alternative suppliers and production facilities if feasible).

A well-constructed recall plan is critical to a company in the event of a contamination. Before a recall, a company should practice implementation of its plan by having periodic calls with members of the recall team. Upon receiving reports of a contamination or illness, the company should access and implement its plan. In the event of a contamination, the company should assemble the key members of the recall team identified in the plan.

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## STEP 2: IDENTIFY THE PRODUCT

Often, a company's immediate reaction upon learning of a contamination event is to recall all products associated with a foodborne illness. While it is only human to react this way, a sophisticated business should resist this type of knee-jerk response. Instead, where time permits, food companies should first localize the problem and address its sources.

Pulling the wrong products from shelves not only results in unnecessary losses for the company; it can also create a sense of panic that could tarnish the brand. An overbroad recall also may lead to an increase in bodily injury claims by individuals who consumed product that was recalled but not contaminated.

More importantly, pulling the wrong products from the shelves does nothing to address the underlying source of the problem, and misallocates valuable resources away from the problem. Moreover,

insurers sometimes allege that a recall was overbroad, thus arguing to limit coverage, even where the company has strong business justifications for the breadth of the recall.

In evaluating the scope of a recall, a company should focus on the following:

- What is the element that causes the product hazard?
- What caused the product defect to occur?
- Where are the unsafe products?
- How many unsafe products are there?
- Did the product fail to comply with any safety regulations? If so, how?
- Can company databases help to identify potential product owners and retailers?

Upon identifying the product to be recalled, immediately discontinue production and shipments to distributors. If affected products are in transit, call them back and notify all retailers to stop selling them.

Depending on the scope of the risk and the extent of the product's distribution, companies also should work with counsel to determine whether to recall the product at the consumer level, or whether a more limited recall may be sufficient.

In working with regulators, it is also important to identify what type of recall is necessary.

Although there are some variations in the ways that different government entities define them, the categories of recall generally are as follows:

- Class 1: Reasonable probability that use of or exposure to the product will cause serious adverse health consequences or death.
- Class 2: Reasonable probability that use of or exposure to the product may cause temporary or medically reversible adverse health consequences or the probability of serious adverse health consequences is remote.
- Class 3: Use of or exposure to the product is not likely to cause adverse health consequences.

It is important to work with the governmental agency addressing the recall to ensure that it properly classifies the recall. In addition to the ramifications that the classification of the recall can have with the public, recall classification also can affect whether certain types of insurance policies cover the event.

Many accidental contamination policies require a potential for bodily injury or property damage to trigger coverage under the "contamination" provision. Accidental contamination policies also often contain alternative triggers of coverage that can apply even absent an actual contamination.

One common alternative trigger — the "governmental recall" endorsement — extends coverage to governmentally sanctioned recalls even where there turns out to be no actual contamination. However, in some policies, insurers contend that this trigger applies only when those recalls are classified as either Class 1 or Class 2. For those policies, the proper classification can mean the difference between coverage and no coverage.

### **STEP 3: CONTACT THE PROPER GOVERNMENT AGENCY**

The law generally requires that if a company obtains information that a product fails to comply with safety standards or creates unreasonable risk of serious injury or death, the company must report within 24 hours that the product violates a safety standard or could be harmful to consumers.

The company should be prepared to address all relevant information when speaking to the agency. Depending on the product being recalled, the company will need to contact the relevant oversite agency, which in most cases will be the Food and Drug Administration, U.S. Department of Agriculture, or Food Safety and Inspection Service. State agencies also may require notice.

**Before a recall, a company should practice implementation of its plan by having periodic calls with members of the recall team.**

Depending on the product, the company may be required to contact multiple agencies that share concurrent jurisdiction. This often happens when the underlying cause of the adulteration is from cross-contamination.

Regardless of what agency is involved in the oversight, it is critical that a company consult with counsel to ensure it has identified all of the agencies with jurisdiction over the recall. In addition, contacting the wrong agency may prompt an unnecessary and costly dual investigation.

#### ***Submitting a recall proposal***

Among the first things a food company must do in initiating a recall is to submit a recall proposal to be reviewed by one or more of the supervising federal or state agencies. It is vital to craft the proposal carefully and precisely to ensure that the agencies gain a clear understanding of the issues and product to be recalled. It is also critical that the agency agree to the scope and depth of the recall.

The recall proposal should state whether the recall will penetrate to the consumer level or whether it will apply only to the wholesaler or retailer. The proposal needs to account for the type of press release the company will issue, as well as how it proposes to check for recall effectiveness.

### **Executing the recall**

Companies generally must execute the recall immediately, even as the relevant agencies review the proposal. If any of the supervising agencies conclude that the proposed approach needs correction, they may advise the recalling company accordingly.

As discussed above, companies should be careful to ensure that they identify the proper scope and depth of the recall. Companies should be prepared to explain the basis of their decisions in this regard, and they and their counsel should consider how much information regarding that decision to include in the recall proposal.

Ultimately, constructive and honest engagement with the agencies overseeing a recall can help to define the scope of the recall appropriately and avoid having an agency second-guess the early decisions the company must make. Strong agency interaction also may be helpful in responding to any criminal investigation that might result from introducing an adulterated food product into the stream of commerce.

### **STEP 4: ALLOW ACCESS BY RELEVANT AUTHORITIES AS NECESSARY**

Federal and some state laws require that during a recall, or prior to the issuance of a recall, a facility must be made available for inspection. The inspector may be entitled to review all records and third-party audits relating to the product, as well as cleaning schedules and other documentation pertinent to the product and its production, transportation, storage and handling.

During a visit, the FDA may collect product samples. The company generally is entitled to review the results of any tests of the products conducted by the government agencies. If lab testing confirms epidemiological evidence linking a product to foodborne illness, the FDA generally will request a voluntary recall.

If there is a reasonable probability that a food will cause risks associated with a Class 1 recall, the company generally will be required to report the incident to the Centers for Disease Control.

There are limits on what the government may review or access, even during a recall. A company needs to understand those limits, but it also must balance its legal obligations with the practical needs of an effective recall and the need to work constructively with the government during the recall and afterward. Again, it is important to consult with counsel to ensure that this balance is correctly struck.

### **STEP 5: WORK WITH INSURERS TO MITIGATE LOSSES**

Many food companies have insurance coverage to pay the losses from a recall. Early actions and strong coordination are critical to obtaining recoveries from these policies.

Most insurance policies contain notice provisions, and companies should provide notice promptly to every insurer that potentially provides coverage. Some of these provisions require notice be provided during the relevant policy period or shortly thereafter, and insurers may try to deny coverage where a company provided notice outside of the time when a policy specifies a claim must be reported.

Because a recall may result in a variety of potential losses and liabilities, companies should cast a broad notice net, providing notice at least to recall/contamination insurers and general liability insurers.

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Companies also should consult with insurance counsel to determine whether other policies, such as property loss or business interruption policies, may also provide coverage and require notice. If there are customer or consumer claims, including bodily injury or property damage claims, companies should consider notifying all their third-party insurers, including general liability, directors-and-officers and errors-and-omissions insurers. In addition to notice requirements, many policies have other strict time-related requirements.

Involving your insurers early in the process can be beneficial in ways that extend beyond locking in potential coverage. Insurance companies often have substantial expertise that they may provide to their policyholders. Contamination policies generally include coverage for the cost of public relations and recall consultants, and most insurers have relationships with experts who can be vital to the success of a recall. Insurers often have extensive experience addressing both facility and product contamination.

Their expertise can supplement the expertise that a company itself may bring. Nevertheless, depending on the circumstances, companies should be aware of potential tensions or adversities that might later arise with insurers.

#### **Communicating effectively with insurers**

Communicating effectively with the insurer during a recall is critical because an insurer sometimes focuses on how a company characterizes a recall event when evaluating coverage. Companies thus need to be careful to ensure that all of their communications, including press releases and communications within the company, take into consideration the terms and conditions of their policies. Involving coverage counsel early to work with the communications team may prevent coverage disputes.

Ultimately, food companies will need to present their loss to their insurers. During the recall, companies should keep

records of all their losses and expenditures, including by collecting backup documentation to support all expenses incurred. If possible, companies should organize their loss information in a manner that is consistent with how insurers will expect to see it.

Many policies now provide coverage for the costs of retaining forensic accountants to help present the claim to the insurers. Using forensic accounting services early can put the company on a more even footing if the insurer questions the costs and losses that a recall may cause.

However, companies also should keep in mind whether and how communications with a forensic accountant may be protected from later discovery in a dispute with a customer, consumer or insurer.

#### **STEP 6: COORDINATE WITH OTHER POTENTIALLY AFFECTED COMPANIES**

Many recalls result from contaminations or other defects in ingredients. Recalls by food manufacturers often implicate their retail customers or other manufacturers that use their products as ingredients.

Before an incident arises, companies should consider coordinating recall plans with key suppliers and manufacturer customers. Then, during a recall, companies should coordinate with their suppliers and manufacturer customers to assure that the scope and effectiveness of the recall are consistent throughout the supply chain.

Food companies also may have indemnification agreements with their suppliers, or they may have agreed to indemnify their manufacturer customers for recall costs and losses. These agreements may also implicate their suppliers' or customers' insurers, including through "additional insured" provisions.

Coordination is essential to managing these indemnity obligations. Early and consistent coordination with other affected companies in the supply chain may help avoid supply chain disputes, which can risk relationships with important suppliers or customers.

#### ***Consider whether your suppliers have responsibility***

Once a contamination event occurs, companies should assess the claims it may have against responsible suppliers, as well as the claims it may face from its own customers. Depending on state law, there may be an array of ways to collect from a supplier. Where there are express contractual guarantees or indemnities, a company may be able to assert a simple breach of contract claim.

Even absent express contractual provisions, there may be claims under the Uniform Commercial Code for breach of express or implied warranties. Moreover, a company can potentially pursue claims under common law tort theories based on negligence or strict liability.

Many states have strict requirements for asserting supply-chain claims. Companies should ensure that they understand and comply with these requirements, including potential requirements to reject affected product and being aware of unusual statutes of limitations that could shorten the time to assert a claim.

Again, companies should have counsel on their recall team to ensure that they comply with any requirements to assert claims against responsible suppliers and in preparing to resolve or defend against customer or consumer claims.

Moreover, claims against a supplier might be covered under the supplier's own insurance. Because the supplier's policies may have limitations that apply to certain types of losses or liabilities, it is important to carefully characterize the facts and claims asserted against the supplier.

#### **STEP 7: COMMUNICATE EFFECTIVELY WITH CONSUMERS**

Maintaining consumer trust during a recall is key, and the company should focus on three pillars to maintain the messaging: transparency, consistency and responsiveness. Managing recall communications is not unlike managing other marketing campaigns.

Companies can use existing communications platforms to publicly acknowledge the recall, apologize as appropriate, and reinforce their commitment to consumer safety. Social media postings and notices in marketing materials help get the word out.

A food company generally should prepare a press release that will precisely communicate its message to the public. A good public relations firm can help craft the press release in a manner consistent with the company's strategic goals.

Keep in mind, though, that federal and state agencies, insurers and even plaintiff lawyers may parse the language of press releases carefully. Therefore, it generally is prudent to involve counsel in crafting the precise language of the press release.

It also is important that the company's message is delivered to customers and consumers consistently. Set up a toll-free number to handle the number of calls expected after the recall only after training has been conducted as to the company's message during the recall. Again, outside consultants can help staff call centers with experienced and well-trained responders.

Keep in mind, too, that consumers often look to a company's website for recall information. Modify the company website to address the recall consistently with its messaging strategy.

Companies need to be transparent in their communications with consumers and media. Transparency involves quick and candid responses in the face of a recall.

Companies that acknowledge and act on consumer concerns show their responsiveness. In fact, companies may want to designate a recall team with a chain of command similar to that of a marketing team. The difference is that the recall team's end goal is to retrieve a product, whereas a marketing team's end goal is to distribute it.

## CONCLUSION

Like it or not, in the end a business will be remembered by how it reacts during a recall and how it engages with the public. Irrespective of how creative and successful a marketing plan was prior to the recall, failure to properly execute a successful recall may result in long-term adverse consequences.

What appears to be a temporary business disruption can quickly result in a congressional hearing, a criminal investigation or even a corporate bankruptcy. Properly preparing for and executing a carefully crafted recall plan can make all the difference.

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