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In March, the Consumer Product Safety Commission published a proposed rule containing new requirements for mandatory recall notices. In this Analysis & Perspective, attorney Eric L. Stone discusses what the proposed rule will mean for manufacturers.

While the proposed rule only applies to mandatory recall proceedings, the author cautions that the CPSC may seek to extend the provision to voluntary recalls and that until that time the commission suggests it be used as a guide for voluntary recall notices. While the CPSC may view the rule as “setting new negotiating parameters” in voluntary cases, the author says, counsel should still seek to negotiate “who is named in a recall notice and the words and scope of the actual notice language.”

Recall Rhapsody: The Consumer Product Safety Commission’s Proposed Recall Notice Rule

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You’ve done everything right, but still “stuff happened.” Now you have to conduct a recall.¹ Anticipation of a recall means inevitable anxiety about the impact on your business and reputation. What effect do the Consumer Product Safety Com-

¹ The term “recall” did not appear in the original version of Section 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2064, but only in the imminent hazard provision, Section 12(b)(1) of the CPSA, 15 U.S.C. 2061(b)(1). However, the term became generally understood and associated with these corrective actions. Congress, therefore, added “Requirements for Recall Notices” in Section 15(i) of the CPSA via Section 214 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110-314, 122 Stat. 3016 (August 14, 2008).

mission's (CPSC) new recall notice proposals² have on you and your recall planning? Do these rules represent a grand departure, or are they merely a compilation of existing policy?

The original Section 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2064, allowed the CPSC, after affording interested parties an opportunity for a hearing, to determine that a consumer product presents a substantial product hazard and order the manufacturers, distributors, and retailers to undertake public notice and to elect to either repair, replace, or refund the purchase price of the product. A product presents a substantial product hazard if it contains a defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public. A violation of a standard or ban promulgated under the CPSA that creates a substantial risk could also create a substantial hazard.³ The Consumer Product Safety Improvement Act of 2008 (CPSIA)⁴ amended the CPSC's recall authority, and now a product might also present a substantial product hazard if it fails to comply with any CPSC rule, regulation, standard or ban under any of the acts administered by the CPSC and that failure creates a substantial risk of injury.⁵

In addition to broadening the reach of Section 15 of the CPSA to all products regulated by the CPSC, the law broadened the CPSC's recall authority under Section 15 of the CPSA.⁶ In addition to allowing the CPSC to recall products subject to regulation under any of its laws,⁷ the law allows the CPSC to pass rules declaring that products with readily observable characteristics that do not comply with generally accepted voluntary standards present a substantial product hazard.⁸ The CPSC no longer has to defer to the manufacturer, distributor, or retailer's election, but may now make the choice between a repair, replacement, or refund remedy.⁹ In cases where the CPSC believes a consumer product presents an "imminent hazard," the CPSC may order notice and a cessation of sales pending the outcome of the imminent hazard federal district court proceeding.¹⁰ The law also allows for the enforcement of even voluntary recalls by the CPSC and state attorneys gen-

eral.¹¹ And, finally, the law required the CPSC to implement a rule within 180 days of passage of the statute governing recall notice elements in orders issued under Section 15 and Section 12.¹² The statute provides some notice principles as well as very specific notice elements that must be included.

The CPSC's proposed rule incorporates and defines several "new" notice requirements. While many of these elements have always been part of the CPSC's recalls, this is the first time that the CPSC has had express, detailed statutory authority to require all of these elements. Further, although the CPSC says this rule applies only in a mandatory recall proceeding, it indicates it might engage in further rulemaking to "extend the requirements to voluntary recalls."¹³ Nonetheless, the CPSC suggests that "[u]nless and until [it does so] the proposed rule would serve as a guide for voluntary recall notices."¹⁴

Substantive Provisions

The proposed rule sets forth some basic principles drawn as much from CPSC experience as from the CPSIA¹⁵: (1) a recall notice should provide sufficient information to motivate people to identify the product and to participate in the recall, (2) the language of the notice should be simple, (3) notice should be targeted based on the product and the circumstances, and firms should consider how the product was marketed in formulating the notice, and (4) direct notice to consumers is most effective.¹⁶

While the new Section 15(i) of the CPSA focuses on content of notice, the CPSC's proposed rule is broader, enumerating the many types of notice that are possible, including Web site notice. It also discusses how to make such notices prominent.¹⁷ For example, Web site notice should be "available on a web site's first entry point, such as a home page," it shall be "clear and prominent," and it "should be interactive" and allow a person to request a remedy directly on the site. The proposed

¹¹ Section 19(a)(2)(b) of the CPSA, 15 U.S.C. 2068(a)(2)(b), and Section 24(b) of the CPSA, 15 U.S.C. 2073(b). State attorneys general may also bring their own substantial hazard "civil action" after giving notice to the CPSC when such "immediate action" is necessary to protect state residents. On its face, the statute requires such actions to be brought in a U.S. District Court where the defendant is found or transacts business.

¹² Section 15(i) of the CPSA, 15 U.S.C. 2064(i), as amended by Section 214(c) of the CPSIA. This provision of the CPSIA and some of the enhancements to Section 15(c) derived in large part from amendment Obama No. 4113 to S 2663, the Consumer Product Safety Commission Reform Act offered by Senators Obama and Cardin, agreed to March 6, 2008. With the press of other business, the CPSC has not met that deadline nor has it proposed revisions to the remainder of 16 CFR 1115 to incorporate the other CPSIA changes.

¹³ Preamble at 74 *Fed. Reg.* at 11883.

¹⁴ Preamble at 74 *Fed. Reg.* at 11883.

¹⁵ Section 15(i)(1) of the CPSA requires guidelines helpful to consumers in (A) identifying the affected product, (B) understanding the hazard including information about injuries, and (C) understanding the available remedy. The CPSC's proposed guidelines in subpart 1115.26(a) are aimed at motivation of consumers, communication style, and methods of communication.

¹⁶ Proposed 16 CFR 1115.26(a), 74 *Fed. Reg.* at 11886.

¹⁷ While this is partially an unattributed elaboration on the provisions of Section 15(c) of the CPSA, the staff has drawn heavily from its own experience and negotiating positions in voluntary recalls.

² "Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking," 74 *Fed. Reg.* 11883 (March 20, 2009), proposing to add to Title 16 of the Code of Federal Regulations subparts 1115.23-1115.29.

³ Section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2).

⁴ Public Law 110-314, 122 Stat. 3016 (August 14, 2008).

⁵ Section 15(a)(1) of the CPSA, 15 U.S.C. 2064(a)(1), as amended by Section 214(a)(1) of the CPSIA.

⁶ Section 15 of the CPSA, 15 U.S.C. 2064, as amended by Section 214 of the CPSIA.

⁷ Congress neglected to broaden the reach of Section 12 of the CPSA, 15 U.S.C. 2061. This "imminent hazard" provision still applies only to "consumer products" and not to all products subject to regulation under any of the CPSC's laws. Many of the agency's enforcement provisions under the CPSA still apply only to "consumer products." It is not clear whether this was due to an oversight by the drafters or was an attempt to defer to authority in CPSC's other laws.

⁸ Section 15(j) of the CPSA, 15 U.S.C. 2064(j), as amended by Section 223 of the CPSIA.

⁹ Section 15(d) of the CPSA, 15 U.S.C. 2064(d), as amended by Section 214(b) of the CPSIA.

¹⁰ Section 15(c) of the CPSA, 15 U.S.C. 2064(c), as amended by Section 214(a) of the CPSIA.

rule also allows the CPSC to require notice to be in languages other than English when “necessary and appropriate” to protect the public.¹⁸

The CPSC’s proposed rule also elaborates upon the statutory “content” requirements. The CPSC has added that the notice shall refer to the corrective action as a “recall” and elaborated at some length on the meaning of several of the statutory terms. The CPSC says notice must include the following:

- (1) the term “recall” in the heading and text;
- (2) date of release of the notice;
- (3) adequate description of the recalled product including product names, users, colors and sizes, model numbers and other designations, and where they may be found, and photographs of the product;
- (4) a description of the recall action and procedures;
- (5) a statement of the number of units distributed;
- (6) a description of the substantial product hazard that conveys the risk, including the underlying defect or problem, and “the type of hazard or risk”;
- (7) an identification of the firm conducting the recall;
- (8) an identification of the product manufacturer(s) and the country of manufacture. If the product was manufactured outside the country, the foreign manufacturer, its city, and country must be listed and the importer must be similarly identified;
- (9) identification of “significant retailers” in the sole discretion of the CPSC or district court, but the regulation sets forth several criteria the CPSC will consider in determining whether a retailer is sufficiently “significant” to be identified;
- (10) dates of manufacture and sale;
- (11) approximate retail price or range of prices for the recalled product;
- (12) a description of incidents, injuries, and deaths;
- (13) detailed description of the remedy and the way to obtain the remedy; and
- (14) other information the CPSC or district court¹⁹ believes is necessary in a particular matter.

The CPSC says that in a substantial hazard case it may choose not to include one or more of these elements if it is “not required.” A district court may make the same judgment in imminent hazard cases.²⁰

Comments on this proposed rule were due April 20, 2009.

Analysis

The CPSIA requires that the CPSC “shall by rule establish guidelines” for the type of notice included in Section 15 or 12 orders. The CPSC proposes to include that guidance in 16 CFR Part 1115, an interpretative rule governing “Substantial Product Hazard Reports.” The CPSC’s *Federal Register* notice implies that this new recall notice subpart is, like the existing Part 1115, not a substantive rule that has the power of law, stating that “[t]he guidelines are essentially a statement of

¹⁸ Proposed 16 CFR 1115.26(c), 74 *Fed. Reg.* at 11886-11887. Section 15(c)(2) of the CPSA, as amended, provides for notice in a language other than English if “necessary to adequately protect the public.”

¹⁹ The CPSC added reference to a district court since this provision also applies to imminent hazard proceedings, although Congress neglected to do so in Section 15(i)(2)(l) of the CPSA.

²⁰ Proposed 16 CFR 1115.29, 74 *Fed. Reg.* at 11888.

policy.”²¹ To the extent the rule diverges from the statute or seeks to apply the principles to voluntary recalls, its status as an interpretative rather than a substantive rule could become meaningful.²²

While Congress provided that “manufacturers” and “significant retailers” of products must be named in recall notices, the CPSC has elaborated upon these requirements. The CPSC added a provision expressly requiring identification of the firm conducting the recall. It also defined broadly what should be included in “manufacturer” and “significant retailer” identifications. Manufacturers include “each manufacturer (including importer)” and must include the name, city, and country of foreign manufacturers as well as the importer and the legal name, city, and state of any domestic manufacturer. While some of these requirements reflect past practices in voluntary recalls, these practices may have as much to do with who gets the blame for the defective product as for assisting consumers in identifying the product.

It is difficult to see for example, how the “legal name” of a manufacturer helps a consumer identify a recalled product that may have a discernible brand name or why the city of origin of a foreign manufacturer serves that purpose. However, in light of the overall scheme of the CPSIA, these requirements should also be examined as an indicator of the CPSC’s thinking regarding the upcoming product tracking/labeling requirements. The CPSC may require similar identification information on products and packaging under those provisions.

The staff has elaborated at some length upon criteria that may make a retailer a “significant retailer” deserving of attention in any recall notice. The enumerated factors include whether the retailer was the exclusive retailer, whether it served as the importer of the product, whether it has stores nationwide or regionally, how many products the retailer sold or held for sale out of the total number of products, or whether identification of the retailer is in the public interest.²³ While identifying the name of a retailer may “help consumers determine whether or not . . . they might have [purchased] the [recalled] product” as the preamble suggests,²⁴ the public interest language appears to be a pretty broad catch-all provision. Does this mean that a large retailer may be named even if it handled only a few products, merely because adding its name to a press release might garner more press attention for the recall? Will the staff attempt to negotiate such retailer identifications into voluntary corrective actions for that reason?

The inclusion of the names of “significant retailers” in recall notices in voluntary corrective actions can greatly complicate the negotiation process since retailers may argue about whether they are indeed “signifi-

²¹ 74 *Fed. Reg.* at 11885. The CPSC makes this statement in arguing that the guidelines may become effective the date of publication of the final rule.

²² If this portion of the rule is intended to also be interpretative, it is not readily apparent why the CPSC added a “Definitions” Section in 1115.25 rather than incorporating them into the existing definitions Section: 16 CFR 1115.3. (The definition of “firm” in 1115.25(d) appears almost identical to the definition of “subject firm” in 1115.3.) However, this new Section may just have been added so the subpart would be “self-contained.”

²³ Proposed 16 CFR 1115.27(i), 74 *Fed. Reg.* 11887.

²⁴ 74 *Fed. Reg.* 11884-11885.

cant.” Further, each retailer may wish to comment on and negotiate the language of the press release and other notices that name them to assure that their liability position and reputation are not undercut in the notices.

In Section 214(2)(E) of the CPSIA, Congress amended Section 15(c) of the CPSA, by providing that notice may be in languages in addition to English. The CPSC proposal at subpart 1115.26(c) says the CPSC or a court might order the notice to be in languages in addition to English whenever it is necessary to protect the public but provides no criteria to focus that exercise of discretion. How should the CPSC or a court decide whether notice is necessary other than in English? Is this to be determined based on the nature of the product or where it was distributed or sold? How many languages are appropriate? At what point might the addition of languages result in a diminution of the readability and, therefore, the effectiveness of the notice? Certainly, the lack of criteria leaves plenty of room for a debate over when one or more additional language might be appropriate.

What impact will this rule have on notice in voluntary corrective action plans? Although the rule applies to litigated imminent hazard and substantial hazard cases, these cases make up a negligible portion of the recalls

undertaken by the CPSC.²⁵ As the preamble states, it is likely the CPSC staff will draw from these rules “as a guide” in negotiating voluntary corrective action plans. While many of these elements are not new to CPSC recalls, this is the first time the CPSC has stated such a comprehensive set of notice criteria—and has detailed statutory authority to support their position. Conceivably, the CPSC staff will view these criteria as setting new negotiating parameters, and justifying a more aggressive statement of hazards, naming of retailers, and other practices in such voluntary recall notices.

While the staff may view the criteria in the proposed recall notice rule as providing an outline of the CPSC’s authority and its negotiating position, there should still be plenty of room for negotiation over who is named in a recall notice and the words and scope of the actual notice language. After all, the ultimate goal of a recall remains providing the consumer with sufficient information about the hazard and corrective action and the details of any corrective action. With an eye toward protection of the client’s reputation, liability position, and business position, sophisticated legal counsel should still have room to negotiate terms and language with the CPSC staff.

²⁵ During the last eight years, the CPSC initiated hearings in no—that is, zero—substantial hazard cases. Throughout its history, the CPSC has resolved something approaching 100% of its cases through voluntary corrective action plans.