

3 Tips For Working With CPSC During The Shutdown

By **Emily Field**

Law360 (January 18, 2019, 7:39 PM EST) -- As the longest partial shutdown of the federal government in history continues, the Consumer Product Safety Commission has all but shuttered operations, except for screening imminent safety risks. Here, Law360 examines what companies need to know about working with the CPSC during the shutdown.

Companies still need to submit timely incident reports of possible product defects. That legal obligation doesn't go away during the shutdown, and those reports aren't going into the ether, said acting CPSC Chair Ann Marie Buerkle.

Reach Out to Senior Staff

With the federal government closed for business, there's a skeleton crew of about 20 essential staff at the CPSC reviewing incident reports on a daily basis, Buerkle said.

Senior staff members such as Executive Director Mary Boyle and her deputy DeWane Ray aren't furloughed and are available to have conversations with companies about whether an incident rises to the level of an imminent threat, Buerkle said. The head of compliance and the head of epidemiology are also still working.

If the agency's hotline, 1-800-638-2772, isn't answered, the call will also be forwarded to by Boyle or Ray, Buerkle said.

During the shutdown, the reports are being screened for incidents that pose an imminent threat to human safety, Buerkle said. She declined to provide a specific example of what would constitute an imminent threat but said that the "totality of the circumstances" would be considered.

Inez Moore Tenenbaum, of counsel at Wyche PA and CPSC chair under former President Barack Obama, said that whether a product poses an imminent threat would be decided case by case.

"It could be a consumer product that explodes or causes fires, for example," Tenenbaum said.

So far, none of the 5,000 reports the agency has received during the shutdown has risen to the level of an imminent threat to human safety, according to Buerkle.

But if the agency receives notice of an imminent threat, it is prepared to call the necessary employees back from furlough to handle the issue.

"So we have a plan in place that if something rises to that threshold level, we will do our best," Buerkle said.

Communicate With Customers

The most important issue now for companies is making sure they're still making timely incident reports to the agency, Buerkle said.

"Going out with their own recall is not where they get in trouble," Buerkle said.

Traditionally, the CPSC has frowned on voluntary recalls, since the agency wants to give its input on a company's remedies and plans, attorneys said. Buerkle said that if a company voluntarily recalls a product during the shutdown, the agency will still review its recall plan once the agency is back in business.

Companies that may be leery of announcing a unilateral recall during the shutdown can still use other methods to communicate to their consumers about a problem with their product, such as a social media awareness campaign, said Jonathan Judge, a partner at Schiff Hardin LLP.

Even if they don't hear back right away, companies should still keep the CPSC in the loop with their plans, Judge said.

"That is one issue that is particularly tricky, and I think it's one where all you can do is provide steady notice to the CPSC of your intent to do something, for example, 'We plan to start this program in the next four to five days, we're concerned about this,' and just keep them apprised at least officially of what your plans are," Judge said.

Be Constantly Vigilant

Companies should still be vigilant about checking consumer and retailer complaints to evaluate whether they raise safety issues, said Sarah Wilson of Covington & Burling LLP.

They should also be taking a look at their programs for reviewing complaints and not see the shutdown as a "vacation" from doing what they should be doing when the agency is open, Wilson said.

And companies that were undergoing an investigation before the shutdown shouldn't see it as a break either, Wilson said.

"I think that the pace of investigations will definitely slow down, but to the extent if a company has already made commitments to undertake compliance program enhancements, it should continue to make those enhancements," Wilson said.

Companies can also take some steps to take corrective actions for a problem with a product short of a formal recall, attorneys said.

"I would suggest that companies that begin to suspect they have a problem think more proactively about how they might fix the problem and how they might alert consumers to the issue and suggest a solution," Judge said.

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