

# Shutting Down Safety?: CPSC and NHTSA Compliance During the U.S. Government Shutdown

January 4, 2019

Product Safety

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The ongoing partial government shutdown has halted most operations of the Consumer Product Safety Commission (“CPSC”) and National Highway Traffic Safety Administration (“NHTSA”), the two federal safety regulators of consumer products and motor vehicles and motor vehicle equipment, respectively. With both major U.S. product safety regulators left without funding, businesses and consumers face significant disruptions to the U.S. product safety system. Here’s what manufacturers, retailers, and distributors need to know.

## 1. Most CPSC and NHTSA operations are halted.

- The CPSC and NHTSA are carrying on only a small subset of their ordinary functions during the shutdown.
- The CPSC’s shutdown directive provides that only work “necessary to the orderly termination of agency activities, to protect against imminent threats to human safety and to protect government property” will be conducted during the shutdown. The directive also provides that only the “minimum number of employees necessary” to carry out those functions will continue to work.
- A skeletal staff will continue to work on CPSC’s core functions—hazard identification and compliance/field operations. Under the directive, CPSC staff will only analyze possibly defective products to determine whether they “create a substantial and immediate threat to human safety,” and will only coordinate and monitor recalls of products posing a “substantial and immediate threat.”
- During the shutdown, the CPSC General Counsel’s Office will only work to provide advice to CPSC staff on the shutdown itself and to file court actions “with respect to products that create a substantial and immediate threat to the safety of human life.” This means that the progress of certain CPSC civil litigation and other matters requiring General Counsel work or review—for example, enforcement investigations and negotiating settlement agreements—will be temporarily slowed.
- The product-safety operations of NHTSA—which regulates the safety of motor vehicles, tires and other motor vehicle equipment, and child car seats—is also halted. Under the Department of Transportation’s shutdown directive, NHTSA has suspended rulemaking, enforcement, data analysis, and defects-investigation activities; has halted compliance testing of vehicles and equipment; and has stopped reviewing incoming information from manufacturers and consumers.

The partial government shutdown may have ripple effects outside the United States. For example, the CPSC often collaborates with other regulators, such as Health Canada, for coordinated recall launches. This practice will likely be disrupted during the shutdown, and may cause either delays in recall launch or duplication of effort.

## **2. But the legal obligations of companies continue in force.**

- During the shutdown, the CPSC and NHTSA will not review incoming reports and correspondence falling outside of the excepted categories. But the lapse in appropriations does not affect companies' obligations to make timely reports to regulators under applicable federal law, such as the Consumer Product Safety Act and National Traffic and Motor Vehicle Safety Act.
- The shutdown does not affect, for example, manufacturers' obligations to timely report substantial product hazards to the CPSC under section 15(b) of the Consumer Product Safety Act, 15 U.S.C. § 2064(b), or the obligation to file reports about safety defect or noncompliance issues in motor vehicles and motor vehicle equipment to NHTSA. 49 C.F.R. § 573.6.
- To avoid potential exposure to significant civil or criminal penalties, e.g., 15 U.S.C. §§ 2069, 2070 (CPSC), 49 U.S.C. 30165, §§ 30170 (NHTSA), companies should consult with counsel as necessary and continue to submit reports to safety regulators—even if regulators may not review or take further action on the report until appropriations are restored.
- Similarly, companies working with regulators on ongoing recalls should continue to monitor recall effectiveness and comply with the terms of the applicable corrective action plan or other agreement. For example, companies undergoing a CPSC-monitored recall should continue to file monthly progress reports with the agency.

## **3. Companies with product safety questions should consult experienced counsel.**

- With nearly all compliance and field operations staff furloughed, the shutdown effectively halts the customary process of collaboration between businesses and regulators integral to the U.S. product safety system.
- During the shutdown, businesses that need regulatory approval on some product-safety action may face significant uncertainty about how and whether to proceed with certain actions until appropriations are restored and the agencies return to business-as-usual.
- Businesses reporting a product safety defect or noncompliance or gearing up for a corrective action may face a dilemma. Waiting to launch a recall until government funding is restored leaves potentially unsafe products in the field, which could present public harm and expose the company to product liability. Conversely, a business that takes unilateral action without CPSC or NHTSA participation will be deprived of the usual channels of advertising a recall, and at worst may be viewed as engaging in an impermissible "silent recall."
- The shutdown will also affect businesses already engaged in a recall. During the recall-monitoring phase, businesses frequently seek agency approval to modify corrective action plans (such as remedies for consumers or disposal methods for recalled products). These requests will remain in limbo until appropriations are restored. Similarly, businesses' requests to close-out agency monitoring of a recall will not be acted upon during the shutdown. Businesses facing post-recall investigations will also face delays and uncertainty.

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- As the shutdown continues, recall effectiveness rates may gradually drop.
- There is no “one size fits all” solution to the ambiguities and uncertainties created by the pending government shutdown. Companies facing shutdown-related questions should consult experienced legal counsel for advice on their legal obligations and options during the lapse in appropriations.

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